

# **The Development of International Arbitration on Bilateral Investment Treaties**

**Disputes Between States and Investor, ICSID Cases Against Turkey  
Regarding Energy Sector**

**Zeynep Akgul**

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*The Development of International Arbitration on Bilateral Investment Treaties:  
Disputes Between States and Investor, ICSID Cases Against Turkey Regarding Energy Sector*

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**THE DEVELOPMENT OF INTERNATIONAL ARBITRATION ON  
BILATERAL INVESTMENT TREATIES: DISPUTES BETWEEN STATES  
AND INVESTOR, ICSID CASES AGAINST TURKEY REGARDING ENERGY  
SECTOR**

**Submitted by**

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**LLM for International Business Law, 2007**



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SECTOR**

Submitted by **Zeynep AKGUL** to the University of Exeter as a dissertation towards the degree of Master of Law by advanced study in International Business Law, September 2007.

**Dissertation Supervisor:** Professor Andrew Tettenborn

**This dissertation is dedicated to the memory of my uncle Av. Akad Ozbek who inspired me to pursue academic career, and my family, and my dear husband for his encouragement and support...**

## **ABSTRACT**

This dissertation analyses developments of international arbitration on investment disputes. Recent years, there has been an extraordinary increase in the number of investment arbitration for breach of Bilateral Investment Treaties (BITs). These treaties include substantive and procedural rules to provide investment security and investment neutrality to foreign investor. In particular, most BITs have investor-state dispute settlement provision which allows investors to sue host states directly. Through analyzing the Turkish BIT experience, this study concludes that there are different approaches that utilized in various investor-state dispute settlement provisions. Thus, the wording of these provisions is important. Furthermore, the ICSID arbitration is mostly incorporated into BITs dispute settlement provisions since the ICSID arbitration has an effective system and different characteristics from other types of international commercial arbitration. This dissertation examines not only the main features of the ICSID, but also the recent amendments made to the ICSID arbitration rules. Finally, after analyzing the concluded and pending ICSID cases against Turkey regarding energy sector, this study concludes that the ICSID has an important role for the development of the international arbitration on investment disputes.

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## **INTRODUCTION**

It is true that in recent years foreign investment is increasing among countries all around the world. The most important thing is that the parties who are involving foreign investment transactions have different interests and rights. For example, the main interest of investors is the profit in these transactions. On the other hand, the aim of host states is to develop their economy. As we can rightly argue that every party has different interests so probably there will be disputes in their negotiations and contracts. Thus, effective international dispute settlement mechanism is needed for investment disputes. For this reason, we seek to focus on investor-state dispute settlement procedure in our dissertation.

The proliferation of Bilateral Investment Treaties (BITs) which include investor-state dispute settlement provisions has an important role in the development of international investment arbitration. Thus, in the first chapter, we analyze what constitutes BITs and what are their impacts on international investment arbitration.

In the second chapter, we examine what are the investor-state dispute settlement provisions in the BITs in order to show our reader how these provisions are effected the international investment arbitration. In particular, this study analyzes these provisions of BITs that Turkey signed with other Countries. In fact, Turkey signed several BITs which have different approaches with many countries. Moreover, the recent developments on investor-state dispute settlement procedures under BITs will be explained in the same chapter.

In the third chapter, we explain the main characteristics of ICSID arbitration to clarify how important is choosing ICSID rules while solving the dispute under the BITs. Also we will mention some discrepancies of ICSID provision from other arbitral procedures in order to show the efficiency of the ICSID procedure. In addition, we will analyze the amendments made to the arbitration rules of the ICSID on April 10, 2006.

Finally, in our last chapter we will explain and analyze concluded and pending ICSID cases against Turkey regarding energy sector so as to illustrate the importance and the practical aspects of the main requirements of investor-state dispute settlement procedures.

## **CHAPTER 1            Bilateral Investment Treaties and International Arbitration**

### **I.        Overview of BITs**

Foreign investment plays an important role in economic development. Mostly developing countries want to encourage foreign investment in their countries. When foreign investor invests in host country, he may encounter so many risks. The followings are some of the risks that foreign investor will face to face: His investment may be unlawfully expropriate or nationalize by host country, or there might be currency transfer restrictions in the host states. The other thing is that the treatment of investment will be changed after the establishment of investment. The host country may treat national investor more favourable than foreign investor. These situations may affect foreign investor badly since there will be no competition at that time. In order to protect its investment from these kinds of risks, foreign investors should rely on some laws in particular international investment law. However, international investment law still continues to develop for foreign investment. Since there is no multinational treaty on investment, bilateral investment treaties are the main sources of international investment law.<sup>1</sup>

Bilateral investment treaties (BITs) are usually signed between two countries. These countries can be one developed country and the other one developing country but recently this tradition has changed and BITs can be signed between two developing and two developed countries.<sup>2</sup> This chapter plans to explain firstly, what the overview of the BITs is secondly, the impact of BITs on international investment law and finally, the development of international arbitration in international investment disputes.

#### **A.        The Aim of BITs**

As the main sources of international investment law, BITs provide investment security and investment neutrality to foreign investment.<sup>3</sup> In other words they include provisions which address above mentioned foreign investments risks. Most BITs have similar provisions and the following issues can be found most of the BITs: Preamble investment and investor definitions, treatment of investment, expropriation, currency

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<sup>1</sup> United Nations Conference on Trade and Development (UNCTAD), Bilateral Investment Treaties 1995-2006: Trends In Investment Rule Making, United Nations, New York and Geneva, 2007, p. 1.

<sup>2</sup> Loibl Gerhard, International Economic Law, Evans D. Malcolm (Ed.), International Law, Second Edition, 2006, p.710.

<sup>3</sup> Vandeveldel J. Kenneth, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, Colombia Journal of Transnational Law, 1998, p.507-514.

transfer, subrogation and dispute settlement provisions.<sup>4</sup> The main goal of developing countries signing BITs or negotiating BITs is to attract foreign investment as a means of fostering economic growth and development. On the other hand, the purpose of BITs for the developed countries is to obtain legal protection for investment and preclude non-commercial risks facing foreign investors in host countries.<sup>5</sup> Indeed, BITs' original name is agreement signed between two countries concerning the reciprocal promotion and protection of investment. It must be noted that most BITs do not explain which contracting party is the source of the investment or which is the recipient.<sup>6</sup> Thus, the promotion and the protection of investment are reciprocal.

## **B. The Origin of BITs**

Before briefly analysing the substance of the BITs, it is necessary to explain the origin of the BITs. BITs can be deemed as a successor to the friendship commerce and navigation treaties (FCNs).<sup>7</sup> In particular, the USA negotiated and signed FCNs with many European states including France, Italy and Latin American states so as to improve and to protect foreign trade relationships with each other.<sup>8</sup> These treaties provided international legal standard for the protection of natural and legal persons.<sup>9</sup> However, they did not directly include investment issues. Thus, European countries realized that there should be treaties that address investment related issues. After this, most European countries commenced to sign BITs with developing countries. It should be noted that the first modern BIT signed between Germany and Pakistan in 1959.<sup>10</sup> Recently, the number of BITs and the number of countries signing these treaties have increased. The numbers of BITs have reached almost 2,500 at the end of 2005.<sup>11</sup>

BITs have substantive and procedural rules that secure foreign investment. Although every BIT covers the same issues, there are many exceptions and reservations.

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<sup>4</sup> Sornaraj M., The International Law on Foreign Investment, Second Edition, Cambridge University Press, 2004, p.217.

<sup>5</sup> Dolzer Rudolf & Stevens Margrete, Bilateral Investment Treaties, Martinus Nijhoff Publishers, 1995, p.12.

<sup>6</sup> Siqueros Jose Luis, Bilateral Treaties on the Reciprocal Protection of Foreign Investment, California Western International Law Journal, Spring 1994, p.257.

<sup>7</sup> Sornaraj op.cit., p. 209.

<sup>8</sup> Vandeveld J Kenneth, The BIT Program: A Fifteen-Year Appraisal, The Development and Expansion of Bilateral Investment Treaties, American Society of International Law Proceedings, 1992, p. 533.

<sup>9</sup> Sornaraj op.cit., p. 209.

<sup>10</sup> Treaty for the Promotion and Protection of Investments, Pakistan-F.R.G., 457 U.N.T.S. 23, Lauterpacht Elihu, International Law and Private Foreign Investment, Indiana Journal of Global Legal Studies, Spring 1997, p.266.

<sup>11</sup> UNCTAD op.cit., p. 1.

In this dissertation, we will analyse investor-state dispute settlement procedure. However, most of the investment disputes are related with expropriation, most favourite nation principle, and national treatment issues which are essential substantive rules of the BITs. Thus, it is important to explain them briefly.

#### **a. Expropriation**

Most BITs include a clause on expropriation and compensation in order to protect investors against the risk of unlawful expropriation. In expropriation clauses, each contracting party agrees not to take any measures directly or indirectly for expropriation or nationalization or any other comparable measures effecting foreign investment made in its territory by nationals of the other contracting party. The BIT between Turkey and China is an example of an expropriation clause utilized in numerous BITs: “1. *The investments made by nationals or companies of one contracting party in the territory of the other contracting party shall not be expropriated or nationalized or subjected to other measures having a similar effect, unless the following conditions are fulfilled:*

- (a) *The measures are adopted for public purpose, within the framework of its laws and regulations.*
- (b) *The measures are not discriminatory.”*<sup>12</sup>

It is true that most expropriation clauses require the measure should be non-discriminatory, for a public purpose, against payment of prompt, adequate and effective compensation and with regard for the due process of law.<sup>13</sup> Due to the fact that there are various disputes regarding indirect expropriations or regulatory takings, some countries such as the USA and Canada redraft their model BITs to include specific provisions on indirect expropriations.<sup>14</sup>

#### **b. National Treatment**

Most BITs include provisions requiring each party to accord the foreign investor the same treatment that host state accords to its nationals.<sup>15</sup> Pursuant to these provisions, each contracting party ensures that the investments receive national treatment. For example, the BIT between Nigeria and Turkey provides that “Each Party

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<sup>12</sup> See Article 3 of the Agreement between The People’s Republic of China and The Republic of Turkey Concerning The Reciprocal Promotion and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_turkey.pdf) (visited 20.6.2007).

<sup>13</sup> Dolzer & Stevens op.cit., p. 97.

<sup>14</sup> UNCTAD op.cit., p 52.

<sup>15</sup> Dolzer & Stevens op.cit., p. 63.

shall accord to these investments, once established, treatment no less favourable than that accorded in similar situation to investments of its investors or to investment of investors of any third country, whichever is the most favourable.”<sup>16</sup> The aim of National Treatment provision is to promote investment neutrality. National treatment means that the contracting parties should give investors of the other contracting party a treatment no less favourable than the treatment they grant to investments of their own investors. Thus, the host state will not discriminate among investors based on nationality. However, it should be noted that there are exceptions to the national treatment.<sup>17</sup>

### c. Most Favourite Nation Treatment

Most BITs contain most favourite nation treatment (MFN) provision which means that suppose Italy and Spain signed a BIT, Turkey which is not a contracting party of this BIT but signed another BIT with Spain which provides MFN clause, at this situation, if Turkish investor made an investment in Spain and he can rely on one of the Italy-Spain BIT clause which gives extra protection to the Italian investors. If there is MFN clause in the BIT, both of the countries’ investors can depend on other BIT clauses which give more protection or right to other countries’ investors.

The question will arise whether the scope of MFN clauses in a BIT apply to dispute resolution provisions or not.<sup>18</sup> In other words, it can be possible for the investors to utilize MFN clause to establish jurisdiction over their investment disputes with host states. This problem will commonly occur, for instance, if the claimant investor fails to fulfil requirement in the investor-State dispute settlement provisions of the applicable BIT. It should be noted that the scope of the MFN clauses is controversial issue in recent ICSID arbitration cases.

The problem was addressed in *Maffezini*<sup>19</sup>, *Salini*<sup>20</sup> and *Plama*<sup>21</sup> cases. In *Maffezini* case, the tribunal held that Mr. Maffezini was allowed to use the dispute settlement provisions of the BIT between Chile and Spain because the MFN clause of

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<sup>16</sup> Article II of the Agreement between The Republic of Turkey and The Federal Republic of Nigeria Concerning The Reciprocal Promotion and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/turkey\\_nigeria.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/turkey_nigeria.pdf) (visited 20.6.2007).

<sup>17</sup> See exceptions for Most Favoured Nation Treatment.

<sup>18</sup> Fietta Stephen, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point*, International Arbitration Law Review, 2005, 131-138.

<sup>19</sup> ICSID Case No. ARB/97/7, Decision of January 25, 2000.

<sup>20</sup> ICSID Case No. ARB/02/13, Decision of November 15, 2004.

<sup>21</sup> ICSID Case No. ARB/03/24, Decision of February 8, 2005.

the BIT between Argentina and Spain is broad and precisely refers to “all matters subject to this agreement”.<sup>22</sup> On the other hand, in *Salini* and *Plama* cases, the ICSID Tribunal found that the MFN clauses of the applicable BITs were not intended to extend to dispute settlement provisions. This new approach taken by ICSID Tribunals summarized in the *Plama* case. Paragraph 223 of the *Plama* case points out that: “. . . the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception; an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them”.

After analyzing these three ICSID cases’ outcome, it can be discovered that the claimant investor can only utilize MFN clauses to apply for the more favourable dispute resolution provisions of BITs with third states, if the Contracting Parties had an intention for this possibility. Thus, the wording of MFN clauses is really important. For example the UK Model BIT illustrates the intention of the parties to incorporate investor-State dispute Settlement provisions into a BIT through MFN clauses. Indeed, Article 3 (3) of the UK Model BIT states that: “*For avoidance of doubt it is confirmed that the treatment (MFN) provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement (It should be noted that Articles 8 and 9 of the UK Model BIT set out dispute settlement provisions)*”<sup>23</sup>

The aim of MFN provision is also to promote investment neutrality. Since it is a non-discrimination provision, the host country is obliged to not discriminate among investments and investors based on nationality.<sup>24</sup> Moreover, most BITs include some exceptions to MFN obligations. For instance, regional economic integration agreement such as custom union is the most essential exception that undermines the non-discrimination provisions.<sup>25</sup>

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<sup>22</sup> UNCTAD, p.39.

<sup>23</sup> Fietta Stephen op.cit., p.136.

<sup>24</sup> Vandeveld, op.cit., p.512.

<sup>25</sup> See Article 2 of the Turkey-Tunisia BITs, Agreement between The Republic of Tunisia and The Republic of Turkey Concerning The Reciprocal Promotion and Protection of Investments, <http://www.unctad.org/sections/dite/jia/docs/bits/TurkeyTunisia.pdf> (20.6.2007).

#### **d. Dispute Settlement Provisions**

As we mentioned above there is not only substantive rules but also procedural rules to protect investors. Most BITs include dispute settlement provisions for both state-state disputes and investor-state disputes. Each treaty includes that unless the dispute cannot be resolved through the diplomatic way, parties can submit the dispute to the arbitration with regard to the dispute settlement provision in the BIT.<sup>26</sup> These two different types of settlement provisions are always written in two separate clauses. Nevertheless, it is essential to note that there is no uniformity between most of the BITs in particular at the dispute resolution parts. Thus, since the dispute settlement provisions are different, it will be more convenient to discuss them separately. First we will slightly explain what constitutes state-state dispute settlement provision in the BITs and in the next chapter we will deeply analyse the investor-state dispute resolution provisions in the BITs which are extremely important issues to understand the development of international arbitration on BITs for our dissertation.

#### **1. State-State Dispute Settlement Provision**

Before instituting formal proceedings, parties are required to solve the dispute by consolidation. If they cannot be successful to settle the dispute, with regard to their request the dispute is submitted to the ad hoc arbitration tribunal. The tribunal will be created from two arbitrators; each one will be selected from one of the parties independently and the third arbitrator from a third country will be appointed by either both of the parties or by the selected arbitrators.<sup>27</sup> If parties cannot reach an agreement regarding the selection of the arbitrators, the President of the International Court of Justice will make the appointments.<sup>28</sup> Numerous BITs which are signed between Turkey and the other countries proved that state-state dispute settlement provisions in these BITs are written almost same language and same procedure.<sup>29</sup> Therefore, it can be said that there is uniformity with regard to this provision.

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<sup>26</sup> Vandevelde op.cit., p.508.

<sup>27</sup> Article 7 of the Turkey-USA BITs provides settlement disputes between contracting parties. Turkey-United States: Treaty Concerning the Reciprocal Encouragement and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_turkey.pdf) (visited 20.6.2007).

<sup>28</sup> *Ibid.* Article 7.

<sup>29</sup> See Article 7 of Turkey-United Kingdom, Agreement for the Promotion and Protection of Investments, and also see Article 9 of Turkey-Tunisia BIT.

## II. The Impact of BITs on International Investment Law

BITs improved international investment law in two ways one is the subject matter of international law, and the protection of shareholders.<sup>30</sup> In fact international law does not recognize private companies as international subjects but with BITs, this is changed. Through BITs, private companies and natural persons can directly sue states. Thus, BITs have become extremely important because of the investor-state dispute settlement provisions. For this reason, investor-state dispute settlement provisions are our main topic to clarify the development of international arbitration on BITs. Moreover, BITs established a new and special regime for the protection of shareholders who are not under the protection of international law.<sup>31</sup>

BITs allow States to enact investment laws but at the same time it provides that any rights in the agreement should not be interfered by any investment rules.<sup>32</sup> In fact, BITs can affect domestic legislation. Countries enacted or amended their domestic laws in order to establish the harmony with BITs. As an example, Professor Mutharika states in his study that in 1993 Zambia government abolished the 1991 code and enacted a new code that permits payments in order to be similar with those that was given in the Zambia-Germany BIT.<sup>33</sup>

BITs have an important role as a source in negotiations of recent regional and multilateral treaties.<sup>34</sup> For instance, BITs influenced the embodiment of the World Bank Group Guidelines on the Treatment of Foreign Direct Investment, subjected in September 1992 by the Joint Ministerial Development Committee of the World Bank and the IMF.<sup>35</sup> In addition, the North American Free Trade Agreement Investment (NAFTA) Chapter (Chapter 11) provides similar provisions in line with the most of the BITs.

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<sup>30</sup> Caliskan Yusuf, The Development of International Investment Law: Lessons From The OECD MAI Negotiations And Their Application to a Possible Multilateral Agreement on Investment, Washington University School of Law, Jurist Science Doctorate (JSD) Dissertation, 2002, p.55.

<sup>31</sup> Kishoiyian Bernard, The Utility of Bilateral Investment Treaties in the Formulation of Customary International law, Northwestern Journal of International Law and Business, Winter 1994, p.350; Sornaraj op.cit., p.228.

<sup>32</sup> Caliskan Yusuf op.cit., p.56.

<sup>33</sup> Mutharika A. Peter, Creating an Attractive Investment Climate in the Common Market for Eastern and Southern Africa (COMESA) Region, Foreign Investment Law Journal, ICSID Review, 1997, p.272.

<sup>34</sup> Caliskan Yusuf op.cit., p.56.

<sup>35</sup> Dolzer & Stevens, op.cit., p. xii-xiii.

### III. The Development of International Arbitration in International Investment Disputes

Recently international arbitration has become an important dispute settlement mechanism for foreign investors' interests to resolve disputes with government entities and to recover losses caused by states' action.<sup>36</sup> Before explaining this recent phenomenon, it is good to analyse previously often used adjudication mechanisms. The protection of the property rights of aliens has been one of the main issues of the international law. In particular, a state is entitled to exercise diplomatic protection for its nationals who are injured by acts of another state.<sup>37</sup> In order to benefit from diplomatic protection, foreigners should be unable to obtain satisfaction through local remedies.

Indeed, under customary international law a foreign investor is required to recourse the disputes in the host state courts.<sup>38</sup> If a foreign investor will not get effective remedies from court, an investor seek to diplomatic protection from its home country. Nonetheless, there are deficiencies of diplomatic protection remedies.<sup>39</sup> First, as a matter of its policy home country may choose not to exercise diplomatic protection, since it does not want to lose international relationship with the host country.<sup>40</sup> Second, even the home country successfully recourses an investors claim, it is not legally obliged to give the proceeds of the claim to its national.<sup>41</sup> Third, it is difficult to determine the multinational corporations' nationality. Thus, the question will rise which state has the right of diplomatic protection.

Knowing these discrepancies, foreign investors often refused diplomatic protection and they prefer to submit their disputes to the commercial arbitration. In fact, international commercial arbitration also provides a forum for the resolution of disputes involving a state. However, foreign investor can recourse their disputes to international commercial arbitration process, only if state granted its consent to arbitration by contract.<sup>42</sup> In practise the concessions contract between investor and state incorporate consent to arbitration in dispute settlement clauses, but this consent is only granted

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<sup>36</sup> Caruba L. Sandra, Resolving International Investment Disputes in a Globalised World, New Zealand Business Law Quarterly, June 2007, p.128-130.; Gottwald Eric, Leveling The Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?, American University International Law Review, 2007, p.246-247.

<sup>37</sup> Don R.Y, Protection of Foreign Investment under International Law, 1979, p.396.

<sup>38</sup> UNCTAD, Dispute Settlement: Investor-State, 2003, p.5.

<sup>39</sup> *Ibid*, p. 6

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> Collins Lawrence, Morse C G J, McClean David, Briggs Adrian, Harris Jonathan, McLachlan Campbell, Dicey, Morris & Collins on the Conflict of Laws, 14th Edition, Sweet & Maxwell, 2006, p 779.

within the scope of the concession agreement and it will not cover other investment issues. Thus, a foreign investor can only pursue litigation in host country. This situation creates problems for foreign investor since the host state can object to jurisdiction of the court or claim state immunity.<sup>43</sup> Due to the fact that above mentioned problems in international commercial arbitration and pursuing the diplomatic protection, the foreign investor needs to have a specific investor state dispute settlement mechanism.

Indeed there are two important developments in international investment law for efficient investor-state dispute settlement mechanisms. Firstly, the establishment of International Centre for the Settlement of Investment Disputes (ICSID) as an arbitral institution is the starting point for the development of arbitration in international investment disputes. The executive directors of the World Bank adopted the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other states.<sup>44</sup> On 18 March 1965 after its ratification by 20 states the ICSID Convention entered into force on 14 October in 1966.

The main aim of this convention is to facilitate foreign investment through the creation of a favourable investment climate. In recent years the number of investor state arbitrations under the ICSID has increased.<sup>45</sup> Furthermore, this proliferation in investment arbitration under ICSID rules caused the institution to amend ICSID rules on 10 April 2006. Thus, this study will explain at Chapter 3 not only the main issues of the ICSID proceedings but also the recent amendments of ICSID rules.

Secondly, the immense growth in the conclusion of BITs and regional investment treaties, most of which provide for the compulsory arbitration of investor-state disputes have main role in the development of arbitration in international investment disputes.<sup>46</sup> As explained above most BITs have common substantive and procedural provisions. These treaties generally provide national treatment, most favourite nation treatment, fair and equitable treatment, protection against expropriation without compensation and dispute settlement mechanisms. It is true that most BITs contain investor-state arbitration provisions which allow foreign investors to sue states directly for the violation of investors' treaty rights. Moreover, the NAFTA and the Energy Charter Treaty also provide investor state dispute settlement procedure.

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<sup>43</sup> *Ibid.*

<sup>44</sup> The text of the Convention is published in 575 United Nations Treaty Series 159, 4 International Legal Materials 524 (1965). See <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>

<sup>45</sup> Harten Van Gus, Loughlin Martin, *Investment Treaty Arbitration As a Species of Global Administrative Law*, *European Journal of International Law*, February 2006, p. 124

<sup>46</sup> Harten Van Gus, Loughlin Martin, *op. cit.*, p. 123; Caruba *op. cit.*, p. 136; Gottwald *op. cit.*, p. 248.

In this dissertation, we will analyse the BITs' investor-state dispute settlement provisions. It is true that the number of investment treaty arbitration disputes registered at the ICSID and other international arbitration mechanisms has increased in recent years. For example, the number of known claims was 219 in year 2005 while it was 75 in 2000.<sup>47</sup>

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<sup>47</sup> Gottwald *op.cit.*, p.247.

## CHAPTER 2      **Dispute Settlements between Investor and State**

### **I.      General Information on Dispute Settlements between Investor and State**

The most important part of the BITs is investor versus state dispute settlement mechanism which is a common characteristic of all BITs. The dispute resolution provisions provide the protection of investors who do not have to depend on diplomatic protection of their countries. Being sure from the compliance of the host countries' obligations stipulated in the BITs makes investors feel confident about investment in that country. Another advantage of this mechanism is the separation of the legal and political issues, since it ensures that disputes are solved in the legal ground.<sup>48</sup> It is also true that a great deal of BITs prevent contracting party from applying the diplomatic protection, while the investor-state arbitral proceeding is still processing.

Most BITs provides general provisions about investor-state dispute settlement mechanism. In fact, most BITs include the following limited issues: stating different arbitration venues which are suitable for the investors, the appointment of arbitrator's procedure, and the obligation of contracting parties regarding the enforcement of arbitration award. Therefore, we can say that various procedural issues with respect to arbitration are not mentioned in most of the BITs. The clarification of other procedural issues can be done only by referring the arbitration rules which existing in ICSID or UNCITRAL.<sup>49</sup>

Recently, an increasing amount of BITs has mentioned investor state dispute settlement provisions more deeply. To clarify, BITs have provided guidance to the disputing parties concerning arbitration procedures and increased the strength of these adjudication mechanisms. In particular, it is obvious that Chapter 11 of the NAFTA has affected these BITs significantly. It is worth while to note that in particular Model BITs of Canada and USA have followed the same approach of the NAFTA Chapter 11.

However, not all of the BITs have same comprehensive investor versus state dispute settlement provisions. The minority of the BITs includes specific information about investor-state dispute settlement provisions but the most of them still continues with the traditional approach and still depends on international arbitration regulations to clarify specific procedural aspects. To analyze these approaches deeply, it will be useful to divide the subject into two parts; first we will focus on rules that are main

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<sup>48</sup> UNCTAD op.cit, p. 100.

<sup>49</sup> *Ibid.* p. 100.

requirements of the investor-state dispute settlement procedures and later we will examine the development of new trends at the investor-state disputes settlement procedures.

## **II. Main Requirements in Investor State Dispute Settlement Provisions**

Developed countries include main requirements for investor-State dispute settlement mechanism in numerous BITs so as to provide its investors more secure environment. The main requirements that mostly stipulated in BITs can be analyzed through following headings: Definition of investment disputes, legal standing, preconditions for the dispute settlement mechanism, the forum of arbitration, applicable law and enforcement of arbitral awards.

### **A. Definition of Investment Disputes**

The definition of “investment disputes” is one of the controversial issues that might be raised in arbitration proceedings. To apply international investment arbitration, the subject of dispute must be investment. The definition of investment disputes differs from one BIT to another one. These discrepancies might have an essential effect on the kind of disputes which are submitted to arbitration. Thus, it is important to define what kind of investment that investors are able to submit to international arbitration under the BITs.<sup>50</sup> For instance, in Turkey-the Netherlands BIT the definition of investment dispute stipulated as a dispute involving “(a) the interpretation or application of any investment authorization granted by a contracting party’s foreign investment authority to an investor of the other contracting party; or (b) a breach of any right conferred or created by this agreement with respect to an investment.”<sup>51</sup>

Furthermore, in the Article VI of the US-Turkey BIT, the definition of “investment dispute” also covers a dispute involving “the interpretation of application of an investment agreement between a Party and a national or company of the other party”. After analyzing these two treaty provisions, it can be discovered that if the definition of investment dispute is broad such as in the above mentioned Article VI of

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<sup>50</sup> Freyer Dana H., Garfinkel Barry H., Bilateral Investment Treaties and Arbitration, Dispute Resolution Journal, 1998, p. 75.

<sup>51</sup> Article 8 (1) (a) (b) of the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey BIT, [http://www.unctad.org/sections/dite/jia/docs/bits/netherlands\\_turkey.pdf](http://www.unctad.org/sections/dite/jia/docs/bits/netherlands_turkey.pdf) (Visited 20.6.2007).

the US-Turkey BIT, this will lead to the ability of utilizing the arbitration for any breach of an investment agreement. Moreover, in most of the recent US BITs, investment dispute defined as broad as it could be. For example; in the US-Argentina BIT, the investment dispute is defined as “a dispute between a party and a national company of the other party arising out of or relating to an investment agreement.”<sup>52</sup>

As mentioned above broad definition of investment dispute is extremely important for investors since if disputes are specifically defined, a huge amount of possibilities may be left out of the agreement. For this reason, most of the investors may not seek to invest in the country which has signed such an agreement. Therefore, the broad definition of investment dispute creates the trend which is preferable between most of countries.

Some other BITs embrace investor-state dispute resolution provisions which are applicable to disputes that are directly related to a “covered investment”.<sup>53</sup> This is the most common approach in most of the BITs, despite there are discrepancies when it is looked through deeply in the details. In particular, there are differences in the clauses that define which types of disputes are suitable to application of investor-state dispute settlement procedure. The followings are the examples of different wordings in the dispute settlement clauses: disputes arising “in connection with” an investment, “arising out” of an investment, “with respect” to an investment, “concerning” an investment or “related to” an investment.<sup>54</sup> For example, Turkey-Russia BIT states that “1. Any dispute between a Contracting Party and an investor of the other Contracting Party *arising in connection with investment activities,*”<sup>55</sup> Moreover, Bilateral Investment Treaty between Turkey and Algeria states that “1. Disputes between one of the Parties and one investor of the other Party, *in connection with his investment,* shall be notified in writing, including detailed information, by the investor to the recipient Party of the investment.”<sup>56</sup> In addition, Turkey-United Kingdom BITs defines disputes “an alleged breach of any conferred or created by this Agreement *with respect to an investment.*”<sup>57</sup>

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<sup>52</sup> See Article VII (1) of the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_us.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf) (visited 22.8.2007).

<sup>53</sup> UNCTAD, *op.cit.*, p.102.

<sup>54</sup> *Ibid.* p.102.

<sup>55</sup> See Article X (1) of the Agreement between the Government of the Russian Federation and the Government of the Republic of Turkey regarding the Promotion and Reciprocal Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/russia\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/russia_turkey.pdf) (Visited 20.6.2007).

<sup>56</sup> See Article VII of the Agreement between The Government of The Republic of Turkey and The Government of The Democratic and Popular Republic of Algeria Concerning The Reciprocal Promotion

It is essential to note that as it is in the drafting an arbitration clause, the wording of the clause is an extremely important issue for investor-state dispute settlement provisions on BITs. Indeed, the scope of an arbitration agreement should be stated precisely in an arbitration clause because an arbitration agreement gives a mandate to an arbitral tribunal to decide about all disputes which can occur within the ambit of that agreement. In fact an arbitrator could not give a decision which goes beyond this mandate. If he does, his award will be rejected recognition and enforcement under the provisions of the New York Convention.<sup>58</sup> Therefore, like an arbitration agreement, BITs should include clear provisions on investor-state disputes. Although national courts, ICSID and other international arbitration institutions do not construe the scope of dispute narrowly which was stipulated in the BITs, parties still have the responsibility of drafting wide range of disputes.

Some BITs restricts the application of the investor-state dispute settlement procedures to “one or very few” obligations in the BITs.<sup>59</sup> For example, if the BITs provision regarding investor-state only permit the investor to submit the dispute with respect to the amount of compensation resulting from expropriation, the investor can recourse only expropriation dispute to investor-state dispute settlement procedure. Thus, this situation limits the application and effectiveness of investor-state dispute settlement mechanism. For example, agreement between China and Turkey provides in Article VII (b) that *“If a dispute involving the amount of the compensation resulting from an expropriation or nationalization referred to in Article III cannot be settled within one year from the date upon which the dispute arose, it may be submitted to an ad hoc arbitral tribunal for settlement in accordance with the Arbitration rules of UNCITRAL by each party subject to the dispute.”*<sup>60</sup>

This is mean that the investor is permitted to apply the investor-state dispute settlement provisions, only if the dispute arises from the amount of compensation which

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and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/turkey\\_algeria.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/turkey_algeria.pdf) (visited 20.6.2007).

<sup>57</sup> See Article 8 (1) (c) of the Agreement between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The Republic of Turkey for The Promotion and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_turkey.pdf) (visited 20.6.2007).

<sup>58</sup> Redfern Alan, Hunter Martin, Law and Practice of International Commercial Arbitration, Fourth Edition, London, 2004, Sweet and Maxwell, p.153.

<sup>59</sup> UNCTAD op.cit., p.103.

<sup>60</sup> See Article VII (b) of the Agreement between The People’s Republic of China The Republic of Turkey Concerning The Reciprocal Promotion and Protection of Investments, [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_turkey.pdf) (visited 20.6.2007).