Foreign Investment Dispute Settlement under ICSID: A Mongolian Perspective

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Abstract

Chapter I introduces the subject matter of the thesis along with the purpose and methodology of research. Although the International Centre for Settlement of Investment Disputes (ICSID) Convention is a powerful dispute settlement mechanism in the field of international investment and has many provisions that have benefitted international society, it has not been widely used or accepted in developing counties. As a developing country and as one of the largest foreign investment recipient countries in Asia, Mongolia needs to consider enlarging the class of dispute that it allows to be submitted to the ICSID. As a Mongolian, I have chosen the Mongolian investment dispute settlement as a model for my analysis in this article. Chapter II analyzes the increased interest for BITs and therefore the increased interest in ICSID arbitration. Why do states use the BITs? Do BITs play an important role in the system of dispute settlement and if so, why? And how do they work together with the ICSID system? The achievements of ICSID and BITs and their influence on foreign direct investments, investors, and the host country are examined. I then try to assess whether or not the goals of ICSID and BIT have been achieved and if investment protection has brought advantages or disadvantages to the involved parties, especially in the case of developing countries. Chapter III reviews the investment dispute legal system in Mongolia and analyzes the three major areas that apply to arbitration: Arbitration law, Bilateral Investment Treaties, and Multinational International Conventions. Chapter IV asks the fundamental but speculative question: What does the future hold for BITs in a developing country such as Mongolia.
Lastly I consider the extent to which the revised legal arrangements in this regard have been successful in Mongolia.

Key Words: Foreign investment dispute settlement, Foreign investment, International arbitration, ICSID, Bilateral Investment Treaty, BIT

Manuscript received on April 6, 2013; review completed on July 31, 2013; accepted on August 28, 2013.

I. Introduction

The ICSID Convention on the settlement of investment disputes between states and nationals of other states (the Convention) was meant to be a cornerstone in international efforts to promote and protect international investment, which was increasingly being directed to developing countries from developed countries. In fact the creation of the Convention corresponded to the dramatic change in the world investment environment that began in the 1950s.[1]

Before the Convention was established, foreign investment disputes were usually solved through local procedures in host states, and if that failed, diplomatic protection of home states followed. These measures proved to be complicated, uncertain, and time consuming. A method to establish an efficient international dispute settlement mechanism to protect and promote international investment was a mutual concern between developing countries and developed countries.

This article purposefully intends that developing countries such as Mongolia create and abide by trustworthy investment dispute resolution system under ICSID. One of the unsatisfactory factors faced by foreign investors in Mongolia is the unreliable dispute settlement mechanism for investment conflicts. This causes both business people and, in particular foreign investors, to hesitate or limit their investment in Mongolia. Therefore, it is important that Mongolia adopt and conform to a dependable and effective investment dispute settlement system which guarantees the security and safety of foreign investment.

This article uses researching methods, such as empirical analysis, case analysis, and comparative analysis methods, to develop reasonable comments, solutions, and conclusions that lead to recommendations for an effective and trustworthy arbitration for investment dispute settlement in Mongolia.

1. Aron Broches, World Bank, ICSID and Other Subjects of Public and Private International Law 161 (1995).

II. ICSID and Developing Countries

A. The Reason for Widespread Adoption of ICSID with BITs

To assess the necessity and practicability of ICSID and BITs, the question whether or not they reached their goals should be answered. It is difficult to assess the results of ICSID and BITs regarding their arbitration regimes because the application of this regime started only a few years ago.

We argue that the spread of BITs is driven by international competition among potential host countries, typically developing countries for FDI. Our main finding is that the diffusion of BITs is associated with competitive economic pressures among developing countries to capture a share of foreign investment.

An increase of FDIs was the reason for the increase of investment disputes. A thicker web of BITs, including better investor protection, was the reason for the increase of ICSID arbitrations. The increase of BITs, the further increase of new BITs, and the steady increase of foreign investments by capital exporting countries around the world will be the reason for a further increase of ICSID arbitration procedure within the next years. This further increase will bring many new ICSID tribunal decisions, which will sharpen the whole arbitration process and the judgments of ICSID tribunals, just as it was during the last decade.[2]

This future development, especially the increase of ICSID arbitration cases, will make an assessment easier and will give the chance to assess the whole process in more detail. It will provide the opportunity to evaluate how BIT cases will affect foreign investments and the ICSID procedure itself in part IV.

Today, with the experience of ICSID and BITs, the answer to the question of whether or not ICSID and BIT have fulfilled their goals is positive. Until the late 1980s there were only a few ICSID arbitration cases and ICSID clauses in international investment contracts were not prevalent.[3]

Due to the proliferation of BITs and their ICSID arbitration clauses, a con-

2. Andrew T. Guzman, *Competing for Capital: The Diffusion of Bilateral Investment Treaties- 1960-2000,* 1 Univ. of Illinois L. Rev. 12 (2008).

3. Kenneth J. Vandevelde, Bilateral Investment Treaty 127 (2001).

stant framework for dispute settlement is available to investors. The BITs pushed the application of the ICSID arbitration regime. The new negotiations of BITs still show that states believe there is a need further for investment protection for their investors and that a membership to the ICSID Convention or BITs can improve the investment climate. As one can observe, the framework set out by the Convention and BITs gives reason to believe that they are not insignificant for stabilizing practices within the world of foreign investments, and for the development within the settlement of foreign investment disputes.

But did this also increase the inflow of foreign direct investments within the states which agreed to ICSID and BIT? So far, it is not ascertainable that a direct connection between BITs or ICSID and foreign direct investments exists. An increase in the attractiveness to foreign investors is not discernible. For example, Japan as the second largest capital exporting country has only signed 11 BITs while the People's Republic of China has entered into well over 110 BITs. However, China as the country with the largest capital inflow has no BIT with the USA, one of the largest investors in China. Furthermore, Brazil, one of the biggest capital importers worldwide, has signed 15 BITs.[4] On the other hand countries which signed and ratified many BITs, especially in Africa, did not score a success with FDIs. They did not record a significant increase of investments.

The final assumption of this is either there are different ways to protect investments (for example government guarantees) or the protection of investment is only one of many issues in the mind of investors. Other factors like the magnitude of the market, skilled labor, infrastructure or political stability may be more important than only the protection of an investment.

All the factors have to come together and to mount up to an interesting mix for investors. Investment protection with BIT and ICSID can therefore only be one part for the increase of foreign direct investment. BITs have no significant independent impact in determining foreign direct investment flows.[5]

In the future it is possible that BIT protection becomes more important if investors discover the outcome of the ICSID arbitration cases, the awarded obligations and the guaranteed protection under these treaties. But today only

4. ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType.

5. Lauge Skovgaard Poulsen, *BITs and Preferential Trade Agreements: Is a BIT Really Better Than A lot*?, 1 Investment Treaty News Quarterly 1, 8 (2010).

the reference to BITs or ICSID is no forceful argument to increase foreign direct investments.

B. Assessment of the ICSID with BITs in Developing Countries

After representation of the ICSID arbitration regime in connection with BIT and their protection obligations, this article will try to assess whether or not the goals of ICSID and BIT were achieved and whether or not this way of investment protection brought advantages or disadvantages to the involved parties.

As one can see, ICSID and BITs measured up partly to their goals. Regarding this result, the question whether or not ICSID and BITs brought advantages and disadvantages for the parties should be asked.

At first, there is the general need of developing countries to import capital for the development of their domestic economy. Therefore it is very dubious whether or not capital importing countries can really choose their contracting partners or if they desperately sign any offered treaty with the hope to improve the investment climate and to attract foreign direct investments.[6]

BITs are considered to be an improvement of market economy and a sign to respect investors' rights by capital exporting countries. The consent to ICSID and BITs is regarded as an indicator for the promotion of a steady legal framework for foreign direct investment. In the eyes of capital exporting countries the combination of trade preferences and development aid with the ratification of BITs is therefore not regarded as coercion.

Secondly, the need for foreign direct investment to improve the economy on the one hand (capital import) and the possibility to invest money and know-how abroad (capital export) on the other hand is the reason why those treaty negotiations are made between unequal partners.

Only when capital importing countries become capital exporting countries will they enjoy the reciprocity of BIT and their investors will be protected as well.

But even if almost all advantages of BITs are on the side of investors or capital exporting countries, host states also can have advantages under these treaties.

6. Sauvant Sachs, The Effect of Treaties on Foreign Investments 83 (2009).

First, they establish a reliable system of investor protection with a solution for dispute settlement. Especially countries with a record of nationalization, for example, former socialist countries, or countries with unreliable political regimes in the past can show their efforts to establish a reliable framework for foreign direct investments. These treaties are one part of a strategy to improve the investment climate.

Second, within a legal framework for investments, host states have the certainty of what they are allowed to do and what not. Unexpected diplomatic interference by foreign governments is reduced and political pressure by other states can be evaded by reference to the treaty or to the dispute settlement under ICSID. Countries with weaker economies would have much more problems to enforce their rights and opinions in a direct confrontation with an economically strong country.[7] It is clear that the home countries of investors support claims of their nationals to prevent its investors from incurring losses. With the depoliticized ICSID arbitration regime and defined host state obligations the capital importing countries can defend themselves effectively against unfounded or excessive investor claims without political interference of the investor's home country.

Therefore a reliable framework can also be an advantage for host countries because it reduces obstacles and promotes a clear treatment or procedure in case of disputes.

Only BITs and ICSID did make it not easier for host countries to attract investments; but these tools can be one stone in a combination of investment preconditions to increase FDI.

The agreement to settle investment dispute under the regime of ICSID and the granting of concessions under BITs could be regarded more as a disadvantage for capital importing countries.

Capital importers make a profit from BITs mostly beside the treaty; they can promote the positive investment climate in their countries. This unequal spread of rights out of investment treaties could be regarded as a disadvantage for capital importing countries. These countries bound themselves to restrictive treaties with broad obligations. BITs do not include exceptions in case of national emergencies. Host countries lose their sovereign rights

7. Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 221 (2009); Foreign Investment Disputes: Cases, Materials, and Commentary 1009-1011 (R. Doak Bishop et al. eds., 2005).

to change investment policies because of investment protection in BITs. Of course, governments could still change laws and policies but they have always to consider that these changes could be regarded as example of expropriation or nationalization under BITs, and therefore they must pay compensation under the treaty.

In my view BITs cannot be judged in isolation. My results demonstrate that we can only understand the impact of BIT programs on FDI with a broader understanding of the political-economic environment surrounding investment.

III. Current Investment Dispute Settlement in Mongolia

A. Investment Dispute Arbitration Legal System in Mongolia

1. Recent Development of Arbitration Law

The first Foreign Trade Arbitration law was only adopted in 1995. It is obvious from its name that this law had regulated arbitration dealing with the foreign trade. But the new law was based on the UNCITRAL Model Law on May 9, 2003. The basic ideas, concepts and principles of the Model Law and even most detailed provisions have been adopted.[8]

In Mongolia, *ad hoc* arbitration, which formerly was not allowed by the previous law, is now permitted by the new law. The new law defines the institutional and *ad hoc* arbitration. In Article 4.1(1), (2) of the law, the institutional arbitration means an arbitration body established to carry out permanent arbitration and *ad hoc* arbitration means an arbitration established for one time to resolve the particular dispute. The institutional arbitration is no longer restricted to one institution.

However, unlike the Model Law, the new Mongolian arbitration law represents a unified regime regulating both international and domestic arbitration. Therefore, even if all parties are non-residents of Mongolia and the Mongolian law does not govern the substance of the case, the awards will be domestic.

The law does not prohibit the disputes of intellectual property to be referred to arbitration. It is a common practice in Mongolia that disputes re-

8. Altantsetseg D., International Commercial Arbitration 102 (2009).

lated to corruption or bribe, are covered under criminal law. Therefore, the disputes concerning a trademark, a patent or an anti-trust are usually resolved by the state court.

Under the new law, the member of Constitutional Court, the judge, the prosecutor, the case registrar, the detective, the officer of court enforcement, the advocator or the notary who had served to any of the parties, other officials who are prohibited to conduct other work which is not related to the legal duties are not allowed to serve as arbitrators.[9]

Also, the new law gives authorities to the Court of Appeal to appoint, challenge, and replace arbitrators, if the parties fail to agree or the agreed procedure fails in *ad hoc* arbitration. In the institutional arbitration, this issue will be decided by the rules thereof. The procedure of the appointment and challenge of arbitrators closely tracks the Model Law.

The court intervention in arbitration is limited by the Model Law principles. In most cases the Court of Appeal is a competent court. The arbitral tribunal has the same power as the Model Law in ordering interim and conservatory measures. If the measure is not implemented with, the party may submit its request to the competent court.

The old law did not say anything about the court intervention in arbitration. It can be said that the court was never involved in the arbitration. The arbitral award was directly executed by a court enforcement organization. The law was silent on the issue of interim and conservatory measures.

Therefore, the arbitrators were not allowed to issue such orders. Moreover, there were no regulations allowing the parties to submit a request for an interim order before the court. Therefore, it is needless to say that the judicial intervention should be limited as there was not such a thing in the Mongolian arbitration. The assistance of the court is particularly important when the claim of one of the parties to arbitration must be secured or the evidence is taken. An assistance of court is always needed when an interim order is to be directed to a third party, as the arbitration has a contractual nature and the arbitration agreement could not affect the third parties. Therefore, the new law follows the ruling of the Model Law in this regard.

According to Article 35 in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties and by the majority of all its members. However, ques-

9. Arbitration Law, 2003, art. 15(2) (Mong.).

tions of procedure may be decided by a presiding arbitrator if it is authorized so by the parties or all members of the arbitral tribunal.

Article 37 deals with the form and contents of making an award. It requires that the arbitral award shall contain names of the arbitral tribunal or a sole arbitrator, the place of arbitration and its date, legal reasons of the arbitral award unless otherwise agreed by parties or the dispute is settled by the parties and arbitration costs. The award may also contain the dissenting opinion, if any.

The setting aside is the only remedy against the award that may be requested from the competent court. The grounds for setting aside are similar to the grounds in the Model Law. The only difference is that these grounds for setting aside may be proved by either the requesting party or a court.

The Court of Appeal, when asked to set aside an award, may, where appropriate if requested so by a party, suspend the setting aside proceedings for a period of time. It will determine the time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take other such action. If the arbitral tribunal fails to correct it, the Court of Appeal shall withdraw its decision and discuss and decide the request.

If a party observes that an award contains an obvious error as a consequence of typographical, clerical, computation or other similar mistakes committed by the tribunal, he shall submit the request to the tribunal for the correction of the mistake within 30 days of the receipt of the award. The tribunal may also correct, supplement or interpret an award if any of the parties should request so within 30 days of the receipt of the award. If the tribunal finds those mistakes it corrects and interprets the award by its own initiative within 30 days from the rendered date of the award.

Costs are specifically regulated in Article 41 of the new law. The arbitration cost includes itself: arbitrators' fee, expenses occurred to the arbitrator during the arbitral proceedings, unpaid costs of interpretation, translation, the costs related to witnesses, and other costs of the arbitral tribunal during arbitration.

As for the institutional arbitration, the administration fee is stated in its rules. Unless the parties agree otherwise, the basic arbitration costs shall be borne by a Respondent in case the Claimant's claim is fully upheld, and by a Claimant in case of dismissal of the claim. If a certain part of claim was satisfied, the basic arbitration costs shall be apportioned between the Claimant and Respondent upon adjustment of the amount of satisfied or dismissed claim. If the losing party does not perform the award voluntarily, the award

may be simply brought to the Court of Appeal. The procedure for recognition and enforcement is regulated in Articles 42 and 43, which are similar to the grounds in the 1958 New York Convention. According to Article 43, the Court of Appeal has a right to refuse to recognize and enforce the arbitral award if the arbitral award is not valid or challenged or withdrawn by the court of place of arbitration.

According to Article 42.9 of the new law, if the Court of Appeal fails to make the write of execution under illegal or unclear reasons, this will not be a reason not to conduct the court enforcement measure. In this case, the court enforcement organization may execute the arbitral award on its own initiative.

The new law was elaborated by leading practitioners of international arbitration. Major characteristics of the new law are presented: (1) The internationally accepted principle of territoriality; (2) Contractual and non-contractual disputes may be resolved by the arbitration unless the parties agreed or the law stated otherwise. The new law does not restrict itself to international commercial arbitration, does it provide special rules for commercial disputes; (3) The parties have to choose a permanent or *ad hoc* arbitration. In the *ad hoc* arbitration, if the parties fail to appoint the arbitrator, the Court of Appeal will appoint the arbitrator. As for the institutional arbitration, this matter will be regulated by its rules; (4) The parties are free to decide on any aspect of the arbitration procedure either in their arbitration agreement or by choosing rules of an arbitration institution. If the parties fail to agree on this, the arbitral tribunal will conduct the arbitration in such a manner as it concerns appropriate; (5) The parties can submit proposals to the arbitral tribunal or the courts to carry out interim measures of protection; (6) The language of arbitration can be either Mongolian or other foreign language. The parties are free to determine the language of arbitration. If such an agreement fails the language of arbitration shall be Mongolian; (7) The arbitral tribunal may request from the courts to take assistance in taking evidence or other judicial act; and (8) Recourse against an arbitral award and enforcement is only available on the basis of very limited grounds well known from the New York Convention of 1958. Unless the international conventions state otherwise than this law, international convention shall prevail.[10]

Therefore, the 1958 New York Convention and the 1965 Washington Convention that were ratified by Mongolia will prevail in arbitration.

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10. ICSID, *supra* note 4.

2. Bilateral Investment Treaties

Mongolia has concluded BITs with 41 countries.[11] In the first Bilateral Investment Treaty between Mongolia and Korea concluded on March 28, 1991, and entered into force on 30 April 1991, Article 9 set forth method of investment disputes between a Contracting Party and an Investor of the Other Contracting Party. It provides that:

> *If any dispute cannot be settled within six (6) months from the date either Party requested amicable settlement, it shall, upon request of either the investor or the Contracting Party, be submitted to the International Centre for the Settlement of Investment Disputes established by the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States, on condition that the Mongolian becomes a party to this Convention.*[12]

Until that moment the dispute shall be submitted to conciliation or arbitration procedure to be mutually agreed upon on the basis of the Washington Convention. Nothing in this Article shall be construed to prevent the parties to the dispute from agreeing upon any other form of arbitration or dispute settlement which they mutually prefer and agree best suits their needs.

Article 10 set forth method of dispute settlement between the Contracting Parties. It provides that:

> *If a dispute between the Contracting Parties cannot be settled after six (6) months, it shall, upon request of either Contracting Party, be submitted to an arbitral tribunal.*[13]

There is no provision about the dispute between foreign investors and government of host state. Article 5 only stipulated that the host state cannot expropriate or nationalize the foreign investment except for the public benefit.

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11. Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 20 (2010).
12. Bilateral Investment Treaties, S. Kor.-Mong., art. 9, Mar. 28, 1991.
13. *Id*. art. 10.

There are similar regulations in the BITs between Mongolia and China,[14] United States,[15] Netherlands,[16] Italia,[17] Japan,[18] Hungary,[19] Indonesia,[20] and Austria.[21]

In the BIT between Mongolia and Republic of United States done on January 4, 1997, we can see the foreign investors' direct participation in dispute settlement.

It provides that:

> *Article 6(2) set forth that first the dispute raised between foreign investor and government of host state, they should try to settle it amicably through conciliation, and dispute about compensation of expropriation, if cannot be settled in six months through amicable procedure, the foreign investor can require to submit the dispute before tribunal established by reference to ICSID convention provisions.*[22]

Here the provision gave a possibility of enlargement of dispute scope beyond the compensation of expropriation. This reflected the flexibility and will to further enlarge application of the Washington Convention in Mongolia.

In the BIT between Mongolia and Italy done on January 15, 1993, it is provided that:

> *In the event that such a dispute cannot be settled amicably within six months of the date of a written application, the Investor in question may submit the dispute at his discretion, for settlement to: "International Centre for the Settlement of Investment Disputes", for the application of the arbitration procedures provided by the Washington*

14. Bilateral Investment Treaties, China-Mong., art. 8, Aug. 26, 1991.
15. Bilateral Investment Treaties, U.S.-Mong., art. 6, Oct. 6, 1994.
16. Bilateral Investment Treaties, Neth.-Mong., art. 1, Mar. 9, 1995.
17. Bilateral Investment Treaties, It.-Mong., art. 9-10, Jan. 15, 1993.
18. Bilateral Investment Treaties, Japan-Mong., art. 10, Feb. 15, 2001.
19. Bilateral Investment Treaties, Hung.- Mong., art. 8, Sept. 13, 1994.
20. Bilateral Investment Treaties, Indon.- Mong., art. 8, Mar. 4, 1997.
21. Bilateral Investment Treaties, Austria-Mong., art. 8-9, May 22, 2001.
22. US-Mong., *supra* note 15, art. 6.2.

> *Convention of 18th March 1965 on the "Settlement of Investment Disputes between States and Nationals of other States" whenever, or as soon as both Contracting Parties have validly acceded to it.*[23]

In the BITs between Mongolia and Cuba, India, Laos, Romania, which are not contracting states of the ICSID Convention, we can find Mongolia applies the ICSID mechanism not only to the member states of the ICSID Convention but also to non-member states. At the same time in all these BITs, Mongolia guaranteed foreign investors that their investment will not be expropriated or nationalized except for public benefit, and further if the expropriation does happen, then the investor will be appropriately compensated.

3. Multilateral International Conventions

As of October 24 1994 the Mongolia has adopted the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award.[24] The major catalyst for the development of an international arbitration regime was the adoption of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The New York Convention continues to set standard requirements for a successful international arbitration process.[25]

The New York Convention provides for international recognition of agreements and awards by national courts. The success of the New York Convention is well illustrated by three factors. First, over 147 countries are party to the New York Convention.[26] Second, for purposes of interpreting and applying the New York Convention, it is now common for the courts of one country to look to the decisions of other foreign national courts to see how specific provisions have been interpreted and applied.

While these national court decisions are not automatically binding, such applications will appear if international arbitration practice and law, which is increasingly of significant influence on parties, arbitrators and national courts, regardless of nationality.

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23. Bilateral Investment Treaties, It.-Mong.,art. 9, Jan. 15, 1993.
24. UNCITRAL database, http://www.uncitral.org/uncitral.
25. Van den Berg A, 50 Years of the New York Convention 23 (2009).
26. ICSID, *supra* note 4.

Third, and this follows from the above two points, it is now generally accepted that agreements to arbitrate and arbitration awards will be enforced by the courts of most countries that are party to the New York Convention. Upholding arbitration agreements and awards is an absolute prerequisite if international arbitration is to succeed and the New York Convention has provided the framework for this success.

The New York Convention was followed by a series of Bilateral and Multilateral Conventions. They had varied purposes and were directed generally to different areas of international business. None of these conventions, with the exception of the ICSID Convention, have achieved anything like the level of success of the New York Convention.

There are a number of international and regional conventions related to arbitration. These include the European Convention on International Commercial Arbitration 1961, Washington Convention on the Settlement of Investment Disputes between States and National of other States 1965, European Convention Providing a Uniform Law on Arbitration 1966, Settlement by Arbitration of Civil Law Disputes Resulting From Economic Scientific and Technical Co-operation 1972, Inter-American Convention on International Commercial Arbitration 1975, MERCOSUR Agreement in International Commercial Arbitration 1998, Amman Arab Convention on Commercial Arbitration 1987, and the Treaty establishing OHADA 1993.

After a long time of consideration and along with the domestic situation and international economic environment improvement, Mongolia signed the ICSID Convention on May 28, 1996.[27]

Once Mongolia ratified the ICSID Convention, Mongolia made such notification to the Centre that pursuant to Article 1(2) of the Convention, the Centre shall provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. From then on, foreign investors can apply the mechanism of the ICSID Convention for claim of compensation resulting from expropriation and nationalization against the Mongolian government.

27. *Id.*

B. Key Problems in Mongolian Arbitration Legal System

1. Applicable Law

An opinion may represent the understanding among Mongolian scholars, however, that the applicable international law should be a) principles and rules of international law stipulated and recognized in the law of host state; b) BIT of which the host state is a member; and c) the universally recognized principles and rules of international law about treatment of the foreign party.

These principles can be referenced as appropriate and practicable international law and used in Mongolia.

Therefore, in agreements with foreign investors, Mongolia can clearly express that any dispute first be resolved by the laws of Mongolia, and only if really needed should international law be applied. As to the applicable international law and considering this diversity of interpretation in international law, Mongolian scholars always claim the applicable international law should be recognized and accepted by Mongolia.

2. Enforcement of Foreign Arbitration Awards

The enforcement of foreign arbitration awards through domestic judicial proceedings is controversial in Mongolia. Having been previously indicated, it is nearly a generally accepted fact that the court of law systems in Mongolia are facing issues within the system itself, including detrimental political influence and corruption.

In this sense, once the enforcement of the foreign arbitration award by the courts is sought, it is very likely that such enforcement process will consume much time and that further, unnecessary costs for such enforcement will be required by the corrupt and bureaucratic system. Thus it turns away from the inherently original concept of and desire for a Mongolian arbitration mechanism, which is to save both costs and time.

3. Qualifications of Arbitrator

The experience and outlook are also vital qualifications of an arbitrator. It is becoming increasingly important for international arbitrators to show

their awareness of the world of international investment relations and of the different traditions, aims, and expectations of the people of that world. The qualified arbitrators play a significantly important role in forming a reliable arbitral institution. As a consequence, an arbitrator must possess the certain qualifications, including education and training, efficiency of languages, experience, and outlook.

One of the most important qualifications for an arbitrator is that he is experienced in the law and practice of arbitration. In this sense, it is not very useful to appoint an arbitrator who is an experienced lawyer but has short practical experience of arbitration.

IV. Influence of Globalization: The New Challenges for Mongolians

Based on the perceived shortcomings of the ICSID system, a number of suggestions for reform are emerging. They aim at reigning in the growing number of ICSID cases, fostering the legitimacy and increasing the transparency of ICSID proceedings; dealing with inconsistent readings of key provisions in BITs and poor treaty interpretation; improving the impartiality and quality of arbitrators, reducing the length and costs of proceedings; assisting developing countries in handling ICSID cases; and addressing overall concerns about the functioning of the system. Meeting these challenges will require an upgrade of entrepreneurial and management skills on future development BITs in Mongolia. In almost all ICSID cases the respondents are developing countries challenged by foreign investors during the last few years.

The new world order is a reminder that under the current circumstances Mongolia could consider enlarging the class of dispute consented to be submitted to ICSID with new concerns on BIT.

A. National Emergency

Mongolia should take great care to clearly outline the adjustment of entry policies in some key sectors and have more state control of extractive industries.

The manifold motivations for these policies included considerations of

national security, food security and industrial policy, as well as the wish to control strategic industries and infrastructure. Restrictions appeared not only in the regulatory framework itself, but also in more stringent administrative practices; for instance, in screening procedures for incoming investment and in a broader interpretation of national security concerns. In addition, Mongolia should be concerned about excessive purchase of land by large-scale foreign firms and government-controlled entities *(e.g.,* sovereign wealth funds), the environmental consequences of overexploitation and their implications for the promotion of rural economic development among domestic rural producers. Mongolia needs to give careful attention to State control over natural resources, as well as their dissatisfaction with the performance of private operators. To obtain more control over extractive industries, governments have chosen different paths. These paths have led to nationalization, expropriation or divestment requirements. For example, to increase to different degrees taxes and royalties in extractive industries, to introduce new taxes that relate to the participation of the private sector in the reform process, and to adopt new laws that raised royalties and taxes following negotiations with the mining business associations. Yet another policy approach is the renegotiation of investment contracts. For example, Ecuador passed a law compelling private oil companies to renegotiate their service contracts in order to replace the taxation arrangement in production-sharing agreements with a flat rate per barrel of oil.[28]

Mongolia needs to consider following points before negotiating BITs: (1) how much to liberalize or restrict FDI; (2) what operational conditions to impose on FDI; and (3) how to deal with outward FDI.

First, when it comes to choosing whether to liberalize or restrict FDI, Mongolia needs to consider a menu of options, including the various alternatives of foreign ownership ceilings versus quantitative quota, formal restrictions versus more flexible screening procedures, and mandatory requirements versus voluntary measures. Even within an industry, different choices can be made about the extent to which it should be open for FDI.

Second, Mongolia needs to carefully consider the pros and cons of different policy options to find the "right" degree of State regulation. For example, although it is the sovereign right of each country to expropriate private property in the public interest subject to conditions stipulated by the domestic law

28. BBC news, http://www.bbc.co.uk/news/world-latin-america.

of the host State and its obligations under international law, such actions also carry numerous risks, such as potential damage to the investment climate, the likelihood of exposure to investment disputes, the danger of economic retaliation, and the risk of economic inefficiency owing to a lack of sufficient capacity and technical expertise. Compared with nationalization and expropriation, increases in taxes and royalties or renegotiations of investment contracts are likely to have less negative consequences and may therefore be less disruptive to the relationship between the host country government and the investor.

Third, deciding only on the degree of openness to FDI may not be sufficient to address the specific policy issue at stake. Attracting FDI requires a stable, predictable, and enabling investment climate. To encourage FDI, countries also need to offer "hard" support through a qualified workforce and good infrastructure. Industry-specific challenges also exist. For example, in agriculture, opening or restricting the degree of access to land by foreigners may be inadequate if authorities do not first create modern, harmonized registration and cadastre systems that can actually measure the extent to which foreign acquisitions take place. In addition, depending on the country, the definition of rural and urban land can vary by region, and productivity ratios may differ regionally or by crops grown. These variations open doors for loopholes in legislation that can be abused on both sides.

Fourth, the issue of openness to FDI also entails a range of sensitive and important issues in connection to trade. They include the potential effects of trade-related investment measures or investment-related trade measures on FDI, and the implications of re-introducing local content requirements or research and development requirements for existing obligations under the BITs. As recent examples in Latin America show, a raise in import tariffs can induce "barrier-hopping" FDI or trigger new patterns of FDI in the region, such as industrial re-clustering or the breaking down of global supply chains into multi-domestic industries.

Fifth, Mongolia needs to ensure that its FDI-related policies address the roots of the problem rather than curing only the symptoms. For example, the most promising way to motivate domestic companies to keep their production and operations at home is to foster favorable conditions which encourage them to invest domestically rather than to create distortions by preventing or discouraging them from investing abroad.

Sixth, Mongolia needs to decide on its institutional set up for designing and

adjusting FDI policies. In China, new policies are reflected in specific lists that identify the industries where FDI is encouraged, restricted or prohibited.[29] India regularly reviews its FDI policy measures and publishes changes in a "Consolidated FDI Policy"[30] document, which contains general conditions of FDI as well as industry-specific conditions (*e.g.* industries in which FDI is prohibited or permitted).

Seventh, inconsistent policy changes and adjustment can create considerable uncertainty about the direction of FDI policies, potentially producing negative effects on the investment climate. These risks call for governments to have a long-term perspective on FDI policies and to focus on stable investment conditions. Prior consultations with affected stake holders at the national and international levels, as well as full transparency in the process of regulatory and administrative changes, help to reduce uncertainty and at the same time promote good governance.

Eighth, in times of economic crisis, there is a considerable risk of countries resorting to protectionist investment measures when addressing FDI. Attention is also warranted to ensure that regulations related to sustainable development do not become a pretext for "green" protectionism. International organizations, such as UNCTAD and the Organization for Economic Cooperation and Development (OECD), continue to monitor national investment policies.

Currently, with respect to the international investment regime, some countries are slowly moving toward a rebalancing of rights and obligations between investors and their host countries. In contrast, a few middle income countries, such as Korea, Chile, and Singapore, have broken the risk barrier and are considered to be low investment risks. Firms have confidence that those countries will enforce the property rights of all investors. In these countries, BITs vary more from the model treaties than in Mongolia. Their stable investment environment enables them to negotiate the terms or even to refuse to sign treaties without risking a loss of foreign investment. For example, Singapore refused to enter into a BIT with the United States based on its model treaty because of its limits on performance requirements. Fur-

29. China's National Development and Reform Commission and Ministry of Commerce promulgated the Foreign Investment Industrial Guidance Catalog (Jan. 30, 2012), *available at* http://www.fdi.gov.cn/pub/laws/.

30. Government of India Ministry of Commerce & Industry Department of Industrial Policy Promotion (Apr. 10, 2012), *available at* http://dipp.nic.in/English/Policies/FDI/.

ther, Singapore's treaties with France, Great Britain, and the Netherlands limit the protection offered to investors to specifically approved investment projects. Singapore only agreed to a treaty that covered investment as part of a broader free trade agreement that contained other provisions of importance to its import and export business. Many earlier investment agreements do not include pre-establishment rights of foreign investor and host state while there is growing pressure in more recent negotiations to have them. It is important to clearly establish the operational parameters at the pre-investment stage so as to avoid conflicts at a later time. There should be annex listing pre-establishment rights as well as any exceptions. Such as annexes are often developed through an offer acceptance process, which permits key stake holders to articulate their concerns. Such a process must be fully transparent. Also pre-establishment obligations would include placing investors under an obligation to provide timely, compete, and accurate responses to public authorities involved in reviewing investment.

Furthermore, Mongolia also must ensure that the dispute resolution process meets it needs by providing reliable results so that its investors can manage their investment risks. This might include retaining political risk insurance so as to protect their investment against adverse changes, such as expropriation, discrimination, foreign exchange controls, or civil disturbances.

B. Protection of Public Policy

It is widely accepted that investment activities impact on environmental and labor standards and on the human rights of individuals in the territories where investment activities are carried out in Mongolia. There are many potential environmental disasters such as floods, droughts, high winds, earthquakes, biological disasters, forest fires, and great amounts of desertification, and air and water pollution that can happen in Mongolia. Statistical information shows that mining has damaged nearly 4,000 hectares.[31]

In this situation, we need to pay particular attention to environmental protection. Certain provisions of the new U.S.-BIT model may hinder negotiation of new BITs with a developing country as Mongolia. For example, the new U.S.-BIT model includes provisions on investment and the environment. It provides that:

31. MAD Investment Policy Database, *available at* http://www.mad-mongolia.com/news/mongolia/.

> [N]*either party can waive or derogate from its domestic environmental laws or offer to do so in order to encourage the establishment, acquisition, expansion or retention of an investment in its territory.*[32]

In this regard, the ICSID authority is that states are required to pay compensation for environmental regulations that impact on foreign investment. The tribunal in *Santa Elena v. Costa Rica* stated as follows:

> *While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.*
>
> *Expropriatory environmental measures — no matter how laudable and beneficial to society as a whole — are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*[33]

For the most part, even though investment dispute settlement tribunals frown upon protectionism, environmental protection is emerging as an area of global concern and is not necessarily a particular interest area of only capital exporters or importers.

In addition, the new U.S,-BIT model new transparency provisions, which could have the effect of forestalling a certain percentage of investor-State arbitrations, since the new provisions give investors an opportunity to discuss the effects of regulatory amendments and host states a chance to reevaluate

32. U.S.-BIT Model, art. 12, 2012.

33. *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/16, Final Award, ¶¶ 71, 72 (Feb. 17, 2000).

proposed changes before final promulgation. In essence, these modifications allow for exchanges of views before the conditions for a dispute actually arise. Therefore, we need to be concerned with participating NGOs.

A further contention is that international principles of investment law that require developing states to pay "fair and equitable" compensation for expropriation bypass the fact that Mongolia lacks the resources to compensate foreign investors according to such international standards. As a result, "fair and equitable" compensation for a foreign investor from a developed state may "unfairly" cripple a developing country as Mongolia by perpetuating a history of dominant foreign states and their investors dispossessing it of its natural resources. Conversely, new BITs devised by developed states that are now capital importers may artfully invoke defenses of necessity, national security, health, safety, and the protection of the environment to deny "fair and equitable" treatment to investors from Mongolia.

C. Balancing Investment Protection and the Public Interest

International legal regimes depend on the vertical relationship between state responsibility and sovereignty, and the right balance between investment protection and public interest.[34]

BITs have not yet developed a coherent approach to the standard of review applicable to disputes engaging the competing interests of host states and foreign investors. BITs typically do not address the relationship between the standards of investment protection, such as indirect expropriation, fair and equitable treatment, and national treatment, and the continuing powers of host states to regulate and take other actions in the interest of their populations. Nor, like most other treaties, do they generally stipulate the applicable standard of review, meaning that tribunals must rely on their inherent powers in the determination of the appropriate degree of deference to the extent that the treaty text does not shed light on the matter.[35]

The greater the degree of deference afforded by investment tribunals, the

34. Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration*, 4 J. of Int. Disp. Settlement (2013)(Forthcoming).

35. Burke W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Virginia J. of Int'l L., 302, 402 (2008).

correspondingly wider the degree of regulatory flexibility enjoyed by host states and conversely the stricter the standard of review, the greater the risk of state liability for action in pursuit of public welfare objectives. Employing standards of review that reflect an appropriate allocation of authority between tribunals and states may be one way, within the current system of investor-state arbitration, for international investment law to find a better balance between public and private interests.[36]

Deference on the basis of sovereignty and proximity is especially relevant to the determination of whether the host state's asserted objective serves the public interest, an inquiry that in many cases operates as a prerequisite for a finding that the host state has acted lawfully. Provided that a measure does not pursue a discriminatory, protectionist or otherwise impermissible objective, a tribunal should display deference in relation to the host state' determination of the regulatory objectives it wishes to pursue, and should refrain from second guessing the importance of the objective or the desired level of protection or achievement of it, including in relation to the regulation of novel or localized issues requiring intervention.

Balancing proportionality has been performed, or referred to, in a number of investment cases,[37] and some tribunals have referred to the concept of reasonableness as delimiting lawful state conduct in the context of fair and equitable treatment.[38]

Balancing, or determining whether a measure is reasonable, risks highly subjective decision-making that is influenced by adjudicators' own political, ideological, and economic beliefs and assumptions. In many cases, it will be more appropriate for national decision makers to make this assessment or adjudicators should attach significant weight to their views.[39]

The adoption of strict standards of review in investor-state arbitration has, most notoriously, resulted in tribunals holding that Argentina' general regulatory measures taken in response to its economic crisis violated its obligations

36. *Id.*

37. *Tecmed v. Mexico* ¶122; *Saluka v. Czech Republic* ¶¶304-307; *Glamis v. US* ¶¶625, 803-804; *Total v. US* ¶¶123, 162, 164.

38. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No.ARB/05/8, Award, ¶ 332 (Sept. 11, 2007); *Continental v. Argentina* ¶254; *ImpregiloS.p.A. v. Argentine Republic*, ICSID Case No.ARB/07/17, Award, ¶ 291 (June 11, 2011).

39. Jud Matthews, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 Emory L.J. 797 (2011).

toward foreign investors. We also see overly strict approaches to the standard of review in a number of cases in which tribunal members do not appear to agree with host states as to the importance of their objectives or the gravity of the situation, or where tribunals have not taken account of host states' comparatively greater expertise in designing regulatory policy. Yet, an increasing number of tribunals have acknowledged the desirability of deference or have approached the standard of review with an understanding of the need for deference for reasons of sovereignty and proximity and relative institutional competence and expertise.

Furthermore, BITs need to be developed a coherent approach to the standard of review applicable to disputes engaging the competing interests of host states and foreign investors. Such an approach to the standard of review would go some way toward achieving a more balanced relationship between the protection of foreign investments and host states' right to regulate in the public interest.

The New International Economic Order of today is a finely tuned balance between the rights of developing countries, the desires of developed countries, and the protections granted to individual investors from around the globe.

V. Conclusion

The international jurisdiction method of the Convention will have a profound legal influence in the future considering the increasing rate of globalization in the past decade.

After reviewing the main possible sources of legitimacy for the ICSID and BITs network in developing countries, early conclusion overall is that the potential benefits of ICSID and BITs have recently become the focus of some scholarly attention, after reviewing the duties and rights under BITs in connection with the dispute resolution regime under ICSID it can be stated that the explosion of BITs and ICSID procedures shows the importance of these vehicles within the business world.

Investor protection is more successful with BITs because the granted rights are enforceable under the treaty. Host states cannot refuse recognition of investor rights, as it is possible under customary international law, when these states did agree to the BIT.

Also, I can say that one cannot blame BITs or ICSID arbitrations for weak economic development or unfair investment protection. BITs and ICSID influence investments only at a second level. Furthermore BITs cause more administrative work for the host country, but once new laws are in place and BIT provisions are recognized within the administrative bodies of the government, then the investment climate improves dramatically.

Another point is the marginal participation of capital importing countries from treaty-based investor protections. BITs and ICSID develop their full potential only if capital importing countries become capital exporters. The investor protection has a reciprocal effect and protects any investment either from capital exporting countries or from mostly capital importing states.

Therefore as soon as capital importers become more capital exporters, the advantages of BITs will be noticeable. Furthermore from the date of the ratification of the treaty all investments from mostly capital importing countries are protected as well.

The vulnerability of capital importing countries is only based on their small negotiation power during the negotiation process, limited technical capacity to handle disputes, potential high procedure cost, and juridical know-how. Support seems to be required to enable these states to effectively manage investment disputes and to incorporate treaty obligations into their domestic law to avoid disputes. ICSID and BITs create a framework for investment protection and dispute settlement. This framework does not force countries to admit FDI.

ICSID and BIT cover only the post-establishment stage of investments. Admission and establishment of investments are still in the hands of the host country. The host country can determine autonomously the admission and the establishment of investments. Therefore concessions for mining of natural resources or acceptance of a tender for development projects are in the power of decision of the host country.

This is the reason why BITs cannot be regarded as a new colonialism of the capital exporting countries. Investment treaties do not give access for example to natural resources of a country. The power of the host states to determine admission rules for investments and grant concessions gives access to these resources.

If pre-investment decisions are based on wrong facts, or the lack of knowledge about world market situations like in the mentioned Botswana case in the early stages of independence, then BIT and ICSID codify investment

conditions which are unfavorable for the host country. The reason for the unfavorable conditions is not the BIT; it is the wrong decision by the government regarding the concession.

The treaties establish a mutual agreement between the parties about treatment of investors and foreign investments. The treaty obligation is a serious commitment for both parties, which cannot be questioned as easily as customary law or sporadic statements in connection with treatment of investments. The application of BITs and ICSID is an advantage for all contracting parties. BIT and ICSID arbitration established a new legal framework for foreign investments and their dispute resolution.

Finally, capital importing countries as the weaker contracting parties do not face unfair treatment or disadvantages out of BITs and ICSID arbitrations. Protected are investors wherever they come from.

Host states still have the power to admit investments and to negotiate investment conditions.

Although Mongolia ratified the ICSID Convention, it is rarely used or has not been used in Mongolia and the relevant legal material and practice are in their infancy.

After changing to a democracy, the Mongolian government approved a huge number of laws, treaties, and amendments in a short period of time without prior discussion, public interest or taking the cultural and historical attributes of society into account. Also in a short time, a large amount of foreign legislation and institutional systems were introduced to Mongolia without regard to the Mongolian socialist mind-set. Even today Mongolians do not understand what a really deliberative decision-making is, and why public participation is so important.

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