Research Article

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The Effect of the Consortium Agreements on the Competence of the International Centre for Settlement of Investment Disputes (ICSID): Analytical Study of the Saudi Foreign Investment System and the Washington Agreement of 1965

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Abstract

This study determines the extent of the impact of the consortium agreements between commercial companies on the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). For the settlement of foreign investment disputes, if the issue arises from the same dispute between foreign investors from several countries, who are linked to each other by a nodal group on the one hand, and with the Kingdom of Saudi Arabia as the host country for investment on the other hand. This study has shown that in some cases, consortium agreements have an indirect role in the emergence of several simultaneous judicial or arbitration procedures for the procedures of the center for settling foreign investment disputes in the Kingdom of Saudi Arabia, considering that the Kingdom of Saudi Arabia is a member of the Washington Agreement of 1965. In this study, we rely on the comparative analytical approach by studying the special nature of the consortium agreements that arise from the alliance of several companies or projects from different countries. These parties bring together an independent legal entity with an independent legal personality to explain that the consortium is considered one of the indirect reasons for the emergence of Simultaneous arbitration procedures for the ICSID. We also rely on the comparative approach between the Saudi Foreign Investment Law of 2000 and the Washington Agreement of 1965 to determine the extent of the impact of these agreements on attracting foreign investors in the Kingdom of Saudi Arabia. Additionally, we try to identify the legal means to prevent the occurrence of this phenomenon or control it if it occurs.

Keywords: *Consortium, foreign investment, arbitration, jurisdiction, ICSID, Washington Convention*

1. Introduction

Governments of countries all over the world—especially in developing countries—seek to attract foreign investments by providing an appropriate environment for foreign investors and overcoming all obstacles that may stand in the way of investing in the country. Which has prompted all countries around the world to issue laws to encourage foreign investment, as well as the inclusion of many model bilateral investment agreements, due to the essential role these investments play in the

economic development of any country. These investments have become the main source on which the budgets of many developing countries are based. In order to achieve these goals, the Kingdom of Saudi Arabia issued the first foreign investment system in 1955 to regulate the investment process of foreign companies in the Kingdom. In 2000, the Saudi government regulated foreign investment in the Kingdom, determining the privileges and guarantees that the system provides to foreign investors, as well as determining the provisions for adjudication of investment-related disputes. Since the discovery of oil, significant foreign investments began to arrive in the Kingdom. Since that time, the Kingdom has allowed resorting to arbitration to resolve disputes that may arise between the management body and the investing company. The oil contracts evidence that the Kingdom concluded with oil companies, which provided for the possibility of resorting to arbitration bodies in the event of a dispute between the two parties, including, but not limited to, the contract concluded between the Kingdom and the Japanese Petroleum Company on December 10, 1955 (Alhussein, 2015). Additionally, the concession agreement concluded between the Kingdom's government and the Standard Oil Company in the state of California (Almuheeb, 2002).

On the other hand, the Kingdom of Saudi Arabia has concluded many model bilateral investment agreements with many countries worldwide to encourage foreign investors to invest in the Kingdom. And Germany in 1996, the investment promotion and protection agreement between Saudi Arabia and France for the year 2002, the investment agreement between Saudi Arabia and Spain for the year 2006, the investment agreement between Saudi Arabia and Japan for the year 2013, the investment agreement between Saudi Arabia and Jordan for the year 2017, and many other model bilateral investment agreements.

Through its launch of the Kingdom's Vision 2030, the Kingdom of Saudi Arabia seeks to make foreign investment one of the most important revenues on which the state budget is based and not rely entirely on oil. The launch of the vision coincided with the delivery of 80 giant government projects, and the project's costs ranged. Each varies between 3.7 billion riyals and 20 billion riyals. The NEOM project is considered an attractive forum for capital and foreign investment, and the gross domestic product of this project is expected to reach more than $100 billion by 2030.

Investment promotion laws in the host countries are keen to provide many financial and administrative facilities and tax benefits to foreign investors, ensuring the protection of the foreign investor's property rights. It ensures that there is no deviation from the policy of double taxation (Legal Guarantees for Foreign Investments in Saudi Arabia, Al-Aql & Al-Sharif, 2016). For example, Article 6 of the Saudi Foreign Investment Law states: 'The project licensed under this system shall enjoy all the advantages, incentives, and guarantees enjoyed by the national project according to the regulations and instructions.' Article 8 of the same system states that: '... a foreign facility licensed under this system may own the necessary real estate within the limits of the need to carry out the licensed activity ....' Article 11 of the same system states: 'It is not permissible to confiscate the investments of the foreign investor in whole or in part except by a court ruling, and it is not permissible to expropriate them in whole or in part except for the public interest in return for fair compensation following the regulations and instructions.'

Despite the great financial benefits foreign investors derive from developing their capital and investing it in different markets, the approval of foreign investors to invest in some countries remains mostly contingent on obtaining some legal guarantees from the countries hosting foreign investments. The most prominent of these is ensuring that the national courts in those countries do not have jurisdiction to settle foreign investment disputes that may arise between them. Along with the desire of investors to get rid of the judicial and executive immunity guaranteed by the general international law of the country hosting foreign investment, where the requirement to resort to international arbitration bodies is one of the important conditions—that investors are keen to include in the investment agreements concluded with the host country. To attract foreign investments to Saudi Arabia and provide legal guarantees for foreign investors, the Kingdom joined in 1980 (Historical Development of Arbitration in Saudi Arabia, Al-Sharif, 2020) the Washington Convention for the Settlement of Foreign Investment Disputes between Host Countries and

Nationals of Other Countries (ICSID). According to Article 1 of the Washington Convention 1965, the ICSID is responsible for settling investment disputes between the contracting states on the one hand and the nationals of the contracting states on the other hand.

As a result of the issuance by most countries of the world of laws encouraging foreign investment, the shift in economic thought to the application of the market economy or what is known as the institutions of globalization, arising from the application of the principle of freedom of trade and industry, which in turn led small commercial companies in developing countries being impacted, these companies are completely unable to compete and stand in the way of large commercial companies. As a result, consortium agreements have emerged since the beginning of the twenty-first century as a lifeline for commercial companies and small economic projects to get out of the economic crisis imposed by laws to encourage foreign investment and the open economy system to compete with major companies and avoid declaring bankruptcy, as These companies found their desire to compete with the major companies through the formation of economic blocs and alliances with each other, and cooperation among them to achieve integration in terms of financial, administrative and technical terms, and to raise their ability to establish economic projects and huge infrastructure projects (Shaheen, 1998 & Baptista et Barthez. 1986).

From a legal point of view, the emergence of the consortium constituted an influential factor for the emergence of many legal problems and a fertile ground for conducting many legal studies on the legal nature of these alliances (Majdi, 2019). However, we will try, through this study, to demonstrate the extent to which the consortium affects the competence of the center in settling foreign investment disputes and how the consortium can create an imbalance at the legal level, represented in the emergence of simultaneous arbitration procedures for the procedures of the ICSID and conflicting jurisdiction in consideration of investment disputes. The phenomenon of conflict of jurisdiction is an undesirable legal phenomenon for all parties because of the negative effects that it may have, represented in the emergence of many simultaneous judicial or arbitral procedures at the same time, in the same case, and between the same parties, which may constitute a waste of resources. It also constitutes an additional financial burden on the parties to the dispute. This phenomenon may significantly impede the implementation of the arbitration ruling issued by the ICSID if several contradictory rulings are issued in the same case. The jurisdiction of the national judicial courts in the host country regarding the dispute arising from foreign investments, and this matter may have counterproductive results in attracting foreign investors to invest in the Kingdom.

2. The Study Problem

They are determining the extent of the impact of the alliance agreements consortium on the competence of the center in settling foreign investment disputes and the impact of these agreements on the emergence of simultaneous judicial or arbitration procedures for the procedures of the ICSID and the impact of this on attracting foreign investors to invest in the Kingdom of Saudi Arabia.

3. The Importance of Studying

This study is of practical importance in determining the reasons and obstacles that could stand in the way of attracting foreign investors, which contradicts the directions of countries and their relentless efforts to attract foreign investors to invest because these investments constitute a major component of the public budgets of those countries, especially in the budgets of developing countries. Also, the consortium agreements may be a reason for the country hosting foreign investment to be subject to simultaneous judicial and arbitration procedures at different judicial and arbitral bodies to settle the same dispute.

4. Study Questions

Through this research, we seek to answer the following questions:

What are the agreements of the alliance consortium? Moreover, what are its forms? How is it formed?

What is the legal nature of an alliance agreements consortium?

How do the consortium agreements contribute to the emergence of simultaneous arbitration procedures for the procedures of the ICSID.?

Does the consortium have negative effects on attracting foreign investors?

What are the most important possible legal and technical means to solve the problem of concurrent procedures?

5. Objectives of the Study

Through this research, we seek to achieve the following objectives:

Recognize what consortium agreements are, the reasons for their emergence, and their importance.

To determine the negative effects arising from the emergence of simultaneous procedures for the center's procedures for settling foreign investment disputes.

To determine how the jurisdiction over foreign investment disputes can be unified.

6. Discussion

6.1 The effect of the Consortium on the competence of the ICSID.

The Consortium is a federal agreement grouping several investors, whether legal or natural, to contribute and participate in implementing one of the mega projects to benefit the management authority in the country hosting the investment. The Consortium's idea goes back to the joint venture (Joint Venture), which arose in the orbit of the Anglo-American system (Baptista et Barthez., 1986). The idea of the joint venture is reflected in the partnership between the foreign investor and the national investor so that it takes the form of the foreign investor's contribution to the investment project in the host country, either in the form of a cash share or an in-kind share, such as providing machinery, equipment, devices, raw materials, or production requirements. The foreign investor's contribution may also represent a moral right, such as a patent, an industrial model, or a trademark (Badri, 2006). The idea of the consortium can be summed up as the agreement of several companies specializing in specific fields to participate among themselves in order to implement huge government projects when a single company is not able to implement them, so these companies form a temporary coalition with sufficient financial, technical and administrative capabilities to implement the huge project.

Legally, the consortium agreements taken from the idea of the joint venture were linked to investment laws that opened the way for concluding such agreements that benefit the constituent companies, especially national companies in developing countries, after they were unable to compete with major foreign companies in the implementation of huge state projects. However, this analysis does not mean that major foreign companies have not benefited from investment laws and the idea of a consortium in particular since they are closely linked to international trade. According to Uteen (Uteen, 2006), these laws enshrine economic cooperation between countries—the capital from investing in foreign markets in cooperation with national capitals (Penrose, 1978).

A group of jurisprudence defines the consortium as "... a federation of companies belonging to more than one country and merging to implement a joint project." (Establishing investment projects following the Build, Operate, and Transfer of Ownership System B.O.T, Qaid, 2000). We do not agree with this definition for two reasons: the first reason is that the consortium can consist of local parties

from the same country as the management entity that owns the project, and it is not required that the consortium consists of parties from multiple countries. The second reason is that the consortium does not result in the merger of companies in a strict sense. Rather, each of the companies party to the consortium retains its legal personality and financial and administrative independence. Others see a consortium as a joint venture that unites itself to form an independent legal entity (Juma).

An example is Article 1 of the S.A.S. (Scandinavian Airways System, 1961) consortium agreement, which is an agreement to establish an air fleet between three airlines: A.B.A. of Sweden, D.D.L of Denmark, and D.N.L. of Norway. This article considered the consortium agreement between these companies as independent companies, knowing that this agreement has not been registered as an independent company in any of these countries and it has not acquired the citizenship of any of them. Also, the principle applicable in the international aviation convention, such as the Chicago Convention, prohibits the double registration of aircraft in more than one country. These agreements do not include the idea of dual nationality. Therefore each company remains the owner of its aircraft (Article 18, Chicago Convention).

This trend of criticism did not escape from the fact that it confuses the consortium and joint projects without considering the fundamental differences between them. In joint projects, all parties are asked to be jointly liable to the contracting administrative authority, and this project operates as if it were a single company. As for the consortium, the situation is different according to the type of consortium. If the consortium is horizontal, each party is directly responsible for the contracting administrative authority. However, if the consortium is vertical, the leading party is directly responsible to the administrative authority for the actions of all the consortium parties, and each of the other parties in the consortium remains responsible for its actions towards the leading party in the consortium. On the other hand, each party to the consortium remains responsible for its actions independently toward others (Hamdan, 2015).

On our part, we agree with what a group of jurisprudence has said that a consortium is an economic and legal grouping of several investors, either natural persons or investors from legal persons, from persons of private law or persons of public law, of one nationality or several nationalities, with the aim to provide the necessary funding for the implementation of huge economic projects, and to cooperate in the provision of advanced technical, administrative and technological expertise within the framework of a single contractual organization, and without creating independent self-assembly or an independent legal personality (Nooh, 2010).

The question that arises in this position is, what factors can affect the competence of the ICSID?

In general, many reasons and factors may affect and detract from the jurisdiction of the ICSID., as in the case of the emergence of simultaneous judicial or arbitration procedures for arbitration procedures at the ICSID. Perhaps the most important of these reasons relates to the interpretation of the provisions of the 1965 Washington Agreement itself. For example, Article 64 of the convention states: 'According to the provisions of this article, disputes that may arise between the states party to the agreement or between the country hosting the investment and foreign investors over the interpretation of any of the Washington Agreement provisions are referred to the International Court of Justice if the dispute is not resolved amicably through negotiation or by any other method agreed upon by the States Parties.' Also, in Article 71 of the convention: '... it becomes clear that any contracting state may withdraw from the agreement by written notification submitted to it, and the withdrawal becomes effective six months after receiving this notification.' However, it remains uncertain whether the investors are protected under Article 72 of the convention (Eljuri & Alvins S. & Mata M., 2012), as there is still disagreement among the jurisprudence about the correct interpretation of Articles 71 and 72 of the 1965 Washington Convention on the rights of foreign investors wishing to withdraw. In this regard, we can distinguish between three main directions. First, its authors believe that the interpretation of the text of Article 72 means that the investors' consent must be obtained before the host country withdraws from the agreement (Schreuer). Secondly, its owners believe that the withdrawal does not have its effect except if no objection has been submitted by the investors to this withdrawal for six months from the date on which the host

country submitted the withdrawal request (Manciaux, 2007). Thirdly, its authors believe that the host country's withdrawal from the 1965 Washington Agreement does not affect the rights of investors, who remain entitled to submit a request to settle the dispute with the host country before the ICSID even after the withdrawal effect (Banifatemi, 2007). However, the real question is, how can the consortium agreements be among the reasons affecting the jurisdiction of ICSID in the arbitration of foreign investment disputes? To answer this question, we will divide these reasons into two main parts, as follows:

6.2 Reasons the host country is investing:

The country hosting foreign investment is not usually satisfied with joining multilateral international investment agreements, such as the 1965 Washington Agreement. However, most countries tend to conclude many bilateral investment agreements. Therefore this matter may constitute a reason for the multiplicity of sources of the lawsuit between the host country for investors and foreign parties to consortium agreements.

For example, Article 6 of the bilateral investment agreement signed between the Kingdom of Saudi Arabia and France states that: 'Disputes related to investments between either contracting parties and an investor from the other contracting party shall be settled amicably as much as possible. It is impossible to settle such a dispute in the manner described in Paragraph 1 of this article within six months from the settlement request's date. At the investor's request, the dispute shall be submitted to the competent court of the contracting party in whose territory the investment is made, or it shall be submitted to arbitration following the agreement'—signed in Washington on March 18, 1965 AD, regarding the settlement of investment disputes between countries and citizens of other countries.

Article 10 of the Bilateral Investment Agreement between the Kingdom of Saudi Arabia and Germany states: 'Disputes that arise between the two contracting states regarding the interpretation or application of this agreement shall be settled amicably, whenever possible, by the governments of the two contracting states. If the dispute cannot be settled in this way, it shall, at the request of either Contracting State, be submitted to an arbitral tribunal. A special arbitral tribunal shall be constituted for this purpose, as follows: each contracting state shall appoint one member, and the two members shall agree to choose a national of a third State as the Chairman. to them and to be appointed by the governments of the two Contracting States ...'. Whereas, paragraph 4 of Article 15 of the Bilateral Investment Agreement between the Kingdom of Saudi Arabia and Jordan states that: 'If any investment dispute cannot be settled amicably within six months from the date of the disputed investor's request for consultation and negotiation in writing ... The disputed investor shall submit the subject matter of the investment dispute to be decided upon by the courts or administrative bodies of a contracting party. The disputed investor may submit the dispute to one of the following international conciliation or arbitration bodies: a) That this agreement is valid for the two contracting parties. b) Conciliation or arbitration by the additional rules of the International Center for Settlement of Investment Disputes if the agreement does not apply to both contracting parties. c) Arbitration following the arbitration rules of the United Nations Commission on International Trade Law. d) Any method of arbitration following the other arbitration rules to be agreed upon with the disputing party.

We note through this presentation that some of the bilateral investment agreements concluded the following with the Kingdom of Saudi Arabia, there is a clear difference in positions regarding the authority competent to settle disputes related to foreign investment. We believe such a difference will not necessarily lead to the emergence of a conflict of jurisdiction with the ICSID in the case where the consortium parties are nationals of one of the countries that have a bilateral investment agreement with the kingdom as if the consortium parties were French commercial companies. However, the situation will change completely if the consortium parties are commercial companies of different nationalities as if it were a German company united with other companies from Japan,

China, and America in one consortium union, it is certain that in this case, each of the companies seeks The parties in the consortium to implement the terms of the bilateral investment agreement signed between the Kingdom of Saudi Arabia, the host country and the country to which the company is affiliated with its nationality.

On the other hand, given the nature of the consortium agreements, we note that the host country for investment, when entering into these agreements, is not satisfied with the bilateral agreement signed between it and the countries to which the foreign investors belong but rather the administrative authority in the host country concludes many contracts and agreements with foreign investors Parties to the Consortium Agreement. As a result, the sources of a lawsuit in foreign investment disputes with the host country are distributed between the Washington Agreement and the bilateral investment agreement between the host country and the country to which the foreign investor belongs, as well as the contract concluded between the administrative authority in the host country and the foreign investors who are parties to the consortium (Abdul Rahman, 2018). Suppose the breach of obligation resulting from the dispute stems from the provisions of the Washington Agreement. In that case, the parties may resort to the ICSID based on Article 1 of the Washington Agreement; however, if the obligation arising from the dispute is one of the obligations contained in bilateral investment agreements, such as the host country's commitment to the principle of fair and equitable treatment (Herzi, 2017) or the commitment to the principle of non-expropriation (Nowara, 2013). In this case, foreign investors can resort to arbitration at the ICSID if its conditions are met or at any international arbitration body or center agreed upon under bilateral agreements between the host country and the country to which the investor belongs. However, if the dispute stems from the state's breach of the contract terms arising from the consortium agreements signed with foreign investors, in this case, most countries require the settlement of disputes through the competent judicial authorities in those countries.

An example is the case of Lanco International vs. the Argentine Republic, where, on June 21, 1993, Argentina submitted a national and international public invitation to bid for the concession to construct Terminal 3 in the port of Puerto Nuevo City. A group of companies, Autotransportes Antartidaa S.A. and Mi-Jackproducrs Incorporated, formed a consortium under the name (Lanco International INC), and due to a dispute between Lanco and Argentina over breaching some terms of the contract, the Lanco Consortium filed a lawsuit with the ICSID on October 1, 1997. However, Argentina insisted that the arbitral tribunal did not have jurisdiction to consider the Lanco lawsuit. The source of the breach that Lanco claims are the contract between him and the administrative authority and not the bilateral investment agreement, and a clause in the contract prevents the plaintiff from filing a case before the ICSID. (Argentina, 2001).

In another case, the Italian company Salini vs. Morocco, Salini Costruttori S.P.A, and Italstrade S.P.A entered into a contract with the Government of Morocco for the construction of a highway connecting Rabat to Fez on October 17, 1995, after which the mentioned companies established a group between them, as an independent legal entity, under the name "Groupement d'Entreprises Salini-Italstrade" for the implementation of the project, and due to a dispute over the implementation, on May 1, 2000, the Italian companies filed a case with the ICSID against Morocco following the Bilateral Investment Agreement (BIT 1990). Signed between the Moroccan government and the Italian government, but Morocco maintained the jurisdiction of the national courts in Morocco for the terms of the contract signed between the company and the administrative body (Case No. ARB/00/4. Decision on Jurisdiction - July 23, 2001).

Although, in many of these cases, the ICSID goes to the judgment within its jurisdiction to settle disputes arising from breach of contractual obligations between the host country and foreign investors on the basis that breaching these obligations—in many cases—constitutes at the same time a breach of international obligations under investment agreements bilateral or collective linking the host country with the countries to which the investors belong. However, this matter is not considered—in our opinion—the optimal solution or the radical solution to prevent the emergence of the phenomenon of conflict of jurisdiction in settling foreign investment disputes with the ICSID in

the same case and with the same parties, because the breach of contractual obligations arising from the consortium that have nothing to do with the international obligations entailed The responsibility of the host country under the Washington Agreement or under bilateral investment agreements remains possible, and the reality of the situation records the attempt of the host country—in most cases—in its dispute with foreign investors to impose the jurisdiction of its national courts, and to evade the subjection of the dispute to commercial arbitration, in an effort to impose its laws and patriotism over the dispute, which is a very dangerous matter that afflicts the endeavors of foreign investors to obtain legal guarantees that will achieve the elements of protection and security for them in the host country in the event that the jurisdiction to settle the dispute is held with the ICSID.

6.3 Reasons for Investors

The consortium is divided into several forms, the vertical consortium, and the horizontal consortium. A Vertical Consortium is a consortium through which one company signs the agreement with the host country, and then this company forms the consortium with other companies in order to complete the implementation of the project agreed upon with the host country. In this type of consortium, direct relations are not established between the host country and the constituent parties. In this case, the consortium parties are not directly responsible to the host country. As for the horizontal consortium, it is the conclusion of the agreement with the host country with several companies in order to implement the project, and thus the intervention of all the constituent parties in a direct relationship with the state and their joint and direct responsibility towards the host country arises (Nooh, 2010).

On the other hand, the consortium can be divided into simple and complex. A Simplified Consortium is a consortium in which the technical, administrative, financial, or operational tasks entrusted to each of the consortium parties are the tasks of the other party so that each party performs its role completely independently of the role of the other party in terms of administrative, technical and financial terms. The complex consortium is a consortium in which the tasks of each constituent party are linked to each other, and the role of each party of the consortium overlaps with the other. This type of consortium requires cooperation and coordination between the constituent parties (Hamdan, 2015).

As a result, it is conceivable that if the country hosting foreign investment is linked under the consortium agreement with several foreign investors from different countries, each party to the consortium will file an independent case against the host country with different arbitration or litigation bodies, according to the bilateral investment agreement concluded between the host country and the country of the foreign investor or under the terms of the contract concluded between the host country and the foreign investor. In this case, the rate of appearance of multiple arbitration procedures simultaneous with the procedures of the ICSID at different arbitration centers or bodies is a very large percentage, and litigation procedures may accompany this before the courts. It is also possible for some parties to resort to settling the dispute through conciliation. Thus we are faced with a case of multiple arbitration procedures under multiple investment agreements submitted by different investors, brought together by the consortium agreement.

In this regard, part of the jurisprudence believes that there is an essential factor that may often contribute to increasing the percentage of achieving the phenomenon of parallel procedures in such a case, represented by the content of the consortium agreement and the method of drafting bilateral investment agreements, as the owners of this trend believe that to determine the level of ownership it is necessary for the investor to enjoy the status of a “party” to the agreement that authorizes him to claim the host country before arbitration or other litigation bodies. It contributes to the emergence of a phenomenon that parallels the arbitral procedures. In light of this not-good way of drafting the terms of the consortium agreements or bilateral investment agreements, the host country finds itself party to multiple claims in the same dispute and under the same agreement (Hansen, 2010).

In such a case, part of the jurisprudence believes that solving the problem of parallelism in

arbitration procedures through joinder is impossible due to the different agreements the source of the dispute concluded with the parties. Requests for intervention and entry are not immediately available in such a case due to the multiple nationalities of the parties and the impossibility of applying the principle of res judicata because different parties in multiple countries are viewing the conflict (Abdul Rahman, 2018). It is also not possible to submit a request to stay the dispute pending judgment in a matching invitation (Stay of the Proceedings) due to the multiplicity of claims, the different nationalities of the parties to the dispute, and the multiplicity of the bilateral investment agreement (Hansen, 2010). In some cases, foreign investors may also wish to search for arbitration (Jarah, 2019) or litigation bodies that they believe are more favorable to them and more favorable to their interests, or the desire of foreign investors to exert maximum pressure on the investment-hosting State in order to compel it to respect the rights of investors (Zeus, Ohigian & Mamiohara).

7. Results

7.1 Means of unifying jurisdiction over foreign investment disputes

The consortium mostly includes clauses for settling disputes arising from the implementation of contracts concluded between the country hosting the investment and the investors who are parties to the consortium. Most of these options range from amicable settlement and conciliation to submitting the dispute to the competent national courts to arbitration at the ICSID or any other arbitration body or center.

A group of jurisprudence believes that one of the most important means by which to reduce the problem of parallelism of arbitration procedures lies with the state hosting the investment, which must, when concluding consortium contracts with foreign investors, specify the party or parties that can claim litigation, through distinguishing between the direct investor and the indirect investor (Hansen, 2010) where foreign investment is divided into two main parts: foreign direct investment, in which the foreign investor contracts with the host country to provide technical, financial and technological assistance to establish or operate the project. The state of his absolute ownership of the investment project, or he participates in the management in case he owns part of it (Baker, 2001). As for indirect foreign investment, the foreign investor does not have a share in the ownership of the project and does not control its management or organization (Ismail, 2015). Consequently, in the case of an indirect investment limited to simply contributing to the capital through the purchase of shares or long-term bonds, the host country must determine the level of ownership necessary for the investor to be considered an appropriate party to the host country's claim. The host country must pay attention to the language in which the consortium agreements are formulated and not define investment in an expanded way because the lack of attention to this matter by the country hosting the investment will result in the availability of capacity for a large number of investors, which is an essential factor in the multiplicity of arbitration procedures. On the other hand, there are many legal means through which the problem of parallelism of procedures can be reduced and controlled in the event of the emergence of simultaneous procedures with the procedures of the ICSID for the settlement of foreign investment disputes among these means:

7.1.1 The first method

Anti-suit Injunction or Arbitration; Anti-suit injunction and Anti-suit Arbitration created by the English judiciary, is one of the means which Prevent the emergence of a phenomenon parallel to the arbitration procedures (Sabbagh v. Khoury & Ors, EWHC 1330 (Comm), June 2018), and a group of jurisprudence defines these orders as the issuance by the competent court of an order to the defendant party to refrain from litigation before another court or arbitration center (Mackenzie, 2016), and in the event of a person's violation of this order, he is considered to have committed criminal contempt of court and as a result subject to civil and criminal penalties (Abdul Rahman,

2018). This method has become one of the methods used in the courts of countries with the Anglo-American system, and the judiciary of some Latin countries, such as Brazil and Venezuela, has already begun to use this method to avoid the problem of concurrent procedures (Gaillard, 2006).

Although the adoption of this solution at the international level, it may collide—at times—with some legal obstacles, as is the case in the countries of the European Union, where the application of this solution at the level of the countries of the union collides due to what is stipulated in the Brussels Agreement that regulates the distribution of jurisdiction between the countries of the union following the principle of mutual trust and equality between the courts of the countries of the union (Briggs, 2013). However, the practical reality is recorded in many cases of the use of ICSID prohibiting litigation orders before the courts of the countries hosting the investment to stop the phenomenon of simultaneous procedures and the multiplicity of parties looking into the dispute arising from foreign investment agreements.

For example: In the case of the Swiss company SGS vs. Pakistan, where the Swiss company, based on the bilateral investment agreement between Pakistan and Switzerland, submitted a claim to EXID, and at the same time, the Pakistani government submitted the dispute to the competent national court based on the contract concluded with the Swiss company SGS, and in this case, the ICSID demanded the Pakistani government to stop the dispute settlement procedures before the national courts until the center's position on the jurisdiction to consider the dispute is determined or not because the presence of two sets of procedures in the same subject is a waste of resources and a waste of time (ICSID Case No. ARB/01/13). Also, in the CSOB vs. Slovak Republic case (ICSID Case No. ARB/97/4) and the Holiday Inn S.A and others vs. Morocco case (ICSID Case No. ARB/72/1).

7.1.2 The second means

Consolidation; Consolidation is one of the means that can be resorted to in the event of the emergence of simultaneous arbitration procedures for the ICSID procedures, based on Article 26 of the Washington Convention, which states that if the parties agree to submit the dispute to arbitration, it is considered that each of them is abandoning any other way of settlement, as Article 27 of the Convention states that no contracting state may file an international case in respect of any dispute in which one of its nationals has agreed with the other state to submit it to arbitration or has been submitted to arbitration.

In some cases, the joining procedures may be limited to the level of the arbitration panel looking into the dispute, as happened in the case of the Italian company Salini vs. Morocco, when the secretariat of EXID reached an understanding with the Italian companies and the government of Morocco, that each of them should appoint the same arbitrator in both cases. Thus, the two cases were joined realistically and indirectly, despite holding independent and separate hearings and pleadings in both cases. However, this procedure prevented the issuance of conflicting arbitration rulings in the same case and between the same parties (ICSID Case No. ARB/00/4. Decision on Jurisdiction - July 23, 2001).

It should be noted that many bilateral investment agreements have become aware of the importance of annexation as a practical solution to avoid the problem of parallel procedures in the same dispute, for example, Article 1126 of the North American Free Trade Agreement (NAFTA) of 1994. Article 10/17 of the Trade Agreement of the government of the United States of America and the government of the Republic of Chile of 1996, and Article 22 of the Canadian Model Bilateral Investment Agreement for the Protection of Foreign Investment 2014.

7.1.3 The third method

The Umbrella Clause; The comprehensive condition, or what is sometimes called the umbrella condition, is one of the most important clauses included in bilateral investment agreements, through which it is possible to prevent the occurrence of simultaneous arbitration procedures for arbitration

procedures at the ICSID in the case of the conclusion of the state hosting investment contracts with foreign investors, nationals of other countries, under the consortium agreements. Under this condition, countries agree with the host country when concluding bilateral investment agreements that any contracts entered into by the host country with investors who are nationals of other countries are covered under the umbrella of their obligations under the bilateral investment agreement. The host countries enter investment contracts frequently with foreign investors (Interpretation of the Umbrella Clause in Investment Agreements, Small, 2006).

Wälde (2005) said that this condition had been known since the fifties, but it was formulated indirectly. In different languages in each treaty, sometimes using the term mirror effect, the sanctity of contract, or the pacta sunt servanda (Pacta Sunt Servanda), and many other terms to denote the Umbrella Clause and provide additional protection for investors by covering bilateral investment agreements between countries for investment contracts concluded by the host country with foreign investors, nationals of other countries, which opened the door to various interpretations appear to indicate what is meant by this item. Article 7 of the Bilateral Investment Treaty between Germany and Pakistan in 1959 was the first direct use of the umbrella clause (Small, 2006).

Other examples of the umbrella clause include Article 9 of the Austrian Model Bilateral Investment Agreement, Article 9 of the 1999 Belgium-Luxembourg-Albania Bilateral Investment Agreement, Article 8 of Germany's 1991 Model Bilateral Investment Agreement, and Article 2 of the United Kingdom Model Bilateral Investment Agreement, and Article 2 of the 1991 United States-Argentina Bilateral Investment Agreement (small, 2006).

The presence of the umbrella clause in bilateral investment agreements entails expanding the substantive scope of arbitration based on investment agreements, even in the case where the contract concluded between the host country and the foreign investor's parties to the consortium is the source of the obligation arising from the dispute, because with the presence of the umbrella clause the terms included in the contracts the consortium raises the international obligations on the host country. Therefore the umbrella clause is considered a condition granting arbitration jurisdiction to the ICSID and the non-competence of national courts in the host country or any party other than the one agreed upon in bilateral investment treaties (Abdul Rhaman, 2018).

8. Conclusion

Consortium agreements play an influential role in the emergence of simultaneous judicial procedures or arbitration procedures for arbitration procedures at the ICSID. Where the consortium arises through the alliance of several commercial companies from the same country or from several different countries in some cases, without these parties bringing together an independent legal entity that has a legal personality independent of the personality of the companies parties to the consortium, which results in a conflict of jurisdiction between the ICSID and the centers of other arbitral courts, due to the emergence of simultaneous judicial or arbitration procedures for the procedures of the ICSID, and this may be due to the multiplicity of sources of action in disputes arising from foreign investment, in the event that the executing companies of the project are allied with each other in the form of consortium agreements, or because the desire of foreign investors in the consortium parties sometimes to search for arbitration or litigation bodies that they believe are more suitable for them and more caring for their interests, and this may be the desire of foreign investors to put pressure on the country hosting the investment in order to force it to respect the rights of investors. In addition, the investment host country sometimes attempts to compel foreign investors to submit to the jurisdiction of its national courts and to evade dispute settlement to commercial arbitration to impose its national laws on the dispute. Any matter that requires the consortium's parties to agree expressly on the competent authority to consider the dispute may arise from the interpretation of foreign investment agreements or from the implementation of the terms of the agreement concluded between them. The host country and foreign investors should not leave this matter until after the dispute arises. Moreover, they should mention the competent authority to look

into the dispute in all contracts and agreements from the consortium.

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