LAW OF INVESTMENT

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Definition and Nature of Investment

- Definition of investment article 2 (1) of proclamation no.1180/2020 define investment as follows "Investment" means expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise;
- "Enterprise" means an undertaking established for profit-making
- "Capital" means local or foreign currency, negotiable instrument, machinery or equipment, building, working capital, property right, intellectual property right, or other tangible or intangible business assets;

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Definition of foreign investment:-

- Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.
- Transfer of physical property such as, equipment, or physical property that is bought or constructed such as plantations or manufacturing plants, constitute foreign direct investment.

Economic principle of investment

- Investment is a science. As a science, there are fundamental principles applicable to investment.

A. Safety of Investment: An investment needs safety since the investor invests his/her fund and time. Thus, adequate protection should exist against the risk of loss of capital

B. Liquidity Any investment is said to be liquid, if it can be converted into cash or sold as and when required.

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- A liquid investment would enable the investor change his/her investment whenever the need arises.
- It would also permit the investor to sell off an unprofitable investment, there by minimizing the losses, and switch over to a more promising investment.

C. Profit is an element of investment.

The main reason of investment is to accrue profit. Profit can be realized in either or both of the capital appreciation yield

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- Capital appreciation occurs when an investment is disposed of at a higher value compared to the price for which it was purchased.
- Yield, on the other hand, is derived in the form of interest or dividend.

D. Tax Implications The investor may be required to pay tax on his/her income.

“every person having income as defined here in shall pay income tax

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E. Government Control

- Government controls certain economic sectors and that may affect investment
- Certain sectors reserved for domestic investor, allowed for joint investment.

F. Legality

The investor is required to invest on areas that are allowed by law. S/he should also fulfill other requirements like license etc.

Types of Investment

- Investment maybe classified based on the nature of investment and identity of investor. Domestic and foreign/FDI and portfolio investment
- FDI investment contrasted with portfolio investment. Portfolio investment is represented by movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments through which capital is raised for ventures.
- There are two types of investment such as, foreign direct investment and portfolio investment

Distinction between portfolio and FDI

- Separation between ownership and management of the company.
- In the case of portfolio investment, it is generally accepted that the investor takes upon himself the risks involved in the making of such investments.
- Portfolio investment was not protected by customary international law.
- But, customary international law protected the physical property of the foreign investor and other assets directly invested through principles of diplomatic protection and state responsibility.

Factors that affect the Direction of Foreign Direct Investment

- Why do you think investors wish required to invest abroad?
- The first reason is that multinational companies own assets that can be profitably exploited on a comparatively large scale, organizational and managerial skills, and marketing net works.
- Foreign investment is attractive to those who own a large amount of money and managerial skills.

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- Other economic factors such as, market ,resource, efficiency/cost and infrastructure.
- Besides, competition strategy and market imperfection will mater for FDI

Investment in Developing Countries

- All about trends of investment.
- In developing countries, the trend is that both inflows and outflows rose in 2005 .
- According to the study conducted by the UN, inflows into and outflows from Latin America and the Caribbean and West Asia rose in 2005. But, only inflows rose in Africa and East, south and South East Asia in the same year.
- In Africa, rising corporate profits and high commodity prices helped boost inflows in 2005 to $ 31 billion from 17$ billion in 2004.

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- However, the region’s share of global FDI remained at around 3%.
- FDI inflows into East Africa fell to $ 1.7 billion from $ 1.9 billion in 2004, which represented only 5% of the inflows to Africa due to lack of resource and political instability.
- Sectoral trends primary production such as, oil and inflow increase in service sector (banking)
- India liberalized its sectors and attract FDI.

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- Foreign investors are encouraged by several factors to invest abroad in general and in a developing country in particular.
- These factors may be categorized as pulling factors and pushing factors.
- Pulling factors are factors that attract the investor towards developing countries to invest.
- Pushing factors, on the other hand, are unfavorable factors in the home state of the investor that repel the investor from that country.

Pulling factors

- Market: Investors need market for their production.
- resource: An investor needs natural and human resources in a reliable manner to produce or manufacture.
- Policy frameworks of a host country also determine the direction of FDI. Liberalized economic policies and privatization policies of a host country attract FDI.
- Political and economic stability
- Existence of relevant clusters

Pushing factors

- The reverse is pushing factor.
- Limited home market
- High cost of production
- Business conditions - stiff competition

Economic Theories of Investment

- Theoretical conflicts have had an impact on shaping legal attitudes to foreign investment.
- The conflict is between two extreme theories, one of which maintains that foreign investment is wholly beneficial to the host state while the other maintains that, unless a state veers away from dependence on foreign investment, it cannot achieve development.
- There is another theory which seek to adopt a middle course between these extreme views.
- All theories focus attention on economic development of the host state, particularly the host developing state.

The classical theory on foreign investment

- The classical economic theory on foreign investment takes the position that foreign investment is wholly beneficial to the host economy.
- The foreign investor usually brings with him technology which is not available in the host state, and this leads to the diffusion of technology within the host economy.
- There is new employment created, whereas, without foreign investment, such opportunities for employment would be lost.

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- The labour that is so employed will acquire new skills associated with the technology introduced by the foreign investor.
- Skills in the management of large projects will also be transferred to local personnel.
- Infrastructure facilities will be built either by the foreign investor or by the state, and these facilities will be to the general benefit of the economy.
- Upgrading of facilities such as, transport, health or education for the benefit of the foreign investor will also benefit the host society as a whole.

The Dependency theory

- The dependency theory is diametrically opposed to the classical theory, and takes the view that foreign investment will not bring meaningful economic development to the host state.
- It was advocate by Latin American economists and political philosophers.
- The theory focuses that most investment is made by multinational corporations which have their headquarters in developed states and operate through subsidiaries in developing states.

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- The proposition is that the subsidiary devises its policies in the interests of its parent company and its shareholders in the home state.
- As a result, multinational corporations come to serve the interests of the developed states in which they have their headquarters.
- The home states become the central economies of the world, and the states of the developing world become subservient or peripheral economies serving the interests of the home states.
- Development becomes impossible in the peripheral economies unless they can break out of the situation in which they are tied to the central economies through foreign investment.

Middle path theory

- This theory found between two extremes.
- Foreign investment not entirely beneficial to the host state and not entirely harmful to the host state.
- Foreign investment which made by multinational corporations benefit the local economy through the flow of capital and technology, the generation of new employment and the creation of new opportunities for export income.
- Multinational corporations defeated the tax laws of states by engaging in transfer pricing.

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- The nature of the technology which was exported was often obsolete and hazardous.
- Multinational corporations can both benefit and harm economic development.
- Thus, a mix of regulation and openness is seen as desirable.
- Many developing states have now enacted legislation to set up screening bodies which permit entry to or give incentives to investments which are approved by these bodies.
- Some have legislation which designed to ensure technology transfers and effected without too many restrictions on their use by the transferee.

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- In the absence of protection through the exercise of military power, there has been an increase in the risks to foreign investment in the modern world.
- Consequently, there has been a search for legal methods of conferring protection upon foreign investments.

THE LIBERAL CONSENSUS

- Liberal economic theory is based on the premise that free market yields maximum productivity.
- Mercantilism argues that extensive state regulation of the economic activity is necessary to promote the interest of a nation.
- According to mercantilists, a national wealth may be equated with the quantity of gold held hold by the state.
- On the contrary, according to liberalists, the wealth of national economy could not be equated with the amount of gold in the treasury; rather national wealth is best measured by the productivity of the people.

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- They further argued that productivity of people is best achieved by an unregulated market.
- Liberals opposed restrictions on national trade. Liberalism propagates for free market economy.
- Boosting of investment necessitates free market economy because it is free market economy that promotes investment.
- This work only where markets are functioning well. However, markets fail in developing countries.
- In such case, state is required to intervene to correct serious market failure.

Risks in Investment

- The risks to foreign investment increased after the end of the colonial period.
- During colonial period, an investor from an imperial state taking assets into the colonies had almost absolute protection, the picture changed dramatically after the independence of the former colonies.
- Where investment was taken into countries not under colonial domination, protection was secured through diplomatic means, which often involved collective exercise of pressure through the threat of force or economic sanctions by home states of the investor.(gun-boat diplomacy)

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- In the absence of protection through the exercise of military power, there has been an increase in the risks to foreign investment in the modern world.
- Consequently, there has been a search for legal methods of securing protection for foreign investments
- The principal risks to foreign investment come from certain uniform and identifiable forces. The presence of these factors will result from either regime change or changes to the existing political and economic policies of the host state.

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- The right of a state to change its economic policy is recognized in modern international law.
- The right now circumscribed by the increasing number of treaties on international investment and trade to which states are becoming parties.
- When states decide to change its economic policy, there is a potential threat to foreign investment.
- It is necessary to understand the underlying causes for a state wanting to make such changes before examining whether the right of the state to effect these changes can be restricted in any way.

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1. The first is political hostility to foreign investment, which is generated by ideological inclinations against the influx of foreign investment.
2. The second is nationalistic concern over the domination of the economy by foreign xenophobic hysteria.
3. changes that take place globally within an industry.
4. The fourth is where an incoming government seeks to rewrite contracts made by the previous regime.

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5. The fifth situation is one in which the state finds the fulfillment of the contract onerous in light of changed circumstances.
6. The sixth is a deterioration in the general law-and-order situation in the country which makes the foreign investment a target for attack by groups of dissidents or marauders.
7. The seventh is where state feels necessary to intervene in foreign investment in order to exercise a regulatory power such as the protection of investment or some economic interest.
8. An eighth is where there is internal corruption

Political Risks

- It is a risk of loss of capital and income of investment due to the government policy of the host country.
- political risk is the danger or possibility that the investor will have to bear the costs and expenses of the damage or destruction or otherwise of the investment property.
- The government of the host country may take a step to forbid repatriation of profits to home

Ideological Risk

- Communist ideology is opposed to private capital and private means of production.
- Whenever socialistic notions take hold in a state, a threat to foreign investment and to private capital will arise.
- In states which are opening their doors to foreign investment, there are still political forces which remain antagonistic to foreign investment either because they are socialist or because they resent the possibility of foreign control of business sectors.

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- Where groups with ideological beliefs opposed to foreign investment come to power, there will be a definite threat to foreign investment.
- The incoming government will seek the reversal of previous attitudes to foreign investment.
- It may want to dismantle the foreign investment which had been allowed into the state by the previous government. It may regard the terms on which entry was permitted as too favorable to the foreign investor and require them to be changed.

Regime Change

- Regime changes, particularly those ideologically inspired, pose problems for foreign investment.
- There could be a change of government in the host state, and the incoming government may wish to change the contracts made with foreign investors by previous governments.
- Such a change of contracts is justified on the allegations of corruption in the making of the contracts.

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- In addition, the change may be made where the legitimacy of previous government had been doubted by the incoming government on objective grounds.
- In general, contracts made by unpopular and non-democratic government suspected by the incoming democratic government.

War and Conflict

- War and conflict are political risks to investment.
- War is an activity that causes loss to resources including the labour forces.
- If there is war or conflict, resource of economic development, capital and labour force will be mobilized.
- it destroys the image of peace, security and stability of the country, and consequently erodes the confidence of potential foreign investors.

Taking of Investment Property

- Taking of investment property is by the State through legislative or administrative measures.
- The host state may require to rearrange its economic structure and this would lead to taking of investment property of foreign investor.
- Taking of property is defined to include ‘not only an outright taking of property but also any such unreasonable interference that the owner there will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.

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- Taking of investment property is an encumbrance on the right of ownership which cripples the usus, fructus and abusus rights of owner.
- Types of taking It may also be possible to categorize takings into direct and indirect takings.
- Outright nationalizations in all economic sectors.
- Outright nationalization on an industry basis: Here nationalization becomes narrower and the host state seeks to reorganize a particular industry by taking over the private enterprises in the industry and creating a state monopoly.

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- Large- scale taking of land by the state- A host state may take the land with the purpose of redistributing land to the landless. In such a case, the investor may be evicted from the land s/he let and invested on
- Specific takings- In such case, a particular enterprise may be the subject matter of taking. For example, a firm dominating a market or industry or a specific plot of land, which is necessary to construct a road may be a target of the taking.

Indirect taking

- Creeping expropriation is defined as "the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment.
- The rights of investor to use the property are diminished as a result of the interference by the state while the legal property remains vested in the investor.
- Interference in the right of management, appointment of managers, refusal of access to labour or raw materials, excessive or arbitrary taxation
- Regulatory takings

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- Regulatory takings are those takings of property that fall within the policy power of a state. It may also arise from state measures like measures to regulate the environment, health, morals, culture or economy of a host country.
- Taking by a host country destroys the ownership rights of an investor in its tangible or intangible assets.
- Taking of property is conditional and the following requirements must be fulfilled.
- Taking of investment property must fulfill the following requirements

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- It must be made for public purpose;
- There should be no discrimination;
- Taking accompanied by payment of compensation;
- There must be due process;

Public purpose

- We do not find universally accepted definition of public purpose. Usually, a host states determination of what is in its public interest is accepted so long as it has a reasonable foundation. Where a taking is made by way of reprisal against the act of a home state of foreign nation, it is considered illegal on the ground that it lacks public interest.

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- Non-discrimination:- Taking of property should be free of discrimination on the basis of national or ethnic origin. Any arbitrary action or any is considered to be contrary to the principle of non-discrimination.
- The principle requires that government measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens.
- Compensation For a taking to be legal, there must be compensation.
- Capital exporting states argue that the Hull standard of prompt, adequate and effective compensation should be met

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- The standard requires that payment of full market value as compensation speedily and in convertible currency.
- Some developing countries, on the other hand, argue that “appropriate compensation” be made to the investor.
- However, this standard is criticized for being vague
- Developing countries argue that a Hull standard is very high to comply and it may deter a state not to take an investment property in the interest of economic development.

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- Thus, they opt to appropriate compensation which is based on equitable principles rather than a hard and fast rule relating to market value.
- But, we do not have standard definition of appropriate compensation, it requires consideration of past practices, the depletion of natural resources, possible lack of foreign exchange and other factors like environmental damage.
- Another method of valuation adopted in treaties is the book value method of evaluation. Thus, it may take the net book value (depreciated assets value) or the updated book value (also referred to as the adjusted book value, which takes into account the inflation.

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- The Hull formula” suggests a fuller, more satisfactory to the investor type compensation, while the “appropriate compensation” formula suggests that additional concrete (historical or other) considerations may be taken into account which will result in a lower final payment.
- appropriate compensation defined as “compensation calculated on the basis of recognized principles of valuation.
- Due Process Requirement compensation due should be assessed by an independent host country tribunal. The due process requirement may be met by other kinds of regular administrative procedures other than courts of law.

Nationalism

- Nationalistic sentiments pose a threat to foreign investments.
- Particularly at times when the host economy is decline prosperous foreign investors who control the economy and repatriate profits will be easy targets of xenophobic nationalism.
- They become targets for opportunistic politicians who may see advantage in such a situation to bring about a change of government.

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- It is a popular measure, which would appease nationalistic forces.
- Religious fundamentalism is of a like character
- The Iranian revolution of 1979 was both nationalist and fundamentalist.
- Nationalistic feeling plays a dominant role in restriction of the flow of foreign investment in developed states, too.

Onerous contract

- Foreign investment contracts, which become too onerous to perform, are also subject to the risk of government intervention.
- In these circumstances, states will reduce the loss that could be suffered by the state or the state agency by interfering legislatively with the contract.

Economic risks

- **Economic risk** is a chance that macroeconomic conditions like exchange rates, government regulation, or balance of payment problem will affect an investment.
- These are commercial risks which reduce the profitability of investors.

Sources of the international law on foreign investment

- Claims relating to the norms of international law of foreign investment can be accepted as principles of international law ***only*** if they are based on accepted source of international law
- These sources of international law are stated in Article 38 (2) of the Statute of ICJ.

Treaties

- Treaties are a source of international law.
- However, no relevant treaties among a large number of states which furnish a comprehensive codified law on foreign investment.
- OECD attempt to come up with Multilateral agreement on investment in the 1990s, but again the attempt met with failure, largely because of dissension within developed states as well as because of the opposition generated by NGOs to a code that took into account only the interests of multinational corporations.

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- The only successful convention in the field is the ICSID convention. But, this is a procedural convention only, setting up machinery for the settlement of investment disputes through arbitration.
- There have been several regional treaties on foreign investment. (NAFTA)

custom

- A widespread custom is a source of international law.
- There are few customs in this sense in the field of foreign investment.
- There is, however, a custom that, when property is taken over by a state, otherwise than in the exercise of its regulatory powers, there must be payment of compensation, though there is still no agreement on the manner in which this compensation is to be calculated.

General principles of law

- General principles of law are recognized as a source of law.
- Positivist legal scholars, who ascribe the rules of international law to the consent of states, treat custom and treaty as the only significant sources of international law.
- Many claims as to the existence of principles of the international law on foreign investment have been based on general principles of law.
- Much of the support for the payment of full compensation upon expropriation of foreign property is based on arguments relating to notions of unjust enrichment and acquired rights being general principles of law.

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- Compensation must be paid is itself said to be a general principle of law
- General principles of law have been used widely by arbitral tribunals in extracting principles applicable to investment contracts.

Judicial decisions

- Judicial decisions are a subsidiary source of international law.
- There are four significant decisions of these courts in the area of foreign investment.

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- The first, the Chorzow Factory Case a decision of the Permanent Court of International Justice, remains the basis for any discussion of issues of compensation for the taking of foreign property.
- The second, the Barcelona Traction Case concerned corporate nationality and the diplomatic protection of shareholders of corporations.
- The third, the ELSI Case, 188 concerned issues as to what amounts to a taking and whether liquidation of a foreign corporation by a court could provide the basis of a claim that there was a denial of justice for which responsibility arose in the state.
- Arbitral tribunal contribute for construction of norms

International norms on Multinational corporations

- There was efforts which have been made to come up with a code of conduct that regulates the conduct of foreign investment.
- developing countries have sought to influence United Nations bodies which they control to formulate rules of conduct for multinational corporations.
- UN accept the claims of developing countries and UN assign some group which conduct study regarding the role of multi national corporation on international economy.

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- An outcome of the report was the effort initiated by the developing counties to draft a code of conduct for multinational corporations.
- But, developed states disagreed with the drafts made by developing countries, and the socialist bloc had its own draft.
- Developed states have become recipient of foreign investment. Thus, they anticipate problems in controlling the activities of multinational corporations.
- The preference of the developed states is for a “balanced code” which would incorporate rights and duties of the multinational corporations and host state

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- The objective of the code is to “maximize the contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations.
- The code addresses both private and public /state/ corporations. In addition, it includes mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities.

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- Respect national sovereignty Art. 7 of the Code states that “transnational corporations shall respect the national sovereignty of the countries in which they operate and the right of each state to exercise its permanent sovereignty over its natural wealth and resources.
- Re negotiation of contract:- The code also created an obligation to renegotiate contracts where the contractual equilibrium that existed at the time that a contract was made has been altered by a fundamental change of circumstances.

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Non-interference in domestic affairs – We have seen that states were accusing multinational corporations of interfering in their domestic affairs.

Abstention from corrupt practices

- The use of bribery by investors to achieve their objectives has also caused general concern.

THE WORLD TRADE ORGANIZATION AND TRADE RELATED INVESTMENT MEASURES (TRIMS).

- Investment and international trade go hand in hand. Market access through trade can lead to foreign investment; this in turn can lead to additional trade.
- No comprehensive multilateral agreement on investment.
- However, a serious effort was made in the 1990,s to negotiate a comprehensive treaty on investment, known as the multilateral agreement on investment (MAI).

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- The MAI would have remove barriers to investment, provided protection against expropriation and instituted a dispute settlement system. However, the MAI negotiations failed in the late 1998 and were abandoned.
- The defeat was related to problems of workers and the environment. NGOs from 70 countries opposed it
- Investment- related measures are addressed in a general manner.

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- Export requirements
- Local content requirement
- Investment incentives
- Transfer of Technology:-The host government may stipulate the kind of technology to be introduced into the country or require the investor to license the technology involved in the investment to locals under a process that will phase.

Opposition to the use of TRIMs

- Their use had the same effect as the use of non-tariff barriers to trade.
- They were also considered to be inconsistent with the aim of the GATT, which is to promote undistorted competition in the international trade.
- Such trade-related investment measures are subject to the disciplines of GATT Article III (national treatment on internal taxation and regulation) and GATT Article XI (general elimination of quantitative restriction
- TRIMs are national policy measures of host countries. They are concerned with investment regulation,

BILATERAL INVESTMENT TREATIES (BITs)

- Since no multilateral agreement the trend of BITs increased.

Reason

- Unsuccessful attempts of MIA, an ad hoc basis and their ability to give rise to general principles of international law is remote. clarify the rules that they would apply in case of any dispute which may arise between them.

FEATURES OF BILATERAL TREATIES

- Aims of treaty
- Property going to be protected
- Standard of treatment NT and MFN
- Right of repatriation
- compensation
- Standard of compensation
- Settlement of investment dispute

CH-5 Regulation and Administration of Investment in Ethiopia

5.1 GENERAL CONCEPT

DEFINITION AND NATURE OF REGULATION

- Regulation is a ***normative standard*** that should be obeyed, and a violator must be forced to comply where there is non-compliance.
- Investment regulation may be defined as control of the government on investment.
- There are three types of regulation: market regulation; industry regulation; and government regulation.

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- A market regulation is aimed at guaranteeing efficiency, flexibility, and low costs. However, market regulation provides **uncertainty** and **instability** for participants.
- Industry regulation may be cooperative or imposed by dominant enterprises.
- Governmental regulation aims at fairness, non-discrimination, consumer protection and quality maintenance. The problem with government regulation is that it may be inflexible in guaranteeing efficient allocation.

PRINCIPLES OF GOOD REGULATION

According to study by the ***World Bank***, a country that wishes its ***economy to perform well*** should take the following five steps.

- Simplify and deregulate in competitive markets- The regulation should be based on the ***principle of competition***, and it should be simple.
- Focus on enhancing property rights- Business in general, and investment in particular, requires the rights of property of the persons to be protected and enhanced.

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- Expand the use of technology- For an investment to be effective in bringing development to a country it must use recent technology.
- Reduce court involvement in business matters- Settlement of disputes in court may develop a ***sense of hostility*** between the parties.
- Make reform a continuous process- Once a regulation is made, it must be reformed so as to fit to the new changes to investment.

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- Using resources most efficiently and economically.
- Being proportionate:- This means the role and actions of the regulator must be proportional to the significance of the issues and risks under consideration.
- Responsibility of firms’ own management. The company management should take responsibility for running the business in a proper manner and maintain adequate financial resources.

Cont’d

- Competition- The market needs competition among investors, and the regulation should **foster(ENCOURAGE)** that.
- Facilitating innovation- The regulations and standards should facilitate innovation of investors in their activities.

THE NEED TO REGULATE INVESTMENT

- Foreign investment often appears to be both real and psychological **infringement on sovereignty**.
- Foreign firm will operate without adequate consultation or to the detriment of local interests in such areas as labour policy or willingness to create export revenues for the host nation.
- They may control the areas of investment, for example, in order to keep foreign investment out of sensitive areas like telecommunications or the media; they may control the terms of investment, by restricting rates at which profit may be expropriated; or they may protect specific local concerns for instance those the deal with labour.

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- The right of a state to control entry of foreign investment **flows from** sovereignty is **unlimited**.
- Once an alien enters a state, both s/he and his/her property are subject to the **law of the host state.**
- conditions could be attached to the entry of a foreign investor into a host state. Conditions could also be attached to the manner in which s/he operates his/her business.

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- States have the power to control foreign investment in their jurisdictions.
- Economic liberalism has remained an ideal whereas the **prerogative (Privilege) power** of the sovereign state to **exclude aliens** or to impose condition on their entry is an **accepted principle of the law.**

5.1 Regulation of Investment in Ethiopia

Constitutional Framework of Investment in Ethiopia

- According to 18 of the US Constitution, the Federal Government has the power to regulate inter state investment.
- The modern rule allows the federal government to regulate investment activities that affect interstate.
- Art. 55(2(b))Coming to Ethiopia, the Federal Government is duty bound to ensure that all Ethiopians are given equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them.

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- The Government is granted the right to own land and other natural resources on behalf of the people and to deploy them for their common development and benefit.
- Without regulation, these natural resources could not be used effectively and efficiently to bring the development of the people.
- The Federal Government is also duty bound to formulate policies which ensure that all Ethiopians can benefit from the legacy of intellectual and material resources of Ethiopia.

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- land and other natural resources are essential for investment. Granting the power to enact law on how to use natural resources, at least by implication, means granting power to regulate investment.
- The Constitution further grants power to the Federal Government to enact law on **interstate commerce and foreign trade** under Article 55(2)(b)
- Therefore, it would be safe to conclude that the Federal Government has the power to regulate inter-state commerce in general and investment in particular.

Economic Policy of Ethiopia

- The general principles by which a government is guided in the management or administration of the wealth and resource of a country.
- ***Economic policy embraces the principles by which a given government is guided to administer the resource of a country.***

Areas Of Investment Reserved For Domestic Investors

- Investors could be categorized into domestic or foreign investors.
- **Who is Domestic investor**: any one of the following who has invested capital in Ethiopia art 2(5)
- An Ethiopian National; b) An Enterprise incorporated in Ethiopia and wholly owned by Ethiopian National; c) The Government; d) a Public Enterprise; cooperative society, A Foreign National or Foreign Enterprise treated as domestic investor

Cont’d

- Areas of investment reserved for joint investment with the government, for domestic investors, and for joint investment with domestic investors shall be specified by Regulation. Art 6 (2)
- article 4 of regulation 474 areas reserved for domestic investor

Areas reserved For government only

- Courier service

Sectors Open To Joint Investment with government

- art 3 of regulation 474/2020
- Manufacturing of weapons and ammunitions
- Import and export of electrical energy
- Bus rapid transit

Areas reserved for Joint investment with domestic and foreign investor

- Art 5 of regulation
- Domestic air transport service
- Freight and forwarding and shipping agency service
- Accounting and auditing service

Procedures of Investment in Ethiopia

- ***Investment permit***:- regulation will be effective through granting or refusing a license to carry on particular investment.
- ***Licensing investors*** means issuing of a license by the authorized government body to the person (whether an individual or a business organization) to undertake in the investment.
- license is essential **to check that the activity is legal** and does not contravene the **morality of the society**, and **to protect the rights of consumers.**

Restrictions On Foreign Investment

- The trend with regard to investment is liberalization.
- However, there are **two most common restrictions on FDI made by governments.** They are ***restrictions on ownership and performance requirements.***
- Restrictions on ownership can take several forms. In some countries, foreign investors are ***excluded from specific fields.***
- It is also possible to limit the ownership of subsidiary while a significant portion of a business organization must be owned by local investors art 5(2) of regulation foreign not more than 49%

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- Restriction to invest on some sectors foreign investors are often excluded from certain sectors on the grounds of ***national security or competition.***
- It is felt that particularly in developing countries local enterprises might not be able to develop unless foreign competition is restricted by a combination of import tariffs and controls on FDI.

Cont’d

- Performance Requirement- Performance requirement is the other restriction on foreign direct investment. It can take several forms. The most common performance requirements are related to **local contents, exports, technology transfer and local participation in top management.**
- The basic function of performance requirements is ***to minimize the cost of FDI and maximize the benefit out of it.***

Cont’d

- Capital Requirement- One of the purposes of attracting foreign direct investment is to attract foreign capital to the host state. Art 9 of proclamation no1180/2020

THE INSTITUTIONAL FRAMEWORK FOR THE ADMINISTRATION OF INVESTMENT IN ETHIOPIA

Investment administration organs art 29 of proc

- Investment board
- Investment commission
- Federal and regional state administration council
- Ethiopian civil aviation authority
- Ethiopian energy authority
- Ethiopian communication authority
- Regional investment administration organ

Ch-6 Major investment opportunity in Ethiopia

- There are investment opportunities to invest in Ethiopia.

Major Investment Opportunities In Ethiopia

- Ethiopia, being a virgin land, offers many opportunities for investment.
- the Ethiopian economic policy adopts a liberal economic thought.
- Liberal economic thought is favorable for investment because it is possible to acquire private property.
- Further, privatization is implemented in Ethiopia. The Privatization program has enabled our Government to privatize state-owned enterprises since 1995.
- this is fertile ground for investment

AGRICULTURE

- It is clear that agriculture is the backbone of the Ethiopian economy.
- Ethiopia grows all types of cereals, fibber crops, oil seeds, coffee, tea, flowers, fruits, and vegetables since it is endowed a with wide ranging agro-ecological zones and diversified resources.
- Therefore, Ethiopia offers opportunities to invest on food crops, beverage crops and cotton.
- Ethiopia has the largest livestock in Africa

Cont’d

- Agro forestry
- Fishery
- Agricultural service
- Manufacturing:- Manufacturing is at its enfant stage of development in our country. the textile and garment, food and beverage, leather, building materials, electrical and electronic products, metallurgy are same of the important ones .

Mining

- Ethiopia also offers an excellent opportunity to invest in mining. Ethiopia has a great potential in mining in general, and gold in particular.
- Ethiopia has also a good potential in deposits of tantalum, platinum, nickel, potash and soda ash.
- In addition, marble, granite, limestone, clay, gypsum, gemstone, iron ore, coal, copper etc are found in Ethiopia.
- The Ogaden, the Ganbella, the Blue Nile and the Southern Rift Valley sedimentary basins also offer significant opportunities for oil and natural gas.

Cont’d

- Tourism:- The landscapes historical sites and events of the country have the power to attract tourists. In addition, the scenery and wild life of Ethiopia attract tourists.
- Infrastructure :-The Ethiopian Government recognizes that the delivery of infrastructural services, such as transport (rail and air), telecommunications and postal services, energy and water have a long way to go before they meet the demand of investors.

Favorable Situations to Invest in Ethiopia

- political Stability???
- Raw materials Ethiopia is a country where domestic raw material is reliable for virtually every investment area.
- Work force is another area that offers a good opportunity for investment in Ethiopia.
- Workforce is abundant in Ethiopia. In addition, it is inexpensive.

Market

- There is a potential for growth of the domestic market with the growing number of consumer populations.
- Ethiopia has an advantageous geographical location providing a strategic market access to Africa, the Middle East, Asia and Europe.
- Thus, the investor can export the products to these countries and sell then easily.
- Ethiopia has preferential market access into common markets for Eastern and Southern Africa (COMESA).

Cont’d

- Furthermore, Ethiopia has given access to the export markets of the European Union under the “Everything but Arms” trade opportunity.
- Ethiopia has favorable market status provided by AGOA of the United States of America.
- GSP

Legal protection

- An investor is given protections and guaranties through Ethiopian laws and agreements.
- Legal protections are provided through bilateral and multilateral investment promotion and protection agreements
- an investor in Ethiopia is treated by internationally accepted rules that are incorporated under bilateral investment agreement.
- Further, the Ethiopian law creates an efficient one-stop shop administrative arrangement facilitating all the pre-and post- investment requirements.

Investment Opportunities at the Regional Level

- Oromia
- Amhara
- SNNP

Current Practical Problems

- follow up and the implementation of investment projects is attributable to investment organs.
- investment organs including insufficient structuring, lack of work force, shortage of budget, vehicles and materials.

Cont’d

- The second problem is lack of knowledge and experience to regulate and to permit incentives.
- investment organs need to train their personnel to upgrade their knowledge and skill to regulate investment projects.
- The fourth problem relates to data. There is lack of experience to systematically gather data and make it available for the required purpose and goal.
- Fifth, there is also a problem in the coordination among investment organs.

Problems Attributable to Investors

- The second group of investment problems is related to the investors themselves.
- Some investors do not reveal correct information when they come to the investment organs to obtain investment license or different services related to investment.
- Based on the Proclamation, investors do not report every six month of their investment progress.
- Sometimes investors change the place of their investment

Problems Attributable to Service Rendering Organs

- The service rendering bodies of the government fail to organize different investment desks to facilitate the services rendered to investors.
- not able to work in collaboration with other service rendering organs.
- The service providing organs do not perform their tasks in accordance with their annual work plans.

Infrastructural problems

- Poor infrastructure ,road telecom and electricity
- Bureaucratic problems- There is a bureaucratic problem, particularly lack of efficiency and transparency in the administration of investment.
- Further, the concept of one-stop-shop service is not implemented.
- Privatization – The process of privatization of public enterprises has become so slow over the last several years, and nearly stalled.

Investment forms in Ethiopia

- art 8 of investment proclamation
- sole proprietorship
- Enterprise established in Ethiopia or abroad
- Public enterprise
- Cooperative society
- Persons who engage in a business **without involving others to share ownership** of the business are known as **sole traders**. They are also called traders or businesspersons.

Cont’d

business organization

- partnerships and companies
- our law recognizes partnerships and companies as forms of business organizations.

BRANCH AND SUBSIDIARY

- a foreigner may have an option to invest in a foreign country through a branch
- A branch is an extension or division of an investment business organization.
- Subsidiary corporation is one in which a parent corporation has a controlling share

Branch vs subsidiary

- Branch **report** to head office But subsidiary to holding company
- branch conduct the same business with parent organization subsidiary not **necessarily**.
- branch do not have separate **legal entity** while subsidiary it has
- Branch 100%owned by parent subsidiary 50-100%
- branch’s liability extend to parent but in subsidiary limited

Cont’d

- **Public enterprises** are instruments of national policy and are autonomous units with legal independence. What is the reason to establish **“state monopolies**” in commodities.
- **Fiscal motive** is the most ancient, reason which had been exemplified by the “state monopolies” in commodities.
- ***Strategy*** is the second reason for the establishment of public enterprise.
- The modern role of government is to act in commerce for the purpose of raising a living standard of its people.
- enterprises are assigned “the operation of business with that of a government department aimed at promoting the **public welfare**

Cooperative Society

- cooperative society is defined as “a society established by individuals on a voluntary basis to collectively solve their economic and social problems and to democratically manage same.
- the main objective of a cooperative society is not profit.
- **Joint investment**

Cont’d

- Sole proprietorship is business in which only one individual owns all the assets, and operates in his/her personal capacity
- simplest and the most common form of business organization in some countries.
- Advantages management & quick decision
- Disadvantage unlimited liability legal,

INVESTMENT INCENTIVES AND GUARANTEES

- Governments, especially industrialized countries, offer considerable investment incentives **to attract investment in general and FDI in particular.**
- Nowadays, most investment incentives are given to both domestic and foreign investors.
- incentives are geared towards large projects or specific foreign investors.
- ***Inventive is any assistance offered by a country to investors.***

cont’d

- Incentives are any measurable economic advantages afforded to specific enterprises or categories of enterprises by a government.
- The grant of a specific advantage arising from public expenditure in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment of a contracting party or a non-contracting party in its territory. (MAI)
- Incentives may include measures either to increase the rate of return of a particular FDI undertaking, or to reduce its costs or risks.

Types of incentive

- ***FISCAL INCENTIVES*** :-Fiscal incentives may include reduction of the standard corporate income tax, tax rate, investment and reinvestment allowances, accelerated depreciation, exemptions from import duties.
- ***Financial incentives*** include government grants, subsidized credits, government equity and participation.

cont’d

OTHER INCENTIVES

Regulatory incentives include

- Lowering of environmental, health, safety or labour standards;?
- **Temporary or permanent exemption** from compliance with applicable standards
- **Stabilization clauses:** guaranteeing that existing regulations will not be amended to the detriment of investors.
- **Subsidized services**: Subsidized dedicated infrastructure: electricity, water, telecommunication, transportation, (a price less than the market

Cont’d

Market privileges

- It includes granting of monopoly rights, protection form import competition, closing the market to further entry, preferential government counteracts.
- Preferential government contracts;

  Foreign exchange privilege
- Special treatment with regard to foreign exchange

ECONOMIC RATIONALE FOR INCENTIVES

- Incentives are intended to promote positive economic benefits among others, job creation, technology transfer, regulation of foreign exchange.
- To correct the failure of markets
- Investment is required to offer benefits to the society and the host country. Nevertheless, market failure may occur and this in turn could discourage investors to invest
- Thus, the government will intervene to correct market failure.

Cont’d

- incentives are used to compensate investors for lost return due to other government interventions. Performance requirements could result in loss.
- Incentives may have distorting effect in capital flow and investment decision.
- incentives are granted with the intention to attract foreign investment so as to promote the development.
- developed countries make more use of financial incentives than that fiscal ones.
- On the other hand, developing countries adopt the reverse.

Incentives in Ethiopia

- Article 21 of regulation the annex of regulation no.270/2012 remain effective until expressly repeal by new regulation.

RETHINKING INVESTMENT INCENTIVES IN ETHIOPIA

- As mentioned before incentives distort capital flow and investment decision.
- It should be based on study
- Ethiopia grant extensive incentives for investment.
- it also demand additional cost for monitoring and follow up
- But no significant flows of investment.
- Thus, it needs rethinking

INCENTIVES UNDER THE ETHIOPIAN LAW

Exemption from the Payment of Customs Duty

the ***duty draw-back*** art 4 proc768/2012

The following shall be eligible for duty draw-back scheme: producer exporters; indirect producer exporters; raw material suppliers; exporter

Cont’d

- ***Duty draw back***:- duty paid on goods ***imported or purchased locally*** by beneficiaries of the scheme listed in Article 4 of this Proclamation shall be refunded
- no refund for payment less than 1000
- The Ethiopian Revenues and Customs Authority shall effect payment in accordance with this Proclamation to the beneficiaries concerned within 30 days of receipt of complete claim for duty draw-back.

Cont’d

EXEMPTION FROM INCOME TAX

- an investor may be eligible for exemption from income tax. annex of the regulation
- Not all sectors are amenable to incentive.
- **real state business** not benefit from income tax exemption.

GUARANTEES TO INVESTORS

- (FDI) is desired by host states, and to attract FDI, incentives have been used. Despite the fact that incentives are available, investors may not decide to invest unless guarantees are available for their investment.
- There is a genuine need for **legal guarantees** for foreign investors. This need could be fulfilled by the **domestic law** of the states concerned.
- The host states are in need of foreign investment and therefore, they, should offer legal guarantees to prospective investors.

Cont’d

- With respect to guarantees to investors, it is essential to grant it for both domestic and foreign investors.
- Guarantees offered to foreign investors may be found in constitutions and codes as well as in special laws.
- ***Investment laws provide for guarantees against expropriation of investment and the right to transfer abroad the investor’s profit and capital***

Repatriation of Capital and Profits

- Any investor who invests in Ethiopia has the right to transfer to his/her country art 20 of proc 1180/2020
- a) Profits and dividends accruing from his investment;
- b) Principal and interest payments on external loans;
- c) Payment related to technology transfer agreement registered in accordance with Article 15 of this Proclamation;
- d) Payments related to collaboration agreement registered in accordance with Article 16 of this Proclamation;

Cont’d

- e)Proceeds from the transfer of shares or conferral of partial or total ownership of an enterprise to another investor;
- f) Proceeds from the sale, capital reduction or liquidation of an enterprise; and
- g) Compensation paid to an investor pursuant to Sub-article (2) of Article 19 of this Proclamation.

Guarantee against Expropriation

- One of the threats to foreign investment is the risk of expropriation of the investment.
- Expropriation is a ***governmental taking***.
- ***Expropriation presupposes compensation unlike nationalization***. Nationalization is made without the view to take away property from wealthy people to minimize disparity.
- Expropriation may be lawful or illegal.
- state is obligated to compensate aliens for any “unlawful interference with their contractual rights.

Cont’d

- Full compensation shall be paid when foreign investment is expropriated.
- The qualities of full compensation are usually its adequacy, promptness, and effectiveness.
- According to **Hull formula**, prompt, adequate and effective compensation must be made to foreign investor upon expropriation. Art 19(2) of investment proc art

Ch-9 Dispute settlement

- Commercial disputes **may be** resolved out of court i.e. through alternative dispute resolution (ADR)
- Commercial persons, including investors chose arbitration because it appeared to be a good way of resolving disputes in the past.

What are the advantages of resolving disputes in court and outside courts?

- The court uses established rules of procedures that are used to investigate facts;
- The principles applied by courts are reliable and reasonable;

Cont’d

- Courts have dignity, authority and attract public confidence

Arbitration

- Arbitration helps the parties to keep their secrets;
- The parties can come up with their own rules or procedures;
- It may help to minimize hostility;
- It may be less costly;
- Freedom of parties

ADR

- Settlement of dispute other than court litigation
- Mediation differs from arbitration because it is nonbinding
- Mediation can occur at any time in the dispute.
- Interest based procedure

Conciliation

- A conciliator listens to the two parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what she believes to be a fair compromise of the dispute.
- mutual consent is essential and would be the basis for enforcement of the solutions

Cont’d

- If the proposal does not resolve the dispute, the conciliator may offer another proposal.
- Although mediators try to get the parties to come up with a settlement agreement themselves, they may also, at the parties’ request, make a specific proposal, similar to what conciliators would do.
- The main difference is that mediation involves a third party whose role is to help the parties reach a mutually agreeable solution to the problem of conflict or disagreement. Mediation is a voluntary process.

Cont’d

- Negotiation is a means of settling disputes usually using verbal communication.
- Arbitration binding and right based procedure

SETTLMENT OF INTERNATIONAL INVESTNMEMT DISPUTE

- ***In foreign direct investment***, we find a relationship among a ***host state***, a ***foreign investor*** and the **home country of the investor**, which is known as ***trilateral relationship***.
- Disputes might arise between states or between states and investors within the context of the investment activities of transnational corporations.
- Investment dispute may either be ***state-to-state or investor-state investment disputes.***

Cont’d

- Governments may take measures affecting the establishment, and operations of investment might create disputes, and such disputes are categorized under state-to state disputes.
- At the international level, two states may arrange dispute settlement mechanisms.
- There is lack of compulsory dispute settlement force within the international system.
- Parties involved must ensure that they can settle the disputes ***amicably*** and ***peacefully***.

cont’d

- Disputes settlement mechanisms and their procedures.
- There is bilateral means by dispute settlement.
- Third party system inter-state investment dispute mechanism.
- Conciliations and negotiations;
- Ad hoc inter-state arbitration;
- Permanent arbitral or judicial arrangements for dispute settlement PCA, ICSID

Investor-State Dispute

- A dispute may arise between a private investor and the state.
- Under customary international law, such a dispute ***may be resolved in the tribunals and/or courts of the country concerned.***

INVESTMENT DISPUTE SETTLEMENT UNDER THE ETHIOPIAN LAW

- The Ethiopian investment laws regulate the settlement of state-state and state –investor disputes.

DISPUTES BETWEEN ETHIOPIAN GOVERNMENTR AND CONTRACTING PARTY

- DIPLOMATIC CHANNELS disputes are governed by the provisions of **bilateral investment treaties.**

Cont’d

- There is opportunity for contracting parties to resolve their disputes before it is submitted to third parties.
- **Most investment treaties** provide that the disputes shall be settled through ***negotiation*** between the governments of the contracting parties.
- In other words, disputes shall be resolved through **diplomatic channels**

Joint Commission

- It the dispute cannot be settled through diplomatic channel, it must be given to a joint commission constituted by representatives of both parties.

  ad hoc arbitral tribunal

- If the dispute cannot be settled within a specified period of time, it must be submitted to an ad hoc arbitral tribunal.

Investor-Ethiopian state dispute

- Negotiation is the one of the mechanisms to settle disputes between an investor and a contracting party. Thus, one of the parties may notify the matter to take an action. Art 28(1) proc

Courts

- Where the dispute cannot be settled through negotiation, it must be submitted to the competent jurisdiction of the **State courts**. 28(3)
- It is also allowed for the parties to the dispute to submit their disputes to arbitration. Art 28(2)

The International Centre for Settlement of Investment Disputes (ICSID)

- it is an **autonomous international organization**.
- It facilitates the arbitration of ***disputes between member countries and foreign investors who are nationals of other member states.***
- The purpose of the convention is to promote an ***atmosphere of mutual confidence between states and foreign investors.***
- The Convention provided a complete, self-contained system for the settlement of disputes between foreign investors and their host states by arbitration.

Cont’d

- The Convention opens the opportunity for contracting parties of bilateral investment treaties (BITs) to incorporate arbitration to solve investment disputes pursuant to the ICSID clauses.
- The jurisdiction of the Centre, as defined by Art 25(1) of the ICSID Convention, extends to
- any legal dispute arising directly out of an investment, between a **Contracting State** (or by any constituent subdivision or agency of the Contracting State designated to the Centre by that State) and a **national of another contracting State**, which the parties to the dispute consent in writing to submit to the Centre.

Cont’d

The following four requirements must be met to have jurisdiction.

- There must be a **legal dispute**;
- It must arise directly out of an investment;
- The parties must have agreed to submit their dispute to ICSID;
- The dispute ***must be*** between a contracting state or its subdivisions and a foreign investor from another contracting state.