An Analysis of the Internationd Center of Settlement of Investment Disputes Agreement on 1965

دراسة تحليلية في اتفاقية تسوية منازعات الاستثمار لعام ١٩٦٥ والقوانين العراقية بشأن التحكيم كأساس لتسوية المنازعات الناشئة عن عقود الاستثمار

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Introduction

Procedures to resolve investment disputes in Iraq can be lengthy given bureaucratic bottlenecks, an unclear decision making structure, and a judiciary system that lacks capacity. Some U.S. companies have decades-long investment disputes that they have been unable to resolve with Iraq government . Many investments claim centre on large fines levied by the government that foreign investors are unwilling to pay. Recently, foreign investors have struggled to receive timely payments for public contracts. National arbitration is currently covered under Articles 251-276 of the Iraqi Civil Procedure Code no 83 of 1969 and Article 27 of the Investment Law no 50 of 2015. These provisions govern the enforcement of arbitration agreements and awards as

well as detailing out the rights of Iraqis and foreigners with respect to Iraqi law.

In term of international arbitration, Ministry of Finance v. Fincantieri[1] is a landmark case low in Iraqi arbitration law. The decision was issued by the Baghdad Commercial Court and approved by the Court of Cassation. The ruling allows courts to apply the Civil Procedure Code to international arbitration agreements and awards instead of forcing parties to waive their contractual rights to resolve their disputes outside of Iraqi courts by not recognizing international arbitration[2]. Iraq joined in to the ICSID 1965 in December 2015. However, not a contracting state to the convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention).

This study will analyse and examine the laws and regulations that cover the investment arbitration issues in Iraq vis-a-vis together with the ICSID Convention 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (Hereinafter referred to as the ICSID Convention 1965) that established the International Centre for Settlement of Investment Disputes (hereinafter referred to as ICSID). These laws are applicable in Iraq in reference to the settlement of investment dispute.

On the other hand, this study presents the analysis of Convention on the Settlement of Investment Disputes between States and Nationals of Other States ICSID 1965 on the Iraqi laws

1-Iraq / 09/30/2012 / Iraq, Presidency of the Federal Appeal Court of Baghdad – Al-Rusafa / Minister of Finance v. Fincantieri Cantieri Navali Italiani S.p.A / 288/B/2011, http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1693&opac_view=2.

2-Ibid.

relevant to the settlement of investment disputes. It scrutinizes the ICSID Convention 1965, the Iraqi Civil Procedure Act no 83 of 1969 and Iraqi Investment Law no 50 of 2015 in order to find out the positive and negative effects of the provisions of the Convention and statutes after Iraq ratification on the ICSID Convention of 1965.On the other hand, These laws are applicable in Iraq in reference to the settlement of investment dispute.

The reason for choosing the subject of arbitration as a basis for resolving investment disputes is to highlight the importance of Iraq after the ratification of the agreement on the settlement of investment disputes ICSID 1965 and the extent of their negative and positive impact on Iraqi law, on the other hand, to reassure foreign investors in the event of a dispute concerning their investment contracts with the Iraqi government that there are an international means. They can resort to it in the event that the national law cannot resolve the existing dispute and other reasons that prompted the researcher to choose this important and main topic to discuss it.

1. The Effects of the ICSID Convention 1965 on Settlement of Investment Dispute in Iraq

The ICSID on settlement of investment disputes was entered into force in Iraq on 17th December of 2015; therefore, this Convention comes after Iraqi signed the ICSID Convention 1965 and deposited its document of ratification on 17th November of 2015. In an atmosphere of on-going difficulties confronting investment into Iraq, this is a critical stride forward in the lawful setting by the Iraqi Federal Government, which has been looking to draw in foreign investment to balance out, remake and differentiate the nation's economy. Regardless of the nation's noteworthy security challenges notwithstanding the budgetary

effect of declining world oil costs, Iraq remains an essential market for universal investment given that it has the world's fifth-largest proven oil holds and needs reconstruction and foundation advancement on a huge scale[1].

The prompt effect of this progression on the investment atmosphere in Iraq is probably going to be generally constrained given the little number of bilateral and multilateral investment treaties to which Iraq is a party and that are at present in compel. Nevertheless, this may flag a move of approach and craving with respect to how rapidly Iraq needs to enhance its legal system for investment insurance. This progression is relied upon to be trailed by the further ratification of respective and multilateral investment treaties and worldwide conventions[2] .

Consequently, all the effects of ICSID Convention on settlement of investment dispute as it applies in Iraq, whether the positive or negative, are vividly expatiated by the researcher below.

1.1 The Positive Effect

The ICSID Convention 1965 is one of the key instruments of international law that secure and advance foreign investment. The ICSID Convention 1965 set up the International Centre for Settlement of Investment Disputes (ICSID), a universal establishment situated in Washington DC that oversees and gives offices to the conciliation and arbitration of global investment disputes where one of the parties to the dispute is an ICSID

1-Herbert Smith Freehills, "Dispute Resolution the ICSID Convention Enters into Force in Iraq,'' Pil Note, http://hsfnotes.com/publicinternationallaw/2016/01/07/the-icsid-convention-enters-into-force-in-iraq/ (accessed January 7, 2016).

2-Ibid.

Convention state. Numerous investment treaties between states, state investment laws, and contracts amongst investors and states accommodate arbitration at ICSID[1].

One of the key components of the ICSID Convention 1965 is that it accommodates an effective administration for the implementation of ICSID arbitral awards. In the event that an ICSID Convention 1965 party State neglects to respect an ICSID arbitral award, that State would wind up in the violation of its global settlement commitments under the ICSID Convention 1965. Furthermore, if the State being referred to is the beneficiary of any World Bank financing, any inability to consent to an ICSID award may have consequences for its association with the World Bank. Moreover, the reason for a party State to oppose requirement of an ICSID arbitral award under the ICSID Convention 1965 is restricted[2].

Moreover, ICSID Convention 1965 gives facilities to the arbitration of disputes among party States and investors specialists who qualify as nationals of other party States. ICSID's role is simply administrative in any arbitration. The assurance or determination of the dispute arranges exclusively with the arbitral tribunal elected. On the other hand, ICSID Convention 1965 gave a free lawful commitment on the Contracting States to respect the resolved[3].

The ICSID has assumed an important function. ICSID is the main arbitration institution whose objective is to encourage

1-Herbert Smith Freehills, Ibid.
2-Iraq / 09/30/2012 / Iraq, Ibid.
3-Andrew Tweeddale, Keren Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice (New York: Oxford University Press, 2005), 450-459.

alternative dispute resolution ADR between foreign investment and States. Since their emergence, Investor-State Dispute Settlement (ISDS) techniques have met with a resonating success. A standout amongst the most striking demonstrations of this achievement is the consistent increment in the quantity of investor-State arbitration in the course of recent years[1].

However, the imperative thing in this circumstance is the uncertainty of investment specialists, and those uncertainties make vision hazy about the foreign investment in Iraq. There is a requirement for the better lawful structure, which helps in the assurance of legitimate privileges of universal investors specialists in Iraq. The execution of ICSID arbitral honours is the most critical wellspring of getting foreign investment in the government plan to convey lawfully right and security to the foreign investors. The organization builds the trust and dealings amongst state and other countries parties, and the establishment, thus, enhances the economy of Iraq as well as takes a section in the development of world economy. Unluckily, at present, ICSID have restricted assets to offer profit to the worldwide investors.

Finally, the advantage or positive impact for the ICSID Convention 1965 for countries such as Iraq who are part of the Convention is to develop the international business and attract investors from foreign countries to another without worry or hesitation for investors[2] . Possibly, the ICSID Convention 1965

1-Sundra Rajoo , "Chartered Institute of Arbitrators' Centenary Conference, Dublin, October 2015: trends in investor-state dispute settlement in the Asia Pacific: reassessing the role of regional arbitral institutions,'' UK Journal Arbitration (2016):1.

2-Ibrahim Ismail al-RubaieandAli Sabah Khudair, A. L. Janabi, "The Legal System to Implement the Provisions of International Commercial

can be more significant and less divisive for Iraq regarding particular anti-legal, political issues and the ICSID agreement. Moreover, there is the lack of substantial progress in Iraq so the approval of convention will be appropriate to resolve this issue. Hence, the current regulation in Iraq under the global law can be considered for the investment arbitration. The national law applied in accordance with enforcement of the foreign investment[1].

1.2 The Negative Effect

ICSID Convention 1965 is seen by some developing countries as an unfair process imposed by the more economically prosperous Western countries. The criticism relates to the fact that ICSID Convention 1965 takes no account of the political realities, which exist in developing countries[2] .

The subject of the ICSID Convention 1965 is that the implementation of the foreign arbitral award identifying with worldwide trade issues does not surpass its jurisdiction for matters identified with sway. And also the Convention has considered the issues that can be connected with the arrangement of inner General of the state. This means, the Convention relating to the investment disputes does not exceed its jurisdiction for issues related to sovereignty. The Convention showed that the reason of the nation to join it with the conditions and reservations as it esteems suitable, not clashing with its interior approaches and directions. Which implies that there is no negative impact anticipated from this Convention, and despite what might be

Arbitration,'' AL- Mouhakiq Al-Hilly Journal for legal and political science 7, no. 2 (2015): 156-221.

1-"Arbitration | Law," Encyclopedia Britannica. Last modified (2016), http://global.britannica.com/topic/arbitration (accessed March 9, 2016).

2-Andrew Tweeddale, Keren Tweeddale, Ibid.

expected, the promotion of the Convention has a positive result, in any event, give another impetus to the potential for foreign investment in Iraq[1].

Under the ICSID Convention 1965, Iraq will be compelled to acknowledge the alleged de-limited impact of qualified bargain based disputes or contract-based disputes with an ICSID arrangement, and the immediate authorization of ICSID awards under compression from the World Bank. The related and tremendously vaunted focal points of ICSID are that it furnishes investors specialists with an immediate access to a type of settlement of a dispute they may have with a host State, investors don't have to depend on the problematic system of tact, and the authorization arrangements of the ICSID Convention 1965 make it exceedingly plausible that last ICSID awards will be successfully enforceable. Another point, more serious hazard is seemingly intrinsic in subjecting the Iraqi State's organs to investment dispute under the extensive variety of treaties that it went into with third party States, which it might have managed without appropriate direction[2] .

Furthermore, for numerous countries, the possibility of submitting to the purview of a foreign court was taken as an insult against its high authority and national respect. The ICSID framework likewise to decrease the functions of national courts in implementation significantly more than in another accessible

1-Ali Fawzi, A. L. – Mosawi, "International Commercial Arbitration and the Possible Application Thereof in Iraq,'' Journal of science for law 30, no. 1 (2015): 1-10.

2-Noor Kadhim, "The Curious Incident of Iraq and The ICSID Convention,'' Kluwer Arbitration Blog, (last modified 2016), http://kluwerarbitrationblog.com/2015/11/23/the-curious-incident-of-iraq-and-the-icsid-convention/?print=print (accessed June 12, 2016).

arrangement of private worldwide arbitration by accommodating direct authorization with no plausibility of appeal an award in those national courts where the requirement of the award would some way or another have been looked for. Likewise, promoting nations, which were restless, to draw in foreign investment would have been opposed to submitting to the purview of an outside court in an execution activity.[1]

2. The Effects of Iraqi Civil Procedure Act no 83 of 1969 on Settlement of Investment Dispute in Iraq

Courts adjudicate on disputes as indicated by their legitimate part as it is comprehended in a specific lawful culture. In many jurisdictions, courts have an obligation to adjudicate on the disputes brought before them. In this way, the Courts and different bodies have existing teachings, strategies, and procedures of thinking that can apply for settlement the disputes[2].

Many Iraqi laws regard arbitration as an important method for resolving trade and investment disputes. For instance, Iraqi Civil Procedure Act no 83 of 1969. However, this makes arbitration decisions issued by competent arbitration intuitions and bodies subject to approval by the competent court, according to provisions of an Iraqi Civil Procedure Act above, and provided that arbitration is entered into at the request the party. The competent court then applies relevant provisions listed in Articles 251-276 of the aforementioned law; such process gives the competent court access to review the original arbitration decision

1-Doak Bishop, James Crawford, and W. Michael Riesman, Foreign Investment Disputes: Cases, Materials and Commentary (Netherlands: Kluwer Law International, 2005), 318-319.

2-Elizabeth Fisher, Eloise Scotford, "Climate Change Adjudication: The Need to Foster Legal Capacity: an editorial comment,'' Journal of Environmental Law, 28, no. 1 (March 2016):3.

and the circumstances and conditions, based on Iraqi law. This necessarily means stripping the arbitration decision of its binding force. The Civil Procedure Act no 83 of 1969 governs Iraqi Arbitration law. Articles 251 to 276 of the said Act deal with the arbitration and arbitration procedures. Therefore, in this part of this chapter the researcher analyses the effects positive and negative from Iraqi Civil Procedure Act no 83 of 1969 on settlement of investment dispute as highlighted below.

2.1 The Positive Effect of ICSID Convention 1965 on Iraqi Civil Procedure Act no 83 of 1969

In the absence of a recognized worldwide tribunal with exclusive jurisdiction over the global business disputes, the main conceivable strategy is to swing to national courts. In any case, in various locales, courts do not have the essential ability and assets to decently resolve complex disputes including universal transactions. Moreover, in a few nations as Iraq, the judiciary is not adequately free from the executive power, which can prompt a suspicion of the predisposition of the domestic judges against foreign organizations required in the dispute[1].

Issues may emerge even inside very much created lawful frameworks with effective and autonomous legal system. For instance, domestic practices, jury's choice of a portion of certain legitimate capacities and intricacy of the court framework, may affect the determination of the global disputes. This will be the situation for the civil law advisor faced with the legal organism of a customary law nation, or in government States portrayed by a two-level lawful framework. Besides, in most court frameworks, judges are seldom relegated to a case on the premise of their

1-Guy Robin, "The Advantages and Disadvantages of International Commercial Arbitration'', International Business Law Journal,(2014): 2-3.

specific experience or skill; consequently, "generalists" of law will frequently be accountable for settling the complex worldwide disputes[1].

Concerning worldwide arbitration, parties normally have a solid comprehension of their dispute and can choose a referee with the vital experience, capacity, and accessibility to determine their dispute. Moreover, as opposed to a solitary state-designated court judge who does not generally have the ability or experience required to appropriately resolve the dispute, arbitral tribunals are regularly made out of a board of three arbitrators. State judges are likewise subject to the danger of movement over the span of the procedure, and such migration could disrupt the effective administration of the case.

In view of the above conditions, it is not hard to comprehend why advanced organizations are hesitant to elude their disputes to national courts, especially where their counterparty is a State. It was, accordingly, important to discover an answer reinforcing legitimate conviction and to empower organizations to get to it when required in universal business. International arbitration is definitely such an answer. In spite of the fact that arbitration is not safe to feedback, it shows various favourable circumstances that transform it into a believable contrasting option to prosecution under the steady gaze of state courts[2].

The issue of enforcement international arbitration for investment disputes under Iraqi legislation especially, Iraqi Civil Procedure Act no 83 of 1969 is problem still on the usage of arrangements of universal arbitration since there are no unmistakable and unequivocal sections identifying with the

1-Ibid .
2-Doak Bishop, James Crawford, and W. Michael Riesman, Ibid .

authorization of these arrangements of Civil Procedure Code, particularly Articles (251-276) of Part 2 that are identified with arbitration. Iraqi Civil Procedure Code No. 83 of 1969 does not address the provisions of international commercial arbitration. This arbitration is considered as "implicit", furthermore, it does not prevent on account of Article 16 of Civil Code No. 40 of 1951 approves the execution of judgments from the international judicial court under a particular law. This means that if a foreigner and an Iraqi are agreed on bearing the contractual relationship, they refer to come under international commercial arbitration and ruling by the international judicial court regarding this conflict. In this case, the enforcement could be enforced in Iraq. It is not right to refrain from execution on the ground that claims a failure to approve the arbitration of international trade under Iraqi law.

For above reasons, the positive effect of ICSID Convention 1965 on Iraqi Civil Procedure Act no 83 of 1969 is the application provisions contained in the Iraqi Civil Procedure mentioned above gives the Iraqi judiciary broad authority to formally and substantively alter arbitration decisions, which weakens the benefit of arbitration. Given this power of inevitable review, the parties to a contract would perhaps be better off to just resort to the Iraqi judiciary from the beginning to resolve their disputes. Moreover, the nation courts will no longer face expensive investment disputes[1].

On a wider scale, the ICSID Convention 1965 is to pursue constituting a solid and viable system of execution, which is a standout amongst the most particular and imperative parts of the Convention. Consequently, the ICSID Convention makes

1-Joost van Dam, "A Future in Investor-State Dispute Settlement: A Good Idea or Not?'' UK Journal, (2016): 5.

uniqueness between the "acknowledgment" of the arbitral award and "enforcing" it. Compliant with this uniqueness, it could be understood that the parties to the ICSID Convention consequently perceive the ICSID arbitration award.[1]

Concisely, although there are benefits to Iraq's accession to the ICSID Convention, the most important of these benefits is to reassure investors and attract investment by providing a way to resolve investment disputes by arbitration away from national courts.

2.2 The Negative Effect of ICSID Convention 1965 on Iraqi Civil Procedure Act no 83 of 1969

Article 26 of the ICSID Convention 1965 permits contracting states to require the exhaustion of domestic managerial or legal cures as a precondition to its agreement to ICSID arbitration.[2] Article 26 of the ICSID Convention 1965 provides that[3] :

"Parties agree to such arbitration is considered under this Agreement, unless stated otherwise, the approval of such an arbitration and the exclusion of any other solution. Can a Contracting State to ask what end the local administration, the judicial solutions as a condition for agreeing to arbitration under this Convention''.

That mean any party of the Convention ICSID 1965 is required the exhaustion of domestic managerial or legal cures as a precondition to its submission to ICSID arbitration. Through reviewing the Articles of Iraqi Civil Procedure Act 83 of 1969, by

1-Dikran M. Zenginkuzucu , "Turkey: Ratification of the ICSID Convention and Enforcement of ICSID Arbitral Awards,'' International Arbitration Law Review (2012) : 6.

2-Dikran M. Zenginkuzucu, Ibid, p 6.

3-Article 25 of the ICSID Convention 1965.

the researcher, the ICSID Convention 1965, it does not have a direct effect on Iraqi Civil Procedure Act no 83 of 1969, but this law touched on arbitration in some Articles.[1] Iraqi Civil Procedure Act 1969 , internal arbitration systems, and not commercial arbitration in some of its provisions, with the offer that the implementation of the decision of the ICSID Convention 1965 be direct without going to spend the State and if the State did not respond to the rule of ICSID Convention 1965, is direct implementation of state funds abroad and booking their assets and this is a dangerous and related matters compromising the sovereignty of States, as happened in the gas issue between Egypt and Israel [2], as a decision was made against Egypt to pay five billion dollars for Israel, an influential amount on Egypt's economy at a time when Egypt is currently experiencing a recession and a lack of resources as a result of events in Egypt in the last period, so the Egypt seriously considering to withdraw from the ICSID Convention 1965, while Iraq has ratified the ICSID Convention 1965 based on law 64 for the year 2012 at a time when Iraq refused to join the New York Convention of 1958, which is less dangerous than the ICSID Convention 1965 not to overlook them spend the state. Therefore, for the implementation of the arbitral award must be approved by the host State to spend to invest the state, and this defect and interference in the affairs of the State must pay attention to him and treated in order to avoid the negative impact of the ICSID Convention 1965 on the settlement of investment disputes.

On the other hand, the most dangerous thing in the ICSID Convention 1965 on the Iraqi Civil Procedure Act 83 of 1969 is

1-Articles (251-276) of Iraqi Civil Procedure Act no. 83 of 1969.

2-Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3).

that the decision of the final ICSID Centre for implementation immediately after its release and does not need to be reviewed or ratification of the national courts to implement it, as is the case with other agreements, for example, the New York Convention of 1958 and the other, so-called arbitral award issued by the ICSID Convention 1965 on the arrow in force. In the case of the country's failure to implement it possible to take a decision of any other state courts to be performed on the assets of abstaining State in which the assets of the state abstaining, as happened to the cause Egypt to seize the assets of the Egyptian aviation company in one of the countries[1] . In addition to that, in the case of agreement between the investor and the host country to solve the dispute by national courts and the issuance of a resolution against the investor does not prevent him from resorting to the ICSID Centre again and disrupt the judicial ruling under the pretext of non-application of fair treatment requirement.

However, the show those arbitral tribunals are entitled to award an assortment of cures, including orders requiring the end of local court procedures.[2] End of court procedures as an alleviation has officially found the application. This cure was conceded in the case ATA v. Jordan case[3].

1-East Mediterranean Gas EMG, an Egyptian joint venture company that supplied gas to Israel Electric through the Arish-Ashkelon pipeline (a pipeline that connects the Arab Gas Pipeline in Egypt with Israel, and Jordan, 2011.

2-Berk Demirkol ,"Ordering Cessation of Court Proceedings to Protect the Integrity of arbitration agreements under the Brussels I regime ,''International & Comparative Law Quarterly(2016): 3 .

3-ATA Construction v The Hashemite Kingdom of Jordan, ICSID Case No ARB/08/2, Award, 18.5.2010.

3. The Effects of Iraqi Investment Law no 50 of 2015 on Settlement of Investment Dispute in Iraq

The contract on the convention of investment dispute amongst States and the Nationals of other States International focus is submitted to the administration of Iraq on March 18, 1965. In addition, later it comes into force on October 14, 1966, by the administrative executives of the global bank for modernization and extension. The ICSID arbitration convention comes into power in Iraq on 17th December 2015. This implies Iraq utilizes the ICSID arbitration convention and put its instrument of support on 17th November 2015 to turn into the arbitration convention's 160th signatory State[1].

Investor-state dispute settlement varies in that the arbitration is global, i.e. behind the effective reach of the host State and the convention instruments, on which the cases depend on most by far of cases, but deal investor rights only, yet do not consider the different interests at stake if issues of public interest are brought to litigation[2].

In addition, investment arbitration is important due to the easy procedure for development of international business in developing country. It helps in fulfilment of the final decision about the dispute between parties and to save cost and time. However, on the international level, there are three Arbitration Conventions approved for the enforcement of the international arbitral award by the Iraqi government, as mentioned below;

1-Puig, Sergio, "Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration &International Investment Law,'' Geo. J. Int'l L. 44, (2012): 531.

2-Andreas Kulick , "Investment Arbitration, Investment Treaty Interpretation, and Democracy,'' Cambridge Journal of International and Comparative Law (2015): 1.

(i) Arab League Convention 1952.
(ii) Riyadh Convention 1983.
(iii) Amman Convention 1987.

All these Conventions are applied in the Arabic states. Moreover, one international arbitration convention is approved on ICSID Convention 1965 by the Iraqi government under Law No. 64 For the year 2012 published in the Official Gazette for Republic Iraqi.[1]

It should be noted that the purpose of the discuss ICSID Convention 1965 as a mentioned above important notice for knowing how Iraqi Government the enforcement of the international arbitral award on the international level, before Iraq joined to the ICSID Convention 1965. Undoubtedly, this explains an effect of the ICSID Convention 1965 on the laws in Iraq after ratifying this Convention, especially, Iraqi Investment Law no 50 of 2015 that will be discussed later.

For this purpose, ICSID Convention 1965 become one of the important factors that need to be taken into consideration, thus, leads us this section to analysis the impacts positive and negative of the Iraqi investment laws, especially, Iraqi Investment Law no 50 of 2015, on settlement of investment disputes.

3.1 The Positive Effect of ICSID Convention 1965 on Iraqi Investment Law no 50 of 2015

Iraq is one of the nations, which are not a signatory to the New York Convention 1958. This implies authorizing an Iraqi award outside Iraq will rely upon whether the country where

1-Iraq joined the Convention on the International Centre for Settlement of Investment Disputes under Law No. (64) For the year 2012 and published in the Official Gazette no (4283) at the 29/07/2013, the Official Gazette of the Government of the Republic of Iraq.

implementation is looked for has an agreement with Iraq on legal matters; has some other unique relationship, or is ready to perform foreign decision in any case of their source.[1]

For one of the positive of Iraqi Investment Law no. 50 of 2015, on settlement of investment dispute, the legalities of ownership by investors of Iraqi no 50 of 2015, property under the revised investment law, where it applies, which is a matter for Iraqi law alone, that means the ICSID Convention 1965, will not resolve this matters. In such manner, numerous foreign firms are still reluctant to give FDI to Iraq, due to fears that the security circumstance is excessively insecure in Iraq. Remarkably, the Iraq Investment Law does not give investors the privilege to full possession rights over property in connection with universal activities[2].

Besides, under international law, regardless of whether the ICSID Convention 1965 way is taken, there might be "escape". Prominently, for Iraq's situation, this could incorporate conjuring of the condition of need defiance under international law, keeping Iraqi government activity from infringing its investment agreements responsibilities. For a case of how this safeguard is described and connected, the invalidation choice with respect to the award in the case *of CMS Gas Transmission* v *Argentine Republic*[3].

1-Karrar-Lawsley , Mohammed Norri & Robert, "Arbitration in Iraq What You Need to Know,'' al –Tamimi& Co, March 2013, http://www.tamimi.com/en/magazine/law-update/section-5/march-4/arbitration-in-iraq-what-you-need-to-know.html (accessed June 30, 2016).

2-Noor Kadhim, Ibid .

3-ICSID Case no. ARB/01/8.

At last, foreign investors ought to observe that ICSID Convention 1965 is not really the most proficient and impartial technique for determining disputes with the Iraqi State. In such manner, it is maybe not amazing that Brazil, a standout amongst the most essential of the South American nations for foreign investment, has purposely picked not to join the ICSID Convention 1965.

In essence, the highly significant point here is that the ICSID Convention 1965 remains an effective instrument for settling investment disputes. The importance of the ICSID Convention 1965 is evident from its role as the provider of the facilities needed for the process of arbitrating the agreements of nationals and States and encourages the agreements between states. The Republic of Iraq during the past few days held some agreements to encourage and protect investments and creates a state of confidence among investors, there is an international body for settling disputes that arise between them, through ICSID Convention 1965. For instance, the agreement for promotion and protection of investments between the Republic of Iraq and the Republic of Belarus according to Law no 52 of 2015[1] , as well as, an agreement for promotion and protection of investments between the Republic of Iraq and the Republic of Sudan.

In broad terms, it can be expressed that most model BITs demonstrate that the states will acknowledge arbitral procedures controlled either under the ICSID Convention 1965 or under the principles of business arbitral institutions[2] .

1-Iraqi Official Gazette no (4397) In 10/2/2016.

2-Sebastian Kasper, "Investor-State Disputes on the Rise: Influencing the Commercial Arbitral World?,'' UK Journal (2016):1 .

Consequently, it can be expected that commercial arbitration institutions such as ICSID Convention 1965 will promote Iraqi Government their attractiveness for ICSID Convention 1965; this might include the presentation of concrete ideas on desirable modification of Iraqi Investment laws such as Iraqi Investment Law no 50 of 2015, for instance, ideas on improving the enforcement of investment awards.

3.2 The Negative Effect of ICSID Convention 1965 on Iraqi Investment Law no 50 of 2015

The ICSID Convention 1965 provides for investors with a direct access to a shape of settlement of a dispute they may have with a host State, the investor does not need a specific mechanism that can be relied upon for diplomacy, on the other hand, the provisions of the settlement of investment disputes shall be final and can be implemented efficiently and effectively is not entitled to the host State of the object to them, and this makes the Iraqi investment law unenforceable[1].

On the other hand, an impact negative against of the ICSID tribunal, that it had been deciphering the arrangements of BITs too generously for capital sending out nations giving foreign investor specialists greatest assurance and forcing undue commitments on the host State. In 2007, Bolivia chose to pull back from ICSID Convention 1965 referring to the extension of the guideline of reasonable and even handed treatment by the ICSID tribunal for foreign enterprises. An additional clarification of the ICSID tribunal stretching out assurance to foreign investor's specialists beyond the level agreed under the customary universal law. Moreover, it is vital to comprehend the centre standards and

1-Noor Kadhim , Ibid.

restrictions relating to the treatment and security to foreign investors specialists under the current universal law[1].

However, where a contract between a State and an investor contains an arbitration clause that subjects the parties to the ICSID tribunal under the ICSID Convention 1965, the State later on cannot enact a legislation that will oust the jurisdiction of the tribunal in respect of the contract as the contract remains binding on the parties and overrides any subsequent legislation. Such legislation can only bind subsequent contracts that are made subject to it. For this reason, the ICSID Convention 1965 in Article 54 paragraph 1 provides that[2]:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state''.

Admittedly, the ICSID Convention 1965 is considered as an umbrella institution established to allow access to its experienced duty to parties to investment disputes whether they belong to the ICSID Convention 1965 or not[3].

1-Srimurugan, Wolverhampton, "Understanding International Investment Law,'' The Law Review, 273 (2014): 6.

2-Article 54 of ICSID Convention 1965.

3-Chatterjee, "Mass/Class Claims before ICSID Tribunals,'' Journal of International Banking & Financial Law Volume 27, Issue 4 , 232 (April 2012): 3.

4. In the Case of Lacunae in the Law for Settlement of Investment Disputes, what Law is Applicable to Arbitration?

The existence of obligation falls to the arbitration application of legal rules that were agreed upon by the parties commission, and in the absence of such an agreement, it is incumbent upon the tribunal adjudicating the dispute in accordance with the law of the Contracting State party to the conflict, including conflict of laws or rules, as well as the principles of international law applicable, this means, that the Convention promised that the omission of the contracting parties to determine the law applicable to the contract, including the law, serves as the approval of the application of the law of the host country to invest in a comprehensive conflict of laws or rules and principles of international law applicable[1].

Moreover, the arbitral tribunal may not rule on the dispute on the basis of the lack of text or ambiguity of the law on the matter before it, on the other hand, are competent to decide the dispute in accordance with the rules of justice and fairness when the consent of the parties on it. The ICSID Convention 1965 provides in Article 42 that[2]:

"(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

1-Nada Abdulrahman Qayssar, "Settlement of Investment Disputes: A Comparative Study in Light of Washington's Convention'' (master's thesis, University of Baghdad, 2014),155.

2-Article 42 of the ICSID Convention 1965.

(2) The Tribunal may not bring in a finding of non-liquid on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequoet bono if the parties so agree''.

It should be noted that, according to this Article, it is possible for an arbitral tribunal to be created based on the foreign investment legislation of the host State. In this situation, the legislation would merely provide the consent of the host State in advance of any dispute with a current or future investor to submit to arbitration under the auspices of an arbitral institution specified in the legislation. Very often, ICSID Convention is specified in the legislation, though other tribunals can also be chosen. The case illustration is provided by *SPP v. Egypt*[1], where the basis of the jurisdiction of the tribunal was founded in the Foreign Investment Law of Egypt. Once jurisdiction is so founded, the law that the tribunal must apply in settling the dispute has to be decided on.

The very fact that jurisdiction has to be found in the legislation may point to the absence of a contractual arbitration clause or a choice of law clause. In such circumstances, the tribunal will have to be guided either by its own procedure laws or by having recourse to techniques of choice of law in the absence of an express by the parties.

As stated above, the ICSID Convention 1965 Article 42, the above-mentioned contains some issues, is the sequencing of the laws according to priority in the application based on the provisions of Article 42 of the ICSID Convention, according to the following:

1-Ibid, 24 .

1. The national legal systems of the host country for investment.
2. The international law.
3. The rules of justice and fairness (through international law including the rules and customs of international trade).

Therefore, reference to the application of national law of the Contracting State party to the dispute did not come from a vacuum so that the interpretation of the rules of national law and is applicable in various conflicts of laws on contracts do not deviate from the two systems:

- The place to contract law. Or
- The place of executing the law.

It is obvious that both interpretations would be in favour of the law of the host country, as it tends to enter into the contract as well as its implementation in the territory of the host country. In my point of view , the ICSID Convention in 1965, gave a certain advantage to the State, through the application of law as if it was devoid of applicable law agreement, is that this preference did not leave in accordance with the will of the State host, but restricted the Convention, the need to apply the international law as well, to monitor the integrity of the application of laws the host State investment on before the conflict and that are often excluded, and this is a point against the Convention by States, since acceding to the mean initial acceptance in a manner not know the consequences as long as the rules to be applied by arbitration tribunals is known in advance to a specific and detailed face, but like this the situation is no stranger to international law, it has often been the international courts and the way to put the rules, especially in the absence of specific rules agreed.

5. Findings

1- The international arbitration had as of late turned into a rising issue and thus turning into a critical piece of the worldwide trade.

2- Arbitration as an alternate to litigation has been broadly adequate as an efficient dispute settlement strategy, particularly in the local and global trade transactions. This is confirmed by the overall changes of arbitration frameworks as universal harmonization of the procedures and substantive arbitration laws. This consensual, restricting strategy for dispute settlement offers a profoundly viable method for settling the cross-fringe disputes far from prosecution in national courts. Keeping in mind the end goal to lead global arbitration procedures, universal arbitration itself needs to give clear advantages to all parties; partnerships furthermore give lawful advisers who are gifted with the right learning, apparatuses, and strategies.

3- International arbitration is referred to worldwide as a powerful dispute settlement system which is likewise a profitable instrument during the time spent investment evaluation and hazard administration. The transnational prosecution can involve high expenses, delays, and capricious or perhaps one-sided prepare that will prompt to an "awful" result or an unenforceable arbitral award.

4- In the event that the right utilization of arbitration can be inferred, it can empower an investor to diminish such dangers, the payback could be generous; it could figure out if an exchange is suitable or the inverse.

6. Conclusion

Through the research of this study, it is concluded regrettably, that Iraq does not have a specific law for arbitration of investment disputes settlement, and Iraqi laws are still weak and poor quality, several gaps and lack of the sufficient provisions relating to this issue, which cannot effectively protect the investment. Nevertheless, surely, after Iraq ratifies the ICSID Convention 1965, it provides effectively the arbitration for investment disputes settlement.

Laws in Iraq, especially investment laws, and should extend activities to protect the investment. Nowadays Iraq received many investments by the international companies, therefore, there is a need for updating its laws to suit the circumstances of the present time and should continue to evolve for the future to be in a deal with the future issues. This is necessary especially now that Iraq has ratified the ICSID Convention 1965, according to Law no. 64 of 2012; Iraqi Government must ensure that laws can resolve the current investment disputes problems. The positive step in this direction would be to reconsider and strengthen the laws that currently exist.

The Government in Iraq looks up to what the future holds since it is already a signatory to the ICSID Convention 1965. In spite of the positive and negative effects of accession, surely, the ICSID Convention can play a role in clarifying the law and contribute to a greater sense of solidarity among states and other international actors, including investment sector. On the other hand, Iraq's accession to the ICSID Convention, a role in reassuring investors and attract investment by providing a means for the settlement of disputes by arbitration away from national courts. As well, Iraq needs some crucial amendment in its laws to encourage implementation of arbitral.

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ABSTRACT :

The complex nature of activities in the investment arena has made disputes unavoidable. Arbitration as the other option to litigation has been broadly accepted as a mean of dispute settlement particularly in the national and international trade transactions including the investment disputes. The primary reason for the study was to look at the efficiency of arbitration framework system in Iraq in resolving investment disputes. The study included an intensive review of the current legal and institutional structure for arbitration in Iraq in correlation with the international arbitration agreements, such as ICSID Convention 1965. Consequently, it looks necessary for Iraq after ratifying the ICSID Convention 1965, which entered into force in Iraq on 17th December of 2015, to have the power to enforce the foreign arbitral award. This study also demonstrates that Iraq through its ratification of the ICSID Convention 1965 by Iraqi Pariliamnt has led to the creation of positive and negative implications on existing law in Iraq. The provisions of ICSID Convention 1965. The findings of this study are the advantages for Iraq to join the ICSID Convention 1965 to attract the foreign investors and trade. As well as, Iraq can enforce the foreign arbitral; through Arab league Conventions and number of bilateral judicial recognition treaties.

المـلخـص:

الطبيعة المعقدة للأنشطة في مجال الاستثمار جعلت النزاعات لا مفر منها. والتحكيم كخيار آخر للمقاضاة مقبول عموما بوصفه إجراء لتسوية المنازعات ولا سيما في المعاملات التجارية المحلية والعالمية بما في ذلك المنازعات المتعلقة بالاستثمار. وكان السبب الرئيسي للدراسة هو النظر في كفاءة نظام إطار التحكيم في العراق في حل النزاعات الاستثمارية. وشملت الدراسة استعراضا مكثفا للهيكل القانوني والمؤسسي الحالي للتحكيم في العراق في ارتباط مع اتفاقات التحكيم الدولية، مثل اتفاقية تسوية منازعات الاستثمار لعام ١٩٦٥، التي انضم اليها العراق بالقانون رقم (٦٤) لسنة ٢٠١٢ ، وبالتالي، من الضروري أن يكون لدى العراق بعد التصديق على اتفاقية تسوية منازعات الاستثمار لعام ١٩٦٥ القدرة على إنفاذ قرار التحكيم الأجنبي.

وتبين هذه الدراسة أيضا أن العراق من خلال تصديقه على اتفاقية تسوية منازعات الاستثمار لعام ١٩٦٥، أحدث آثارا إيجابية وسلبية على القانون القائم في العراق. ولذلك، فإنه يهدف أيضا إلى تحديد الآليات القائمة لإنفاذ قرارات التحكيم في العراق. ومن ناحية أخرى، اقتراح حلول قانونية التي من شأنها أن تساعد العراق على تسوية النزاعات الاستثمارية ، والنتائج التي توصلت إليها هذه الدراسة هي مزايا انضمام العراق إلى اتفاقية تسوية منازعات الاستثمار لعام ١٩٦٥ لجذب المستثمرين الأجانب والتجارة ، فضلا عن ذلك، يمكن للعراق إنفاذ التحكيم الأجنبي من خلال الاتفاقيات العربية وعدد من معاهدات الاعتراف القضائي الثنائية. وتوصي الدراسة بأن يصدق البرلمان العراقي على مشروع قانون التحكيم التجاري الذي قدم لمجلس النواب منذ عام ٢٠١١ للاعتراف بقرارات التحكيم الأجنبية في العراق وإنفاذها، ولم ير النور لحد الان والاقتراح على السلطات التشريعية إصدار قانون جديد مستقل للتحكيم الدولي يتعلق بتسوية المنازعات الاستثمارية .