

Investment Arbitration and Sovereignty from a Turkish Law Perspective¹

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Introduction

Turkey is party to many Bilateral Investment Treaties² (“BITs”) and to the Energy Charter Treaty.³ Under these investment treaties, Turkey provides investors with a wide range of rights, such as fair and equitable treatment, full protection and security, non-discriminatory treatment, national treatment and most-favored nation treatment. In addition, under these treaties, Turkey gives its consent to a number of investment arbitration mechanisms, such as International Center for Settlement of Investment Disputes (“ICSID”) and the United Nations Commission on International Trade Law (“UNCITRAL”) for disputes arising out of alleged treaty violation claims of the investors. Investment arbitration is a relatively new concept for Turkey. In the first ICSID arbitration case against Turkey, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, the

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² Turkey’s BITs are available at <http://www.unctadxi.org/templates/DocSearch.aspx?id=779> (last visited August 12, 2009).

³ The Energy Charter Treaty is available at <http://www.encharter.org/upload/9/120520674515751158192049714743532131935190860213f2543v3.pdf> (last visited August 12, 2009).

tribunal accepted jurisdiction on 4 June 2004 and resolved the case on merits on 19 January 2007.⁴ The second case filed against Turkey was *Motorola Credit Corporation, Inc v. Turkey*, ICSID Case No. ARB/04/ which was resolved by settlement on 21 November 2005. Ongoing cases against Turkey are *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/, *Cementownia "Nowa Huta" S.A. v. Turkey*, ICSID Case No. ARB(AF), *Europe Cement Investment and Trade S.A. v. Turkey*, ICSID Case No. ARB(AF)/07/2 and *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20 and *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13⁵.

Investment treaties contain no restriction as to what kind of public law transactions may generate an investment dispute, subject to an investment arbitration mechanism stated in the treaties. Therefore, all kinds of public law transactions (legislative, executive or judicial) are arbitrable under these investment treaties to the extent that they generate an alleged violation claim of the treaty rights of the investors.

This paper analyzes what kind of Turkish public law transactions might give rise to an investment arbitration claim. This paper argues the following two basic points: (i) that the principle of arbitrability provided under Turkish domestic law is not applicable to investment treaty disputes and (ii) that the arbitrability of all kind of public law transactions demonstrates a need to reconsider the concept of the state's sovereignty.

This paper is organized as follows: Part I describes how Turkey gives its consent to investment arbitration mechanisms. Part II discusses what kind of disputes can be considered investment disputes subject to investment arbitration mechanisms under dispute resolution clauses of the investment treaties. Part III examines what kind of public law transactions can be subject to an investment arbitration mechanism. Part IV discusses the consequences of the arbitrability of all kind of public law transactions in the principle of arbitrability recognized in Turkish domestic law and Part V discusses its consequences in the concept of sovereignty and points out the end of this concept with regards to investment disputes.

I- Consent to Investment Arbitration

Unlike arbitration between private parties, investment arbitration does not need a contractual relationship between parties. It is accepted

⁴ *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, Decision on Jurisdiction, ICSID Case No. ARB/02/5 available at <http://ita.uvic.ca/documents/psegdecision.pdf> (last visited August 12, 2009) and *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, Award, ICSID Case No. ARB/02/5 available at <http://ita.uvic.ca/documents/PSEGlobal-Turkey-Award.pdf> (last visited August 12, 2009).

⁵ There are also ongoing investment treaty arbitration cases filed by Turkish parties against other countries as follows: *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29; *Rumeli Telekom A.Ş. and Telsim Mobil Telekomunikasyon Hizmetleri A.Ş. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16; *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1; *Barmek Holding A.Ş. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/16.

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that a sovereign state can give its consent to an investment arbitration mechanism in (i) an agreement (i.e. arbitration clause of an investment agreement between the state and the investor, or a compromise signed following the occurrence of a dispute) (ii) its domestic legislation (i.e. a provision in its investment laws) (iii) an investment treaty, bilateral or multilateral.⁶ In the latter situations, the state unilaterally offers its consent to submit a dispute with an investor to arbitration and, when an investor initiates an arbitration request with an arbitration mechanism, he/she is deemed to have accepted this offer.⁷ Most of the investment treaties and national investment legislations refer to the ICSID. In addition, the ICSID Additional Facility, the UNCITRAL or other forms of arbitration are also offered in the alternative.

The first case where an investor successfully initiated an ICSID arbitration on the basis of a unilateral promise contained in national legislation was the case of *SPP v. Republic of Egypt*.⁸ In this case, the consent was based on the Egypt Foreign Investment Law of 1974. Now several states use this method of giving consent to arbitration mechanisms.⁹ Turkish national legislation does not include any consent to investment arbitration mechanisms on a general basis.

In addition to national legislation, a large number of BITs and multilateral investment agreements such as the Energy Charter Treaty,¹⁰ the North American Free Trade Agreement (“NAFTA”)¹¹ and the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur¹² include the consent of states to international arbitration mechanisms.

Even though Turkey does not give its consent to investment arbitration mechanisms through its national legislation, it does so through several BITs and the Energy Charter Treaty. Most of the BITs that

6 For more explanation about this procedure see Jan Paulson, *Arbitration Without Privity*, 10 ICSID Rev. -FILJ, 232 (1995). For consent procedure of ICSID see Georges R. Delaume, *Le Centre International Pour le Reglement des Differends Relatives aux Investissements*, (CIRDI), 109 Journal du Droit International (Clunet) 779,780 (1982); Christoph H. Schreuer, *The ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Cambridge University Press, 193 (2001); Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours, 352; Ali Yesilirmak, *Jurisdiction of International Centre for Settlement of Investment Disputes over Turkish Concession Contracts*, ICSID Rev. -14 FILJ 2, 407 (Winter 1999); Andres R. Sureda, *Two Views on ICSID Arbitration (A) ICSID: An Overview*, World Arbitration and Mediation Report, 167 (June 2002); See also Report of the Executive Directors of ICSID ¶ 23 available at <http://www.worldbank.org/icsid/basicdoc/partB.htm> (last visited August 12, 2008).

7 Schreuer, *supra* note 4, at 207.

8 Paulson, *supra* note 4, at 232.

9 For other examples of consent based on a national law legislation, see Algeria Foreign Investment Law of 1999, article 1; Kazakhstan Foreign Investment Law of 1995, article 1, Madagascar Foreign Investment Law of 1989, article 3. See Schreuer, *supra* note 4, at 132; Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Center for Settlement of Investment Disputes*, ICSID Review, 12 FILJ 303 (Winter 197).

10 Article 26, see *supra* note 3. Arbitration requests based on the Energy Charter Treaty before ICSID began after 2000. See Tood Weiler & Thomas W. Waelde, *Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation*, 102 Oil, Gas & Energy Law Intelligence 4 (March 2003).

11 Article 1120, available at <http://www-tech.mit.edu/Bulletins/nafta.html> (last visited August 12, 2009); see also Charles H. Brower II, *Structure, Legitimacy and NAFTA's Investment Chapter*, Vanderbilt Journal of Transnational Law, 42 (January 2003); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA CHAPTER II*, Yale Journal of International Law 373,374 (Summer 2003).

12 Article 9, available at <http://www.cvm.gov.br/ingl/inter/mercossul/coloni-e.asp> (last visited August 12, 2009).

Turkey is a party to refer to ICSID;¹³ however, the ICSID Additional Facility, UNCITRAL or other forms of arbitration are also offered in the alternative.¹⁴

II- Investment Dispute Definition Under Bits of Turkey

In some BITs under which Turkey gives its consent to investment arbitration mechanisms, an investment dispute that may be subject to an investment arbitration is defined as a dispute between a contracting state and a national or company of the other contracting state arising out of or related to: (i) the interpretation or enforcement of an investment agreement between the contracting party and such national or company;¹⁵ (ii) the interpretation or enforcement of an investment authorization granted by the contracting party's foreign investment authority to such national or company or (iii) an alleged breach of any right conferred or created by the treaty with respect to an investment.¹⁶ In some treaties the first situation,¹⁷ in some others the first two situations,¹⁸ are not included in the definition of 'investment dispute.' In another group of treaties, investment dispute is defined as "disputes between a contracting party and investor of the other contracting party arising out of and related to an investment of the investor in the contracting state"¹⁹ or only "an investment dispute between a contracting state and investors of the other contracting state."²⁰

The Energy Charter Treaty defines an investment dispute as a "dispute between a contracting party and investor of another contracting party relating to an investment of the latter in the area of the former which concern an alleged breach of an obligation of the former under Part III of the Treaty."²¹

Based on the above definitions, this paper categorizes the origin of the investment disputes which may subject to an investment arbitration mechanism in three ways: (1) contractual disputes, (2) disputes arising out of investment authorization and (3) treaty violation claims.

An investment dispute may first be contractual in nature as seen in

13 Turkey signed ICSID Convention on 24 June 1987 and the Convention came to effect for Turkey on 2 April 1989 available at <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited August 12, 2009).

14 See *supra* note 2.

15 BIT between Turkey and United Kingdom, (Official Gazette 5.9.1996 – 22631), article 8 (1) (b) refers to an investment agreement signed with the foreign investment authority of the contracting party.

16 See e.g., BIT between Turkey and U.S.A., (Official Gazette 8.13.1989 – 20251), article VI (1); BIT between Turkey and Georgia, (Official Gazette 6.4.1995 – 22303), article VII (1); BIT between Turkey and United Kingdom, *supra* note 13, article 8 (1).

17 See e.g., BIT between Turkey and Netherlands, (Official Gazette 9.8.1989 – 20276), article 8 (1); BIT between Turkey and Bangladesh, article VI (1); BIT between Turkey and Belgium, (Official Gazette 10.8.1989 – 20306); BIT between Turkey and Austria, (Official Gazette 2.10.1991 – 20782), article 9 (1); BIT between Turkey and Denmark (Official Gazette 5.27.1992 - 21240), article 8 (1); BIT between Turkey and Korea, (Official Gazette 7.16.1994 – 21992), article 10 (1); BIT between Turkey and Romania, (Official Gazette 7.16.1994 – 21992), article 6 (1).

18 See e.g., BIT between Turkey and Switzerland, (Official Gazette 10.6.1989 – 20304), article 8 (1).

19 See e.g., BIT between Turkey and Krygyzstan (Official Gazette 2.12.1995 - 22200), article VII (1); BIT between Turkey and Kazakhstan, (Official Gazette 2.11.1995 – 22199), article VII (1); BIT between Turkey and China (Official Gazette 5.1.1994 – 21921), article 7.

20 See e.g., BIT between Turkey and Kuwait (Official Gazette 7.5.1991 – 20920), article 8 (1); BIT between Turkey and Turkmenistan, article VII.

21 See *supra* note 3, the Energy Charter Treaty, Article 26 (1).

the case of a “dispute arising out of an investment agreement.” In addition, even if an investment dispute definition in an investment treaty does not refer explicitly to a “dispute arising out of an investment agreement,” if it refers generally to “disputes arising out of an investment;” in this case also, an investment dispute may be a pure contractual dispute to the extent that the agreement between investor and contracting state can be deemed to be an investment under the related investment treaty. Furthermore, if an investment dispute definition only refers to “disputes between the contracting state and the investor” this case also may cover disputes arising out of a contract.²² On the other hand, when an investment dispute definition only refers to a treaty violation claim, a pure contractual claim may be subject to an arbitration mechanism provided in the investment treaty to the extent that it gives rise to a treaty violation claim.

Second, an investment dispute may arise out of an investment authorization as seen from the above definitions. General investment dispute definitions such as “disputes arising out of an investment” or “disputes between an investor and the contracting state” may also cover disputes arising out of an investment authorization although the definition of investment dispute does not make an explicit reference to disputes arising out of an investment authorization.

Third, disputes may be based on treaty violation claims. General investment dispute definitions such as “disputes arising out of an investment” or “disputes between an investor and the contracting state” may also cover treaty violation claims, although the definition does not make it explicit. In addition, claims arising out of a contractual dispute or out of an investment authorization may also be based on treaty violation claims to the extent that the dispute refers to treaty violation grounds.

Pure contractual disputes and disputes regarding an investment authorization shall mostly be between an agency or representative of the state and the investor.²³ On the other hand, in disputes due to treaty violations, the claim is raised against the state and international law principles apply.²⁴ In order to refrain from raising their claims solely against an agency or representative with whom they signed the investment contract or which provided an investment authorization so as to benefit from the protections of investment treaties, investors mostly

²² See *infra* note 39.

²³ With respect to ICSID, in this kind of disputes two more conditions are to be present: (i) the said agency or representative must be appointed to the Center by the state; (ii) the state must approve or waive the consent given by such agency or representative under ICSID Convention, Article 25 (3).

²⁴ In this case, it is not important whether or not the agency or representative of a state is appointed to the ICSID. See *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* Case No. ARB/97/3 ICSID Decision on Annulment ¶ 75 (hereinafter “*Vivendi*”), available at http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf (last visited August 12, 2009); *SGS Société Générale de Surveillance S.A. v. Republic of Philippines* ARB/02/6 ICSID Decision on Jurisdiction note 6 (hereinafter “*SGS v. Philippines*”) available at http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf (last visited August 12, 2009).

base their claims on an allegation of breach of their rights in the investment treaties, even if the claim is purely contractual or purely arising out of an investment authorization. Therefore, investment arbitration disputes mostly concern claims of breach by the states of the rights provided to investors under investment treaties.²⁵

Below is the explanation as to how the above mentioned three categories may give raise to an investment arbitration case.

III- Arbitrable Public Law Disputes

a- Contractual disputes

A contractual dispute can be subject to an investment arbitration in two forms: (i) as a pure contractual dispute or (i) under a treaty violation claim. Although investment arbitration mostly concerns claims regarding breach of treaty rights, the fact that some BITs define an investment dispute which can be subject to investment arbitration mechanisms as a “dispute arising out of investment agreements between the investors and the states”²⁶ demonstrates that a pure contractual dispute can be subject to investment arbitration. In addition, even though the investment dispute definition of an investment treaty does not explicitly refer to a contractual dispute if it generally refers to “any dispute” or “disputes arising out of an investment” these situations are also considered to include pure contractual disputes.²⁷

Under Turkish law, an investment agreement signed between a public entity and investor may be in the form of either private law contracts or administrative contracts²⁸. Public law concession contracts, as a form of administrative contracts, are mostly used for foreign investments. Although private law contracts are arbitrable under Turkish law, public law concession contracts were not deemed to be arbitrable up until 1999, when the Constitutional amendment and subsequent amendments in related domestic laws allowed public law concession contracts to be subject to either international or domestic arbitration.²⁹ On the other hand, even before such legislative amendments, public law concession contracts were arbitrable, since Turkey gave its consent in several BITs to investment arbitration mechanisms. Some of the BITs of Turkey make explicit reference to “disputes arising out of investment agreements” as arbitrable investment disputes. In addition, some of them only refer to “disputes arising from an investment.” This case seems to contain a dispute arising out of a concession contract

25 Judith Gill & Matthew Gearing & Gemma Birt, *Contractual Claims and Bilateral Investment Treaties: a Comparative Review of SGS Cases*, 21 (5) Journal of International Arbitration 397 (Oct. 2004).

26 See generally BITs of the U.S.; Rudolf Dolzer & Margrete Stevens “Bilateral Investment Treaties”, at 146. See e.g. BIT between U.S. and Argentine (1997), article VII (1).

27 See *infra* note 39.

28 Metin Gunday, *Idare Hukuku*, 140 (1997).

29 For Constitutional Amendment see Law No: 4446, Decision Date: 8.13.1999, Official Gazette: 8.14.1999 – 23786. For other related legislative amendments see Law No:4492, Decision Date: 12.18.1999, Official Gazette: 12.21.1999 – 23913, Law No. 4501, Decision Date:1.21.2000, Official Gazette: 22.1.2000 – 23941.

since the concession contracts or only contracts are generally defined as an investment under these treaties. Some of the BITs only refer disputes between an investor and the contracting state. This case also may cover disputes arising out of contracts.³⁰

Regarding the jurisdiction of ICSID with respect to contractual disputes, under Article 25 of the ICSID Convention, ICSID has jurisdiction over “legal disputes arising directly out of an investment.”³¹ This provision does not make any distinction between purely contractual disputes and disputes arising out of claims of breach of treaty rights.³² In addition, the fact that this provision refers to any constituent subdivision or agency of a Contracting state as party to a dispute, in addition to a contracting state itself, also demonstrates ICSID’s jurisdiction over pure contractual disputes since investors mostly enter into an investment contract with a subdivision or agency of a state and a treaty violation claim cannot be referred against a subdivision or agency of a state. If the contractual claims towards the subdivision or agency of a state were not subject to ICSID’s jurisdiction, the reference to subdivisions or agencies of a state would be meaningless. The fact that the consent to ICSID arbitration can be given by an investment contract also demonstrates that purely contractual disputes can be subject to ICSID’s jurisdiction.³³ Further, ICSID publishes some model clauses to guide those wishing to submit their contractual disputes to ICSID arbitration.³⁴ As a result ICSID’s jurisdiction extends to pure contractual disputes.

However, whether or not contractual claims may give rise to investment treaty violation claims became a question before some ICSID tribunals. In previous ICSID cases, ICSID tribunals did not review the nature of investors’ claims as to whether it is a “pure contractual” or “international law” claim. ICSID tribunals used to review their *ratione personae* jurisdiction, *ratione materiae* jurisdiction and the presence

30 Yesilirmak discusses the arbitrability of public law concession contracts before ICSID that have already been concluded before the recognition of the arbitrability of public law concession contracts in Turkish national law. The author argues that even if the concession contracts were not arbitrable under Turkish law, Turkey gave its consent to ICSID under several BITs for disputes arising out of “a breach of any right provided in the Treaty” which is enough to cover disputes arising out of Turkish concession contracts; see Yesilirmak, *supra* note 4, at 411. However, although general dispute resolution clauses such as “disputes between an investor and a contracting state” or “disputes arising out of an investment” may cover disputes arising out of concession contracts, in order that a treaty right violation claim cover a dispute arising out of a concession contract, this dispute must be more than a contractual dispute and must generate treaty violation claims.

31 Under ICSID Convention Article 25 three elements of ICSID’s jurisdiction exist: (i) *ratione materiae* (subject matter jurisdiction), (ii) *ratione personae* (personal jurisdiction) and (iii) consent to ICSID. The requirement that dispute be “a legal dispute arising directly out of an investment” constitutes *ratione materiae* element. The requirement that “one of the parties to dispute be a contracting state and the other party be national of another contracting state” constitutes *ratione personae* element. In addition there must be written consent of the parties which does not need to be in the same document. For more explanation about jurisdiction of ICDID see Chitharanjan F. Amerasinghe, *The Jurisdiction of the International Center for the Settlement of Investment Disputes*, 19 *Indian Journal of International Law* 166 (1979); Francisco Gonzalez de Cossio, *The International Center of Investment Disputes: The Mexican Experience*, *Journal of International Arbitration*, 19 *Kluwer Law International* 3, 229-231 (2002); William Rand & Robert N. Hornick & Paul Friedland, *ICSID’s Emerging Jurisprudence: The Scope of the ICSID’s Jurisdiction*, *The New York University Journal of International Law and Politics*, 33 (Winter 1986); see also *supra* note 4 for consent to ICSID.

32 See *SGS v. Philippines*, *supra* note 23, at ¶ 29.

33 See ICSID Executive Directors Report ¶ 23.

34 ICSID model clauses, available at <http://www.worldbank.org/icsid/model-clauses-en/7.htm#A> (last visited August 12, 2009).

of the consent element (*i.e.* consent arising out of investment contract between the parties, investment treaty or domestic law) in order to accept jurisdiction for the alleged breach of investment treaty right claims, without considering whether or not the claim is a contractual claim. In other words, previous ICSID tribunals, when deciding their jurisdiction for breach of treaty claims, accepted *de facto* the international law claim character of contractual claims, without considering whether or not they are purely contractual. As an example, in the *Fedax* case the dispute was a pure contractual dispute arising out of non-payment of a contractual obligation.³⁵ However, the claim was based on an alleged treaty violation claim. The tribunal reviewed the presence of an investment, an investment dispute, personal jurisdiction and the consent element and concluded that it had jurisdiction for the alleged breach of BIT claim, notwithstanding that the dispute was contractual in nature. Schreuer argues that this result of the tribunal in the *Fedax* case was an indirect use of an umbrella clause of the Netherlands – Venezuela BIT (Article 3).³⁶

Whether or not ICSID tribunals have jurisdiction over contractual claims referred in the form of “treaty violation claims” started to be a question when investment agreements between an investor and a state provided a forum clause other than ICSID. The first ICSID case where jurisdiction of ICSID for treaty violation claims was questioned when the contract between the investor and the state included a forum other than ICSID was the *Lanco* case.³⁷ The tribunal in *Lanco* only analyzed its jurisdiction based on the element of consent to ICSID as the forum. The *Lanco* tribunal accepted jurisdiction for a treaty violation claim in a dispute where the investment contract contains a forum other than ICSID without considering whether the dispute was a contractual dispute nor whether or not a contractual dispute can give raise to an international law claim. According to the tribunal, once the parties gave their consent to ICSID arbitration, they lost their right to seek to settle the dispute in any other forum, domestic or international.³⁸ The tribu-

35 See *Fedax N.V. v. Republic of Venezuela* (Case No. ARB/96/3), Decision on Jurisdiction of July 11, 1997 (hereinafter “*Fedax*”); 37 ILM 1378 (1998).

36 Christoph Schreuer, *Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Fork in the Road*, 231, at 252. For explanation about umbrella clauses see *Id.*, at 250.

37 *Lanco International Inc. v. Argentina*, Decision on Jurisdiction, ICSID Case No ARB/97/6 (December 8, 1998) (hereinafter “*Lanco*”) available at <http://ita.law.uvic.ca/documents/Lanco-Final.pdf> (last visited August 12, 2009).

38 In this case the investment contract was between an investor and an agency of the Argentine government. Pursuant to jurisdiction clause of the contract, the Federal Contentious-Administrative Tribunal of Buenos Aires had an exclusive jurisdiction on contractual disputes. See *Lanco*, *supra* note 36, at ¶ 6. The investor initiated a request for arbitration seeking compensation for damages due to alleged breach by the Argentine government of the obligations set forth in the BIT. The Tribunal decided that the exclusive jurisdiction clause of the contract does not prevent the submission of disputes to ICSID. The tribunal based its reasoning on Article 26 of the ICSID Convention. The tribunal very narrowly interprets “unless otherwise stated” wording of the first sentence of Article 26. According to the Tribunal only exception of the principle of exclusion of other remedy is set forth in the second sentence of Article 26 which provides a possibility where a Contracting state may require exhaustion of local remedies. The tribunal added that a state may require the exhaustion of domestic remedies as a prior condition to its consent to ICSID arbitration (i) in a bilateral investment treaty, (ii) in its domestic legislation or (iii) in a direct investment contract containing an ICSID clause. According to the tribunal the Argentina – U.S. BIT does not provide any point for the exhaustion of domestic remedies, neither the domestic legislation of Argentina does so. BIT provides a fork in the road provision giving an option to the investor to choose between having recourse to the ordinary jurisdiction, previously agreed dispute settlement procedures or having recourse to the international arbitration (A BIT clause which provides that the investor must choose between

nal decided that the consent to ICSID is given by BIT; therefore any other forum provision after the consent to ICSID arbitration is established is invalid. Therefore, the tribunal in this case accepted ICSID's jurisdiction for treaty violation claims, despite the fact that the dispute arose out of a contract and the contract provided a forum other than ICSID, based on the consent given to ICSID in the related BIT.

Another major ICSID decision on this issue was the decision on annulment in the *Vivendi* case.³⁹ In this case, the concession contract provided a forum provision referring contractual disputes to the Contentious Administrative Court in the relevant province in Argentina. The tribunal made a distinction based on the essential basis of the claim: if the essential basis was contractual, the exclusive jurisdiction clause would be given effect; on the other hand, if the essential basis was a treaty standard, the dispute resolution clause of the BIT would apply notwithstanding the exclusive jurisdiction clause of the contract. Therefore, a contractual claim might give rise to an international law claim if the essential basis of a claim is a treaty standard. On the other hand, according to the tribunal, a pure contractual claim still can be subject to ICSID's jurisdiction if the dispute resolution clause of the BIT refers to "any dispute" provided that no any other forum selection clause exist in the contract between the parties⁴⁰.

On the other hand, the cases of *SGS v. Philippines*⁴¹ and *SGS v. Pakistan*⁴² considered the umbrella clauses when addressing the same issue, but with different results. Umbrella clauses are provisions in investment treaties which require compliance with investment contracts or other undertakings of a state to an investment treaty's substantive standards.⁴³ In *SGS v. Philippines*, the investment contract⁴⁴ between a Swiss investor and the Philippines provided that actions concerning disputes in connection with the obligations of each party to the agreement would be filed at the Regional Courts of Makati or Manila.⁴⁵ A dispute arose regarding the alleged failure to pay SGS's invoices for services in the period between 1998 and 2000. SGS argued that the umbrella clause of the BIT (Article X (2)) required the state to respect "commitments or obligations arising under contracts entered into by

recourse before the domestic courts or international arbitration and that once made, the choice is final is often referred as a "fork in the road" provision. For more information see Schreuer, *supra* note 35, at 239-240). According to the tribunal the dispute settlement procedure of the parties' agreement cannot be considered a previously agreed dispute settlement provision since administrative jurisdiction cannot be selected by mutual agreement. The tribunal decided that once a valid consent to ICSID arbitration is established, any other forum should decline jurisdiction.

39 See *supra* note 23.

40 See *Vivendi*, *supra* note 23, at ¶ 98. The Committee contrasted this provision with Article 1116 of the NAFTA which requires a claim that a breach of one of the substantive NAFTA provisions has occurred; see Schreuer, *supra* note 35, at 243.

41 See *supra* note 23.

42 *SGS Societe General de Surveillance S.A. v. Islamic Republic of Pakistan* Decision on Jurisdiction ICSID Case No. ARB/01/13 (hereinafter "*SGS v. Pakistan*") available at http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf (last visited August 12, 2009).

43 Schreuer, *supra* note 35, at 250.

44 Investment contract in this case was a Comprehensive Import Supervision Service Agreement ("CISS Agreement") regarding provision by SGS of import supervising services to the Philippines.

45 See *SGS v. Philippines*, *supra* note 23, at ¶22

the parties.” The court concluded that the contract at issue was an obligation of the Philippines with regard to specific investments in its territory. It added that the effect of the umbrella clause was to elevate a breach of contract claim to a treaty claim under international law.⁴⁶ The tribunal found that the umbrella clause includes the obligation to pay what is due under the contract and therefore elevates a breach of contract claim to an international law claim. Accordingly, the tribunal recognized its jurisdiction regarding international law *i.e.* BIT claims of SGS. On the other hand, this tribunal also recognized the jurisdiction of ICSID for pure contractual claims under the “disputes with respect to investments” language of dispute resolution provision of BIT.⁴⁷ The Tribunal accordingly set forth that it was open to SGS to refer the present dispute as a contractual dispute under the dispute resolution provision of the BIT and that the BIT’s general dispute resolution provision did not purport to override the exclusive jurisdiction clause of the investment contract in the case at issue.⁴⁸ In addition, the tribunal analyzed its jurisdiction under Article 26 of ICSID Convention. Different from the *Lanco* case, this tribunal decided that the phrase “unless otherwise stated” in this Article include a contrary statement or agreement by the parties. Therefore, according to the tribunal when there is a contrary agreement between the parties regarding contractual disputes, the contractual disputes are not admissible before ICSID.⁴⁹

In *SGS v. Pakistan*, the dispute arose out of a contract between SGS and Pakistan for the provision by SGS of services similar to those provided by SGS to the Philippines. The dispute was again regarding alleged non-payment of invoices. Article 11 of the BIT provided that “either contracting part shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the other Contracting Party.” SGS again argued, based on this umbrella clause, that the breach of contract claims were elevated to the level of breach of international treaty claims, thereby the tribunal had jurisdiction over the contractual claims. However, the Tribunal in *SGS v. Pakistan* rejected this argument. The tribunal did not accept that the word “commitments” used in Article 11 should extend so as to elevate the contractual claims to the level of a breach of international treaty

46 Judith Gill & Matthew Gearing & Gemma Birt, *Contractual Claims and Bilateral Investment Treaties: a Comparative Review of SGS Cases*, 21 (5) Journal of International Arbitration 397 (Oct. 2004).

47 As in the *livendi* case, this tribunal also compared NAFTA and BIT at issue and stated that when investor-state arbitration is intended to be limited to claims brought for breach of international standards, this is expressly stated such as Chapter 11 of NAFTA. See *SGS v. Philippines*, *supra* note 23, at ¶132.

48 Different from *Lanco* case, the tribunal in this case stated that “it should not matter whether the contractually-agreed forum is a municipal court or domestic arbitration”. “[The] basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision”; see *SGS v. Philippines*, *supra* note 23, at ¶138. The Tribunal resounded its decision on the basis of the *maxim generalia specialibus non derogat*. According to the Tribunal BITs were not concluded with any specific investment and accordingly BITs’ dispute resolution provisions were more general than specific provisions of particular contracts, which are freely negotiated between the parties. See *Id.*, at ¶141.

49 The tribunal makes a distinction between admissibility and jurisdiction. According to the tribunal, unless otherwise provided, treaty jurisdiction is not abrogated by contract. On the other hand a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum; see *SGS v. Philippines*, *supra* note 23, at ¶ 154.

law. In addition the tribunal stated that the dispute settlement provisions of the BIT would not supersede all otherwise valid non-ICSID forum selection clauses of the parties. As a result, the tribunal decided that the alleged breaches of the investment contract did not constitute or amount to a BIT breach and the tribunal had no jurisdiction over claims exclusively on contract.⁵⁰

As a result, pure contractual claims are generally considered to be arbitrable, in addition to ICSID's generally-recognized jurisdiction over pure contractual claims. However, according to ICSID tribunals, alleged breaches of contracts do not directly constitute a treaty violation claim, but they may do so, depending on the essential basis of the dispute or the presence and the wording of umbrella clauses of investment treaties.

b- Disputes arising out of Investment Authorization

As stated above in some BITs of Turkey, investment dispute is defined as a "dispute between an investor and the contracting state relating to interpretation or enforcement of an investment authorization granted by investment authority of the former." Therefore, an investment authorization also can give rise to an investment dispute before an investment arbitration mechanism to which Turkey gave its consent by the related bilateral investment treaty.

These BITs mostly state that an investment authorization is granted by the investment authority of the contracting state. A narrow interpretation of the wording "investment authority" will result in accepting only the Undersecretary of Treasury, Foreign Investment General Directorate as the investment authority in Turkey.⁵¹ This authority served as a sole authority to grant permits and authorizations regarding foreign direct investments in Turkey until June 2003 when the permission and authorization system was transformed to a notification system by the Law on Foreign Direct Investments.⁵² Today, no permission exists regarding foreign direct investments, except liaison office formations.

However, the permission granted to foreign investors by the Undersecretary of Treasury regarding formation of a corporation, participation in a corporation, opening a branch or liaison office before the annulment of permission system seem to be in the form of an investment authorization. Therefore, disputes arising out of previous investment authorizations can be subject to investment arbitrations within the meaning of the term 'investment treaties.'

However, it can be argued that investment authority term must be interpreted broadly, to include authorities other than Undersecretary

⁵⁰ See *SGS v. Pakistan*, *supra* note 41, at ¶ 162.

⁵¹ See Law No: 4875, Decision date: 6.5.2003, Official Gazette: 6.17.2003 – 25141, Article 2 (c) and Application Regulation of Law on Foreign Direct Investment Official Gazette: 8.20.2003 - 25205 article 3.

⁵² See Law No: 4875, Decision date: 6.5.2003, Official Gazette: 6.17.2003 – 25141.

who grant any kind of permit, license or authorization to investors. Accordingly, the permits, licenses granted by other authorities can also be considered to be an investment authorization within the meaning of investment treaties.

Under Turkish law, the permits, licenses or authorizations given by all kinds of state bodies are in the form of unilateral administrative acts. Therefore, other than contracts, unilateral administrative acts also can give rise to an investment dispute subject to an investment arbitration mechanism. A possible investment arbitration request arising out of a dispute due to an investment authorization can be based on the investment dispute definition of a bilateral investment treaty, such as a dispute arising out of an investment authorization. In addition, a definition of investment dispute such as a dispute relating to an investment can also be the basis of such a claim provided that this permission can be deemed to be an investment under the related investment treaty. Further, if the definition of investment dispute includes only disputes arising out of breach of treaty rights of investors by the state, also in this case an investment authorization can be the origin of the dispute provided that an alleged treaty violation claim exists.

c- Treaty rights violation claims

The bilateral or multilateral investment treaties of Turkey include rights such as national treatment, most favored nation treatment, non discrimination, fair and equitable treatment and non confiscation or nationalization without a prompt, adequate and public benefit compensation. Any alleged violation claim of these rights by Turkey may result in an investment dispute subject to investment arbitration mechanisms provided in investment treaties.

Investment treaties do not provide any restriction as to what kind of transactions can be the origin of these disputes. On the other hand, it seems that an investor may request arbitration against a state for every kind of public law transaction (executive, legislative or judicial activity) provided that this transaction generates a violation of any treaty right of an investor. Therefore, any treaty violation claim can find its origins in a number of public law transactions.

First, how may a court decision be the origin of a treaty right violation claim?⁵³

53 One view under Turkish law is that the state can not be hold liable because of the activities of the judiciary power, unless otherwise provided in a law see Yildizhan Yayla, *Idare Hukuku*, 138 (1990). Pursuant to this view, a decision given at the end of a judicial process is final. Therefore, this decision can not be reviewed. In addition, it is argued that liability of the state for judicial functions would result in accepting non conformity of judicial decisions and this would cause distrust towards the courts; see Pertev Bilgen, *Idare Hukuku Dersleri, Idare Hukukuna Giriş*, 327 (1996). Bilgen disagrees with this view and argues that the state can be hold liable for the judicial functions. According to Bilgen, the independency of the courts does not change the fact that the judicial function is exercised by the courts on behalf of the state, it is a public law function of the state and the damage occurred due to judicial function has to be compensated under the principle of equality towards the public obligations. Further, the author states that a final award never reflects the absolute true, and almost all jurisdictions recognize extraordinary means of review for court decisions, accordingly, a state can be hold liable for the judicial function. Finally, he adds that holding the state liable for the judicial function will not distrust towards the court, but in contrary, this will strengthen the trust on the same

INVESTMENT ARBITRATION AND SOVEREIGNTY

In the *Loewen*⁵⁴ case, the claim arose out of a trial court decision of the U.S. The claimant alleged that in litigation arising out of a commercial dispute brought against the Claimant, the Mississippi State Court violated Chapter 11 of NAFTA by its discriminatory treatments and arbitrary applications.⁵⁵ U.S. objected to the jurisdiction of the ICSID tribunal, among others on the grounds that the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not “measures adopted or maintained by a party” within the scope of NAFTA Chapter 11,⁵⁶ and the Mississippi court judgment cannot give rise to a breach of Chapter 11 because it is not a final act of the U.S. judicial system. The tribunal interpreted the phrase “measures adopted or maintained by a party” broadly to include the acts of the judicial, as well as legislative and administrative, bodies in accordance with the general principle of state responsibility by referring to draft Article 4 on State Responsibility adopted by the United Nations General Assembly Drafting Committee. The tribunal pointed out that the state’s responsibility for judicial acts came to be recognized and judiciary is not independent of the state, the same as legislative or executive activity. The tribunal concluded that NAFTA Chapter 11 may extend to disputes, whether public or private, so long as the state is responsible for the judicial act which constitutes the measure complained of and that the act constitutes a breach of NAFTA obligation like, for example, a discriminatory precedential judicial decision. In addition, regarding the grounds for objection that the Mississippi Supreme Court decision was not a final decision and cannot give rise to a breach of NAFTA Chapter 11, the tribunal also stated that any judicial action which violates a rule of international law is attributable to the state, whether it is a final action or not. As a result, the tribunal recognized the state responsibility theory under which any conduct of a state organ shall be considered as an act of the state under international law, whether the organ be legislative, executive or judicial and whatever position it holds in the organization of the state.

In the *Mondev*⁵⁷ case, the claim arose out of a U.S. Supreme Court decision. The claimant alleged that in a litigation arising out of a commercial contract dispute filed by the Claimant, the Massachusetts Supreme Court violated Chapter 11 of NAFTA including national treatment, minimum standard of treatment and expropriation and compensation provisions.⁵⁸ In this case, the U.S. did not object to the ju-

manner that the extraordinary means of review do. *Id.*, at 328-330.

54 *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3. (NAFTA) (January 5, 2001) (hereinafter “*Loewen*”) available at <http://ita.law.uvic.ca/documents/Loewen-Jurisdiction-2.pdf> (last visited August 12, 2009).

55 See *Loewen*, *supra* note 53, at ¶¶ 30,31.

56 Article 1101 (1) of NAFTA provides: “This Chapter applies to measures adopted or maintained by a party relating to (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; ...”

57 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (October 11, 2002) (hereinafter “*Mondev*”) available at <http://ita.law.uvic.ca/documents/Mondev-Final.pdf> (last visited August 12, 2009).

58 For claims of the Claimant see *Mondev*, *supra* note 56, at ¶ 2.

isdiction of the tribunal regarding the decisions of the Supreme Court and the tribunal did not discuss the arbitrability of judicial decisions; however the question was whether the conduct that had given rise to the dispute occurred before NAFTA came into effect.⁵⁹

As a result, even if there is no arbitration case against Turkey arising out of a claim of violation of treaty rights based on a court decision to the date, it seems that in the near future Turkish court decisions, whether trial court or appeal court decisions and even if related to a private law dispute, may give rise to an investment arbitration claim to the extent that they are violating treaty rights of investors. For example, the origin of an investment dispute might be a ‘set aside’ decision of the Constitutional Court. Under Turkish law, the Constitutional Court reviews the conformity of laws with the Constitution and is entitled to cancel a provision of a law if it is not in conformity with the Constitution. Therefore, if the Constitutional Court sets aside a provision of a law which granted some rights to the investors, it is likely that an affected foreign investor refers to an arbitration by alleging that this cancellation constitutes a violation of its rights under an investment treaty such as most favored nation treatment, national treatment, fair and equitable treatment.

Second, how can a legislative activity give rise to a dispute subject to investment arbitration? In *Ethyl*⁶⁰, the claim arose out of an act passed by the Canadian Parliament, namely Manganese-based Fuel Additives Act. The claimant alleged that this act breached the obligations of Canada under NAFTA Chapter 11. In this arbitration case, the tribunal dealt with the question as to whether or not a legislative action can be considered a “measure adopted or maintained by a party” within the scope of NAFTA Chapter 11 and therefore be subject to arbitration. Canada argued that no legislative action constitutes a “measure” subject to arbitration under Chapter 11 of NAFTA. Given that the act at issue came into force and received Royal Assent, the tribunal concluded that it constitutes a “measure” within the meaning of NAFTA by referring to the definition of the “measure” in NAFTA which incorporates “any law, regulation, procedure, requirement or practice.”

In *PSEG v. Turkey*⁶¹, PSEG alleged breach of U.S. – Turkey BIT by legislative amendments in Turkish Energy Market eliminating the possibility of obtaining a Treasury guarantee, the long-term power purchase agreement and fund agreement⁶².

⁵⁹ See *Mondev*, *supra* note 56, *Mondev*, at ¶¶ 67-69.

⁶⁰ *Ethyl Corporation v. Canada*, Decision on Jurisdiction, UNCITRAL (June 24, 1998) (NAFTA) (hereinafter “*Ethyl*”), available at <http://ita.law.uvic.ca/documents/Ethyl-Award.pdf> (last visited August 12, 2009).

⁶¹ See *supra* note 3.

⁶² *PSEG v. Turkey*, *supra* note 3, ¶¶ 45-54. Under Turkish law some commentators argue that the state can not be held liable for legislative activity in referring to the principle of unliability of the sovereignty. Professor Bilgen argues that this view is not acceptable today. Sovereignty is not only exercised by the legislative power but also by the executive

Finally, how can an executive activity can give rise an investment arbitration dispute?

In the *Occidental*⁶³ case before the London Court of International Arbitration based on UNCITRAL Arbitration Rules, the dispute arose out of Resolutions of a state entity of Ecuador, namely Servicio de Rentas Internas (“SRI”), revoking the granted Value Added Tax (“VAT”) payments to Occidental and denying further reimbursements. When denying the reimbursement requests made by Occidental, SRI based upon the amendments in tax legislation, arguing that the oil industry is not entitled to tax refunds. Therefore, the dispute in this case originated from the administrative acts of a state entity, as well as legislative amendments in tax law. Occidental alleged a breach of treaty obligations by Ecuador arising out of the BIT between the U.S. and Ecuador, such as breach of fair and equitable treatment, treatment no less than that required by international law, national treatment, as well as impairment by arbitrary and discriminatory measures. Regarding legislative amendments in the tax law, the tribunal concluded that the tax law was changed without providing any clarity about its meaning and extent and the practice and the regulations were also inconsistent with such changes. On the grounds of lack of stability and predictability of the legal and business framework of the investment, the tribunal concluded that Ecuador breached its obligations to accord fair and equitable treatment and in addition full protection and security. The tribunal also pointed out that an alteration in legal and business environment in which the investment has been made triggers a treatment that is not fair and equitable. Regarding the resolutions of SRI, the tribunal concluded that they were breaching the ‘no less favorable treatment provision’ of the BIT because of the erroneous and narrow interpretation by SRI of the tax legislation to exclude the oil sector from reimbursement. As a result, on the grounds that both changes in the legal environment by amendments to the tax law and revoking the Granting of the Resolutions and denying further VAT funds, the tribunal concluded that there was a breach of the treaty rights of Occidental.

Investments of foreign investors in Turkey might be subject to a number of administrative acts in the form of unilateral administrative act or administrative contracts.⁶⁴ In addition, an investment itself may consist of an administrative act (i.e. license, permission). As seen

and administrative power, therefore the state should be hold liable due to laws, as well as the executive power does due to its acts and actions; see Bilgen, *supra* note 52, at 318, Yayla, *supra* note 52, at 135.

63 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467 (July 1, 2004), available at http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf (last visited August 12, 2009).

64 Under Turkish law, administrative acts are generally classified in two groups: (i) unilateral administrative acts, (ii) administrative contracts. Unilateral administrative acts are generally classed in two such as (i) personal acts and (ii) general regulatory acts General regulatory acts create general, abstract legal effects Decrees, regulations, ordinances, orders, plans, programs are grouped under the general regulatory acts On the other hand, personal acts create direct effects merely for a specific person or situation For example, license, permission, retrieval of permissions, bans, imposition of a tax; see Yayla, *supra* note 52, at 105-107.

above, an administrative act of Turkish government may also give rise to an investment arbitration claim to the extent that it allegedly violates a treaty right of an investor.

As a result, all kinds of public transactions and acts are arbitrable before the investment arbitration mechanisms provided in the investment treaties. Turkey will face more arbitration cases in the near future on alleged violations of treaty rights. Therefore, Turkey has to reconsider its public law acts and activities in compliance with the investment treaties.

V- Principle of Arbitrability

According to the principle of arbitrability provided under Turkish law, only transactions which are subject to the free will of the parties, mainly contractual disputes, are arbitrable. On the other hand, disputes arising out of issues such as propriety rights, private life rights, family law issues and marriage, bankruptcy, criminal law and administrative law are not arbitrable since they are not subject to the free will of the parties.⁶⁵ This principle is based on the element of public interest.⁶⁶

As explained above, the investment treaties make no distinction as to what kinds of acts, actions or transactions of a state may give rise to an alleged treaty violation claim. Therefore, all kinds of public law acts and actions of public interest may generate an investment arbitration claim provided in investment treaties. In other words, public law disputes which are not subject to the free will of parties at the level of national law, are deemed to be subject to the free will of the parties under investment treaties.

Pursuant to the New York Convention of 1958, Article V (2) (a) states that the fact that the subject matter of the difference is not capable of settlement by arbitration under the law of the country where the enforcement is sought is a grounds to deny an enforcement claim. Article 62(c) of the Turkish Law on International Private Law and Procedural Law (Law 5718) refers to a similar provision. In accordance with these provisions, may an enforcement court in Turkey refuse to enforce an investment arbitral award if the award regards a dispute arising from a public law transaction which is not considered to be a matter subject to the free will of the parties under Turkish domestic law? The answer will likely be no. It seems that, as stated above, by giving its consent to investment arbitration mechanisms through investment treaties, Turkey has accepted that all kinds of investment disputes, even those arising out of a subject which is not arbitrable under national law, are arbitrable before international investment arbitration mechanisms. In addition, with respect to ICSID decisions, this

65 Suha Tanrıver, *Kamu Hizmeti İmtiyaz Sözleşmeleri ve Tahkim*, Prof. Dr. Kemal Oğuzman'ın Anısına Armağan, 1071 (2000); see also Turkish Civil Procedure Code, Article 518.

66 Geoffrey M. Hartwell, *Arbitration and the Sovereign Power*, 17 (2) Journal of International Arbitration, at 13 (2000).

is not a question at all since ICSID has its own enforcement rules and an arbitral award given by ICSID is not subject to any enforcement procedure but directly applicable against a state.

IV- Sovereignty

The question of whether international law threatens the external legal sovereignty of states has been well discussed. The prominent view on this respect is that there is no danger. According to this view, international law as a form of agreement law is not a denial of states' legal sovereignty, but rather an exercise of that sovereignty.⁶⁷ However, it is also agreed that the severity of enforcement mechanisms that consist of outside pressure provided in investment treaties may result in the loss of external sovereignty.⁶⁸

Today, one of the limitations of state sovereignty is investment treaties. Under these treaties, contracting states provide the investors of other contracting states with a wide variety of rights such as fair and equitable treatment, non-discriminatory treatment, national treatment, most-favored nation treatment. Under these investment treaties, contracting states also give their consent to a number of investment arbitration mechanisms such as ICSID and UNCITRAL to which foreign investors can refer for their alleged investment treaty violation claims. As one of these enforcement mechanisms provided under investment treaties, ICSID decisions are binding and directly applicable in a contracting state. Turkey is party to a number of investment treaties and also to the ICSID Convention.

No limitation is provided in the investment treaties as to what kinds of acts, actions or transactions of a state may give rise to an arbitration claim. As explained above, the claims before investment arbitration mechanisms may originate from different acts or actions of a state such as administrative contracts, administrative acts or actions, legislative acts or judicial decisions. Therefore, giving consent in investment treaties to investment arbitration mechanisms for violation of investment treaty rights results in that the all kinds of acts or actions of every kind of public authorities of a sovereign state (i.e. courts, regulatory bodies) can be subject to the jurisdiction of an investment arbitration mechanism since a state might violate these rights through actions of its different bodies.⁶⁹ In other words, legislative, executive or judicial activities of a state may be subject to an investment arbitration mechanism to the extent that this activity gives rise to an alleged violation claim by investors of their investment treaty rights. Can this

⁶⁷ Steven Lee, *A puzzle of Sovereignty*, at 4, available at <http://www.bu.edu/wcp/Papers/Poli/PoliLee.htm> (last visited August 12, 2009).

⁶⁸ *Id.*, at 5.

⁶⁹ Thomas W. Waelde, *Treaties and Regulatory Risk in Infrastructure Investment, The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment* 34 (2) *Journal of World Trade*, Kluwer Law International, at 37 (2000).

kind of enforcement mechanism provided in investment treaties with respect to violation by states of treaty rights, still be considered within the concept of sovereignty?

When he explained in the beginning of XVI age that “if you refer to an outside organization for resolving disputes within a state, you can no longer talk about the State or the sovereignty,” Suarez was merely referring to the outside organizations for private law disputes.⁷⁰ He did not even presume that one day a state would be liable for all its legislative, judicial or executive activities before an outside arbitral tribunal.

This kind of liability of the state with all its bodies before an outside organization is also recognized under the international human rights conventions. For example, Turkey is party to the European Convention on Human Rights which provides for the liability of states for non-conforming acts or actions of their bodies in the context of the Convention before the European Court of Human Rights.⁷¹ However, where the European Convention of Human Right provides for the liability of Turkey in general towards its citizens, investment treaties provide liability of Turkey in favor of foreign investors. In consideration of the fact that a state’s sovereignty originates from its nation, the limitation of state sovereignty in favor of its citizens through an international human rights convention can still be considered to be within the concept of sovereignty. However, when a state’s sovereignty is limited in favor of an outside factor, i.e. nationals of other states, we should reconsider the concept of state sovereignty.

Conclusion

Investment arbitration is a new concept for Turkey. Turkey gives its consent to certain investment arbitration mechanisms through investment treaties. The number of investment arbitration cases against Turkey is on the increase. Given that the investment arbitration mechanisms decide on the state’s liability arising out of public law activities through executive, legislative and judicial power, the concept of investment arbitration requires reconsideration of the concept of state sovereignty.

⁷⁰ Cemal Bali Akal, Varolma Direnci ve Ozerklik, Bir Hak Kurami icin Spinoza’yla, at 281-288 (2004).

⁷¹ For liability of the states before the European Court of Human Rights see Seref Gozubuyuk & A. Feyyaz Gocuklu, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, Avrupa İnsan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi (2003); Seref Gozubuyuk, Yönetim Hukuku, at 462.