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EXCLUSIVITY OF ICSID's JURISDICTION?

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Izvorni znanstveni članak

Isključiva nadležnost Međunarodnog centra za rješavanje ulagačkih sporova?

Ovaj članak posvećen je vrijednom naporu glede određivanja isključive nadležnosti međunarodnog arbitražnog tijela za rješavanje ulagačkih sporova između država i državljana drugih država. Premda je u Konvenciji o rješavanju ulagačkih sporova između država i državljana drugih država dat novi pristup u međunarodnom pravu, upravljen na napuštanje pravila o iscrpljivanju domaćeg pravnog puta i ograničavanje prava na pružanje diplomatske zaštite, ona ipak sadrži kompromise s uvriježenim stajalištima u doktrini. Isključiva nadležnost Centra za rješavanje ulagačkih sporova ozbiljno je narušena i modificirana uvođenjem mogućnosti da stranke uglave "nešto drugo".

Autor se zalaže za uvođenje novih pravila bez iznimaka te za izravan pristup pojedinaca i pravnih osoba međunarodnim tijelima u svezi s njihovim građanskopravnim sporovima s državama - bez bilo kakvih ograničenja ratione materiae i ratione personae koja su sadržana u Washingtonskoj konvenciji iz 1965. godine.

Ključne riječi: *Washingtonska konvencija iz 1965., Međunarodni centar za rješavanje ulagačkih sporova, isključiva nadležnost.*

1 General Remarks

The preparatory work on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter - Convention) by virtue of which the International Centre for Settlement of Investment Disputes

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(hereinafter - ICSID or Centre) was established, shows that the entire idea was motivated by the necessity of finding ways and means to promote foreign private investments and canalize the immense power of private capital in favour of less developed countries.[1] It was also absolutely clear that private capital would not flow into LCD's without suitable protection. Obviously, disputes between private investors and host states arise from time to time and appropriate means of settling these disputes were necessary.

The traditional rules and doctrine of international law did not recognize private persons as subjects and accordingly, their *jus standi* before international forums was not recognized. Of course this doctrine had to change towards some degree of subjectivity.[2] The Convention represents one of the instruments that support the growing opinion in favour of capacity of private persons in proceedings before an international forum. Traditionally, whether correct or not, private investors do not believe too strongly in the impartiality of the local courts in actions against the host states. As history shows, those proceedings were in many cases only a veil for the "legalized robbery" of foreign private investors. On many occasions the investors were forced to invoke the diplomatic protection of their states, which could have brought their cases before an international tribunal. However, this was not the ideal way to resolve the problem. First, in some countries private investors were required to waive their right to seek diplomatic protection.[3] Second, host states could refuse to submit to the jurisdiction of an international tribunal.[4] In any case, invoking diplomatic protection could worsen relations between the states, which is certainly an undesirable result. Modern international relations in trade and other economical activities are regulated through bilateral and multilateral conventions and not by gunboat diplomacy. However, this century is full of contrary examples.[5]

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[1] The History of the preparatory works on the Convention has been published by the Centre in four volumes:

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents concerning the Origin and the Formulation of the Convention:

Vol I Analysis of Documents Concerning the Origin and the Formulation of the Convention (Analyse des Documents Relatifs a l'Origine et a l'Elaboration de la Convention, Analisis de los Documentos Relativos al Origen y la Formulacion del Convenio), 1970

Vol II Documents Concerning the Origin and the Formulation of the Convention, 1968

Vol III Documents Relatifs a l'Origine et a l'Elaboration de la Convention, 1968

Vol IV Documentos Relativos al Origen y la Formulacion del Convenio, 1970.

[2] See Norgaard, The position of the Individual in International Law, 1962.

[3] However, giving diplomatic protection is the right of a state and it is doubtful that a waiver by a private investor could have any effect.

[4] See History, p. 1 - Note by A. Broches, General Counsel transmitted to the Executive Directors: "Settlement of Disputes between Governments and Private Parties".

[5] E. g. The joint naval intervention by Germany, Great Britain and Italy in Venezuela in 1902 had all the features of gun boat diplomacy. This and other European interventions sparked

Certain private investors were able to negotiate arbitration agreements with host countries but the validity of those agreements was in many cases denied and, finally faced with refusal of the host country to proceed with arbitration, the private investor could only invoke diplomatic protection.[6] That situation was obviously "unjust". Apart from the problem of determining when law is just or unjust, because the definition would obviously include extralegal principles, we can at this point be satisfied with the idea of justice as "a demand for equality".[7] International as well as national law can be unjust, and theories that law cannot be unjust (although laws are not always good since they do not always serve the people's needs - but still they are not unjust) seem to be unrealistic.[8] Unfortunately, law can be, and much too often is, bad or unjust.

In other words, widespread recognition by the states that foreign private persons, both individuals and legal persons, could have direct access to an international tribunal in case of certain disputes with host governments was necessary. Although those ideas were primarily in the interest of the developing countries, it should be noted that these countries were the group most opposed to the Convention. They had a one-sided and narrow approach to the entire idea. This was clearly seen in the consistent attitude of Latin American countries inspired by Calvo's doctrine. It would be unfair not to comment that provisions of the Convention are also in favour of private investors, but that is quite normal in efforts to find the solutions in order to satisfy mutual interests. The proposed provisions were widely debated, but special consideration was given to the provisions concerning jurisdiction. There were many objections predominantly directed toward restriction of the jurisdiction of the Centre (excluding all classes of disputes but "investment" disputes[9] calls for the precise definitions of the term "investment",[10]

characteristic exercises in ad hoc international law to suit debtors in default and gave birth to the Drago Doctrine and the Calvo clause. See Drago, Luis N, La Republica Argentina y el Caso de Venezuela, 1903.

[6] History, p. 2. See Broches, The Convention on the Settlement of Investment States and Nationals of Other States, Recueil des cours de l'Académie de droit international, 1972, p. 344. See also Staker, Christopher, Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes, 61 BYBIL, 1990 p. 155; Paasivirta, Esa, Internationalization and Stabilization of Contracts Versus State Sovereignity, 60 BYBIL, 1989, p. 315.

[7] See Ross A., On Law and Justice, 1959, p. 269.

[8] See Hobbes, Tomas, Leviatan, I and II, ed. Schneider, H.W., 1958 ch.30, p. 272.

[9] See History, p. 652 sq. Letter adressed to the Bank by the Minister of Finance of the Republic of China on November 9, 1964.

1) Jurisdiction of the Center:

The jurisdiction of the Center as stated in Article 26 of the Draft is too broad, especially in view of the loose definition given to the word "investment" under article 30. While it may be difficult to provide a clear-cut definition for "investment" in this Convention, it is nevertheless clear that the purpose of this Convention is to encourage international private investment and

nationality of the investor etc.[11]). The significant portion of the objections was

not to protect foreign property as such. Capital importing countries seek foreign investments either by special investment promotion legislation or through investment agreement with the foreign investor. It is therefore only reasonable that the jurisdiction of the Center to be created by this Convention should not extend to legal disputes that arise out of "investments" other than those made pursuant to an investment agreement with the host State in response to special investment promotion legislation. It is suggested that the wording of article 26(1) be amended accordingly.

[10] See Amesaringhe C.F., The Jurisdiction, .p.178. sq.; Schreuer, Commentary - Article 25, p. 355 sqq.; Lamm, C.B., Smutny, A.C., The Implementation of ICSID Arbitration Agreements, 11 FILJ, 1996. One of the proposals was - "The term "investment" comprises all categories of goods and includes but is not limited to:

a) the ownership of movables and immovables as well as all other rights in rem such as mortgages, pledges, etc.;

b) the right of participation in companies and all other participations;

c) credit (pecuniary obligations) and rights to a performance having an economic value;

d) copyrights, industrial property rights, technical processes, goodwill; concessions under public law, including exploration and extraction concessions".

See History p. 492. sq. Mr. Ghanem (Lebanon) ..."investment" was an economic concept and did not correspond to any European legal concept, it was essential to clarify it before it could be incorporated in a legal instrument. To begin with, the concept should be analysed in a way in which it was applied by investors and States. Thus in his view the ways in which capital was invested in a country, could be exemplified by three hypothetical cases:

1. An investor might acquire all or part of a local private enterprise or conclude a contract with it. The host State was then outside this legal bond, and could not, therefore, be held to any special obligation vis-a-vis the investor that would permit recourse to arbitral procedure. The investor would in such a case, have the same status vis-a-vis the State as the State's nationals.
2. An investor might enter into a contract with the host State but on the terms and according to the rules that would have governed a contract between the State and one of its nationals. The State was clearly a party to the agreement, but the foreign investor should not be able to count on any form of jurisdictional privilege not enjoyed by the nationals of that state. In this case, as in the previous one, the Contract as a whole could only be governed by the internal laws of the host State.
3. The investor might have invested only because of a legal arrangement, quire outside the ordinary law, between him and the host State. Such an agreement could only be valid because it had been concluded by the government of the host State which had the power to make such a contract binding. The State was, therefore, not only a party to the contract but, in the very exercise of its sovereign power by virtue of which it concluded the investment agreement, would have given an implicit guarantee to the investor, that it would not use that sovereign power to alter the terms of investment unilaterally.

Only in the third case could the possibility of inserting a clause compromissoire be considered.

On the basis of this analysis, he proposed inclusion in the Convention of the following definition of the term "investment":

For the purposes of this Convention "investment" shall mean the commitment of capital by the national of a Contracting State in the territory of another Contracting State on the basis of an agreement concluded between the latter and the investor, in accordance with a special procedure for which no provision is generally made in the contracts concluded by that State.

[11] See History, p. 255. - Macaulay (Sierra Leone) and reply of Mr. Broches.

directed to the negation of the exclusivity of the Centre's jurisdiction and to the possibility of the local courts avoidance. [12]

It is quite obvious that the task for the drafters of the Convention was to provide direct access of investors to the Centre without explicit avoidance of local remedies and also without raising certain constitutional problems in some states.[13] This led to the final provision of the Convention which is certainly a step forward but deserves further consideration regarding its application and consequences. In our view, Art. 26 needs revision towards establishing ICSID's jurisdictional exclusivity without any possibility of other remedies - even if the parties stipulate otherwise. One of the achievements was that the idea of exclusivity prevailed. However, it is not clearly set out within the actual provisions of the Convention. Bearing in mind the recent competition between the states to make the investment climate more suitable to attract foreign private investments, it is reasonable to predict that exclusions of the rule of exclusivity of the Centre's jurisdiction would be rare by means on insisting on exhausting local remedies.

Furthermore, exclusivity of the Centre's jurisdiction could be seen in the general prohibition of diplomatic protection where consent to the jurisdiction of the ICSID has been given.[14] The report of the Executive Directors on the Convention does not explain the motivation regarding this provision. There is no elaboration of this rule.[15] However, it is obvious that there is no need for diplomatic protection if

[12] See, History p. 256 Uganda - (Mallamud) pointed out "...effect of Article II, Section 1. would be to place nationals on a par with States. That represented a departure from customary international law and was a step which should not been taken lightly. He asked what justification there was for such a move and whether there were many private investors clamoring to be put on a par with States in order to sue States outside municipal courts."

[13] Op.cit. p.53 sqq.

Mr. Lieftinck....recalled his earlier comments on the desirability of settling disputes between governments and nationals of other states by arbitration and conciliation; on the usefulness of a special concention providing rules and machinery for the purpose; and on the importance of the institutional arrangements, particular with respect to the functions and organization of the proposed Centre and its relation to the Bank and Permanent Court of Arbitration...

Mr Broches agreed with Mr. Krishna Moorthi...that local courts and local law should be respected. Section 4 of article II was not intended to elevate arbitration procedured over local law. It was designed, rather, to avoid any question whether, once there was an agreement to arbitrate, that avenue was immediately availalable or whether it was necessary to pursue other remedies first.

[14] See Art. 27. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

[15] See Report...at 33. "Claims by the investor's State "When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect to a dispute which one of its nationals and another Contracting State have consented to submit, or have

the private party has *locus standi* before international forum.

However, because of the phrase "unless otherwise stated", the consent of the parties, especially in cases in which the state gave its advanced consent in a bilateral investment treaty, could be conditioned to various procedures preceding or even competing with the jurisdiction of the ICSID. In some situations the consent of the parties could in various manners refer to different arbitration bodies - potential conflict is in sight. If the clauses are unclear or poorly written, that can raise more problems which we would like to explore. Special attention should be given to the relationship between the jurisdiction of ICSID, which is alternative or concurrent to national courts or other arbitration bodies. Cases before the ICSID were not numerous, but they are indicative and allow some generalizations. Nevertheless, principle of "exclusivity" is a principle with numerous exceptions.

2 Exclusivity of Jurisdiction

Under the provisions of the Convention, consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. However, the Contracting states may require the exhaustion of local administrative or judicial remedies as a condition of their consent to arbitration before the Centre.[16] Due to the fact that the rule of exclusivity can be modified quite easily and not only in favour of exhaustion of the local remedies. Regarding that, it seems that the second sentence of Article 26 is unnecessary. It appears that the origin of that provision lies in circumstances during the "travaux preparatoires" of the Convention and particular in the fact that some states were explicitly opposed to the rule of exclusion of other remedies. These states included especially the Latin American states under the influence of Calvo's doctrine.[17] We can go back to the debate over justice and injustice, which is affected with extralegal axioms. Each standing point pretends to be general and more satisfiable regarding equity and the people's needs. So, having in mind what happened during the last two centuries, we can understand the frustration of those states. However, their attitude was defective. It is interesting to mention that five of those states created the Central American Court of Justice, which is the first international tribunal to recognize the procedural capacity of individuals to bring claims against Contracting States - except their own.

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submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute."

[16] See Art. 26.

[17] Membership of Latin American states was at the end of 1987 limited to Ecuador and Paraguay - excluding the Caribbean and Central American states. At the end of 90's the situation was quite different. See List of Contracting States (appendix). Also see Baker, James, and Yoder, Lois J., ICSID Arbitration and the US Multinational Corporation, 5 J. Int'l Arb., no. 4 1988. p. 84.sqq; Sprague, A Courageous Course for Latrin America: Urging the Ratification of the ICSID, 5 Houston Journal of International Law, 1982, p.157 sqq.

Of course the rule of exhaustion of local remedies was not forgotten.[18]

Some delegates thought that proposed provisions would privilege foreign investors vis-a-vis domestic citizens.[19] This argument seems to be true. But that doesn't mean that we have to deprive foreigners in order to make equality. The better or more appropriate way is to improve the position of domestic citizens having in mind the treatment of foreigners.

Nevertheless, it seems that the attitude towards the exclusivity of the ICSID's jurisdiction was dominant from the beginning of the work on the Convention.[20] The opposition was quite strong, yet not sufficient to win. However, it had significantly affected the final provisions of the Convention. Maximalistic intentions were directed towards insertion of a provision that would have made "exhaustion of local remedies" a rule and not an exception to the rule of jurisdictional exclusivity, unless otherwise stated.[21] But the majority was against that action of Latin American states.[22] That could also be seen in the provisions on those matters in the Draft Convention of 1964.[23]

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[18] The Court was created in 1907 at Cartago (Costa Rica) by the Washington Convention of 20 December 1907 signed by Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador. See. 2 AJIL, 1908, p. 231

[19] History, p. 348 (Mr Galvez - Chile)...the scope of section 16 was far broader than might appear at first sight, since it brought to light possible conflict between national legislation and the award rendered by the Arbitral Tribunal. A foreign investor, having exhausted all his remedies under the national legislation would be able to resort to arbitration and thus be placed in a privileged position vis-a-vis nationals of the host State. Hence, it should be specified that (which) issues could be submitted to arbitration.

Afterwards the idea arose to include the wording "unless otherwise specified" (Mr. Meneses).

[20] See R 62-1 (SD) (June 5,1962) Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors. See History, p. 19 sqq. Section 4. - "Except as otherwise stated therein, an undertaking to have recourse to arbitration shall be deemed to be an undertaking to have recourse to arbitration in lieu of any other remedy." See also - First Preliminary Draft, Article III sec. 16 - History, p. 162.

Art. IV. Section 16 Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings in lieu of any other remedy.

[21] See History, p. 758 (Mr. Perez - Ecuador)..."strongly advocated the inclusion of a provision to the effect that the investor should first have to exhaust local "administrative" procedures so that the claim could not be instituted before all available local administrative measures have been exhausted".

[22] Op. cit. p. 759 (Mr. Melchior Spain)..."the Article as it stood is entirely satisfactory...the Ecuadorian proposal could lead to confusion..."

[23] See History, p. 622, Z 12 (September 11, 1964) Draft Convention: Working Paper for the Legal Committee. Article 27.

(1) Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings to the exclusion of any other remedy.

In our view the provision included in the second sentence of Art. 26 serves predominantly as a matter of compromise and in some cases as an aid to lead drafters of the arbitration clauses towards which special arrangements in the provisions concerning dispute resolution could be made. But that provision together with wording "unless otherwise stated" could be seen as a failure to establish a new valuable rule.[24] It is quite understandable that the "Report of the Executive Directors on the Convention" stressed the outdated rule of "exhaustion of local remedies".[25]

The drafting history of Art. 26 was predominantly focused on the relationship of ICSID arbitration and the courts of the host countries. The question of concurrent or alternative jurisdiction between ICSID and other arbitral bodies was outside of the scope of the debate. It seems that everyone was preoccupied with "sovereignity, principles of customary international law etc., "and this important question was forgotten. However, "exclusivity" works towards all remedies, including other arbitration proceedings, of course, unless otherwise stated.

The rule regarding the need for exhaustion of local remedies as a condition to proceed with international arbitration is an old-fashioned one, and the whole question is purely academic.[26] Long debates about this question were almost certainly an excuse for some predominantly capital importing states that were not willing to refuse the idea of the Convention openly, but tried at least to minimize the effects of its provisions.[27] All of these efforts of the capital importing countries for

[24] See Cancado, Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, 1983.

[25] See Report...at 32 "It may be presumed that when a State and the investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make it clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies".

[26] See Cancado, T, The Birth of State Reponsibility and the Nature of Local Remedies Rule, 56 Revue de droit de sciences diplomatiques et politiques, 1978, p. 157-188; Hackworth, G.H. Responsibility of States for Damages Caused in their Territory to the Person or Property of Foreigners, 24 AJIL, 1930, p. 500 .

[27] History, p. 308. sq. (Mr. Escobar - Bolivia) "...sovereignty of States could not be subordinated to the authority of an international institution without being seriously impaired. Sovereignty could not be alienated, for any consideration whatever, without undermining the State through the dispersion of its powers. Those responsible for preparing the draft had failed to appreciate its adverse effects. Thus the Bank itself seemed to be displaying a lack of confidence in the countries wishing to attract foreign capital; moreover, the existence of the draft Convention might have caused investors to defer action pending the Government's decision on it. In view of those ill effects, he would prefer the Bank to abandon the project. Bolivia had an investment development law in force which recognized a series of rights, privileges and safeguards in respect of foreign capital invested in this country. Any problems that might arise must be settled by Bolivia's own courts, so as to preclude any unconstitutional discrimination against its own nationals. The Bank should suggest to

abandoning the project of the Convention, or at least towards reducing the jurisdiction of the Centre e.g. by means of restricting disputes that could have brought to it, or restricting the types of persons that have *locus standi* before the Centre, were in fact against their own interests. Confidence among private investors and the capital importing countries and some kind of healthy investment "climate" is absolutely necessary for their development. That is almost impossible to achieve by restricting the jurisdiction of the Centre by any means and certainly not by forcing the "exhaustion of local remedies" rule. In any case, proceedings before the local courts that could be subsequently brought to international arbitration could be seen negatively by either party to the dispute. It is almost certain that local proceedings through a certain period of time[28] are a waste of time and other resources to private investors. On the other hand, the state party to the dispute can also derive negative results from these proceedings. First, publicity before the local courts can induce other investors to reduce or abandon their efforts, and second, a different award in an arbitral proceeding would almost certainly be embarrassing to that country.[29]

To avoid negative results from the "exhaustion of local remedies" rule, states could act (1) by consenting to the ICSID jurisdiction without previous proceedings before local courts or administrative bodies; or (2) by refusing to consent to ICSID jurisdiction after the local proceedings. It could be expected that further developments would be in favour of ICSID jurisdiction without previous proceedings before local courts. It is quite important to note that the provision of Art 26. refers only to the arbitration and not to conciliation before Centre. In case of conciliation, other remedies are available without any particular stipulation of the parties.

Generally speaking the rule of noninterference of other bodies while a proceeding is pending before ICSID is in accordance with the self - contained nature of proceedings under the Convention.[30] They are possible without the assistance of any domestic or other court even in the case that one of the parties is not willing to

governments the adoption of a specific and expeditious procedural system to settle disputes with foreign investors within the legal and administrative machinery of each country. He also observed that if the draft Convention were not unanimously rejected, foreign capital might blacklist the countries that did not wish to submit their disputes with investors to international adjudication".

[28] Even this is limited from 3 to 18 months, which is the usual provision in most BIT's. See INVESTMENT AGREEMENTS - WESTERN HEMISPHERE FTAA WORKING GROUP ON INVESTMENT

www.americas.fiu.edu/ftaa/investme (1999)

[29] See Peters, P., Dispute Settlement Arrangements in Investment Treaties, NYIL, 1991, p. 134.

[30] See Giardina, Andrea - ICSID: A Self-Contained, Non-national Review System in International Arbitration in the 21st Century: Towards "judicialization" and Uniformity? Twelfth Sokol Colloquium, Lillich & Brower ed. New York 1994

cooperate. That can be seen, e.g., from the provisions referring to the constitution of the tribunal,[31] on proceedings in the absence of a party,[32] in autonomy of arbitration rules,[33] applicable law[34] and provisional measures.[35] Moreover it can be

[31] SECTION 2. CONSTITUTION OF THE TRIBUNAL

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2)(a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(2)(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

[32] Article 45

(2) If any party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

[33] Article 41

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

[34] Article 42

(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.

[35] Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances

seen in annulment proceedings. Local courts could have the role only in enforcement proceedings.[36] The provisions of Art. 54(3) and especially of Art. 55 can be strongly criticized. Because of its existence, it is advisable to the investors to negotiate a waiver of immunity of the states that with which they are dealing. However, regarding the Centre's exclusivity, parties to the dispute can stipulate anything else, and in *ultima linea*, liquidate exclusivity of the ICSID's jurisdiction. In order to achieve that, they are advised to use Model clause 12:

> The consent to the jurisdiction of the Centre recorded in citation of basic clause above shall not preclude either party hereto from resorting to the following alternative remedy: identification of other type of proceeding. While such other proceeding is pending, no arbitration proceeding pursuant to the Convention shall be instituted.[37]

3 Effect of Consent

If there is no specific stipulation of the parties, it is obvious that, from the moment at which the agreement to arbitrate is reached, there is no possibility to use other remedy. It is not necessary that the proceeding be pending. The existence of consent is a sufficient cause for this effect.

What would happen if one of the parties, in spite of the existing ICSID arbitration clause, institutes proceedings before some other arbitration or judicial body? Generally speaking, exclusivity of ICSID jurisdiction means that that body should rule its incompetence relating to the actual dispute and, depending on the

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so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

[36] Article 54

(1) 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.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting state relating to immunity of that State or of any foreign State from execution.

[37] See Model clauses 1993.

relevant procedural rules, at least stay the proceedings. But, regarding the other arbitration body, it would be obvious that there is some kind of consent to the jurisdiction of that body. So it is only problem of interpretation. Does the fact that consent exists to the other arbitral body represent "unless otherwise stated"? The answer could be "yes". The same can be said for all other stipulations of the parties to the dispute.

If another remedy is unavailable because of "exclusivity", the situation could be more complicated if, after the decision on its unavailability, institution of the proceeding before ICSID fails independently because of the non-existence of jurisdiction of the Centre. Should this body have the previous right to examine the validity of the arbitration clause and existence of the ICSID's jurisdiction? The doctrine is generally against that possibility, but practice shows that it happens. However, if the attempt to institute proceedings before ICSID fails, this body could ignore the arbitration clause and decide on its own jurisdiction in accordance with its procedural rules. In case there is no decision regarding the jurisdiction of the Centre (either in accordance to screening power of Secretary General or power of the arbitral tribunal to decide on its competence), that body could have difficulties, especially in cases in which arbitration clauses are unclear or poorly written. The problem could be even worse if the parties do not dispute the jurisdiction of that body. Several interesting questions with significant practical considerations could arise. In cases in which proceedings were instituted before a local court and neither of the parties had iniciated proceedings before the Centre, does that court have the right to evaluate the arbitration clauses referring to ICSID and, in case that it presumes that they are not valid, assume jurisdiction? The answer is no, but keeping in mind that investment arrangements could be completed and usually consist of numerous agreements that are not contained in a single instrument, the chances of unclear arbitration clauses rise. In some (most) cases, the court would not be aware that the ICSID clause even exists. A different problem arises when the request for arbitration was made but the Secretary General did not make any decision using its screening power (Art. 36 (3)) and the Tribunal did not make its decision on competence.

In our view domestic courts should in any of those cases abstain from the proceedings except in the case of procedural rulings such as refusing its jurisdiction or referring parties to the ICSID to resolve jurisdictional questions. In other words, independently of the procedural rules of the court, it would not be possible for it to assume jurisdiction. If the court breaks that rule, the State could be involved in an international dispute according to the Art. 64 of the Convention. Accordingly, that would be a dispute over the interpretation and application of the Convention, which should be resolved by negotiations, arbitration or in *ultima linae* before ICJ. The abstention rule[38] should be closely followed, which means that the local court or

[38] See Gifis, p. 2 - "abstention" policy adopted by the federal courts whereby the district court may decline to exercise its jurisdiction and defer to a state court for the resolution of a federal constitutional question.

other body of the any Contracting State, from the moment of awareness of the possibility of jurisdiction of the Centre, should stay any proceedings and especially on any proceeding in order to assume its jurisdiction. [39]

3.1 Mine v. Guinea

The "Rule of Abstention" can be seen clearly from the US brief submitted to the Court of Appeals for the D.C. Circuit in Maritime International Nominees Establishment v. The Republic of Guinea.[40] There, the United States intervened in the proceedings mainly because of the danger to involved in the dispute concerning the application and interpretation of the ICSID Convention pursuant to Art. 64.The United States intended to prevent the US court from improperly asserting jurisdiction over ICSID cases. The proposed rule was similar to the procedure adopted in order to ensure autonomy over jurisdiction by the Iran - US Claims Tribunal in Crokner National Bank v. The Government of Iran[41] and represents the basic principle of federal arbitration law that the United States courts are to respect the parties' intent to have questions of arbitral jurisdiction resolved by the arbitrators.

The history of the case shows that the Liechtenstein company MINE entered into the joint venture with the Republic of Guinea, which provided for establishment of the domestic company known as SOTRAMAR with the basic purpose of ensuring the transport of bauxite from Guinea. The contract contained a conciliation/arbitration clause that was unclear in regard to the certainty of asserting jurisdiction of the ICSID:

> SUBMISSION OF DISPUTE TO THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES
>
> The Government of the Republic of Guinea (hereinafter called "the Host State") and Maritime International Nominees Establishment (hereinafter called "the Investor") hereby agree to submit to the International Center for the Settlement of Investment Disputes

[39] See Delaume, ICSID Arbitration and the Courts, 77 AJIL 1983 - "In the context of the Convention domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration."

[40] 20 ILM 1981 p. 1436 sqq. "in doubtful cases, ICSID must be permitted to determine its own jurisdiction", "to accommodate ICSID's exclusivity and autonomy over jurisdiction the United States believes that cases which arguably fall within ICSID's exclusive jurisdiction must be stayed to allow the party alleging ICSID's unavailability to seek a jurisdictional ruling from ICSID"...."to prevent United States courts from improperly asserting jurisdiction over ICSID cases, and to accord the necessary deference to ICSID's jurisdictional autonomy, the United States submits that rule of absention should be followed in U.S. courts".

[41] Op.cit. p. 1479. See 20 ILM 1981, 363 sqq.

(hereinafter called "the Center") in order to settle by arbitration by virtue of the Convention for the Settlement of Investment Disputes between States and Nationals of other States the following disputes: All disputes existing between the "A" and "B" shareholders of SOTRAMAR deriving from ..... of August, 19, 1971 between the Host State and the Investor. The parties hereby precise that investor is Swiss. Any Court of arbitration constituted on the occasion of a dispute submitted to the Center by virtue of the present agreement shall be composed of one arbitrator nominated by each party and one arbitrator nominated by the President of the Board of Directors of the Center who will assume the chairmanship of the Court.[42]

This clause, in the view of the parties accomplished only that ICSID can act as an appointing authority. Subsequently, the parties to the dispute expressly agreed to the jurisdiction of the ICSID (1975). This consent was contained in two separate instruments.

However, afterward MINE filed a petition to the US court to compel arbitration and asked the court to submit the dispute to the American Arbitration Association instead of to ICSID, which was motivated as follows:

"prompted to propose...a revised submission by an indication from ICSID that the original joint submission was inadequate in certain technical respects to initiate arbitral processes"; that "as long as Guinea does not sign revised submission, MINE cannot initiate arbitration before ICSID"; and that "because ICSID will not appoint arbitrators without the execution by Guinea of the revised submission, the refusal by Guinea to execute the revised submission makes unavailable the method originally agreed upon by the parties for choosing arbitrators".[43]

Nevertheless, the consent existed but it was not contained in a single instrument.

Guinea ignored the district court proceedings which resulted in an order compelling arbitration before the AAA. The court based its decision mainly on the circumstance that the ICSID was unavailable. Subsequently, MINE instituted an arbitration proceeding before the AAA. Guinea ignored the arbitration proceedings in the same manner as before the district court, and the arbitrators rendered an award in favour of MINE.

When MINE filed a motion to confirm the award, Guinea entered into the proceedings with a motion to dismiss for lack of jurisdiction. The main point was that the court order to compel arbitration was based on a false premise because the ICSID arbitration was in fact available. However, the court confirmed the award

[42] Delaume, ICSID Arbitration, p. 786.

[43] 20 ILM 1981 p. 1440.

and entered the judgment, reasoning that Guinea implicitly agreed to submit to arbitration in the US by virtue of its consent to arbitration under ICSID, and that consent constituted waiver from immunity from suit under the FSIA. The court also mentioned that Guinea had conducted substantial commercial activities in the US which was sufficient for its jurisdiction.[44]

The court made several mistakes which do not need special consideration at this point. Nevertheless it would be useful to emphasize a few points. First, the mentioned provision of the FSIA applies only if the existing international agreements to which the US is a party do not provide for something else. The ICSID Convention is certainly an international agreement with that effect, bearing in mind its provision in Art. 26. Second, consenting to arbitration under the auspicies of the ICSID does not mean that the arbitration will take place in Washington D.C. According to Art. 63 of the Convention parties to the dispute may agree to any location as the seat of arbitration with regard to the institutions with which ICSID has made arrangements.[45] Also, they can choose any other location that is subject to the approval of the arbitral tribunal after consultation with the Secretary - General of the ICSID. Only in the absence of special agreement of the parties to the dispute would proceedings take place at the seat of the ICSID (Art. 62). This point was also stressed in the Report of the Executive Directors.[46]

Finally, the court of appeals reversed the district court's decision on the ground that Guinea was entitled to immunity from the suit!? The result was correct

[44] See Delaume...p. 787 sq.

(1) by agreeing to arbitration under the auspices of ICSID, Guinea had implicitly agreed to submit to arbitration in the United States, since ICSID headquarters are located in Washington D.C.;

(2) consent to arbitration in the United States constituted waiver of Guinea's immunity from suit under section 1605(a)(1) of the FSIA;

(3) numerous meetings in Connecticut and the District of Columbia relating to the contract showed that Guinea had conducted substantial commercial activities in the United States, within the meaning of section 1605(a)(2) FSIA, sufficient to give jurisdiction to the court; and

(4) since the court had jurisdiction over Guinea, the order compelling arbitration was proper and the court had authority to confirm the award.

[45] Op. cit. p. 788. Such agreements have been concluded with:
- Permanent Court of Arbitration at The Hague
- Asian-African Legal Consultative Committee
- Regional Centre for Commercial Arbitration (Kuala Lumpur)
- Regional Centre for Commercial Arbitration (Cairo)

[46] See Report, at 44. Place of Proceedings..."In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services."

but based on the wrong considerations. The court refused to mention Art. 26, which is certainly a provision that establishes the duty to the court to stay out of the proceedings before the relevant decision of ICSID is issued.[47] Furthermore, and relating to the question of existence of consent, US courts have shown ignorance of the fact that consent need not be recorded in a single instrument.

3.2 Exclusivity of the Jurisdiction of the Centre and Croatian Law

Croatia became a Contracting State on October 22, 1998. Exclusivity of the Center's jurisdiction should therefore be the general rule for eventual proceedings before Croatian courts in cases that involve jurisdiction of the ICSID. It is unnecessary to mention possibilities of modifications made by the consenting parties. Thus, we shall presume that modifications do not exist. Due to constitutional provisions in Croatia, international agreements are included in and prevail over domestic law, and for that reason the Convention could be seen as modifying general rules regarding the jurisdiction of the Croatian courts. According to Art. 42 of the Croatian Law on Arbitration (official gazette 88/2001), a court should dismiss a request of the plaintiff, annul all previous procedural acts and refuse further jurisdiction if the defendant objects to jurisdiction due to an existing arbitration clause. However, if the defendant fails to object to jurisdiction during the preliminary hearing or at least at the first hearing before the end of the presentation of the statement of defence, the court would in accordance to that provision assert jurisdiction, except in case of consent to arbitrate before ICSID. That is possible only by applying the constitutional provision of prevailing international law over domestic. So, the procedural decision would be based directly on the provision of Art. 26 of the Convention. Even if by correct interpretation of constitutional provisions exclusivity of legal proceedings before ICSID can be established, Art. 42 of the 2001 Law on Arbitration should be amended with provision, unless otherwise provided by other law.[48] That would be helpful at least for avoidance of situations similar to that which happened before the US courts in case MINE v. Guinea and involving Croatia into the dispute concerning interpretation and application of the Convention according to the Art. 64 of the Convention. In any case a defendant should have the right to object to jurisdiction of the court at any stage of the proceedings and not only at the stage of the first hearing.

[47] Op. cit. p. 792 "Under the circumstances, it is clear that the Convention, and not the FSIA, supplied the correct answer to the problem that confronted the court of appeals. MINE v. Guinea must therefore be regarded as missed opportunity to give the decision its proper legal setting.

[48] That would include international agreements to which Croatia is a party.

3.3 Competence on Competence

It is important to point out again that domestic courts should not be competent to resolve questions of the existing valid jurisdiction of the Centre. Only the Secretary - General of the ICSID and the conciliation commission or arbitration tribunal of the ICSID have that power.[49]

That was an idea from the beginning of the preparatory work on the Convention[50] and the general rule of arbitration, although some regimes recognise that the power of an arbitral tribunal to determine its own jurisdiction should be subject to judicial scrutiny both before and after the award.[51] Also, under the UNCITRAL Model Law it may be recalled that Article 16(3) provides that the tribunal may rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits. However, where the tribunal rules as a preliminary question that it has jurisdiction, "any party may request, within thirty days after having received notice of that ruling, the court specified...to decide the matter, which decision shall be subject to no appeal; while a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

However, parties to the dispute at the beginning had the right to stipulate something else e.g. that local court or other body has that power (?) which was subsequently avoided.[52] Some delegates remarked that the words "jurisdiction of

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[49] Art. 28(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Art. 36(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Art. 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

[50] R 62-1 (SD) (June 5, 1962)

Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, See Documents, p. 19 sqq.

Article IV section 5.

Except as herein otherwise provided, or as otherwise agreed between the parties, any Conciliation Commission and any Arbitral Tribunal constituted pursuant to this Convention shall be the judge of its own competence.

[51] E.g. Egyptian Law on Arbitration 1994 (art. 22), Nigeria's Arbitration and Conciliation Decree (Art. 12(4))

[52] See History, p. 148 Article II section 3.

(1) Any Conciliation Commision and any Arbitral Tribunal constituted pursuant to this Convention shall be the judge of its own competence.

the Center" and "competence of the Tribunal" should be emphasized. Proceedings asserting jurisdiction should have two phases. Accordingly, the Secretary - General should first decide whether the dispute is within the outer limits of the jurisdiction of the Centre. [53] Second, if the dispute is within the scope of the Convention, the arbitral tribunal would have the power to decide about its competence in a particular case.[54] That power is obviously independent of the screening power of the Secretary General.[55]

If one of the parties in the proceedings raises an objection to the competence of the tribunal and if the tribunal finds that the objection is well-founded, it has to refuse its jurisdiction to the dispute. The Tribunal will have to consider its jurisdiction without any objection in case when respondent fails to appear.[56] However, the Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the

(2) Any claim of a party to a dispute that the Commision or the Tribunal lacks competence on the ground that

(i) there is no dispute;

(ii) the dispute is not within the scope of undertaking;

(iii) the undertaking is invalid; or

(iv) a party to the dispute is not a national of a Contracting State,

shall be deal with by the Commission or Tribunal, as the case may be, as a preliminary question.

The same in Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of other States - WORKING PAPER FOR CONSULTATIVE MEETINGS OF LEGAL EXPERTS DESIGNATED BY GOVERNMENTS, Adis Ababa, December 1963; Santiago, February 1964; Geneva, February 1964; Bangkok, April 1964; COM/AF/WH/EU/AS/1 (October 15, 1963) See History, p. 184. sqq.

[53] See Report at 20. ..."in addition, the Secretary - General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is manifestly outside the jurisdiction of the Centre... The Secretary - General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which may result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre, e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention."

[54] See History p. 408 - Mr. Van Santen - Netherlands.

[55] See Report...at 38 "Article 41. Reiterates the well - established principle that international tribunals are to be judges of their own competence and Article 32. Applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary - General to refuse registration of a request for conciliation or arbitration is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary - General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre."

[56] See Broches, The Convention, p. 367.

jurisdiction of the Centre and within its own competence.[57] In case of additional and counter claims, there is no provision for any role of Secretary-General. The Draft Convention of 1964 also had a provision regarding the competence of the Tribunal to decide over its jurisdiction independently of the objection of any of the parties that the dispute is not within the scope of the Convention or consent to the jurisdiction of the Centre.[58]

4 Competing and Alternative Jurisdiction

Provisions in arbitration clauses, national laws and bilateral and multilateral treaties that refer to the jurisdiction of the ICSID very often point to jurisdiction by other bodies. When stipulating those opportunities, drafters of the clauses should be careful or numerous problems might consequently arise.

4.1 Bilateral Investment Treaties

Bilateral investment treaties in numerous cases contain clauses referring to the jurisdiction of the ICSID and other arbitral bodies or even to the jurisdiction of courts. "The exhaustion of local remedies" rule is almost inevitable a part of those agreements and is usually limited for a certain time period. It could be regarded as unuseful custom. BIT's usually contain provisions on necessity for "informal conciliation" or "consultations".

BIT Argentina/Bolivia provides an unspecified conciliation procedure during the period of six months. After that period, a dispute can be brought before a competent court of the host State or to the international arbitration. If the investor is a plaintiff and the parties cannot agree about the body that will be competent for the dispute settlement, he has the right to choose. If the investor's choice is international arbitration, his further choice is between the ICSID if both States are Contracting States, Additional facility to the Centre if the condition ratione personae is not fulfilled, or *ad hoc* arbitral tribunal established according to the UNCITRAL Arbitration Rules. This provision can produce serious disputes. First, there is no provision on which act of the State or of the investor would represent a starting point for peaceful consultations, which would be the date for calculation the time

[57] See Arbitration Rule 41(2).

[58] See History p. 630

Article 44.

(1) The Tribunal shall be the judge of its own competence.

(2) The Tribunal shall be constituted nothwithstanding any claim of a party to the dispute that the dispute is not one in respect of which arbitration proceedings may be instituted pursuant to this Convention, or is not within the scope of its consent to such proceedings. Such claim shall be submitted to the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

limit of 6 months. Since there are no other procedural rules for that period (time calculating method, delivery of notification etc.) and since there are no widespread accepted international rules on those questions, successful objections to the ICSID's jurisdiction are likely to happen.[59] That omission could result if ruling that conciliation process was not attempted to be made or that time limit for conciliation has not expired. Furthermore, if the investor is a plaintiff, further procedure can be easily continued because the provision "in favour investor's choice" is clear. But what will happen when the claimant is a State? In the absence of the investor's consent, the dispute could not be resolved before any arbitral tribunal. In reality, if the investor is not a cooperative party, the State can opt only for the local courts.[60]

BIT Argentina/Canada refers to peaceful settlement, but it cannot be assumed that this procedure is obligatory in order to adjudicate the dispute to some other body e.g. ICSID. Both parties have the right to initiate proceedings before local courts of the State that is the party to the dispute. However, it is unclear when a dispute can be brought before an international arbitral tribunal. There are three mentioned conditions, and it is not certain whether they are cumulative or alternative. It seems that they are alternative, but only if we would think *in favorem iurisdictionis* of the Centre. Certainly, objections to jurisdiction could be very strongly based.[61]

Technically, this BIT does not contain consent of the States to any arbitration

[59] Actualy this is the case in most BIT's.

[60] Convenio entre la República de Bolivia y la República Argentina para la Promoción y Protección Recíprocas de Inversiones, 17 de marzo de 1994.

> Any dispute relating to investments between an investor of one Contracting Party and the other Contracting Party will, to the extent possible, be settled through amicable consultations. (Article 9 (1)).
>
> If it was not possible to settle the dispute within a period of six months, it may be submitted:
>
> a) to the competent tribunals of the host party; or
>
> b) to international arbitration.
>
> If the investor is the claimant and the parties do not agree on which dispute settlement mechanism to use, the investor's opinion shall prevail.
>
> Election by the investor of either one of these procedures shall be definitive. (Article 9 (2)(3)(4)).
>
> Where the dispute is referred to international arbitration, the investor may refer the dispute to:
>
> a) ICSID, provided each Contracting Party is a party to the ICSID Convention. (For the interim period, both parties give their consent to the submission of the dispute to the ICSID Additional Facility Rules); or
>
> b) an ad hoc arbitration tribunal established under the UNCITRAL Arbitration Rules. (Article 9 (5)).

[61] Agreement between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 5 November 1991.

and only refers to the fact that consent could be given. In our view, jurisdiction of the local court in cases in which the investor is the plaintiff is undisputable even if it is not mentioned in bilateral investment treaty - so it is unnecessary. A result that allows jurisdiction of the internationai arbitral tribunal even in cases in which the dispute is finally settled before the court but the parties are still in dispute is contrary to the concept of res judicata, allows legal uncertainty and puts courts in the inferior position. It is also contrary to logic. If the dispute is finally settled, it does not exist. Moreover, what would happen if during the arbitration proceedings the party that won the case before the court institute execution proceedings? We could say that res judicata is a general principle of international law. This principle was stated also in the AMCO v. Indonesia (Resubmission: Jurisdiction) award. Although we find that tribunal had no res judicata because previous award was annuled as a whole in the award of the Ad hoc committee, we find it useful to stress this principle as a general rule.[62]

BIT's that Argentina concluded with Chile, Ecuador and Salvador are more clear even if they do not have a precisely determined starting point for the time limit of "consultations". After the expiration of that time limit the investor has the right to choose between a competent court or international arbitral tribunal and among the latter he can choose the Center, Additional Facility (if condition ratione personae is not fulfilled regarding to the States) or Ad hoc tribunal according to the UNCITRAL Arbitration Rules.[63] So, competing jurisdictions are excluded.

Disputes which arise between an investor of one Party and the other Party with regard to an investment of the former, which have not been amicably settled, shall be submitted, at the request of one of the Parties involved, to the decision of the competent tribunal of the Party in whose territory the investment was made. (Article X (1)).

Investment disputes may be submitted to international arbitration by one of the parties of the dispute when:

- the Contracting Party and the investor have so agreed;
- eighteen months have elapsed without the competent tribunal having given its final decision;
- the final decision of the tribunal has been made but the parties are still in dispute. (Article X (2)).

The investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

a) ICSID, provided that the Contracting Parties are party to the ICSID Convention, and to the Additional Facility of the Center;

b) an international arbitrator or ad hoc arbitration tribunal appointed by a special agreement or established under the UNCITRAL Arbitration Rules.

If after a period of three months an agreement has not been reached on the procedure, the parties shall be bound to submit it to arbitration under the UNCITRAL Arbitration Rules. (Article X (3)).

[62] See Lowe, Vaughan, Res Judicata and the Rule of Law in International Arbitration, 8 African Journal of International and Comparative Law, 1996, p. 39

[63] Tratado entre la República de Argentina y la República de Chile sobre Promoción y Protección Recíproca de Inversiones, 2 de agosto de 1991.

The Argentinian BIT with Jamaica is *prima faciae* similar, but there is one significant difference. An attempt of consultation is also necessary, the investor has the right to choose between a court and international arbitration - but if he opts for arbitration he does not have the right to choose between the Centre and arbitration established under the UNCITRAL arbitration rules. If in three months the parties to the dispute do not come to a special agreement, only the jurisdiction of the Centre remains available. In our view, this should be the model clause in bilateral investment treaties and with clarification regarding the beginning of the counting necessary time of three months it would be almost ideal for both parties.[64] The BIT

Any dispute.... will, to the extent possible, be settled through amicable consultations. If it was not possible to settle the dispute within a period of six months, it shall be submitted, at the request of the investor:

a) to the competent tribunals of the host party; or

b) to international arbitration.

Election by the investor of either one of these procedures shall be definitive. (Article 10 (1)(2)).

Where the dispute is referred to international arbitration, the investor may refer the dispute to:

a) ICSID, provided each Contracting Party is a party to the ICSID Convention. (For the interim period, both parties give their consent to the submission of the dispute to the ICSID Additional Facility Rules); or

b) an ad hoc arbitration tribunal established under the UNCITRAL Arbitration Rules. (Article 10 (3)).

Convenio entre el Gobierno de la República del Ecuador y el Gobierno de la República Argentina para la Promoción y Protección Recíproca de Inversiones, 18 de febrero de 1994.

Acuerdo entre la República de El Salvador y la República de Argentina para la Promoción y Protección Recíproca de Inversiones, 9 de mayo de 1996.

[64] Agreement between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments, 8 February 1994.

Any dispute relating to investments between an investor of one Contracting Party and the other Contracting Party will, to the extent possible, be settled amicably. (Article 9 (1)).

If it was not possible to settle the dispute within a period of six months, it may be submitted:

a) to the competent tribunals of the host party; or

b) to international arbitration.

If the investor is the claimant and the parties do not agree on which dispute settlement mechanism to use, the investor's opinion shall prevail.

Election by the investor of either one of these procedures shall be definitive. (Article 9 (2)(3)(4)).

In case of international arbitration, the dispute shall be submitted to:

a) ICSID, provided each Contracting Party is a party to the ICSID Convention. (For the interim period, both parties give their consent to the submission of the dispute to the ICSID Additional Facility Rules); or

b) an ad hoc arbitration tribunal established under the UNCITRAL Arbitration Rules.

If after three months the selection of a forum has not been made, the parties shall be bound to submit the dispute to ICSID. (Article 9)

with the United States is obviously made according to the US Model BIT's[65] which were widely described in many publications.[66]

However, the BIT Canada/Uruguay should be mentioned separately.[67] It

[65] Agreement between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991.

Parties to the dispute should seek resolution through consultation and negotiation.

If the dispute cannot be settled amicably, the national or company may choose to submit the dispute for resolution:

a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

b) in accordance with any applicable, previously agreed dispute settlement procedures; or

c) to binding arbitration in accordance with Article VII (3). (Article VII (2)).

Provided that the national or company has not submitted the dispute for resolution under Article VII (2) a) or b) and six months have elapsed from the date on which the dispute arose, the national or company may choose to consent in writing to the submission of the dispute for settlement by binding arbitration. (Article VII (3)).

Consent set out explicitly in Article VII (4). The submission of the dispute for settlement by binding arbitration may be made:

i) to ICSID, provided that the Party is a party to the ICSID Convention; or
ii) to the Additional Facility of the Centre, if the Centre is not available; or
iii) in accordance with UNCITRAL Arbitration Rules; or
iv) to any other arbitration institution, or in accordance with other arbitration rules, as may be mutually agreed between the parties to the dispute. (Article VII (3)).

[66] See Pogany Istvan, Bilateral Investment Treaties: Some Recent Examples, 2FILJ, 1987. Also see Para, Antonio, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 FILJ, 1997; Bilateral Investment Treaties, United Nations Centre on Transnational Corporations, New York, 1988; Dolzer R., Stevens, M., Bilateral Investment Treaties (1995); Broches, A. Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, Essays on International Arbitration, Liber Amicorum Pieter Sanders, Kluwer Law and Taxation Publishers 1982; Kunzer, Kathleen, Developing a Model Bilateral Investment Treaty, 15 L. & Pol'y Int'l Bus. p. 273, 1983; Leich, Marian Nash, International Economic Law: Bilateral Investment Treaties, 80 AJIL p. 948, 1986; Lewis, Eleanor R., The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variation in the U.S. Bilateral Investment Treaty Program, 22 L. & Pol'y Int'l Bus. p. 527, 1991; Ocran, T. Modibo, Bilateral Investment Protection Treaties: A Comparative Study, 8 N.Y.L. Sch. J. Int'l & Comp. L. p. 401, 1987.

[67] Agreement between the Government of Canada and the Government of the Oriental Republic of Uruguay for the Promotion and Protection of Investments, 16 May 1991.

Disputes which arise between an investor of one Party and the other Party, which have not been amicably settled after a period of three months, shall be submitted, at the request of one of the Parties involved, to the decision of the competent tribunal of the Party in whose territory the investment was made. (Article X (1)).

Investment disputes shall be submitted to international arbitration if one of the parties so requests, when:

- the Contracting Party and the investor of the other Contracting Party have so agreed; or

shows plainly all the negative consequences of the "exhaustion of local remedies" rule. This treaty allows adjudication of the dispute before the ICSID after the final domestic award is brought, but it is considered by either party to be manifestly unjust or violating the provisions of the Agreement. Apart from the question of justice and injustice which is *in fine* extralegal concept, it is almost certain that in most cases one of the parties to the dispute would invoke the existence of manifest injustice. So, what should be done with the final award that was brought in the court proceedings? Regarding to the tribunal of the Centre, it should be nonexistent. The state of the proceedings also have to consider this award as without effect in order to avoid an international dispute according to the Art. 64. But this award can normally be recognized and executed in some third country that is not a party to the Convention. Although this situation is likely to be rare, those kind of provisions in BIT's deserve more careful consideration. Also, provision of this BIT that jurisdiction of any international arbitration can be established by request of either party is defective. This is not true in cases in which the request is made by a State. Where is the consent of the other party to the dispute? There is another similar fundamental mistake (regarding the choice of arbitral bodies) in provisions of this bilateral investment treaty. In the absence of any agreement, it provides for jurisdiction of international arbitration under the UNCITRAL Arbitration Rules. The consent of the Contracting States to the BIT is certainly present, but there is no valid consent of the investor, and it is highly unlikely that jurisdiction of such arbitration body could be established without consent of the private investor.

The BIT Denmark/Korea (1988) also fails to determine a relevant starting point when the negotiations between the parties to the dispute started.[68] Similarly, that applies to the BIT UK/Benin (1987), which extensively elaborates the

- eighteen months have elapsed without the competent tribunal having given its final decision; or

- the final decision of the tribunal is considered by either party to be manifestly unjust or violates the provisions of the Agreement. (Article X (2)).

The investor and the Contracting Party concerned in the dispute .....either to:

a) an international arbitrator or ad hoc arbitration tribunal of three members appointed by a special agreement or established under the UNCITRAL Arbitration Rules; or

b) the ICSID, where both Contracting Parties are party to the ICSID Convention.

If after a period of three months an agreement has not been reached on the procedure, the arbitration shall be undertaken by an ad hoc tribunal of three members and the parties to the dispute shall be bound to submit it to arbitration under the UNCITRAL Arbitration Rules.

There are additional provisions that cover cases where the appointing authority is a national of one of the Contracting Parties or is otherwise prevented from fulfilling his functions. (Article X (3)).

[68] Peters, P., p. 121 - "1. Any Dispute which may arise between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be subject to negotitations between the parties in dispute.

procedure for choosing the dispute settlement mechanism.[69] The BIT Netherlands/ Ghana (1989) contains at least some idea of the starting point for an attempt of amicable settlement of the dispute. Still, it would be preferable that the procedure regarding amicable settlement is regulated more precisely in order to avoid future objections to jurisdiction. The choice of the arbitration body is up to the aggrieved party. How is it determined which party is aggrieved? In some situations each party can feel aggrieved. In that case, it could produce serious jurisdictional conflicts of different bodies to the dispute.[70]

If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months either party shall be entitled to submit the case to ICSID.

[69] Op. cit. p. 121. sq. - Each Contracting Party hereby consents to submit to ICSID any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the ICSID Convention be treated for the purposes of the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within 90 days between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of a disagreement as to whether conciliation or arbitration should be chosen the national or a company affected shall have right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

2. Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or (b) the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.

[70] Op. cit. p. 123. "1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter in the territory of the former Contracting Party shall if possible be settled amicably. 2. If such disputes cannot be settled according to the provisions of paragraph 1 of this article within a period of 6 months from the date either party to the dispute requested amicable settlement, the dispute shall, by mutual consent, be submitted to international arbitration or conciliation. 3. Where the dispute is referred to international arbitration or conciliation, the national and the Contracting Party concerned in the dispute may, subject to the choice of the aggrieved party, refer the dispute either to: (a) ICSID (having regard to the provisions, where applicable, of the ICSID Convention and the Additional facility for the administration of conciliation, arbitration and fact-finding proceedings); or (b) an international arbitrator or an ad hoc arbitration tribunal to be appointed by a special agreement or established under the arbitration rules of UNCITRAL. Consent is clear - Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration or conciliation. Regarding to the nationality of juristic person concept of

4.2 Bilateral Investment Treaties to which Croatia is a Party

Bilateral investment treaties to which Croatia is a party have quite different provisions on the settlement of disputes between the Contracting State and private foreign investors. The BIT with Italia refers to "amicable" settlement during the period of six months and after that the right of the investor to choose between local remedies and arbitration including ICSID if the *conditio ratione materiae* is fulfilled.[71]

The BIT with Hungary also refers to consultations and negotiations but significantly points out that those consultations could be directed "through diplomatic channels" which generally does not violate the rule established under Art. 27. But if any of the States would eventually be involved, it should be done carefully in order to avoid disputes that could arise according to the Art. 64. of the Convention. Other provisions relating to the settlement of disputes between a private investor and the Contracting State are more or less the same as in the BIT with Italy.[72] The rule is followed in treaties with France,[73] Slovakia,[74] Romania,[75] Greece,[76] the Czech Republic[77] and Argentina.[78] However, the BIT's with Chile[79] and Portugal[80] provide that after amicable negotiations the investor has the right to choose only between the local courts and ICSID while the possibility of an arbitrational tribunal established according to the UNCITRAL Arbitration Rules is excluded.

The BIT with Canada[81] is quite extensive and it seems that it opens possibilities for jurisdictional problems. As a rule the BIT's to which Canada is a party have unusual and sometimes unclear provisions. In our case, which was probably a Canadian proposal, in article (Art.XII 3(b)), referring to one of the possible conditions for jurisdiction of the international arbitration, we can be sure

control is applied - A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals of the other Contracting Party shall in accordance with Article 25(2)(b) of the above Convention be treated for the purposes of the Convention as a company of the other Contracting Party."

[71] See Offic. Gazz. 4/97 Art. 9.

[72] Offic. Gazz. 1/97 Art. 8.

[73] Offic. Gazz. 1/97 Art. 9.

[74] Offic. Gazz. 1/97 Art. 8.

[75] Offic. Gazz. 6/95 Art. 9.

[76] Offic. Gazz. 6/97 Art. 9.

[77] Offic. Gazz. 6/97 Art. 8.

[78] Offic. Gazz. 4/96 Art. 9.

[79] Offic. Gazz. 5/96 Art. 8.

[80] Offic. Gazz. 12/97 Art. 9.

[81] Offic. Gazz. 12/97 Art. XII, see. Add. Protocols I i II.

that Contracting States accept the right of the private investor to bring the dispute to its competent court. That is obvious in any case. However, the private investor has the right, six months after the case is pending before a competent court, to initiate arbitration proceedings if these following conditions are fulfilled:

1. He consents to that arbitration (which is absolutely unnecessary in the case of the ICSID, his request to arbitration would certainly be preceded with consent due to the provisions of the Convention),[82]
2. He accepts that he lost the right to initiate or continue with any other dispute settlement procedure in connection with the act that allegedly represents breach of the agreement,[83] and
3. If the time limit of three years counting from the date that the investor became aware or could have become aware of his loss or damage has not elapsed.

The third condition mentioned could in many cases represent a serious obstacle to the Tribunal of ICSID (or any other tribunal) in the matter of determining its jurisdiction. If all of those cumulative conditions are fulfilled, the private investor can choose between the ICSID, the Additional Facility (in case that the condition rationae personae is not fulfilled) or an arbitration body established under the UNCITRAL Arbitration Rules. The Contracting States unconditionally consented to any of those arbitrational bodies but this consent, together with the consent of the investor, should be in accordance to the Convention or the Additional Facility Rules or to the written consent within the meaning of Art. II of the New York Convention. The place of the arbitration is restricted to the countries that are parties to the New York Convention. Nevertheless, in certain classes of disputes there are additional rules that unnecessarily complicate the situation mainly because of unclearness. Referring to disputes that involve financial institutions, the competent court and even the arbitrational tribunal of the Centre should stay the proceedings if the Contracting States invoke and ask for a written report of the State party to the dispute and the State whose national is a party to the dispute if the appropriate defense against the plaintiffs arguments exists. We can only comment that the investor's state is unnecessarily involved - the provisions are beyond the spirit of the ICSID Convention and recent trends in international law. The court or the arbitrational tribunal cannot continue with the proceedings until the mentioned report is not delivered. The Contracting States will in separate proceedings prepare the report which is obligatory for the court. If in the period of 70 days a report is not delivered, the court or the Arbitrational Tribunal can continue with the proceedings.

[82] It seems that practice of the ICSID allows so called "consent propriu motu". In other words it can be implicit. See Chatterjee Charles, The Arbitration between AMT v. Republic of Zaire, When Challenges to the Jurisdiction of an ICSID Tribunal are not Valid, 16 Journal of International Arbitration, p. 45

[83] But what would happen if the chosen arbitral body refuses jurisdiction?

It is also stated that the special body should have necessary competent knowledge regarding the disputed financial service. It is unclear what constitute "competent knowledge" or who is competent to evaluate it. Separate rules are applicable in the case of tax measures and damages to controlled corporations.

The BIT with Kuwait [84] adopts provisions from the US Model BIT. Of course it is the case in the treaty with the United States.[85] The treaty with Switzerland[86] provides consultation and afterwards jurisdiction of the Centre. If the Centre does not have jurisdiction, the treaty provides for diplomatic protection(?). The agreement with Bosnia and Hercegovina[87] contains an obligation requiring the private investor to inform "in detail" the host State about existence of the dispute. There is no such provision that obligates the Contracting States. After the "amicable" attempt, the investor can choose between the Centre and the arbitral body established under the UNCITRAL Arbitration Rules. The agreement with Austria[88] provides that after the negotiations, both parties have the right to choose between the ICSID and arbitration tribunal established according to UNCITRAL arbitration rules. In that case there is no real alternative jurisdiction. It is quite likely that the competition between jurisdictions exists due to the fact that either party can choose a different body. The arbitral body is not always bound with the provision of Art. 26 like the state courts. Also, the presumption that the investor's consent to the jurisdiction of those arbitrational bodies exists is wrong. A provision similar to Art. 8(3) of the BIT Slovakia/Czech Republic would be quite helpful.[89] The agreement with Albania is quite poorly written.[90] It provides for amicable settlement of disputes and, after that, the possibility for both parties to bring the dispute to the competent national court or "any international tribunal" (?) which shall *mutatis mutandis* apply rules that the BIT provides for the settlement of disputes between the Contracting States. This BIT is confusing because it subsequently provides for arbitration under the UNCITRAL Arbitration Rules and the appointing authority in the person of "the President of the Court of International Arbitration of ICC"(?). The provision referring to the ICSID is unclear, and we can assume that consent of the Contracting States does not exist. One of the treaties that strongly follows the previous one is the BIT with China.[91] After negotiations, either party can bring the dispute to the competent court of the host State. The consent to international

[84] Offic. Gazz.. 11/97 Art. 9.

[85] Offic. Gazz.. 6/97 Art. 10.

[86] Offic. Gazz., 6/97 Art. 8.

[87] Offic. Gazz. 8/97 Art. 7.

[88] Offic Gazz. 19/97 Art. 9.

[89] The dispute shall be resolved by such agency referred to in Section 2. above as was the first one to which a proposal for the resolution of the dispute was submitted.

[90] Offic. Gazz. 2/94 Art. 9 and 10.

[91] Offic. Gazz. 2/94 Art. 8.

arbitration does not exist - there is only a distant remark that the dispute can be brought to arbitration. However, if the jurisdiction for international arbitration exists, that means that subsequent consent of both parties is given, in absence of special agreement the appointing authority would be the Secretary - General of ICSID. The Arbitrational Tribunal should apply its own procedural rules; however, it can apply rules that are in force before ICSID. We would specially like to refer to the provision on the applicable law which in the context of this paper is not relevant but shows how many misunderstandings and lack of knowledge exist. This BIT provides that a competent court would apply the laws of the host State including the conflict of laws rules, provisions of the BIT, and generally recognized principles of international law "accepted by both contracting parties". It would be very interesting to see how the Arbitrational Tribunal or a competent court will determine which rules of international law are accepted by both parties.

As it can be seen in many bilateral investment treaties, clauses that refer to the ICSID are combined with clauses that refer to other arbitration bodies - mainly *ad hoc* arbitration under the UNCITRAL Arbitration Rules. In many cases, this jurisdiction is "in reserve" in case that Center does not have jurisdiction. They can hardly produce a conflict of jurisdictions. That is also obvious where the investor is entitled to choose between different solutions. However, in some previously mentioned cases the possibility of a conflict of jurisdiction is high. We can highly evaluate the Croatian BIT with the Netherlands.[92] The exclusivity of the ICSID's jurisdiction is clear. Binding consent of the States that they accept jurisdiction of the ICSID is obvious (Art. 9.(3)). The investor has right to request arbitration under the auspices of the ICSID if conditions ratione personae are fulfilled (that both states are Contracting States) regarding the obligations of the Parties towards him. However, it seems that if State would wish to request arbitration under the ICSID as a claimant, that would not be the case. This is a doctrinally correct provision because consent of the private investor cannot be presumed.

4.3 Multilateral Treaties, National Laws and Agreement of the Parties to the Dispute

Multilateral treaties also contain several arbitral systems that are available for the settlement of disputes between contracting states and private parties. According to NAFTA, the investor has the right, when six months have elapsed from the moment when the dipute arose, to request ICSID arbitration if conditions ratione personae is fulfilled. If that is not the case, the Additional Facility or arbitration under UNCITRAL arbitration rules are also available.[93] Those are typical alternative jurisdictions without a possibility of conflict. Similar provisions are

[92] Offic. Gazz. 10/98 - Art. 9.

[93] Art. 1120 NAFTA

included in Energy Charter Treaty and Mercosur Protocols.[94] Several authors stress the point that this kind of clause (an asymmetric clause - that it is only the investor and not the state, that can choose one of the possible arbitral procedures) is a novelty.[95] It is obvious that this is not such a novelty and that they are not inserted solely for the convenience of investor. On the contrary, it is the best way to avoid a conflict of jurisdiction.

Some national laws contain provisions like those in the above-mentioned multilateral treaties.[96] However, in most cases this is not true.

Nevertheless, separate agreements between States and private investors usually contain arbitration clauses. Opposite to the situation with BIT's, MIT's, or national legislation where a real conflict of jurisdiction is rare, in the case of special

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Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing party and the Party of the investor are parties to the Convention,

(b) the Additional Facility Rules of ICSID, provided that either the disputing party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules

[94] 34 ILM 1995, p. 360 sqq, Paulsson J., Arbitration Without Privity, p. 422 sqq.

[95] See. Wälde, Thomas, Investment Arbitration Under the Energy Charter Treaty - From Dispute Settlement to Treaty Implementation, 12 Arb. International, no 4. p. 452.

[96] Schereuer, p. 161.sq. Kazakhstan Law on Foreign Investments of 1995.

1. Disputes and disagreements arising in connection with foreign investments or activity connected therewith shall be settled, wherever possible, by means of negotiations or in accordance with previously agreed procedure for the settlement of investment disputes.

2. If such disputes can not be settled by means of negotiations within three months from the date of recourse in writing by any of the parties to the other party, then any of the parties to the dispute may transfer the dispute, if there is written consent of the foreign investor, for settlement to:

(a) judicial agencies of the Republic Kazakhstan empowered in accordance with legislation of the Republic Kazakhstan to consider such disputes, or:

(b) one of the following arbitration agencies:

- ICSID if the State of the investor is a party to this Convention, or;

- The Additional Facility if the State of the investor is not party to the ICSID Convention, or;

- Arbitration agencies founded in accordance with the Arbitration Rules of the Commission of the United Nations for the International Trade Law (UNCITRAL), or;

- Arbitral consideration at the Institute of Arbitration of the International Chamber of Commerce in Stockholm, or;

- To the Arbitration Commision attached to the Chamber of Commerce and Industry of the Republic Kazakhstan.

3. If a foreign investor does not give written consent to consideration of the dispute in the procedure provided for the point 2 of present Article, the dispute may be transferred to judicial agencies of the Republic Kazakhstan empowered in accordance with legislation of the Republic Kazakhstan to consider such disputes.

agreements between the investor and the host State, arbitration clauses can be poorly or unclearly written. Thus, competition between different bodies is more likely to occur here. Furthermore (and usually), the host State and a private investor enter into several agreements in which we can sometimes find arbitration clauses that refer to different bodies. Some of them point to the Centre, while others point to some arbitration body or even to the court. Also, it happens that some of those instruments in order to realize the investment do not contain settlement of dispute clauses and, more importantly, some of them could be concluded not between the "true investor" and the host State, but between some subsidiary of the investor and the host State.

Of course, parties to the dispute can initiate proceedings before different bodies in connection to different agreements even if the whole investment operation can be deemed as inseparable, which is obviously the inclination of the ICSID's tribunals in a number of cases.

In Klöckner v. Cameroon, several contracts between the host State and the private investor were concluded. Some of them referred to the jurisdiction of the ICSID except one which pointed to the ICC.

The Protocol of Agreement from 1971 contained the following arbitration clause:

> "Disputes relating to the validity, the interpretation, or the application of the clauses of the present protocol shall be settled by the parties agreement, failing which they shall be resolved in conformity with the arbitral procedure established by the International Convention on the Settlement of Investment Disputes of the International Bank for Reconstruction and Development (IBRD)".[97]

After the first agreement, the parties subsequently concluded several contracts dealing with the specific matters of the overall project. One of them was a Supply Contract for the fertilizer factory of 1972 containing the same ICSID clause as in the Protocol of Agreement.

However, the Management Contract of 1977 contained an arbitral clause referring to the ICC:

> "All disputes arising from the present contract shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or the more arbitrators named in the conformity with said Rules. The Arbitral Court shall have its seat in Bern, Switzerland, and shall apply Swiss substantive law".[98]

This clause was incorporated in the contract that was actually concluded between the claimant and the company, which was founded jointly by the host-State

[97] 2 ICSID Reports p. 13. See Schreuer op. cit. p. 163.

[98] Op. cit. p. 164 sq.

and the investor and which was under the investor's control, so the ICSID clause would be without sense (rationae personae). Further developments showed that this company came under the control of the host state and became even an agent in the sense of the provisions of the Convention.

Facts pointed out that the general agreement (Protocol of Agreement) provided that the foreign investor was predicted as "the manager" and in fact he completed all of the management operations even before the specific agreement was concluded. The investor initiated arbitration proceedings before the ICSID on the basis of the contract from 1972. However, the host State brought a counterclaim regarding the poor management of the claimant. The investor objected to the jurisdiction of the Centre on the basis of the ICC arbitration clause and Art. 46 of the Convention, which defines the permissibility of counterclaims and requires that they be "within the scope of consent of the parties and... otherwise within the jurisdiction of the Centre."

The Tribunal rejected the arguments of the investor Klöckner and grounded its opinion on the provision of the Protocol of Agreement of 1971 which was interpreted as to mean that the Tribunal had jurisdiction in regard to all aspects of the investment operation. One of those aspects was also the obligation of the Klöckner in the sense of management. The Tribunal also noted that Klöckner accepted jurisdiction of the ICSID in relation to all rights and obligations from the Protocol of Agreement without any specific declaration to the management.[99] This case is interesting from a wide range of aspects. The arbitration clause referring to ICC and settlement of disputes concerning management was concluded between the investor and the private domestic company that was under the investor's control. Subsequently, this company fell under the control of the State and moreover became its "agent" in the sense of provisions of the Convention with approrpiate designation to the Centre. However, between that private company (SOCAME) and the claimant there was no existing consent to jurisdiction of the Centre. This award was subsequently annulled but not for lack of jurisdiction. Nevertheless the parts of the award regarding the jurisdiction of the Centre and in connection to the management contract were also debated in the *ad hoc committee* award. It was stated that Klöckner had never expressly consented to the jurisdiction of the Centre regarding the overall contract and had interpreted the provision from the Protocol of Agreement only as an obligation to conclude the future contract regarding management. Nonetheless, the *ad hoc committee* came to the conclusion that both interpretations were possible and that there was no excess of power by the Tribunal.[100]

[99] 2 ICSID Reports 9. Decision of 21 October, 1983 p. 14. See Schreuer, op. cit. p. 164 sq.

[100] Schreuer op. cit. p. 166; Thopmson D, The Klöckner v. Cameroon Appeal. A note on jurisdiction 3 J.Int.Arb. p. 93, 1996; Paulsson, Jan, The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements, 1 J. Int'l Arb. p. 145, 1984. See 2ICISD Reports p. 95 Decision on Annulment 3 May 1985

This was a clear situation of conflicting jurisdictions where all solutions can have defendable grounds. Some doctrinal opinions emphasized that the exclusivity of the jurisdiction of the Centre was not that strong bearing in mind the ICC clause. But that was not to be interpreted as if such jurisdiction excluded jurisdiction of the ICSID.[101]

An interesting situation appeared in SPP (ME) Ltd. & SPP Ltd. v. Egypt which deserves more consideration.[102] The consent of Egypt existed in its national law, and for the jurisdiction of the Centre only the consent of the private investing party was needed. Accordingly, exclusivity of the Center's jurisdiction will be in effect when the consent to arbitrate under ICSID is perfect. Anyway, another question was on the table. Does the fact that proceedings were terminated before ICC preclude the jurisdiction of the ICSID?

In 1974 SPP and EGOTH a public Egyptian company entered into contract related to the construction and development of tourist complexes which contained the ICC clause. The contract was expressly approved by Egyptian Ministry of Tourism. Subsequently, there were allegations that he was bribed. Relying on that clause, SPP initiated proceedings before the ICC against EGOTH and Egypt which subsequently resulted in an award in favour of the claimant. However, Egypt filed its motion to annul that award due to the fact that no consent of Egypt existed. After the motion was filed, SPP informed Egypt that it would initiate proceedings before

"There may of course be differences on the correct interpretation of the Protocol of Agreement and its relationship to a subsequent agreement like the management contract. The inclusion of an ICC arbitration clause in this latter contract may also be interpreted in opposing ways. In this case, the Tribunal refused to accept, in the absence of completely precise and unequivocal contractual provisions, that the parties to the Management Contract wanted to "derogate" from the Protocol's ICSID clause. The Tribunal may have implicitly accepted that the ICSID clause constituted for both parties an "essential jurisdictional guarantee", the relinquishment of which could neither be presumed nor accepted in the absence of clear evidence.
Such an interpretation of the agreements and especially of two arbitration clauses, whether correct or not, is tenable and does not in any event constitute a manifest excess of powers."

[101] See Schreuer, p. 166 - "Overlapping consent clauses referring to different types of arbitration within the same overall relationship are undesirable and should be avoided. Once a dispute arises, it is often not practical to dissect the relationship into different segments and to pursue remedies simultaneously in separate fora... If competing consent clauses exist nevertheless, it makes more sense to have the entire dispute heard by one tribunal, preferably the one with the most comprehensive (but who should judge that?) jurisdiction. In the present case, this was clearly the ICSID. A provision derogating from ICSID's exclusivity by adding another remedy does not, unless clearly so intended, rule out ICSID arbitration. Providing for additional procedures should be interpreted as giving the claimant a choice of remedies. However, once this choice has been made, the parties must be bound by it. The principles of ne bis in idem and res iudicata would clearly preclude any attempt by a party to one set of arbitration proceedings to seek another remedy in the same matter."

[102] See Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Decision 20 May 1992, 8 FILJ, 1993.; Delaume, The Pyramids Stand - The Pharaons Can Rest in Peace, 8 FILJ, 1993; Craig, The Final Chapter in the Pyramids Case; Discounting an ICSID Award for Annulment Risk, 8 FILJ, 1993

the ICSID - that pefectuated arbitration clause in sense of Art. 25 of the Convention. In the same time SPP reserved its right regarding the eventual attachment or execution accordingly to the ICC award. The Appealing Court in Paris subsequently rendered a decision that annuls the ICC award because there was no consent of Egypt.[103] While the case was pending before the ICSID, SPP appealed to the cour d'cassation. In proceedings before ICSID, Egypt invoked Art. 26 of the Convention and stated that SPP reserving its right from the ICC award broke the rule of exclusivity established by this provision. So, in the view of Egypt, jurisdiction of the ICSID did not exist. The Tribunal of the Centre refused objections of Egypt and noted that the provision of the Art. 26 does not necessarily mean that parties to the dispute can not use other remedies. That is why the expression "unless otherwise stated" exists. The tribunal also stated its view concerning competing jurisdictions:

> "when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal".[104]

Considering that opinion, the Tribunal refused the objection of Egypt that jurisdiction of the Centre does not exist in the sense of Art. 26. However, it decided to stay the proceedings while they were pending before the French court. Consequently, the French court affirmed the decision of the court of the first instance, and the Tribunal continued with its proceedings. Obviously, the first question was whether consent to the arbitration existed. It was almost certain that consent to the ICC did not exist and that was strongly supported by decisions of the French courts. The Egyptian legislation contained a provision referring to the Centre if there is no other agreement of the parties.[105] Since there was not any other agreement, the question was the existence of consent on the side of the investor. As the investor was the claimant and had notified the defendant about its intention to initiate ICSID proceedings, the Tribunal noted that jurisdiction of the ICSID existed.[106]

Nevertheless, according to the assessment of the Tribunal it seems that a valid arbitration clause referring to ICC would preclude jurisdiction of the ICSID due to the specific provision of Egyptian law that falls into "except otherwise stated".

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[103] See Schreuer, p.167; Rambaud, P. L'affaire des pyramides, 31 Annuaire Français de Droit International p. 508, 1985.

[104] 3 ICSID Reports p. 129.

[105] That was also questionable. There were linguistic arguments over the interpretation of Egyptian legislation and its original meaning in Arabic.

[106] See Decision on Jurisdiction II, 1988. 3 ICSID Reports p. 131.

4.4 Jurisdiction of the Centre and Domestic Courts

Similar problems arise when an agreement or several agreements refer to the jurisdiction of the ICSID and to the jurisdiction of a local court. This kind of provisions could be set out in different ways. Local courts usually serve as a method of exhaustion of local remedies,[107] and reference to them could be a condition to subsequent proceedings. However, sometimes that would not be the case, and appropriate attention should be given to the interpretation of agreement.

In some cases, a provision of the agreement could establish alternative jurisdiction with the investor's right to choose. In the first mentioned case, after the exhaustion of local remedies which resulted in non-rendering any decision through certain time limits or in rendering a decision (res judicata!), proceedings before domestic bodies are the condition for initiating a proceeding before the international arbitration.

As we have said, sometimes it is not clear whether this recourse represents a condition for subsequent jurisdiction of the Centre. In Tradex Hellas S.A. v. Republic of Albania, which in fact did not include a question of the jurisdiction of the local courts but rather other remedies provided by national legislation (amicable settlement), the defendant objected that "Tradex made no good faith effort to resolve the "dispute" amicably before resorting to arbitration, as required by the 1993 Law and general principles of international law". The provision of the mentioned law reads as follows:

> "If a foreign investment dispute arises between a foreign investor and either an Albanian private party or an Albanian state enterprise, and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to any applicable, previously agreed upon dispute-settlement procedure. If no dispute settlement procedure has been agreed upon, then the foreign investor may submit the dispute for a resolution to a competent court or administrative tribunal of the Republic of Albania in accordance of its laws".[108]

Obviously, Albania claimed that ICSID arbitration can only be initiated after the failure of a good faith effort to settle the dispute amicably, and that Tradex did not make such an effort. The tribunal's conclusion on this point is unclear. In the award, it mentioned that the second sentence of provision of Art. 8. does not mean that amicable settlement is a condition to subsequent proceedings before the ICSID[109] and expressed its opinion that it did not need to decide this matter because

[107] Cancado, Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, 1983.

[108] Decision on Jurisdiction 14 FILJ, 1999 p. 173

[109] Op. cit. p. 182 "In addition, if the dispute arises out of or relates to expropriation,...then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission therefore, to the ICSID...".

"even assuming that a good faith effort for amicable settlement is also required before an ICSID procedure, it considers that Tradex has shown sufficiently such an effort having been made."[110] In our view the tribunal refused to decide on a very important question that could be the "test" for the future practice of the ICSID. Because "exclusivity" of is a rule, condition regarding to the exhaustion of local remedies or amicable settlement should be clear and should be interpreted restrictively. In this case, it is clear that such an interpretation of Art. 8(2) would lead to the conclusion that amicable settlement was not a condition.

Nevertheless, the second mentioned case could involve at least two situations. The arbitration clause could be set out in a way that a choice of one of the parties to the dispute in favour of local remedies would not preclude that it could be brought before arbitration - as we saw in some BIT's to which Canada is a party. A different situation would be when a choice in favour of one of the body precludes jurisdiction of the other body. A situation when both parties have a choice is undesirable and can raise real jurisdictional conflict. The general rule should be that the first proceedings preclude other proceedings, but when we have ICSID and Art. 26., opinions could in some cases be different and strongly based. However, this is not supported by ICSID tribunals.

In our view there is no reason not to allow alternatives, but the choice has to be on one of the parties (preferably the investor). However, principles of legal certainty, mainly *lis pendens* and especially *res judicata,* should be defended. Once the choice is made, other remedies should not be not allowed. Those kind of provisions are set out in above-mentioned law of Kazakhstan.

According to the investment law of Yemen, a private investor has the right to choose which does not affect his right to initiate proceedings before the courts of Yemen.[111] Problems with constitutionality raised in the Netherlands regarding the exclusivity of the Centre's jurisdiction could not have been avoided easily in this manner. The Netherlands Constitution of 1815 had a provision which guaranteed to everyone the right to access to the courts. In reference to that, the provision of the BIT that obliges a foreign investor to settle its claims towards the Netherlands as a host State before the ICSID would be unconstitutional. There was the opinion that that problem could be simply avoided by making ICSID arbitration available to the investor at its option.[112] Nevertheless, a different attitude is also possible. The provision in the BIT which precludes the investor's right to access to the court if he opted for the ICSID could also be deemed unconstitutional. That depends on the constitutional provisions that refer to the possibility of a person waiving its guaranteed rights. However, this provision was omitted from the Constitution in the 1983 revision. Oddly formulated similar provisions can be found in the BIT Italia/

[110] Op. cit. p. 183.

[111] Schreuer, p. 171.

[112] Peters, p.118.

Tunis by virtue of which the investor has the right to initiate arbitral proceedings if and when he waives his right to use a domestic court.[113]

It seems that the exhaustion of local remedies rule does not satisfy private investors or the States. So far as the investor is concerned, he presumes that the dispute will not be settled through the limited period of time or that it will be resolved in an unsatisfactory manner for him. So, for the investor, it is only a waste of time. On the other hand, there is a question of who will cover the costs of the "exhaustion of local remedies". In most cases no decision will be brought - there will be no decision regarding the costs of the proceedings. This problem could be resolved in the way that the dispute over the costs of the "exhaustion of the local remedies" enters into the proceedings before the arbitral tribunal as the question that should be decided upon rendering the award on the merits. This procedure could produce more disorientation if a local court renders a decision concerning the costs and the arbitral award differs from it. That is another strong reason why the doctrine of *lis pendens* and *res judicata* should be followed as an unbreakable rule. The "exhausting of local remedies" is a traditional rule, but it is mainly connected to questions regarding diplomatic protection and should not be supported in those matters.

On the other hand, with proceedings before the courts, States could have unwanted publicity and the constant threat that an award of the courts would be practically annulled before the arbitration.

Nonetheless, two different decisions in the same matters can cause serious damage to the international legal system. In our view, the "exhausting of local remedies rule" is worse than settlement of the disputes only before domestic courts.

Some countries that are insisting on a strict implementation of that rule have reached absurd results. A clear example of this is one asymmetric dispute settlement clause in the BIT US /Morocco which provides that (1) in regard to the position of the American investor, exhausting of local remedies is required before initiating the ICSID arbitration (2) regarding the Moroccan investor in the US the only access is to the US courts.[114]

Holiday Inns v. Morocco[115] also involved several agreements containing provisions referring to different bodies for the settlement of disputes. The General agreement (namely Basic Agreement) pointed to ICSID arbitration. However, several subsequent contracts with provisions regarding the execution of obligations in the General Agreement, including loan agreements concluded by the companies controlled by the foreign investor and the state agency, the CIH referred to the Morrocan courts. And finally, the General Agreement also had a provision

[113] Op. cit, p. 135.

[114] See Peters...p. 140

[115] See 1 ICSID Reports p. 645 sqq.; Lalive, P. The First "World Bank" Arbitration (Holiday Inns v. Morocco) - Some Legal Problems.

regarding the jurisdiction of the Centre in cases of disputes connected to loans. That created more embarrassment. The Government of Morocco objected that the ICSID should stay out of the proceedings while proceedings before the Moroccan court were pending and should await a decision of that court regarding the loan dispute. Furthermore, the Government of Morocco stated that the ICSID Tribunal can only evaluate effects of Morrocan court decisions regarding the rights and obligations in arbitral proceedings. The Tribunal rejected this objection of the Moroccan Government on the grounds that the investment operation should have been treated independently of the existence of several contracts, which could not have been deemed as separate.[116] The Arbitral Tribunal also noted that "international proceedings in principle have primacy over purely internal proceedings"[117] and that conflict of jurisdictions should have to be resolved in favour of the ICSID arbitration.[118]

In Attorney General v. Mobil Oil NZ Ltd (Mobil Oil v. New Zealand),[119] Government of New Zealand tried to institute proceedings before a national court in order to obtain interim injunction against proceedings that Mobil Oil had initiated before ICSID. The host State granted to the investor certain favourable "offtake rights" that were contained in the agreement referring to the ICSID arbitration. The subsequent legislation affected those rights, and Mobil referred the dispute to the ICSID. After the case was registered by the Secretary - General of the ICSID, the Government initiated proceedings before a local court. Mobil objected to those proceedings and noted that domestic proceedings should be stopped while the ICSID case was pending, relying not only to Art. 26 of the Convention but even more on Sec. 8. of the Arbitration (International Investment Disputes) Act 1979, which was designed to give effect to the Convention in New Zealand.[120] The

[116] See 1 ICSID Reports p. 680 "it is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out."

[117] See Schreuer, p.172

[118] See Lalive, The First World Bank Arbitration (Holiday Inns v. Morocco). - Some Legal Problems; Tupman W.M. Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes 35 ICLQ, 1986, p. 813 sqq.

> "the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings".

[119] See 4 ICSID Reports p. 117.

[120] See Schreuer...p.182. Also see ICSID/8-F, Contracting States and Measures Taken by Them for the Purpose of the Convention.

Government claimed that there was no dispute in the sense of the general agreement, but rather a domestic dispute in connection with the "offtake rights" affected by legislation. The New Zealand High Court rejected the Government's action and found that the case was within the scope of the general agreement which entitled both parties to refer the dispute to the ICSID. It is important to observe that the Court expressed its view in favour of ICSID jurisdiction and the overall notion of the investment.[121] In further developments, the ICSID Tribunal was informed that its jurisdiction would not be challenged.[122]

Common doctrinal and legislative views could be summarised to state that the jurisdiction of the courts could be established even if there is an existing arbitration clause. That happens when the parties "silently" derogate jurisdiction of the arbitral tribunal and when they do not object to the proceeding before the court. Therefore, the same rule can be applied in the case of ICSID jurisdiction and domestic courts. Those thoughts can seriously damage the exclusivity established by Art. 26.

In AMCO v. Indonesia proceedings before the national court were pending and the request to ICSID followed. Due to the "effect of the consent" in the sense of Art. 26 of the Convention, this was not important. However, this case involved other difficult and quite complicated questions of identity of the litigating parties and parties to the consent. The proceedings before the Court were initiated by P.T. Wisma, a company that was controlled by the Indonesian government. However, one of the parties to the dispute before ICSID was not the P.T. Wisma. Indonesia disregarded that fact and pointed out that AMCO had waived its right to initiate proceedings before ICSID because it had "silently" accepted jurisdiction of the Indonesian Court. The Tribunal rejected the Indonesian objections and stated that there was no identity of the parties and furthermore, that the subject matter was different.[123] In its Award 1984, the Arbitral Tribunal pointed out that there were no problems with those parallel proceedings (!?) but also that the domestic proceedings could not constitute any obligation to the Tribunal.[124] The consideration of the

New Zealand Arbitration (International Investment Disputes) Act, 1979. (Act No. 39 of 1979)

[121] See 4 ICSID Reports 135, Judgement, 1 July 1987

"Having regard to the interlocking considerations which obviously must apply in a contract of this magnitude and complexity, to isolate one aspect of the investment which is possibly largely domestic, and advance that as a ground for applying domestic rather than international principles, ignores the overall impact of the contract".

[122] Op. cit. p. 164 Findings on Liability, Interpretation and Allied Issues.

[123] See 1 ICSID Reports 389 sqq. Decision on Jurisdiction 25 September 1983.

[124] 1 ICSID Reports p. 460 -

"In any case, an international tribunal is not bound to follow the result of a national court. One of the reasons for instituting international arbitration procedure is precise that parties - rightly or wrongly - feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgement was binding on an international tribunal such a procedure could be rendered meaningless.

court that the doctrine of lis pendens should not be followed in our view is doubtful even if it is possible according to the provision of Art. 26 and some mentioned bilateral investment treaties.[125] If the jurisdiction of any arbitral or judicial body is validly seized, that should preclude jurisdiction of other bodies. As we have said, that usually results in two different decisions that are quite suitable to separate executional proceedings. In this case that was not a problem of *lis pendens* because there was no identity neither of the parties to the dispute nor on the subject matter. But that legal opinion is not practical at all. It is worthy to point out that this question deserves serious international consideration and that Art. 26 needs revision in order to avoid any possible "exhausting of the local remedies" proceedings.

The question of the "silent" waiver of the right to the jurisdiction of the ICSID was previously elaborated in relation to Croatian legislative provisions on those matters. In our view, this is not possible when ICSID has jurisdiction - nevertheless amendments to the relevant provision as a lead to the judges in order to avoid mistakes would be desirable. There is a distant possibility that the tribunal would rule that this falls into "except otherwise stated". It could note, as it did in other cases, that no particular form of that stipulation is provided, so "silent" waiver would be possible.

In most cases a valid ICSID arbitration clause would preclude the right of the parties to use other remedies. That depends on the national legal provisions, stipulation of the parties etc. - in other words, on the consent of the parties to the dispute. In the case of the ICSID, that should be a rule without exceptions, which is not the case in e.g. Yemen law. Art. 1121 of NAFTA provides that investors can initiate arbitral proceedings only if they waive their right to initiate or continue any administrative or court proceedings accordingly to the Contracting States laws. That provision institutes the same rules to any other remedy (e.g. diplomatic protection). As NAFTA leaves a possibility to the investor to initiate proceedings before the ICSID, the Additional Facility and the Arbitral Tribunal established UNCITRAL Arbitration Rules, it seems that waiving those other arbitral remedies in consent to arbitrate before the ICSID should also be crucial for the jurisdiction of the Centre. However, conflict of jurisdiction can arise if the state has initiated domestic litigation. Lis pendens would argue for staying the ICSID arbitration until the domestic court has reached a judgment and then using Treaty - arbitration as an

Accordingly, no matter how the legal position of a party is described in a national judgement, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any res judicata effect of a national court. In its evaluation, therefore, the judgements of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal."

[125] The doctrine of lis pendens could be seriously and negatively impacted with the proposed provisions of the Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters adopted by the Special Commission on 30 October 1999. See Art. 21 of the Draft.

"appeal" mechanism exclusively available to the investor.[126] But the existence of consent and effect of consent clearly argue to staying of the domestic proceedings.

In Benvenuti & Bonfant v. Congo, the Government of Congo invoked *lis pendens*. Proceedings were instituted before the court in Brazavile against Mr. Bonfant, who was the agent of PLASCO, the company jointly owned by the Government and Benvenuti & Bonfant S.R.L. The Tribunal maintained that there was no identity of the parties and disregarded this objection.[127] But the same question posed in AMCO v. Indonesia remained without answer. In our view, tribunals in both cases refused to clarify that exclusive jurisdiction to the ICSID exists even in cases of pending cases before other bodies. Of course, the tribunals were not obliged to rule on this problem because of the lack of the identity of the parties. But what would happen if identity existed? In that case, the Tribunal would have to give special attention to whether there is some stipulation of the parties that could justify jurisdiction of the court. If jurisdiction is valid, the ICSID should stay of the proceedings. If it is not, the general rule from Art. 26 should be applied.

In LETCO v. Liberia, the defendant instituted parallel proceedings before the local court, but the Tribunal disregarded those proceedings.[128] Subsequently, the Tribunal awarded LETCO the costs incurred in carrying out the parallel proceeding which was based on Liberia's bad faith. Liberia was a non-cooperative party (abstention of proceedings) and contrary to the contractual agreement, it commenced proceedings in Liberia in order to nullify the results of the ICSID arbitration.[129]

It is worthy to note that most national laws allow a national court to stay a proceeding commenced in disregard of a valid arbitration clause. The 1994 Egyptian Arbitration Law contains this principle, although it is not expressly stated that an arbitration clause that may have such a implication need necessarily be valid:

"The court before which an action is brought concerning a disputed matter which is subject to an arbitration agreement shall hold this action inadmissible provided that the defendant raises this objection (that the matter in issue is arbitrable

[126] See. Wälde, Thomas, Investment Arbitration Under the Energy Charter Treaty - From Dispute Settlement to Treaty Implementation, 12 Arb. International, no 4. p.461.

[127] 1 ICSID Reports p. 340. Decision of 15 August 1980. "With respect...to the Government's request to the Tribunal to dissese itself in favour of the Revolutionary Court of Justice, the Tribunal declared that there could only be a case of lis pendens where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals. The Tribunal stated that these conditions were not satisfied. In particular the case before this Tribunal was in fact between B&B and the Government and not between Mr Bonfant in his capacity as agent of PLASCO and the Government."

[128] 2 ICSID Reports p. 378. Award 31 March 1986.

[129] Op. cit. B) 4)

and that there is a subsisting arbitration agreement in relation thereto) before submitting any demand or defence on the merits of the case."[130]

Thus, if an application on the merits is made by a defendant to a suit (e.g. by filing a statement of defense) instead of raising the requisite defense, this will be deemed to be a waiver of his right to use arbitration. This Article is not identical with an equivalent provision of the UNCITRAL Model Law. Article 8(1) of the Model Law provides:

"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

4.5 ICSID and Other Arbitral Bodies

It can be generally stated that when there are concurrent arbitral clauses between the ICSID and other arbitral bodies, the ICSID would have priority if Art. 26 is taken in consideration and if there is no stipulation of the parties to the dispute that changes the rule of exclusivity. Of course, especially if that arbitration body would have its seat in a non - contracting State to the Convention, the answer could be different. Furthermore, a different answer could be given in situations in which the parties to the dispute "otherwise stated". So, for the purpose of this paper, we have to suppose that there is no specific stipulation of the parties in that direction.

A different standing point could involve numerous complications and difficulties. In Mine v. Guinea, it produced delay and unnecessary costs. Guinea's failure to cooperate in proceedings before the AAA motivated the ICSID Tribunal to impose on it all the costs of the AAA arbitration even though the objection to the jurisdiction of AAA was successful.

Nevertheless, in case there is an existing award of some other arbitral body and simultaneously the jurisdiction of the ICSID is valid, it could produce far reaching consequences in proceedings regarding the execution of those awards. It can be clearly seen in the case of the AAA award in MINE v. Guinea. Mine tried to execute that award in the Belgian and Swiss courts without any success.[131] The Belgian court found out that provision of Art. 26 precluded MINE's right to obtain attachments under the AAA award while proceedings before the ICSID were pending. In that case, Guinea invoked immunity, but that question was not

[130] Art. 13(1) See Asouzu, Amazu, The Egyptian Law Concerning Arbitration in Civil and Commercial Matters, 8 African Journal of International and Comparative Law, 1996 p. 147

[131] See 4 ICSID Report p. 32 and 41 - Court of the First Instance of Antwerp and Republic and Canton of Geneva, Tribunal of First Instance, Eighth Chamber, Judgement No. 2514, March 13, 1986, Case No. 885 S 4984 - Maritime International Nominees Establishment c/o Inter Maritime S.A. v. The Republic of Guinea. Also see Screuer, p.179sq.

considered since it was not necessary because of the "exclusion of any other remedy" rule. The Swiss court had a similar assumption of this question. Guinea requested the Tribunal to issue provisional measures and directed MINE to dissolve all pending attachments. Mine objected to this request, pointing out that these proceedings are not pre-judgement provisional measures but enforcement proceedings deriving from the AAA award. The Tribunal rejected this objection and issued provisional measures under Art. 47.[132]

In SPP v. Egypt, the Tribunal was not explicit in favour of ICSID jurisdiction and stayed proceedings until the decision of the court regarding the jurisdiction of the ICC was brought.[133] In other words, the expression of Art. 26 "unless otherwise stated" was given the most possible extensive meaning. If this case could be noted as a "test", it seems that there is very little of the ICSID's exclusivity left. We have also to point out on the previously mentioned decisions of the US courts in Mine v. Guinea, which give us much reason to believe that competing arbitral jurisdictions will not be automatically resolved in favour of the ICSID.

As a matter of a fact, the ICSID had jurisdiction in those cases solely because the state courts found that the arbitral jurisdiction of other bodies did not in fact exist, so there were no competing jurisdictions.

Unclear clauses regarding the settlement of disputes can sometimes produce various interpretations. In Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic, consent of the host State was contained in the BIT, which provided for negotiations between parties to the dispute and afterwards:

"2. If the dispute between the investor of one Party and the other Party continues after a period of three months, the investor and the Party shall have right to submit the dispute to either:

1) the International Center for the Resolution of Investment-Related Disputes (?!) with special regard to the applicable provisions of the Treaty on the Resolution of Investment-Related Disputes arising between States and nationals of other States, open for signature in Washington D.C. on 18 March 1965, provided, however, that both Parties are parties to such Treaty; or
2) an arbitrator or an ad hoc international arbitration tribunal established in accordance with the arbitration rules of the United Nations Organization Committee for International Trade Law. Parties to the Dispute may agree in writing upon modifications of such rules. The arbitration award shall be final and binding on both parties to the dispute...

[132] 4 ICSID Report p. 69 - Award of 6 January 1988. "The Tribunal recommended that MINE immediately withdraw and permanently discontinue all pending litigation in national courts and that it commence no new action. Litigation based upon the AAA award was deemed to out of the ICSID arbitration for purposes of the provisional measure".

[133] See note 101.

4. The dispute shall be resolved by such agency referred to in Section 2. above as was the first one to which a proposal for the resolution of the dispute was submitted."[134]

If both parties have the right to choose between different arbitration bodies, the provision of the section 4 is highly recommended. In this case, proceedings pending before one body would without any doubt preclude possible subsequent proceeding before other bodies, and jurisdiction of the Centre does not prevail. We have seen that some Croatian BIT's do not contain that provision. However, a defendant objected that "even assuming that BIT was in force, the parties had not "jointly" invoked Article 8 (its arbitration provision)".[135] Obviously, the defendant thought that "joint action" was necessary due to the wording "the investor and the Party shall have right to submit the dispute to". Of course, more clear provision would preclude this objection, and replacement of the word "and" with the word "or" is recommended in similar situations. Respondent's objection was dismissed regarding the expert evidence presented by Claimant. The Tribunal also noted that Respondent itself admitted that the wording of article 8 was "ambiguous" and concluded:

> "Moreover, a holding that the parties must submit their dispute to arbitration jointly would amount to a finding that the terms of Art. 8 of the BIT, even if otherwise effective for purposes of ICSID jurisdiction, do not provide for binding arbitration unless the parties agree to arbitration if and when a dispute arises. As correctly pointed out by Claimant, such an interpretation would leave investors without the protection afforded by international arbitration, contrary to the main objective of bilateral investment treaties. The fact that some such treaties may contain provisions for joint submission of disputes to arbitration does not compel the conclusion that provisions whose wording is at best ambiguous must be interpreted in like manner. Such a construction of the terms of a treaty would be incompatible with the applicable international rules for the interpretation of these types of agreements (Vienna Convention, art.31(1))...the language of this provision makes sense only if it is predicated on the assumption that each party to a dispute has the right separately to initiate the arbitration proceedings."[136]

[134] Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999 at 4. Agreement between the Government of the Slovak Republic and the Government of the Chech Republic Regarding the Promotion and Reciprocal Protection of Investments, November 23, 1992.

[135] Op. cit. at. 11.

[136] Op. cit. at. 57-58 Viena Convention Art. 31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. See also Shabtai, Rosenne, The Law of Treaties, A Guide to the Legislative History of the Vienna Convention, 1970, p. 215 sqq.

In fact, jurisdictional conflict between two arbitral bodies was not possible in this case due to the fact that first proceedings would preclude any other. Nevertheless, a problem arose regarding the method of initiating proceedings which is outside of the scope of this paper. The Tribunal correctly noted that if "joint submission" was necessary, that would in fact mean that there is no binding consent since one of parties could refuse to act in "joint action". Moreover, that would preclude any arbitration body from asserting its jurisdiction, and that kind of interpretations is obviously senseless. The national court would be the only remaining remedy.

4.6 Jurisdiction of the ICSID and Provisional Measures

Many doctrinal and practical considerations should be directed to the question of provisional measures issued by courts while proceedings before the ICSID are pending. The drafting history of the Convention shows that there were debates regarding the provisional measures that could have been issued by the Centre. The main question was, however, linguistic. Should the Tribunal be empowered to "prescribe" or "recommend" provisional measures?[137] In the end, the Tribunal was empowered only to recommend provisional measures.[138] A penalty provision was also omitted.[139] That was not wise since we have seen that in some case provisional measures issued by the Tribunal have been disregarded. We can point out that as one of the failures of the Convention since an unaccepted "recommendation" could sometimes prevent the winning party in ICSID proceedings from fulfilling its

[137] Letter addressed to the Bank by the Minister of Finance of the Republic of China on November 9, 1964.

6) Provisional measures
Article 50 of the Draft provides that the Arbitration Tribunal may "prescribe" provisional measures necessary for the protection of the rights of the parties, and that it may fix a penalty for failure to comply with such provisional measures. Underlying this provision is the theory that provisional measure, having the nature of "interim award" , should be enforceable on the same basis as final award. Leaving open the question of whether the Tribunal shall have the power to render "interim award" it may nevertheless be pointed out that a "provisional measure" is different from an "interim award" in that the former deals with matters not yet certain and may be revoked at any time during the proceedings while latter is rendered with respect to matters already ascertainable during the proceedings. As such, provisional measures should not and need not be enforceable on the same basis as final awards. It is therefore sufficient that the Tribunal be empowered to "recommend" rather than "prescribe" provisional measures...

[138] Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

[139] Draft Convention Art. 50(2) The Tribunal may fix a penalty for failure to comply with such provisional measures. See, History 812 sqq (Broches); Brower, Goodman, Provisional Measures, p. 442.

objectives of litigation. In other words, it could be a meaningless victory.[140] Questions regarding provisional measures issued by the courts while there is existing consent to the ICSID or while the proceedings before the ICSID are pending were not debated at all (?!). So, does the exclusion of any other remedy affect the issuance of provisional measures by the local courts?

In AGIP v. Congo, the claimant requested a measure of preservation in order to collect books, accounting documents etc. The measure was granted, but the Government did not comply. The Tribunal only noted in its award that it "does not lose sight of the facts...that the Government did not comply with the decision of the Tribunal...as to the measures of preservation.

The Working Paper provided in Article VI Section 6 that "except as parties otherwise agree, the Arbitral Tribunal shall have the power to prescribe, at the request of either party, any provisional measures necessary for the protection of the rights of the parties.[141] Due to the fact that power of the tribunal regarding the provisional measures seems to be quite weak, the question of the possibility of their issuance by other bodies in context of Art. 26 is essential.[142] Power of the Tribunal under Art 43.(b) is undisputable (of course it has also some degree of defect - "except if parties otherwise agree") but that cannot be identified with provisional measures.[143]

In any case, those questions deserve careful consideration during the process of drafting arbitral clauses. It is disappointing that the investors do not see this point as an important one, and even more that provisions considering those matters are not included in bilateral and multilateral investment treaties.

In the practice of the Centre, different views were expressed regarding this problem. In Holiday Inn's v. Morocco,[144] the Government requested and obtained from the Moroccan court a provisional measure to terminate construction of the facilities at the claimant's cost. Regarding the finished hotels, the court appointed a "judicial administrator". The claimant noted that under articles 26 and 47 of the

[140] See, Caron, Interim Measures of Protection: Iran - US Claims Tribunal 46 Zeitschrift für ausländisches Öffentliches Recht und Volkerrecht, 1986, p. 466 "It is quite clear from the drafting history that the interim measures "recommended" are only morally binding. Although this may reduce the effectiveness of ICSID, it is not argued to have negated the judicial nature of ICSID."

[141] See History, p. 41 sq.

[142] See Brower, Goodman, Provisional measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6 FILJ, 1991. p. 431; Friedland P.D., Provisional Measures and ICSID Arbitration, 2 Arbirtration International p. 335, 1986.

[143] Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings:

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

[144] See Lalive, p.132 sqq.

Convention, the Moroccan court had no jurisdiction to issue that measure because ICSID arbitration was pending. However, Morocco presumed that that matter was under the exclusive jurisdiction of the Moroccan courts. On the other hand the Tribunal stated that it has the right to recommend provisional measures and that "the parties are invited to abstain from all measures likely to prevent definitely the execution of their obligations".[145] The Tribunal also recommended consultations "in order to maintain in the hotels the character of the enterprise which is part of the international chain of Holiday Inns Hotels". It seems that the Tribunal was undecided. In any case, it failed to order to Morocco to discontinue proceedings before the Moroccan Courts and to stop constructing and operating the hotels. Exclusivity obviously failed in this first ICSID arbitration. Apart from this question, one additional important question should be raised. What should be done with the enforcement of the provisional measures "recommended" by the ICSID Tribunal? We believe that this recommendation should have effect in the courts of the Contracting States and in case they refuse to cooperate, the international dispute between the States would be in place. In that case, the prohibition of Art. 27 of the Convention should not be followed.

In MINE v. Guinea, the Tribunal recommended provisional measures directing the claimant to abstain from proceedings before Belgian and Swiss courts. It is obvious that its standing point was that only the Arbitral Tribunal had jurisdiction in the matter of provisional measures.[146] This opinion was supported in the decision of the Swiss competent body on the request of MINE to unsuccessful proceeding on enforcement of the AAA award maintain as a provisional measure.[147]

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[145] Op. cit. p. 136. Also Parra, The Practices, p. 42, and Schreuer, p 184.

[146] 4 ICSID Reports 47; Schreuer, p. 185.

"The Tribunal further recommends that MINE disolve every existing provisional measure obtained in litigation in national courts (including attachment, garnishment, sequestration, or seizure of the property of Guinea, by whatever term it is designated and by whatever means obtained) and that MINE seek no new provisional remedy in a national court".

[147] Schreuer, p. 186 -

"Under the terms of Article 26 of the Convention of 18 March 1965, the consent of parties to arbitration under this Convention is, in the absence of any stipulation to the contrary, considered as renunciation of all other recourse.

Under the circumstances, MINE does not pretend to be beneficiary of any clause whereby the Republic of Guinea would have authorized it to resort to other measures against it, whether of a provisional nature or not, than those decided upon by the ICSID Arbitral Tribunal."

The Arbitral Tribunal did not authorise recourse to such measures but that, on the contrary, it recommended to MINE, in its decision on provisional measures of 4 December 1985, that it should withdraw and permanently discontinue all pending litigation before national courts as well as withdraw all other provisional measures.

...in resorting to ICSID arbitration proceedings, MINE waived the ability to request provisional measures against the Republic of Guinea in Switzerland. Therefore

The case Atlantic Triton v. Guinea shows that there is possible a quite different attitude towards this question.[148] There the claimant succeeded in obtaining a provisional measure from the French court and attached three vessels belonging to the Guinea before ICSID proceedings were initiated. However, consent existed, and in our view exclusivity was in place. The relevant point is not the moment of initiating proceedings, but the moment when the consent to arbitrate is accomplished. That is the exact meaning of the related provisions of the Convention. The Guinea appeal was successful, and the authority lifted attachments on the basis of Art. 26 of the Convention.[149] The Tribunal of the Centre was silent in affirming the exclusivity of its jurisdiction and refused to issue a provisional measure.[150] It also refused the claim of Guinea for damages suffered from attachments that Atlantic Triton had obtained from the French court and showed that, by its opinion, provisional measures were not within the exclusive jurisdiction of the Centre.[151] According to the Tribunal, "the very complexity of the question raised prohibits and reproach to a signatory of an ICSID arbitration clause for having opted for an interpretation consistent with a solution very widely adopted in international arbitrations as well as by national decisions".[152] Nonetheless, the Arbitral Tribunal lost one point. The arbitration under ICSID is quite different from other arbitrations and its self-contained nature is designated solely to avoid

MINE is committing a manifest abuse of the law in invoking these proceedings to attempt to obtain the maintenance of an attachment, which is the typical provisional measure."

[148] See Audit, Bernard, Comment [on November 18, 1986 French Cour de cassation decision in Société Atlantic Triton c. République populaire révolutionnaire de Guinée], 76 Revue Critique de Droit International Privé, p. 760, 1987.

[149] See Friedland P.D., Provisional Measures and ICSID Arbitration, 2 Arbitration International p.343, 1986; Schreuer p.187.
The guide to the activities of ICSID, drawn up by that body, specifies at page 11 that, unless otherwise agreed between the parties, consent to arbitration by ICSID excludes recourse to any other remedy and consequently the parties cannot apply to local administrative or judicial authorities in order to obtain provisional measures but must solely have recourse to the arbitral tribunal...the clear purpose and spirit of the Convention, as revealed by the Arbitration Rules, implies that the arbitral tribunal has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures. The terms used, such as remedy and recourse (Article 26 of the Convention) have a general scope which dispels possible ambiguity."

[150] See 3 ICSID Reports 17; Friedland...Provisional Measures, p. 344 sqq; Marchais...Measures provisoires, p. 289 sqq.

[151] 3 ICSID Reports 17 sqq.; Schreuer, p.188.

At. p. 35 - "while it certainly follows from the foregoing texts that the Tribunal has jurisdiction to recommend conservatory measures, it hardly follows, as obviously, that such jurisdiction should be exclusive and prohibit any recourse to national courts, traditionally and virtually universally recognized as having sole jurisdiction to order such measures".

[152] Op. cit., p. 36.

interference with national courts as far as possible. If it is possible in the matter of provisional measures, it would be better. In 1986, the French Cour de cassation as a final instance brought a decision that the first instance court had jurisdiction.[153] This decision has very important doctrinal as well as practical importance. It shows that matters of provisional measures are not widely seen uniformly.[154] However, it had little practical importance since vessels left the port before it was brought. And yet it is doubtful considering the fact that the Cour de cassation was certainly aware of the 1984 revision of the Arbitration Rules of ICSID which accentuated the intention of Art. 26 regarding the provisional measures quite differently.

It is absolutely clear that two opposite standpoints toward this problem exist.[155] This problem was resolved before the final decision of the French courts, but in favour of the jurisdiction of the ICSID. This means that the term

[153] 3 ICSID Reports 11.

Art. 26. Provides that consent to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. This provision was not intended to prohibit parties from applying to a national court to seek conservatory measures in order to guarantee the execution of an award which might subsequently be given...this ruling of the Court of Appeal misapplied Article 26 of the Convention because the power of the national judge to order conservatory measures is not excluded by the Convention of Washington and can only be excluded by the express agreement of the parties or by tacit agreement arising from the adoption of arbitration rules including such a renunciation."

[154] See Gaillard, E, Note, 112 JDI 1985; Gaillard, E, Note 114 JDI 1987; Audit, B, Note, 76 Rev. Crit. Droit Int. Prive, 1987; Van den Berg A.J., Some Recent Problems in the Practice of Enforcement under the New York and ICISD Conventions, 2 FILJ 1987, p. 439 sqq; Broches A, A Guide for Users of the ICSID Convention, News from ICSID, Vol 8/1 1991; Hirsh M, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 1993; Delaume, G. Foreign Sovereign Immunity: Impact on Arbitration, 38 The Arbitration Journal 34, 1983 p. 34 sqq; Toope, S.J., Mixed International Arbitration, 1990; Delaume, G, ICSID and the Transnational Financial Community 1 FILJ 1985; Delaume G, Transnational Contracts, Applicable Law and Settlement of Disputes, 1990; Delaume, Judicial Decisions Related to Sovereign Immunity and Transnational Arbitratoin 2 FILJ 1987; Friedland, ICSID and Court-Ordered Provisional Measures; Dominice, Ch, Quelques observations sur la question des mesures conservatoires dans les arbitrages CIRDI, 112 La Semaine Judiciaire 1990.

[155] See. Schreuer, p. 191 sq.

IN FAVOUR OF THE JURISDICTION OF NATIONAL COURTS	IN FAVOUR OF THE EXCLUSIVITY OF ICSID JURISDICTION
The urgency of circumstances in which a party may dispose of assets or otherwise change a situation to the detriment of the other party does not make it practical to wait until the ICSID tribunal is constitued and may start to act under Art. 47	Art. 26 is uniequivocal and does not provide for an exception in respect of court ordered provisional measures

"recommend" now has a stronger notion in the sense that the recommendation is directly executable in the Contracting states. The existing Arbitration Rule 39[156] was amended in 1984 with a new paragraph 5, which is strongly in favour of ICSID exclusive jurisdiction, although it allows disputing parties to stipulate otherwise.[157]

The power of the tribunal under Art. 47 is limited to a recommendation and hence inadequate.	This self - contained character as well as the mixed nature of the dispute between States and foreign investors fundamentally distinguishes ICSID Arbitration from other arbitration regimes. Therefore, provisional measures by domestic courts should only be permitted if the parties to a dispute have given their express consent.
The concept of "remedy" in Art. 26 only covers decisions on the merits and not interim measures.	The danger of abuse of provisional measures both in the host State and in third countries far outweighs their usefulness.
The exclusive power of an ICSID Tribunal does not extend to the enforcement of awards, which is left to domestic courts (Art. 54). Provisional measures must be seen as steps preliminary to enforcement.	The Tribunal may take account of any refusal to comply with provisional measures it has recommended as well as of attempts to dissipiate assets to the detriment of the other party.
The common rule in arbitration as evidenced by other arbitration rules and by domestic law is that domestic courts have the power to order provisional measures. An intention to deviate from this common rule is not apparent from the drafting history of Art. 26 and would have to be clearly expressed by the parties to a dispute.	The highly effective enforcement mechanism provided by the Convention minimises the need for provisional measures.

[156] Rule 39 -

Provisional Measures

(1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[157] (5) Nothing in this Rule shall prevent the parties provided that they have so stipulated in the

There are certain doctrinal thoughts that this new rule may be outside the scope of the rule making power in Art. 44. of the Convention, and that some national courts will regard the agreement to oust their jurisdiction as ineffective on grounds of public policy.[158] In our view this provision is only pointing out that exclusivity of jurisdiction relates also to the provisional measures which was obvious before, but the provision of Art. 26 in regard to Art. 47 was in some cases wrongly interpreted.

In Ceskoslovenska Obnhodni Banka, A.S. v. Slovak Republic, the Tribunal considered various jurisdictional objections of the defendant. Some related to a lack of jurisdiction due to the fact that it was unclear whether consent of the parties existed. Others were directed to the non-existence of conditions ratione materiae and also ratione personae. However, the Tribunal upheld its jurisdiction over the dispute and rendered its decision on jurisdiction having in mind that consent exists and that the conditions ratione materiae as well as ratione personae were fulfilled.[159] The Claimant asked the Tribunal on several occasions to issue provisional measures seeking the suspension of bankruptcy proceedings pending against the company in Slovak Republic, which was probably entitled to receive certain funds from the Slovak Republic under the agreement that contained an arbitration clause referring to the ICSID. Moreover, refusal of the Slovak Republic to fulfil its obligation to cover the losses of that company, which was in debt to the claimant, was the subject matter of the dispute. Due to the fact that the consent of the parties had no reference to the jurisdiction of local courts concerning the provisional measures it was clear that the Tribunal was competent to recommend those measures solely if jurisdiction existed. Although we can debate the issues concerning the existence of consent and fulfilment of the other jurisdictional conditions, there is no room to object to the exclusive competence of the Tribunal to recommend provisional measures if the tribunal upholds its jurisdiction. However, it seems that the Tribunal was somehow reluctant and initially denied the requests for provisional measures. Finally, in Procedural Order No. 4., the Tribunal recommended the suspension of bankruptcy proceedings "to the extent that such proceedings might include determination as to whether the Slovenska inkasni spol. s.r.o. (Slovak Collection Company) has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration."[160] At present we do not have

agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.

[158] See Collins, Lawrence, Provisional and Protective Measures in International Litigation, 234 Recueil des Cours 9, 1992, p.104. sq.

[159] See Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999.

[160] Op. cit. at. 9.

information about the echo of this recommendation in the Slovak court that is dealing with the bankruptcy proceedings and accordingly we assume that it is abstaining from determination as to whether the SIS has a valid claim towards the Slovak Republic. Of course, the court can be aware of this recommendation only if some of the parties to the bankruptcy proceedings invoke so and due to Art. 26. of the Convention, should abstain from further proceedings in that direction.

Concerning the cases pending before the Additional Facility, this rule of exclusivity is not followed, so the courts would have jurisdiction in matters of provisional measures.[161] These in accordance with proceedings before the Additional Facility provisions of the Convention are inapplicable and even some different stipulation of the partie should not affect jurisdiction of the local courts.

In our view, the self-contained nature of proceedings before ICSID is of the utmost importance and it should be preserved as such, while the assistance of the courts should be avoided as much as possible.[162] There are so many reasons why national courts should be avoided in these matters, and feeling that they are not immune from political influence proved in many cases is not baseless. Potential for abuse exists in situations where the State sets provisional measures because it will be perfectly positioned to seize the foreign investor's assets located in the State.[163]

If the parties are willing to preserve the right to request provisional measures before the courts, Model clause 1993 recommends a separate clause in arbitration

[161] ARBITRATION (ADDITIONAL FACILITY) RULES

Article 47 Provisional Measures of Protection

(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

(2) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.

(4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

[162] But see Broches, A Guide for Users of the ICSID Convention, 8 News from ICSID, No. 1, 1991, p. 8 - However, the presumption that in the absence of such a stipulation (an agreement by the parties that provisional measures may be requested from a municipal court) provisional measures by a court are excluded is at variance with the almost universal recognition in the area of commercial arbitration that to seek measures from a court and for a court to grant them is not inconsistent with an arbitration agreement (as most recently and clearly expressed in Article 9 of the 1986 UNCITRAL Model Law on International Commercial Arbitration).

[163] See Friedland, ICSID and Court - Ordered Provisional Remedies: An Update, Arbitration International, 1988, p. 165.

agreements.[164] However, this Model clause has a serious defect because a state still does not waive its immunity from the enforcement procedure, which is quite possibly an undesirable effect depending solely on the very different national legislative provisions. Our advice to the investor is that arbitration clauses referring to the ICSID should be upgraded with separate clauses referring to the waiver of immunity in the context of executing provisional measures (they can be regarded as *sui generis* enforcement measures). It is worthy to point out the 1991 International Law Commission Draft articles on jurisdictional immunities of States and their property presented to the General Assembly (Art. 18(1)):

"No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
   (i) by international agreement;
   (ii) by an arbitration agreement or in a written contract; or
   (iii) by a declaration before the court or by a written communication after the dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the Property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."[165]

Of course, the model clause referring to the waiver of immunity in enforcement procedures is also recommended.[166]

[164] Clause 14
Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests.

[165] See Collins, Lawrence, Provisional and Protective Measures in International Litigation, 234 Recueil des Cours 9, 1992, p. 171.

[166] Clause 15
The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.

5 Conclusion

Almost everyone agrees that the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 represents a giant step forward in international law regarding private parties and their disputes with states. The direct access to an international forum was necessary, as foreign private persons can hardly expect impartiality in the courts of the states with which they are in litigation. On the other hand, "diplomatic protection" to foreign nationals is not suitable for several reasons. It is restricted by the "exhaustion of local remedies" rule and acceptance of the private investor's state, and there is no guarantee that the state to which the claim is directed would be willing to accept jurisdiction of any international body. Finally, the "diplomatic protection" could make a serious impact on relations between involved states, which should be eschewed as much as possible.

There was (and is) a large amount of abuse concerning the right of diplomatic protection of its nationals by a state. The colonization of many former colonies began with the dispatch of forces by powerful states to protect their companies or strategic economical interests. Many states tried to protect themselves from those situations, and so it was common for Latin American states to require foreign companies under contract with those states to agree to a condition that the companies would not appeal to their own governments for assistance with respect to any matter arising out of the contracts, but would rely on local courts and administrative institutions to resolve disputes. An extreme example is the clause in the North American Dredging Company Case, which required in effect that the contractor shall be regarded "as Mexican in all matters".[167] Those Calvo Clauses had been the subject of great controversy and discussion because the right of diplomatic protection is the right of the state and not that of its nationals and, therefore, it cannot be waived by the nationals concerned.[168]

However, the achievements of the Convention are in some ways limited. The drafting history shows that there were many intentions to abandon the whole project or, at least, to restrict the scope of its application. Provisions of the Convention point out that some of those intentions were successful.

The most desirable idea, so far as civil matters are concerned, would be that foreign private persons (individuals and companies) in case of disputes with host-

[167] See Feller, A.H. Some Observations on the Calvo Clause, 27 AJIL, 1933, p. 46. See also Calvo clause in Mexican Railway contract... "The company shall always be a Mexican Company even though any or all of its members should be aliens, and it shall be subject exclusively to the jurisdiction of the courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said company and all aliens and successors of such aliens having interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexicans in everything relating to said company" at p. 466.

[168] See Nathan K.V.S.K., ICSID and Dispute Resolution in International Civil Engineering Contracts, 58 Arbitration, 1992. no 3. p. 198.

States, have direct access to the appropriate international forum. That forum should be exclusively competent for all disputes between states and the nationals of other states. Its self-contained nature is necessary, and the assistance of the state courts should be limited only to matters of enforcement of awards, but without restrictions like that set out in Art. 55 of the Convention. Of course, it looks like an utopian idea which has no chance to be widely accepted by the states. In our estimation, the Convention has widely opened the door to that goal, and it is only a matter of time when we shall see that utopia become reality. Due to the fact that economic development has enormous importance, especially in the less developed countries, it was impossible to achieve this goal without the immense power of the private capital that directly affects development process through its investments, so the traditional attitudes and concepts had to be abandoned. However, it was not a painless project. The less-developed countries, and among them especially the Latin American states, were opposed to the idea of the Convention.[169] It is quite understandable why there was no confidence and why those countries more or less openly saw the Convention as an attempt of the capital-exporting countries to dominate them. That opposition was of course under the veil of sovereignty concepts and doctrinal pureness and without any observance of the fact that those concepts are outlived. In any case, the private capital would not flow to countries that are not willing to protect it properly. Indubitably, proceedings before national courts do not mean "proper protection". So, the Convention obviously protected and the interests of those states. Of course, they were more willing to deal with investors before their courts and other bodies, and they argued in favour of their legislation, which protected foreign investments, and in favour of separate power of the courts in relation to the executive and legislative powers, but the investors were not impressed.

However, we have mentioned that strong opposition to the idea of the Convention resulted in that some of its provisions representing a compromise between the new and outlived concepts. In the context of this research, special reference to the "exhaustion of local remedies" rule was given.

The matters of jurisdiction of the ICSID were widely debated, and finally ICSID jurisdiction was restricted by various outer limits which should disappear in the future. However, some uncertainties can be observed but their extensive consideration would be out of the scope of this paper. For example, the jurisdiction of the Centre is limited to "legal disputes arising directly out of investments," but there are no appropriate definitions for those terms. Of course, during the preparatory work of the Convention, there were different proposals in that direction, but finally important definitions to *jurisdiction ratione materiae* were omitted. One

[169] Action known as "El No de Tokyo" Latin American states voted en bloc against the Board of Governors Resolution instructing the Executive Directors to prepare a convention. See Broches, The Convention, p. 348.

of the failures due to the non-existence of the definitions is seen in the provision that allows states to limit jurisdiction to certain classes of disputes or to exclude others. Regarding the jurisdiction ratione personae, restrictions can be observed quite easily. *Ius standi* is approved only to the nationals of the Contracting States, which is, from the political-philosophical point of view, an outlived concept in the same manner as the concept of reciprocity. Why should the nationals of some states suffer or benefit because of acts of their states? The states should simply recognize *ius standi* before the Centre to every person that is a disputing party. The adoption of the concept of control as the means of determining the nationality of a foreign legal person (but only if stipulation of the consenting parties exist) represents one of the steps forward. There are numerous provisions of the Convention that can be regarded as a compromise between those two opposite standpoints. We can only hope that the new conceptions will finally prevail. The provision of Art. 26 is one of them.

Exclusivity of the Centre's jurisdiction is a new rule. However, that "exclusivity" is seriously jeopardized with the possibility of the contracting parties stipulating differently. The second sentence of that provision, which is absolutely unnecessary due to the existing wording "unless otherwise stated," is solely a lead to the countries in which direction they should affect exclusivity of the Centre's jurisdiction. Adequate to the existing customs and possibly to the "solemn and friendly atmosphere" while investment contracts are negotiated this restriction represents normal provision in the consent to arbitration. Almost regularly, the "exhaustion of local remedies" rule can be noticed in advanced consent of the States given in national legislations, bilateral and multilateral investment treaties.

The application of this rule can lead to undesirable situations and violations of one of the most valuable traditional rules *res iudicata*. At present, the ICJ has stuck to customary international law, and in the ELSI case it found that it was "unable to accept that an important principle of customary international law (exhaustion of local remedies) should be held to have been tacitly dispensed with".[170] There are some doctrinal thoughts leading to similar conclusions, which seems to be based on the thoughts that international commercial arbitration is controlled by a select "mafia".[171] The main point of this standing point is that if domestic courts are controlled by politicians, it can be said that international arbitration tribunals are branches of powerful western corporations and that so called *lex mercatoria* owes its existence to published books and articles of "important authors" who are acting in favour of those corporations.[172]

[170] Elettronica Sicula S.p.A. (ELSI) US v. Italy, 1989, ICJ Reports p. 15; See 84 AJIL, 1990, p. 249, Mann, F.A., Foreign Investment in the International Court of Justice: The Elsi Case, 86 AJIL, 1992, p. 92 sqq.

[171] See Sornarajah, M, Power and Justice in Foreign Investment Arbitration, 14 Journal of International Arbitration, 1997.

[172] Op. cit. - "private law making".

The scope of this paper was to emphasize this new rule and to consider its doctrinal and practical implications as much as it is possible. The elaboration of those questions and specially consideration of the decisions of the relevant courts and the arbitral tribunals which were in the same matters untolerably different lead to the conclusion that exclusivity of the ICSID's jurisdiction should be absolute and not subject to any restrictions. In our view, that can be achieved only with appropriate revision of relevant provisions of the Convention. The frequent glorifications of the present solution simply forget to mention that exclusivity means nothing if it is restricted with "unless parties otherwise agree".[173]

*CASES BEFORE ICSID**

1. **Holiday Inns S.A. and others v. Morocco (Case No. ARB/72/1)**
2. **Adriano Gardella S.p.A. v. Cóte d'Ivoire (Case No. ARB/74/1)**
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3. **Alcoa Minerals of Jamaica, Inc. v. Jamaica (Case No. ARB/74/2)**
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4. **Kaiser Bauxite Company v. Jamaica (Case No. ARB/74/3)**
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6. **Gabon v. Société Serete S.A. (Case No. ARB/76/1)**
7. **AGIP S.p.A. v. People's Republic of the Congo (Case No. ARB/77/1)**
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[173] See Nathan K.V.S.K. , ICSID and Dispute Resolution in International Civil Engineering Contracts, 58 Arbitration, 1992. no 3. p. 103 sqq.

"However, the courts of states which have acceded to the ICSID Convention cannot intervene before or during arbitral proceedings and will not hear appeals from the arbitral award where the states have agreed with private investors to unconditional reference to ICSID arbitration." This statement is only partialy true.

* Concluded and pending, including references on published decisions and awards.

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9. **Guadalupe Gas Products Corporation v. Nigeria (Case No. ARB/78/1)**

10. **Amco Asia Corporation and others v. Republic of Indonesia (Case No. ARB/81/1)**
Jurisdictional decision of September 25, 1983, 23 ILM 351 (1984); 10 Y.B. Com. Arb. 61 (1985) (excerpts); 89 I.L.R. 379 (1992); 1 ICSID Rep. 389 (1993); French translations of English original in 1985 Revue de l'arbitrage 259 (excerpts); 113 Journal du droit international 202 (1986).
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11. **Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Case No. ARB/81/2)**
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12. **Société Ouest Africaine des Bétons Industriels v. Senegal (Case No. ARB/82/1)**
Award of February 25, 1988 and its attachments, 117 Journal du droit international 192 (1990) (excerpts); 6 ICSID Rev.-FILJ 125 (1991); English translations of French original in 17 Y.B. Com. Arb. 42 (1992) (excerpts); 2 ICSID Rep. 164 (1994).
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13. **SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar (Case No. CONC/82/1)**

14. **Swiss Aluminium Limited and Icelandic Aluminium Company Limited v. Iceland (Case No. ARB/83/1)**

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100. PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (Case No. ARB/02/5)
101. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6)

Summary

EXCLUSIVITY OF ICSID'S JURISDICTION?

This paper is dedicated to the valuable effort to establish exclusive jurisdiction of an international arbitral forum for settlement of investment disputes between states and nationals of other states. Although the new attitude in international law towards the abandonment of "exhaustion of local remedies" rule and limitation of the right to diplomatic protection were shown in Convention on the Settlement of Investment Disputes between States and Nationals of other States, the Convention still contains compromises between traditional doctrinal standing points. Exclusivity of the ICSID's jurisdiction is not complete and it is seriously modified with the possibility given to contracting parties to stipulate "something else".

The author pleads for the adoption of new rules without exceptions and direct access to the international forum of any individual and private person regarding disputes in civil matters with states - without any restriction ratione materiae and ratione personae contained in 1965 Washington Convention.

Key words: *1965 Washington Convention, ICSID, exclusive jurisdiction.*

Zusammenfassung

AUSSCHLIESSLICHE ZUSTÄNDIGKEIT DES INTERNATIONALEN ZENTRUMS ZUR LÖSUNG VON INVESTITIONSSTREITFÄLLEN

Dieser Aufsatz widmet sich der Festlegung ausschließlicher Zuständigkeit eines internationalen arbiträren Körpers für die Lösung von Investitionsstreitigkeiten zwischen Staaten und Bürgern anderer Staaten. Obwohl in der Konvention zur Lösung von Investitionsstreitigkeiten zwischen Staaten und Bürgern anderer Staaten im Völkerrecht ein neuer Ansatz besteht in Richtung des Aufgebens von Regeln über die Erschöpfung des einheimischen Rechtswegs und Begrenzung des Rechts auf Gewährung von diplomatischem Schutz, enthält sie dennoch Kompromisse mit eingebürgerten Standpunkten und Doktrinen.

Die ausschließliche Zuständigkeit des Zentrums zur Lösung von Investitionsstreitigkeiten ist durch die Einführung der Möglichkeit, dass die Parteien "etwas anderes" festsetzen ernsthaft gestört und modifiziert.

Der Autor setzt sich für die Einführung neuer Regeln ohne Ausnahmen ein sowie für den direkten Zugang von Einzelnen und juristischen Personen zu internationalen Körpern bezüglich ihrer bürgerrechtlichen Streitigkeiten mit Staaten

- ohne jedwede Einschränkungen ratione materiae und ratione personae, die in der Konvention von Washington von 1965 enthalten sind.

Schlüsselwörter: *Konvention von Washington von 1965, Internationales Zentrum zur Lösung von Investitionsstreitfällen, ausschließliche Zuständigkeit.*

Sommario

GIURISDIZIONE ESCLUSIVA DEL CENTRO INTERNAZIONALE PER LA RISOLUZIONE DELLE CONTROVERSIE DI INVESTIMENTO?

Questo articolo è dedicato al prezioso sforzo di stabilire la giurisdizione esclusiva di un organo arbitrale internazionale per la soluzione delle controversie sugli investimenti tra stati e cittadini di altri stati. Nonostante il nuovo orientamento del diritto internazionale verso l'abbandono della regola dell'esaurimento delle azioni locali e la limitazione del diritto alla protezione diplomatica espressi nella Convenzione sulla decisione delle cause di investimento tra stati e cittadini di altri stati, la Convenzione contiene ancora compromessi tra le posizioni dottrinali tradizionali. La giurisdizione esclusiva del Centro per la risoluzione delle controversie di investimento non è completa ed è stata seriamente modificata con la possibilità riconosciuta alle parti contraenti di stipulare "qualcos'altro".

L'autore invoca l'adozione di nuove regole senza eccezioni e il diretto accesso all'organo internazionale di qualsiasi persona fisica e giuridica rispetto alle controversie in materie civili con gli stati - senza alcuna delle restrizioni *ratione materiae* e *ratione personae* contenute nella Convenzione di Washington del 1965.

Parole chiave: *Convenzione di Washington del 1965, ICSID, giurisdizione esclusiva.*