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of International Law

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Rights of the Host States within the System of International Investment Protection

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List of Abbreviations

AAA	American Arbitration Association
ABGB	General Civil Code [DEU]
ASEAN	Association of Southeast Asian Nations
AUT	Austria
BIT	Bilateral Investment Treaty
BRIC	Brazil, Russia, India and China
BUL	Bulgaria
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
Coll.	Collection of Laws [CZE]
Coll.i.t.	Collection of International Treaties [CZE]
CZE	Czech Republic
DEU	Germany
DRC	Dispute Resolution Clause
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTAC	Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce
GAFTA	The Grain And Feed Trade Association
GATT	General Agreement on Tariffs and Trade
IBFD	International Bureau of Fiscal Documentation
IBRD	International Bank for Reconstruction and Development
ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry Ukraine
ICC	International Chamber of Commerce
ICJ	International Court of Justice

ICSID	the International Convention / Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
IMF	International Monetary Fund
ITO	International Trade Organization
LCIA	The London Court of International Arbitration
MAI	Multilateral Agreement on investment
MERCOSUR	Southern Common Market
MFN	Most Favourite Nation
MIGA	Multilateral Investment Guarantee Agency
MNE	Multinational Enterprises
MZV	Ministry of Foreign Affairs of the Czech Republic
NAFTA	North American Free Trade Agreement
NED	The Netherlands
NGO	Non-Governmental Organization
NPM	Clause Non-Precluded Measures Clause
NS	Supreme Court of the Czech Republic
NSS	Supreme Administrative Court of the Czech Republic
OECD	Organisation for Economic Co-operation and Development
OEEC	The Organisation for European Economic Co-operation
OGEL	Oil, Gas & Energy Law
P.C.I.J.	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
PRC	People's Republic of China
RF	Russian Federation
ROM	Romania
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SVK	Slovak Republic
TEC	Treaty establishing the European Communities
TFEU	Treaty on the Functioning of the European Union (Lisbon Treaty)
TNC	Transnational Corporation
TRIMs	Trade Related Investment Measures
U.N.R.I.A.A.	United Nations Reports of International Arbitral Awards
U.N.T.S.	United Nations Treaty Series
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WJA	World Jurist Association
WTO	World Trade Organization

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Tax Aspects of Foreign Investments

Key words:
Foreign investments | public interest | economic value | expropriation | international taxation | double taxation | OECD Model Conventions

Abstract | *The globalization of the economic market has compelled the removal of trade barriers and clamored for the liberalization of capital transfer. In such an open market, several criteria play a key role for the decision where available capital will eventually be invested, and the most important of them is presumably the criteria of the tax burden in a given country. This gives rise to what is known as 'tax competition' – a phenomenon which ultimately need not be beneficial, in that lowering taxes of course also curbs the flow of revenues into public coffers; in countries whose treasuries run up primarily mandatory expenses, this will lead to growing deficits that with maximum effort can at best be kept in check, but never be eradicated altogether. Naturally, the dominant concern in the area of foreign investment is to prevent double taxation. This paper attempts a review of the issues in connection with the Czech Republic's approach in this regard.*

| | |

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1.01. In the preparation of this paper[1], we realized that, given the potential scope of our contribution, the assignment was too broad. International taxation issues are encountered in practice by large numbers of economists, lawyers and tax specialists, who have no choice but to engage in the relatively challenging task of retrieving, accumulating and evaluating information from a myriad of sources for the sake of their specialization. The Czech Republic's increasingly intensive involvement in the global economy means that all tax professionals are faced with a need to follow this path. The Czech Republic currently has a plethora of small and large companies belonging to foreign owners. Many of them are part of multinational behemoths, where knowledge of international tax issues is an essential item in the toolbox of every economic manager. Investments by Czech entrepreneurs abroad are hardly an exception these days either. With major two-way worker migration, the tax implications of foreign investments need to be addressed.

1.02. The Czech Republic's tax system[2] is characterized by the transfer of maximum liability to taxpayers, forcing them to bear all risks associated with any errors. In this respect, international taxation is an everyday part of the workload for tax consultants, corporate tax specialists, auditors and employees of regional financial authorities. Naturally, we should never lose sight of the fact that each State has its own specific tax features and that each state has the competence to decide how general rules under international treaties will be implemented in national tax law. Mere knowledge of the Czech Republic's tax legislation cannot and does not mean that the same rules automatically apply abroad.

[1] This paper was prepared as part of a research project of the Faculty of Law, Charles University, Prague, registered under number MSM 0021 620 804 and entitled "Changes in Law at the Beginning of the Third Millennium – Roots, Background and Prospects".

[2] *Cf.*, for example, Marie Karfíková, *Úloha daňového systému při zajišťování funkcí státu* (*The Role of the Tax System in Safeguarding the Functioning of the State*), *in* KONFERENCE 2001: ČESKÝ STÁT A VZDĚLANOST, Praha: Karolinum 274 (V. Jirásková ed., 2002).

1.03. In particular, it is necessary to define the term "foreign investment" and the term "financial law", an intrinsic part of which is tax law. As "foreign investment" is not defined by our legal system, we need to draw on an interpretation of the relevant legal provisions governing this area, e.g. the general procedure for expropriation is provided for in Article 11(4) of the Charter of Fundamental Rights and Basic Freedoms[3]. More detailed conditions are laid down in the Expropriation Act.[4] Rules contained in the Commercial Code[5] which are applicable to foreign investments are, by nature, special provisions (particularly Section 25). We can infer from this provision that the business-related assets of foreign persons and the assets of legal entities with foreign participation may be regarded as a foreign investment.

1.04. This provision of the Commercial Code protects foreign persons from the deprivation or restriction of their ownership titles by the State. Under the cited provision, the Commercial Code allows for expropriation only:

a) on the basis of the law,
b) if the condition of the existence of a public interest is met, and
c) for compensation.

The Commercial Code does not provide protection from the withdrawal or restriction of a right constituting an easement, in which case the Expropriation Act is directly applicable.

1.05. A public interest must satisfy the condition that it cannot be met otherwise. The Constitutional Court, under Finding Pl. ÚS 24/08 of 17 March 2009, declared that the public interest in a particular case is determined in administrative proceedings based on the weighting of various special interests, after considering all contradictions and comments. It must be quite clear from the grounds of a decision focusing on the existence of a public interest why the public interest outweighs numerous private, particular interests. A public interest should be found in the process of decision-making on a specific issue (typically in relation to expropriation) and cannot be set *a priori* in a particular case. For these reasons, the determination of a public interest in a particular case is typically an executive rather than a legislative power. It is essential for an expropriation decision issued in administrative proceedings to be reviewable by a court.

1.06. Neither the Commercial Code nor any other piece of Czech national legislation defines the concept of the "investments" of foreign investors in the Czech Republic. Nevertheless, this concept is always defined in the introductory provisions of agreements on investment promotion and protection.

[3] Resolution No 2/1993 on the promulgation of the Charter of Fundamental Rights and Basic Freedoms as part of the constitutional order of the Czech Republic.

[4] Act No 184/2006 on the withdrawal or restriction of ownership titles attached to land or structures (the Expropriation Act).

[5] Act No 513/1991 Coll., the Commercial Code, as amended.

1.07. The States Parties undertake to foster conditions in their national territory conducive to investment by investors from the States Parties. Legal relations associated with investments are fundamentally governed by the laws of the State in whose territory the investment takes place; the majority of existing agreements on investment promotion and protection are based on the MFN clause.

1.08. The States Parties undertake to protect, in their territory, investments by investors from other States Parties made in accordance with their laws, and not to obstruct, by means of irregular or discriminatory measures, the administration, maintenance, use, exploitation, expansion, sale or disposal of such investments.

1.09. The Contracting States undertake not to expropriate or nationalize investments by investors from another Contracting State and not to take any other action against the investments of other Contracting States having the same effect as nationalization or expropriation, except under the following conditions:

a) the measures are taken in the public interest and in accordance with the law,
b) the measures are not discriminatory,
c) the measures are accompanied by provisions on the payment of prompt, adequate and effective compensation, which must correspond to the market value of the investments immediately prior to such measures and is freely transferable abroad.

1.10. As is clear from the title of this paper, investment – not any investment, but just international investment – is subject to protection afforded by international law. Therefore, to apply "international investment law" norms properly, it is necessary to define this term, set its boundaries in some way, and thus separate it from capital transactions to which such protection is not applicable.

1.11. However, any quest for a uniform definition of this concept applicable for our purposes is doomed to failure[6]. The various international instruments on the protection of international investment define it only for their own purposes, or avoid a definition completely[7], so a uniform definition remains missing. "Investment" is originally an economic term. As mentioned above, no uniform definition of foreign investment exists. In all cases, it entails the intention of two parties in bilateral treaties or multiple parties in multilateral conventions which the parties decide to designate the economic processes as foreign investment. Once indicated

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[6] Since there is no universally acceptable definition of "investment", the national legal systems define this term differently depending on the objectives they are pursuing. It is hardly surprisingly, then, that each agreement contains its own definition of the term. UN Centre on Transnational Corporations, Bilateral Investment Treaties, London: Graham & Trotman Limited (1988).

[7] Nor is a definition forthcoming from the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Notice No 420/1992).

in a contract, an economic term becomes a legal concept defined for the specific contract in the relevant field.

1.12. The term "investment" means any kind of asset invested in connection with economic activities by an investor from one Contracting State in the territory of another Contracting State in accordance with the laws of that other Contracting State and includes, without limitation:

a) movable and immovable property, as well as all property rights such as mortgages and liens or pledges;
b) shares, bonds and any other form of participation in companies;
c) claims to money or to any performance under contract having a financial value and associated with an investment;
d) intellectual property rights, such as copyright and related rights, industrial designs, technical processes, trademarks, trade names, trade secrets, patents, know-how and goodwill, associated with an investment;
e) rights conferred by law or under contract, and licences and permits under the law, including concessions to explore for, extract, cultivate or exploit natural resources.

Any subsequent change in the form in which assets are invested or re-invested has no effect on their nature as investments, provided that such a change is in accordance with the laws of the Contracting State in whose territory the investment was made.

1.13. In relation to foreign capital, inflows of which into the Czech Republic were and are indispensable, it is increasingly important to know how to deal with any dispute concerning an investment by a foreign investor in the Czech Republic or by a Czech investor investing abroad. In view of the intricacy and complexity of disputes arising from investments, it became necessary to regulate the handling of disputes in a multilateral international treaty[8].

1.14. In 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention") was negotiated in Washington and entered into force on 14 October 1966 (Czechoslovakia was bound by the Washington Convention as of 8 April 1992 – see Notice No 420/1992; it has been binding on the Czech Republic since 1 January 1993).

1.15. Under Article 1 of the Washington Convention, the International Centre for the Settlement of Investment Disputes (ICSID) was established with headquarters at the International Bank for Reconstruction and Development in Washington. The purpose of the Centre is to provide facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Washington Convention. Under Article 19, the Centre enjoys diplomatic privileges and immunities on the

[8] The content of international agreements on investment protection and promotion was discussed in detail in 5 (10) OBCHODNÍ PRÁVO (1996).

territory of its Member States. Administrative tasks in the Centre's work are performed by its secretariat, headed by the Secretary General.

1.16. As these treaties are aimed at creating a common and, as far as possible, universal procedure for the protection of international investments, they naturally attract the greatest attention. Multilateral treaties generally give priority to the use of a more abstract definition of investment. Obviously, this can be attributed primarily to the immense difficulty in achieving a consensus among all parties at a multilateral level.

1.17. Although the Washington Convention is the most important multilateral document on the settlement of investment disputes, having been signed by more than 150 countries and including the Czech Republic as a Member State since 1993, it is limited to the determination of jurisdiction for any dispute between a Contracting State and a national of another Contracting State arising directly from an investment. However, an actual definition of that term is missing in the agreement[9].

1.18. It is necessary to reiterate that the requirement of the economic development of the host country is one of the elements of the economic definition of investment, which is based on an objective approach to the definition of the concept[10]. As indicated and stated above, multilateral conventions contain a more general definition of investment. Bilateral agreements on the promotion and protection of investment, however, contain relatively broad and detailed definitions of investment. As an example, the term "investments" includes all assets developed by an investor from one Contracting State in the territory of another Contracting State in accordance with its legislation, in particular:

a) movable and immovable property and all rights in rem;
b) shares and other forms of participation in companies;
c) claims and demands for money transferred to create economic value and claims to performance of economic value;
d) intellectual property rights, including copyright, trade property rights such as patents and inventions, trademarks, industrial designs and models, as well as consumption patterns, technical processes, know-how, trade names and goodwill;
e) public authorizations for the search, extraction or exploitation of natural resources[11].

[9] Article 25 of the Washington Convention.

[10] Another argument supporting the claim that the concept of investment in the Washington Convention is not dependent solely on the will of the parties is the existence of two requirements regarding the text of a request for the resolution of disputes by the centre. The first is the requirement of the parties' consent to the submission of the dispute, and the second is that the dispute must be a legal dispute arising directly from an investment.

[11] Notice of the Federal Ministry of Foreign Affairs No 454/1991, Agreement between the Czech and Slovak Federal Republic and the Republic of Austria on the promotion and protection of investments.

1.19. As another example, the term "investment" means any kind of asset invested in connection with economic activities by an investor from one Contracting State in the territory of another Contracting State in accordance with the laws of that other Contracting State and includes, without limitation:

a) movable and immovable property, as well as all rights in rem, such as mortgages, liens, pledges and similar rights;
b) corporate shares, bonds or contributions, or any other form of participation in companies;
c) claims to money or to any performance having an economic value and associated with an investment;
d) intellectual property rights, such as copyright, rights attaching to trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names, and goodwill, associated with an investment;
e) rights conferred by law or by contract, licences and permits under the law, including concessions to explore for, extract, cultivate or exploit natural resources[12].

Any change in the form in which assets are invested does not affect their status as investments.

1.20. The numerous international treaties on the promotion and reciprocal protection of investments concluded by the Czech Republic prove that this is an established standard subject to relatively little modification. In this regard, in treaties concluded with countries with economies in transition and developing countries outside Europe, the Czech Republic also promotes the standard European model agreements on the reciprocal promotion and protection of investments, with a broad definition of investment.

1.21. Generally speaking, legislation in the field of investment promotion and protection, in tandem with other fields of law, has developed considerably in recent years. Taken from the short-term historical perspective, we can see that the original agreements applied only to foreign direct investment in the form of tangible assets. The current trend is to expand the scope of the definition, rooted in the autonomous will of the parties entering into an investment agreement, and should be respected. At present, international investment protection is not limited to resources meeting the objective economic characteristics of an investment, but encompasses all resources which the parties decide to subsume under the concept of investment. Basically, there is a need to monitor current trends in "investment case–law". The host State must take a prudent approach to any activity (whether factual or legal) interfering with the property rights of an international investor as lawsuits for infringement of the regime for the treatment of foreign investments run to considerable amounts.

[12] Notice of the Ministry of Foreign Affairs No 198/1994, Agreement between the Government of the Czech Republic and the Government of Romania on the promotion and reciprocal protection of investments.

1.22. Despite the failure of the most recent attempt, the draft Multilateral Agreement on Investment (MAI), States have not abandoned their efforts in this field, with the WTO working on a multilateral investment agreement. Nevertheless, at this point we believe that, for any future proposal to be successful, more notice should be taken of developing and other countries highlighting the need to revise not only the host State's liability for failing to provide adequate protection to foreign investments, but also the responsibilities of international investors for losses incurred by the host State.

II. Taxation of Foreign Investments

1.23. The development of versatile and mutually beneficial economic relations is one of the objectives pursued by Czech foreign policy. Some forms of economic, trade and cultural relations and the resulting income may generally establish the tax liability of Czech tax residents (natural persons and legal entities) in other countries and vice versa. In the absence of tax treaties, this also results in international double taxation.

1.24. The taxation of foreign investments is subject to financial law. Theory of law regards the fundamental principles intersecting a whole particular legal branch as the basis of that legal branch. The individual standards forming a legal branch cannot be in conflict with such principles[13]. This must be respected in connection with the definition of financial law as a branch of law. Financial law[14] should be examined and assessed as a legal branch growing out of a particular group of erstwhile legal standards governing both substantive and procedural issues. Financial law regulates a special group of social relations and enjoys a natural position as a special branch of law and the legal system.

1.25. In its legal standards, financial law primarily regulates the set of rights and obligations of natural persons and legal entities in relation to central and local government budgets. In addition, it covers the procedure to be followed by the competent central and local government authorities in their implementation, compliance and enforcement in order to safeguard the legal certainty of entities subject to financial legislation. On the part of liable entities, legal certainty is important in that the competent authority (a tax administration or other relevant body) cannot impose obligations on them other than those provided by law[15]. The obligations of tax entities are primarily governed by national acts and, to a lesser extent in tax law, by secondary legislation[16]. The significance of the guidelines issued by the

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[13] *Cf.* Jaromír Harvánek et al., Právní teorie (*Legal Theory*), Brno: Iuridica Brunensia 239 (1995).

[14] For more details, see, for example, Milan Bakeš, Marie Karfíková, Petr Kotáb, Hana Marková et al., Finanční právo, Praha: C. H. Beck 12 (5th revised ed. 2009).

[15] Article 11(4) and (5) of the Charter of Fundamental Rights and Basic Freedoms as part of the constitutional order of the Czech Republic.

[16] *Cf.* for example, Marie Karfíková, *Postavení daňového práva v systému práva* (*The Status of Tax Law in the Legal System*), *in* Teoretické otázky finančního práva–

Ministry of Finance, which tend to be recommendations to the public but, in some cases, also carry legislative importance, should not be overlooked. These are mainly guidelines issued by the Ministry of Finance within *the scope of competence conferred on it by Section 39(b) of the Income* Tax Act[17]. Notable examples are Guideline D-286 and MoF Measure No 05/13 797/2008 – 152 of February 2008. When dealing with international taxation, however, domestic legislation falls woefully short. The right to levy taxes and determine the conditions for the calculation and payment thereof is one of the basic manifestations of state sovereignty.

1.26. Tax relations with other countries, as provided for in the Income Tax Act, can be briefly defined as the sum of the tax obligations of foreign entities (non-residents) in relation to the Czech Republic arising from income generated from sources within Czech territory (sources of income) and the sum of the tax obligations of domestic entities (residents) in relation to the Czech Republic arising from income generated abroad.

1.27. The expansion of international economic cooperation also increases the participation of foreign enterprises (both natural persons and legal entities) in economic processes and other economic activities in the Czech Republic (and, of course, vice versa). This activity then generates taxable income. Tax legislation does not generally make a distinction between tax entities as domestic natural and legal persons and foreign natural and legal persons. The relationship of a tax entity to a state territory, which is a prerequisite for the establishment of a tax obligation, is referred to by tax regulations as tax jurisdiction (tax domicile). This is a subjective relationship assuming that a person has permanent residence, a registered office, establishment, branch, etc., in the relevant territory. What is crucial is the fact that this person need not be a national of that State. Nationality is not a decisive criterion when determining the tax jurisdiction. Special tax jurisdiction applies to those persons (natural or legal) in respect of whom unlimited tax liability is applied, i.e. all their income derived from domestic sources and foreign income is subject to taxation. These persons are referred to as *tax residents*. Tax non-residents are other natural and legal persons who are subject to limited tax liability applicable only to income from domestic sources.

1.28. The conditions of personal and material tax jurisdiction and the consequent extent of tax liability are not regulated in all States in the same way. One of the most serious corollaries of this situation is the emergence of double taxation. Double taxation arises where the same subject of tax, i.e. income or property, is repeatedly subjected to identical or similar taxation[18].

SBORNÍK Z KONFERENCE O TEORETICKÝCH OTÁZKÁCH FINANČNÍHO PRÁVA KONANÉ 25. DUBNA 2003, Praha: Karolinum 103, 104 (M. Karfíková ed., 2004).

[17] Act No 586/1992 on income tax, as amended.

[18] ZUZANA RYLOVÁ, MEZINÁRODNÍ DVOJÍ ZDANĚNÍ, Olomouc: ANAG 9 (2nd updated ed. 2007).

1.29. The most common form of double taxation is the taxation of the income of a specific natural person or legal entity in the State where the natural person is resident or the legal entity is established and the simultaneous taxation of the same income in the source country of the income. Obviously, in a situation of double taxation there would be no motivation for an investor to make foreign investments.

1.30. The issue of international double taxation applies only to direct taxes, i.e. it does not affect indirect taxes that are territorial in nature. There are two methods to avoid international double taxation:

1. the exemption of foreign income from taxation and
2. the offset of taxes paid abroad.

Double taxation is unwelcome because it reduces the potential revenue that tax residents of one State would have from another State. In particular, this may be income from construction, assembly, research and other operations, from the provision of commercial, technical or other consultancy services, from the use of patents and other industrial property rights, from interest and participating interests and from other sources. Double taxation also affects the income from employment, the income of performers and athletes, and revenue from the use of copyright applicable to literary, artistic or scientific works. As international double taxation is the result of a conflict of the tax laws of two States, such taxation can be eliminated effectively only by actions of these countries mutually coordinated by an international treaty.

1.31. In mutual tax relations between the Czech Republic and other States, a number of double taxation agreements[19] have been concluded and others are being prepared. A draft agreement with Barbados is the most recent version. There are certainly opportunities for Czech entrepreneurs who want to engage in business abroad, including in areas such as tourism, transport infrastructure, agricultural machinery, medical products, etc.

1.32. The comprehensive tax agreement put forward, expertly prepared on the basis of the standard OECD and UN models, ensures the objective distribution of rights to the levying of income tax between the two countries in those cases where income has a source in one country and is for a beneficiary residing or established in the territory of the other. The agreement covers basic forms of cooperation between the competent authorities of both parties. It facilitates the settlement of disputes arising in the interpretation and implementation of the agreement, the exchange of information on taxes of every kind and description, and allows for the coordination of the activities of both countries' tax authorities seeking to limit tax evasion and fraud.

1.33. The agreement, although formally negotiated as an agreement between the Government of the Czech Republic and the Government of Barbados, is classified as a presidential treaty in the Czech Republic and, prior to

[19] See Appendix: List of the Czech Republic's existing double taxation agreements concerning tax on income or tax on income and capital as at 1 January 2010.

ratification by the President, will be submitted to the Czech Parliament for its approval in accordance with the Czech Constitution[20] because it regulates the rights and obligations of persons and property which are otherwise the preserve of the law. In their specific application, the provisions of this agreement will take precedence over national law once all the conditions of the Czech Constitution have been met.

1.34. International double taxation agreements do not introduce new types of taxes, but supplement or amend the provisions of the national tax systems of individual countries so as to avoid the international double taxation or non-taxation of income. In the absence of international double taxation agreements, international double taxation would occur in the following cases in particular:

- if a taxpayer, on the basis of national tax systems, is resident in two States[21] or if one State taxes income on the grounds that the source is situated in its territory, while the other State taxes income on the grounds that the taxpayer is resident in that State – this situation is referred to as legal double taxation;
- if national tax systems disregard the fact that tax has already been paid in another country on income from a foreign source (a classic case is the transfer of corporate profits as dividends, where the State from which the payment is made taxes the dividend on the basis of the source rule, while the State in which the recipient of the dividend is situated taxes the dividend on the residency rule)[22] – the above situation is known as economic double taxation.

1.35. Legal double taxation can generally be avoided by international double taxation agreements (completely if dual residency arises because under such an agreement a taxpayer may be resident only in one of the Contracting States). With economic double taxation, the situation is more complex, as the existence of international double taxation agreements only reduces double taxation by allowing a taxpayer to set off tax paid abroad[23]. In international tax practice, however, besides double taxation, double non-taxation of income may occur. This situation may arise if the taxpayer's income is not taxed in either the State of the source (e.g. due to

[20] Constitutional Act No 1/1993, the Constitution of the Czech Republic.

[21] For more details, see Danuše Nerudová, *Zdaňování příjmů rezidenta České republiky ze zdrojů v zahraničí* (*Taxation of a Czech Resident's Income from Foreign Sources*), *in* 12 (4) Daně a právo v praxi 31–38 (2007).

[22] Within the European Union, the double taxation of dividends paid between a parent company and a subsidiary is prevented by Directive 90/435/EEC on parent companies and subsidiaries – for more details, see Danuše Nerudová, Harmonizace daňových systémů zemí Evropské unie (*Harmonisation of the Tax Systems of the EU Member States*), Praha: ASPI 236 (2005).

[23] For more details on the avoidance of double taxation, see Vlastimil Sojka, Mezinárodní zdanění příjmů. Smlouvy o zamezení dvojího zdanění a zákon o daních z příjmů (*International Taxation of the Incomes, Agreements on the Avoidance of the Double Taxation and the Act on the Income Taxes*), Praha: ASPI 324 (2006).

the granting of a tax advantage) or the State of residency (e.g. due to an exemption from income tax).

1.36. An integral part of the international tax practice is the issue of tax evasion, which mainly takes place internationally (in relation to direct taxes) in the manipulation of transfer pricing between associated enterprises for the formal transfer of profits to countries with low tax burdens. Efforts to combat tax evasion are being developed in this field at national level by means of unilateral action (usually included in national tax legislation) and bilateral or multilateral arrangements – in particular by means of international double taxation agreements. Multilateral action includes the Arbitration Convention of Member States of the European Union and the European Commission Directive on combating tax fraud.

1.37. To summarize the above, there are three basic reasons why States enter into international double taxation agreements:

- to avoid international double taxation;
- to avoid international double non-taxation;
- to prevent or reduce the possibility of tax evasion.

In terms of areas covered by a double taxation agreement, these agreements can be divided into:

- restricted agreements relating to a specific type of income and capital;
- comprehensive agreements relating to all types of income and capital.

1.38. There are currently two model conventions for the conclusion of comprehensive double taxation agreements, differing in particular by the criteria used as the basis for determining the State entitled to tax income. These are:

- the model provided by the OECD (Organization for Economic Cooperation and Development) – this model agreement is concluded between developed countries, as the right to tax income is left to the State in which the taxpayer is resident;
- the model provided by the UN (United Nations) – this model agreement is mainly concluded with developing countries, as the right to tax income is left to the State in which the taxpayer's income source is located.

1.39. Agreements with the US are a specific international taxation chapter in their own right, as a different principle of taxation is applied in them. The taxpayer's residency (and therefore unlimited tax liability) is based on citizenship rather than on residence or the period that the taxpayer has remained in a particular country. Therefore, the opinion is often voiced that international double taxation agreements where one of the Contracting States is the United States constitute a third type of model agreement.

1.40. The development of international trade in the post-war years brought with it the need to establish a mechanism through which it would be possible to eliminate international double taxation. In fact, in the post-war years a number of OECD Member States were already party to international double taxation agreements, not only based on the first model from 1928 (drawn up by the UN), but also based on other models. However, the problem with these models was that they were not universally accepted

by all States, and therefore the existence of different types of treaties significantly complicated the way international tax situations were handled. The above situation therefore required the establishment of a single model setting out common principles, definitions, rules and methods of taxation.

1.41. The first step towards the formation of this unified model for the conclusion of international double taxation agreements was made in 1955 by the OEEC (the Organization for European Economic Cooperation, later the OECD), when the first recommendation on the issue of international double taxation was adopted. In 1956, the Fiscal Committee began working on the draft of the first single model intended to unite international double taxation agreements concluded between OECD Member States. The Committee drew up a "Draft Double Taxation Convention on Income and Capital". The OECD Council subsequently, in 1963, adopted a recommendation on the basis of which existing international double taxation agreements between OECD Member States were to be revised.

1.42. By virtue of experience gained in the process of reviewing existing agreements and, especially, in response to developments in cross-border trade, the draft of the first single model was supplemented and, in 1977, a new single model was adopted. Since the OECD Model Convention first emerged, it has had a growing influence on international tax relations as it enables countries with different national tax systems to apply harmonized rules in the taxation of cross-border activities. The rise in the impact of the OECD's Model Convention is underscored by the fact that OECD Member States reviewed most of their existing international agreements and by the fact that this model is also widespread among countries which are not OECD Member States. Agreements based on the OECD model are now made between non-member countries. Further evidence of the growing influence of the Model Convention can be seen in the fact that it was used as the basis for the revision of the UN model, which had come into existence long before.

1.43. An international double taxation agreement concluded in accordance with the OECD model always concerns residents of the Contracting States and encompasses the taxation of income and capital. For the avoidance of double taxation (or, conversely, double non-taxation), the agreement establishes two categories of rights:

- non-exclusive right – each of the participating States is entitled to tax income or capital;
- exclusive right – income and capital are to be taxed by the State where the taxpayer is resident.

This mechanism ensures that the income or capital will not be taxed twice (or that will be taxed at least once). Regarding the taxation of income as dividends and interest, there is a limit on the amount of tax which may be applied by the source State. On the other hand, the State in which the taxpayer (receiving income in the form of dividends or interest) is resident must allow the taxpayer to apply the exemption method or a credit system, which leads to the avoidance of double taxation.

1.44. For the sake of completeness, we note that the first efforts by the League of Nations (subsequently the UN) to prevent double taxation date back to 1921, when a group (the members of which were Italy, the Netherlands, the UK and the US) was established to study the aspects of international double taxation. In subsequent years, this working group was expanded to include other States. The group's sessions between 1922 and 1927 resulted in a draft "Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Direct Taxes Dealing with Income and Property Taxes", "Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties", "Bilateral Convention on Administrative Assistance in Matters of Taxation" and "Bilateral Convention on Assistance in the Collection of Taxes". The above drafts were sent to Member and non-Member States, which were invited to send representatives to a General Meeting of Government Experts, held in 1928. This meeting led to the formation of a fiscal committee to deal with the creation of uniform rules for the taxation of cross-border activities. In 1933, the "Convention for the Allocation of Business Income between States" was drafted. In 1940, a conference was held in Mexico which adopted the "Mexican Model" – the "Model Bilateral Convention for the Prevention of the Double Taxation of Income" and the "Model Bilateral Convention for the Establishment of Reciprocal Administrative Assistance for the Assessment and Collection of Direct Taxes". As in the case of agreements based on the OECD model, these model conventions were also constantly revised. Another revision, focusing on the taxation of interest, dividends, royalties and pensions, followed in London (the London Model) in 1946. After 1954, all international taxation activities transferred to the OEEC (later the OECD), where they have remained ever since.

1.45. In the mid-1960s, interest in the problem of international double taxation was also resurrected at the United Nations. The aim was to encourage foreign investment flows to developing countries. This interest eventually resulted in a series of negotiations between 1968 and 1977. Based on the results of sessions, the UN Model Convention was drafted and then adopted in Geneva in 1979. It was published in 1980 under the title "Model Double Taxation Convention between Developed and Developing Countries". In response to changing economic and financial environment, greater globalization, and the mushrooming of tax havens, this single model again had to be revised in the 1990s.

1.46. The UN Model Convention is a compromise between taxation in the State of residency and taxation in the source State, but places much greater emphasis on taxation in the source State than the OECD Model Convention. Nevertheless, in the application of the principle of taxation in the source State the Convention anticipates that:

- in the taxation of income from assets abroad, related expenses will be taken into account and therefore only net income will be taxed;
- taxes will not be so high as to discourage foreign investment;
- income from investments will be divided fairly with the country providing the capital.

The UN Model contains a much broader definition of a permanent establishment; the duration required to give rise to a permanent establishment is only six months (compared to 12 months in the OECD Model). Insurance enterprises are also deemed to have a permanent establishment in the other Contracting State if they collect premiums in that other State. Not least, the UN Model regards facilities or stocks stored for the distribution of goods or trading as a permanent establishment.

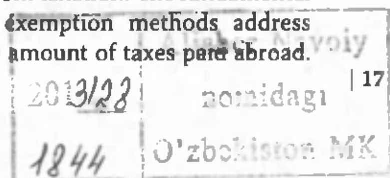
1.47. Business profits are closely linked to the existence of permanent establishments, hence there are differences here, too. Under the UN Model, the profits of an enterprise in one State are taxable only in that State, unless the enterprise carries on business in the other State through a permanent establishment situated therein. If it engages in business in this way, its profits may be taxed in the other State in so far as they can be attributed to the permanent establishment or sales of goods in that other State which are the same as or similar to those sold through the permanent establishment.

1.48. The basic difference between the UN Model and the OECD Model in respect of dividends, interest and royalties is the fact that the UN Model Convention does not include withholding tax rates, instead leaving this issue open to bilateral negotiations. In the case of royalties, the UN Model allows these fees to be taxed in the source State unless the tax imposed exceeds a certain percentage of the gross amount (whereas in the OECD Model royalties can be taxed only in the State in which the beneficiary is resident). Under the UN Model, the source State is entitled to tax gains derived from the alienation of property. Gains from the alienation of shares or other similar rights in a company whose assets consist directly or indirectly principally of immovable property situated in the source State may be taxed in that State (the same wording was incorporated into the OECD Model Convention in 2003). Other income is taxed in the source State under the UN Model and in the State in which the beneficiary taxpayer is resident under the OECD Model.

1.49. As mentioned above, one of the objectives of international double taxation agreements (irrespective of whether they are concluded in accordance with the UN or OECD Model) is to prevent international double taxation. This is done through various methods for the avoidance of double taxation (see Article 23 of the OECD Model Convention and Article 23 of the UN Model Convention). International tax practice distinguishes between two basic groups of methods:

- the credit system,
- exemption.

With the credit system, tax paid abroad can typically be set off against the tax liability in the State in which the taxpayer is resident. In respect of exemption methods, whether or not income has been taxed abroad plays no role – income generated abroad is exempt from taxation. The fundamental difference between the methods is that exemption methods address income, while credit methods deal with the amount of taxes paid abroad.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1.50. Article 23A of the OECD Model Convention offers exemption as a method of avoiding double taxation. As the fact of whether or not income has been taxed abroad is irrelevant in the application of exemption methods, theoretically this could lead to the international double non-taxation of income. Exemption methods can be broken down into:

- full exemption,
- exemption with progression.

In recent years, the European Union has started debating the greater transparency and simplification of international double taxation issues within the single market. The European Commission's goal is to create a model "EU double taxation convention" based on the OECD Model, under which Member States enter into bilateral and multilateral double taxation agreements.

1.51. In 2002, the EU Model Tax Convention, based on the OECD Model, was drafted. This single convention, upon being signed by all Member States of the European Communities, was intended to replace existing bilateral agreements between Member States. A similar double taxation agreement exists, for example, between the Nordic countries – the Nordic Treaty, concluded between Denmark, Finland, Iceland, Norway and Sweden.

1.52. In view of the fact that the introduction of this model requires unanimous adoption by all Member States, since it must be approved in the form of a directive in order to be binding on all parties, no particular success has been achieved in this field. Therefore, this area will, unfortunately, remain coordinated only through the judgments of the European Court of Justice until an EU Tax Convention is created and adopted which is acceptable to all Member States. In this context, attention should be drawn to the Lisbon Treaty[24], which has been in force since 1 December 2009 and gave the European Union exclusive competence in the field of foreign direct investment. The European Commission responded to this change in July 2010 by proposing to introduce a monitoring system that would impose the new obligation on Member States to have existing agreements reviewed in order to identify any provisions incompatible with European law. If the Commission were to discover any problems in this respect, the Member State would be required to renegotiate the agreement; if that Member State takes no action or fails in its attempt at renegotiation, the agreement would become unlawful. The protection of foreign investment was and is governed by bilateral investment agreements. It should be noted, however, that there will come a time when a European investment agreement is concluded with a third country, although, for the time being, there is no indication of when this will happen[25].

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[24] For more details, see ALEXANDER J. BĚLOHLÁVEK, OCHRANA PŘÍMÝCH ZAHRANIČNÍCH INVESTIC V EVROPSKÉ UNII (*Protection of Foreign Direct Investments in the EU*), Praha: C. H. Beck 220 (2010).

[25] Ivo Janda, Magdalena Líčková, *Nová evropská politika ochrany zahraničních investic-aneb přípravné práce začínají* (*New European Policy of the Investment*

Appendix:

List of the Czech Republic's Existing Double Taxation Agreements Concerning Tax on Income or Tax on Income and Capital as at 1 January 2010

Contracting State	Valid as of	Reference in Collection of Laws [*Coll.*] (or Collection of International Treaties [*Coll.i.t.*])	Financial Bulletin [*Finanční zpravodaj*]
Albania	10. 9. 1996	270/1996 Coll.	12/96
Armenia	15. 7. 2009	86/2009 Coll.i.t.	
Australia	27. 11. 1995	5/1996 Coll.	2/96
Azerbaijan	16. 6. 2006	74/2006 Coll.i.t.	1/2/2007
Belgium	24. 7. 2000	95/2000 Coll.i.t.	4/2001, 9-10/2003, 6-7/2007
Belarus	15. 1. 1998	31/1998 Coll.	5/98, 11/98
Brazil	14. 11. 1990	200/1991 Coll.	
Bulgaria	2. 7. 1999	203/1999 Coll.	
China	23. 12. 1987	41/1988 Coll.	6/88, 11/97, 3/2000
Denmark	27. 12. 1982	53/1983 Coll.	4/83
Egypt	4. 10. 1995	283/1995 Coll.	1/96
Estonia	26. 5. 1995	184/1995 Coll.	12/2/95
Ethiopia	30. 5. 2008	54/2008 Coll.i.t.	
Philippines	23. 9. 2003	132/2003 Coll.i.t.	11/2004
Finland	12. 12. 1995	43/1996 Coll.	2/98, 1/2005
France	1. 7. 2005	79/2005 Coll.i.t.	12/1/05, 11/12/06
Georgia	4. 5. 2007	40/2007 Coll.i.t.	8-9/2007
Croatia	28. 12. 1999	42/2000 Coll.i.t.	6/2000, 3/2001
India	27. 9. 1999	301/1999 Coll.	7/8/2000
Indonesia	26. 1. 1996	67/1996 Coll.	4-5/99
Ireland	21. 4. 1996	163/1996 Coll.	5/98, 4/2009
Iceland	28. 12. 2000	11/2001 Coll.i.t.	
Italy	26. 6. 1984	17/1985 Coll.	4-5/87, 12/97, 4-5/99, 1/1/2003
Israel	23. 12. 1994	21/1995 Coll.	1/95, 4/95
Japan	25. 11. 1978	46/1979 Coll.	5/80
South Africa	3. 12. 1997	7/1998 Coll.	3/99
Jordan	7. 11. 2007	88/2007 Coll.i.t.	
SFRY (former Yugoslavia)	17. 4. 1983	99/1983 Coll.	3-4/84, 5/94
Canada	28. 5. 2002	83/2002 Coll.i.t.	11-12/2002
Kazakhstan	29. 10. 1999	3/2000 Coll.i.t.	4-5/2000, 4/2009
South Korea	3. 3. 1995	124/1995 Coll.	10/95
North Korea	7. 12. 2005	3/2006 Coll.i.t.	
Kuwait	3. 3. 2004	48/2004 Coll.i.t.	
Cyprus	26. 11. 2009	120/2009 Coll.i.t.	
Lebanon	24. 1. 2000	30/2000 Coll.i.t.	
Lithuania	8. 8. 1995	230/1995 Coll.	12/2/95, 12/97

Protection- the Preparatory Works Have Been Initiated), available in Czech at: http://www.epravo.cz/top/clanky/nova-evropska-politika-ochrany-zahranicnich-investic-aneb-pripravne-prace-zacinaji-65908.html (accessed on December 20, 2010).

Latvia	22. 5. 1995	170/1995 Coll.	9/95, 5/96
Luxembourg	30. 12. 1992	79/1993 Coll.	10-11/93
Hungary	27. 12. 1994	22/1995 Coll.	1/95
Macedonia	17. 6. 2002	88/2002 Coll.i.t.	9-10/2002
Malaysia	9. 3. 1998	71/1998 Coll.	4-5/99
Malta	6. 6. 1997	164/1997 Coll.	11/97
Morocco	18. 7. 2006	83/2006 Coll.i.t.	1/2/2007
Mexico	27. 12. 2002	7/2003 Coll.i.t.	2-3/2004, 8-9/2007
Moldova	26. 4. 2000	88/2000 Coll.i.t.	
Mongolia	22. 6. 1998	18/1999 Coll.	2/99
Germany	17. 11. 1983	18/1984 Coll.	3-4/84
Nigeria	2. 12. 1990	339/1991 Coll.	
Netherlands	5. 11. 1974	138/1974 Coll.	5/80, 9/97, 1/98, 7-8/99
Norway	9. 9. 2005	121/2005 Coll.i.t.	12/1/2005
New Zealand	29. 8. 2008	75/2008 Coll.i.t.	4/2009
Poland	20. 12. 1993	31/1994 Coll.	2/96
Portugal	1. 10. 1997	275/1997 Coll.	3/99
Austria	22. 3. 2007	31/2007 Coll.i.t.	6-7/2007
Romania	11. 8. 1994	180/1994 Coll.	12-1/94
Russia	18. 7. 1997	278/1997 Coll.	12/98, 1/2/99
Greece	23. 5. 1989	98/1989 Coll.	11-12/89
UAE (United Arab Emirates)	9. 8. 1997	276/1997 Coll.	
Singapore	21. 8. 1998	224/1998 Coll.	1/2/99
Slovakia	14. 7. 2003	100/2003 Coll.i.t.	7-8/2003
Slovenia	28. 4. 1998	214/1998 Coll.	10/98
Serbia and Montenegro	27. 6. 2005	88/2005 Coll.i.t.	10/1/2005, 8-9/2007, 1-2/2009
Sri Lanka	19. 6. 1979	132/1979 Coll.	5/80
Syria	12. 11. 2009	115/2009 Coll.i.t.	
Spain	5. 6. 1981	23/1982 Coll.	3/82
Sweden	8. 10. 1980	9/1981 Coll.	1/81, 2/98
Switzerland	23. 10. 1996	281/1996 Coll.	12/96, 4/2/2005
Tajikistan	19. 10. 2007	89/2007 Coll.i.t.	
Thailand	14. 8. 1995	229/1995 Coll.	1/98
Tunisia	25. 10. 1991	419/1992 Coll.	10/95
Turkey	16. 12. 2003	19/2004 Coll.i.t.	4-5/2004
Ukraine	20. 4. 1999	103/1999 Coll.	3/2000
US (United States)	23. 12. 1993	32/1994 Coll.	11/94, 3/96
Uzbekistan	15. 1. 2001	28/2001 Coll.i.t.	6/2001
United Kingdom of Great Britain and Northern Ireland	20. 12. 1991	89/1992 Coll.	6/92, 12/96
Venezuela	12. 11. 1997	6/1998 Coll.	4-5/99
Vietnam	3. 2. 1998	108/1998 Coll.	6/98

| | |

Summaries

DEU [***Steuerliche Aspekte von Auslandsinvestitionen***]
Die Globalisierung der Wirtschaftsmärkte erzwingt die Beseitigung von Handelshemnissen und ruft nach freiem Kapitalverkehr. Wo das verfügbare Kapital dann tatsächlich investiert wird, hängt maßgeblich von mehreren Kriterien ab, als deren wichtigstes die Frage der steuerlichen Belastung gelten darf. Dies führt zu dem sog. Steuerwettbewerb, der in letzter Konsequenz keineswegs ein positives Phänomen sein muss, da Steuersenkungen natürlich die Fiscus--Einnahmen verringern, und wenn diese vorrangig gesetzliche Pflichtaufgaben zu erfüllen haben, entstehen stetig wachsende Budgetdefizite, die auch unter großen Anstrengungen höchstens reduziert, aber nicht beseitigt werden können. Innerhalb des Problemfelds Auslandsinvestitionen dominiert selbstverständlich die Forderung nach einer Vermeidung der Doppelbesteuerung. Der vorliegende Beitrag versucht, den diesbezüglichen Ansatz Tschechiens näherzubringen.

CZE [***Daňové aspekty zahraničních investic***]
Globalizace ekonomického trhu si vynucuje odstraňování obchodních překážek a žádá si umožnění přesunu kapitálu. Pro umístění volného kapitálu je pak rozhodující několik kritérií, kdy za nejdůležitější můžeme považovat otázku daňového zatížení. Dochází ke vzniku tzv. daňové konkurence, což ve svém důsledku nemusí být jev příznivý, protože se snížením daní dochází samozřejmě ke snížení příjmů veřejných rozpočtů a pokud veřejné rozpočty mají především mandatorní výdaje, potom vznikají rozpočtové schodky, které narůstají a s velkými obtížemi se je daří maximálně snižovat, ale v žádném případě odstranit. V problematice zahraničních investic je samozřejmě dominující požadavek na zabránění dvojího zdanění. Na problematiku přístupu České republiky na tomto úseku se snaží poukázat tento příspěvek.

POL [***Aspekty podatkowe inwestycji zagranicznych***]
Republika Czeska w nieunikniony sposób włączyła się w niezbyt odległej przeszłości w handel międzynarodowy, co wynikało z rozmiarów gospodarki i jej otwartości. Proces ten nastąpił pod koniec ubiegłego wieku i zyskał dodatkowo na znaczeniu wraz z przystąpieniem Czech do Unii Europejskiej w 2004 roku. Porządek prawny Republiki Czeskiej zmuszony był zareagować na potrzebę tworzenia nowych spółek z udziałem kapitału zagranicznego, na restrukturalizację wielu spółek lub ich włączanie do nadnarodowych grup, a to wszystko za cenę poszukiwania optymalizacji podatkowej. Artykuł przedstawia spojrzenie na inwestycje zagraniczne i na umowy o zapobieganiu podwójnemu opodatkowaniu.

FRA [***Aspects fiscaux des investissements étrangers***]
Dans un passé récent, la République tchèque n'a pas pu éviter son intégration dans le commerce international en raison de la taille et de l'ouverture de son économie. Ce processus a débuté à la fin du siècle dernier et s'est accentué avec l'adhésion de la République tchèque à l'Union européenne en 2004. L'ordre juri-dique de la République tchèque devait réagir au besoin de création de nouvelles

sociétés avec la participation de capitaux étrangers, à la restructuration d'un grand nombre de sociétés ou à leur entrée dans des groupes supranationaux, tout cela en recherchant une optimisation fiscale. L'article porte un regard sur les investissements étrangers et les conventions relatives à la double imposition.

RUS [***Налоговые аспекты иностраных инвестиций***]
Недавнее прошлое Чешской Республики было отмечено ее неизбежным включением в международную торговлю, что связано с размерами и открытостью экономики страны. Этот процесс начался в конце прошлого века и приобрел особую значимость со вступлением Чешской Республики в Европейский Союз в 2004 году. Правовые нормы Чешской Республики были вынуждены реагировать на необходимость создания новых компаний с участием иностранного капитала, реструктуризацию ряда компаний или их вступление в транснациональные группы в связи с поиском решений по оптимизации налогообложения. В статье рассматриваются иностранные инвестиции и соглашения об избежании двойного налогообложения.

ES [***Aspectos fiscales de las inversiones extranjeras***]
En el pasado reciente la República Checa no pudo evitar involurarse en el comercio internacional, por el hecho de ser una economía abierta y de tamaño reducido. Ese proceso se produjo a finales del siglo pasado y cobró importancia con la adhesión de la República Checa a la Unión Europea, en el año 2004.
La legislación y el orden jurídico de la República Checa tuvieron que reaccionar a la necesidad de constituir nuevas sociedades comerciales con participación material extranjera, reestructurar una serie de sociedades, y tomar posición de cara a la incorporación de estas últimas a grupos transnacionales, todo ello al precio de buscar la optimización fiscal. Los autores del artículo ofrecen su visión respecto de las inversiones extranjeras y de los acuerdos para evitar la doble tributación.

Alexander J. Bělohlávek

Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals

Key words:
confidentiality | host state | investment treaty | investment dispute | international law | international treaty | publicity | proportionality | arbitration agreement | commercial dispute | trade secrets | ratione temporis | treaty arbitration | commercial arbitration | investment arbitration | third party | hearing | public interest | disclosure of information

Abstract | *The fact that a state is a party to arbitration does not give the arbitrators the status of public officers or subjects of public law, let alone [public] international law. Arbitration is, above all, a universal procedural mechanism. The principal specifics of investment arbitration become especially apparent in connection with the application of substantive standards. Confidentiality and publicity/privacy are predominantly procedural issues. Opinions that argue that there exists any global, internationally recognized principle of confidentiality as an intrinsic feature to arbitration are illusory. Standards of confidentiality are subject to important territorial differences that depend on the seat of arbitration. The only universally accepted principle is probably the principle of confidentiality of hearings and the obligation of confidentiality binding on the arbitrators. This applies not only to international commercial arbitration, but also to investment disputes. Even in investment disputes, the parties enjoy a high standard of autonomy when it comes to confidentiality and the disclosure of information. Although we cannot deny the existence of a qualified public interest in investment disputes, this aspect should not influence confidentiality, publicity or the disclosure of information, because the ultimate interest in the disclosure of information in investment protection cases principally benefits the nationals of the host state. The author is of the opinion that these nationals could demand the disclosure of information regarding a particular dispute directly upon the host state and according to the mechanisms that the particular state employs for the purpose of the disclosure of information*

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by the state (legislation regulating access to information, etc.). The author has serious doubts as to the power and the entitlement or authorization of arbitrators to make broad decisions on the disclosure of information concerning the particular proceedings by one of the parties. They cannot assess the interests of a third party (a person who is not a party to the proceedings). This does not apply in exceptional cases where the arbitrators restrict the right of the parties to disclose a specific piece of information in procedural situations that could jeopardize the course and the purpose of the proceedings. This is the only aspect within the power of arbitrators as concerns publicity. Nonetheless, such measures ought to be exceptional and adopted only in cases of specific and imminent danger.

I. Legitimacy of Waiver of Rights

2.01. It is all too frequently argued that confidentiality and privacy are the main features of arbitration. We can agree with the statement that the access of the public to information about arbitration is principally different in litigation as opposed to arbitration. Naturally, this aspect can often be the reason why this particular method of dispute resolution is the preferred option. It is not necessary to assume *a priori* that the ultimate objective is to conceal any unlawful conduct of the parties from public authority, although such cases cannot be entirely ruled out either[1]. Indeed, experience shows, unfortunately, that these cases are more and more frequent[2]. The reason for choosing arbitration with restricted or excluded public access often lies in a legitimate effort to protect trade secrets that could be jeopardized by public court proceedings. Indeed, the European Court of Human Rights has repeatedly ruled[3] that waiving the right to a public hearing (public proceedings) is legitimate if based

[1] See, for instance, Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 (2) OGEL (2003); electronic version available at: http://www.ogel.org/article.asp?key=1198 (accessed on October 17, 2010).

[2] See, for instance, ALEXANDER J. BĚLOHLÁVEK, ARBITRATION, ORDRE PUBLIC AND CRIMINAL LAW, Kiev: Taxon marg. 858 (2009).

[3] In connection with arbitration, see, for instance, *Osmo Suovaniemi et al.* v. *Finland* (Dec.), application no. 31.737, February 23, 1999. Fair trial, namely the holding of a hearing and publicity of proceedings, was discussed by the ECtHR generally in connection with litigation, for instance, in (i) *Allan Jacobsson* v. *Sweden*, ECHR Rep., February 19, 1998 (unreported); (ii) *Håkansson* v. *Sweden*, 13 EHRR 1 (1990), ECHR Rep.; (iii) *Pauger* v. *Austria*, 25 EHRR 105 (1997), ECHR Rep.; and (iv) *Bryan* v. *United Kingdom*, 21 EHRR 342 (1995), ECHR Rep. Public access to court proceedings was specifically addressed by the ECtHR, for instance, in the following cases: (v) *Diennet* v. *France*, 21 EHRR 554 (1995), ECHR Rep.; (vi) *Sutter* v. *Switzerland*, 6 EHRR 272 (1984), ECHR Rep.; (vii) *Ruiz-Mateo* v. *Spain*, 16 EHRR 505 (1993), ECHR Rep.; (viii) *X* v. *Austria* (*Commission Dec.*), No. 5362/72, 42 CD 145 (1972), EComHR; and (ix) *Kamasinski* v. *Austria*, 13 EHRR 36 (1989), ECHR Rep.

on a voluntary expression of will[4]. Arbitration thus offers an effective mechanism for the legitimate protection of trade secrets and similar values often representing valuable assets[5]; at the same time, it enables *efficient enforcement of rights in contentious proceedings without* endangering these *"values"*. The waiver of the right to a public hearing by entering into an arbitration agreement does not breach the principle of *proportionality*, taking into account the interest in the protection of certain, mostly commercially significant circumstances[6]. However, the author would like to emphasize that he is not of the opinion that the waiver of publicity (the exclusion of the public) in arbitration and especially *full confidentiality* are aspects that are globally considered natural (or implied) defining characteristics of an arbitration agreement[7].

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[4] At the same time, however, the waiver (renunciation) of a particular right (as a component of fair trial) must be *unequivocal*. See the ECtHR in *Osmo Suovaniemi et al. v. Finland* (Dec.), application no. 31.737, February 23, 1999 et al. However, certain sources argue that an arbitration agreement automatically implies an interest in excluding the public. This is particularly typical of *common law* countries. See, for instance, DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT, London: Sweet & Maxwell 97, Marg. 4. 22 (2005). The abovementioned author is referencing *Dept. for Economic Policy of the City of Moscow v. Bankers Trust Co. International Bank*, [2004] 2 Lloyd's Rep. 1, 17.

[5] See, for instance, Petr Hajn, *Soukromoprávní ochrana obchodního tajemství* (*Protection of Trade Secrets under Private Law*), 4 (2) PRŮMYSLOVÉ VLASTNICTVÍ 33 (1994). There are certainly good reasons to regard trade secrets of various kinds as intangible assets in the broadest sense of the word, whether their subject matter is a formally protected right or not. Indeed, the fact that rights to intangible assets include much more than formally protected and formally protectable rights in the area of so-called intellectual property that are usually most protected only on the basis of the principle of territoriality (despite the fact that such formal protection is provided), the significance of trade secrets in the broadest sense is crucial; a special dimension of this meaning manifests itself especially in relationships with an international element, or in international commercial transactions (although naturally not only *a contrario*). See, for instance, Ivo Šronĕk, *Mezinárodní obchod a práva k duševnímu vlastnictví* (*International Commerce and Intellectual Property Rights*), 8 (1-2) PRŮMYSLOVÉ VLASTNICTVÍ 9 (1998); Aleš Zábrs, *Know-How, součást vlastnictví firmy, hospodaření s ním a jeho ochrana* (*Know-How, a Component of the Company's Assets, Management and Protection of Know-How*), 3 (2) PRŮMYSLOVÉ VLASTNICTVÍ 37 (1993) et al.

[6] See, for instance, Juraj Guoth, *Charakteristika majetkových práv* (*Description of Property Rights*), 7 (2) DAŇOVÁ A HOSPODÁRSKÁ KARTOTÉKA (1999); Alexander J. Bělohlávek, *Význam pojmu majetkové právo v občanskoprávních a hospodářských vztazích* (*Meaning of Term "Property Right" in Civil-Law and Economic Relationships*), 13 (12) PRÁVO A PODNIKÁNÍ 2 (2005).

[7] See, for instance, LORD MUSTILL & STEWARD C. BOYD QC, COMMERCIAL ARBITRATION, London: Butterworths Law 41 (2nd ed. 1989). These authors describe the arbitration agreement as having the following *natural features:* (i) the results are to be binding on the parties; (ii) the substantive rights are to be determined by the person to whom disputes are referred; (iii) the Tribunal's jurisdiction is determinable from what the parties have agreed; (iv) the parties to the agreement must either agree upon an arbitrator or a method by which he or she may be appointed; (v) impartiality must be explicit or implicit; and (vi) the parties must intend for the decision or award to be

Exceptions in commercial arbitration are territorially conditioned, they can follow from the applicable arbitration rules, or any [other][8] express or implied [9] agreement of the parties.

II. Arbitration as Universal Procedural Mechanism

II.1. Specifics of Treaty Arbitration in *Investor* v. *State* Disputes

2.02. *Investor* v. *state* (the so-called *host state*) arbitration exhibits many specific features when compared to international commercial arbitration. The main difference lies in the fact that the jurisdiction of the *forum* is based on public international law instruments. These primarily include bilateral or multilateral international treaties between sovereigns, as subjects of international law. This article does not consider whether the investor's rights are primary (original) or derived rights. Provisions regulating the settlement of *investor* v. *state* disputes (usually proposing several alternatives) incorporated in international treaties do not, in the opinion of the author, constitute arbitration agreements. Applying the terminology of private law to the definition of the nature of such provisions, it is the host state's offer of an arbitration agreement. This offer is limited by the term (validity and individual effects, i.e. terms *ratione temporis*) of the respective instrument of international law, and it is extended to an unlimited number of *interested parties* (recipients) defined solely by subjective elements (definition of investor under the respective instrument) and the scope of the international treaty (definition of investment). Nonetheless, the author considers an arbitration agreement to be concluded even in *investor* v. *state* disputes. An arbitration agreement comes into existence as soon as the investor declares his or her irrevocable will to make claims against the host state in arbitration (in the manner offered by the international treaty), and thereby accepts the *offer of an arbitration agreement*[10]. It is an agreement on the settlement

enforceable. The author believes that it is necessary to add another feature, in particular, the explicit or implicit waiver of court jurisdiction on the merits.

[8] Agreement on a particular *forum* very often comprises an agreement on the application of particular arbitration rules or other procedural laws, rules or standards.

[9] The author is not of the opinion that an agreement on confidentiality regarding the main contract would at the same time imply an agreement on confidentiality covering the arbitration proceedings pursuant to the arbitration clause incorporated in the main contract. One could possibly arrive at such conclusions on the basis of a remark mentioned *in* Jeffrey W. Sarles, *Solving the arbitral confidentiality conundrum in international arbitration* 10; available at: http://www.appellate.net/articles/Confidentiality.pdf (accessed on September 11, 2010), although J. W. Sarles definitely means the confidentiality clause incorporated directly in the arbitration clause (arbitration agreement).

[10] The author intentionally avoids analysis of the alternatives offered by a number of investment treaties, namely the jurisdiction of the courts of the host state over the resolution of a particular investment dispute. It is true that this alternative is only elected in exceptional cases (apart from mandatory application of this option under the

of a particular, already existing dispute. The author does not consider it necessary to elaborate on those cases in which the arbitration agreement is already incorporated in an individual contract between the host state and a particular investor regarding a specific investment. This situation does not differ from other investment disputes with respect to the matters analyzed in this article, or it is even less complicated due to the fact that the respective *individual contract* often contains a dispute resolution clause (usually a specific arbitration clause).

II.2. Diverse Theories on Confidentiality of Arbitration and High Degree of Dependence on The Standards in Particular Countries

II.2.1. Controversial Myths about Universal Nature of Implied Natural Features of Arbitration

2.03. Every state (*lex arbitri* and national practice) has its own approach to publicity/privacy or confidentiality of arbitration[11], which are often principally different from one another. The author is of the opinion that publicity and confidentiality of arbitration depend on the place at which the particular proceedings take place (seat of arbitration). The seat of arbitration is a factor that the parties can influence and thereby express their will as regards the publicity and confidentiality of the particular proceedings. However, it is difficult to fully comprehend these matters without a detailed comparative knowledge of the practice in the individual countries, at least those that are in the individual legal cultures and regions often selected as the seat of arbitration. International commercial (in this case both substantive and procedural) customs play an important role in this area as well[12]. However, they are more contingent on the particular region than most commentaries (especially by *common law* authors) admit. By the way, this is by no means limited to the issue of the

so-called « fork in the road » provision). This comes as no surprise. On the contrary, it would be rather surprising if the investor lodged his claim with the court (as the public authority) of the same state designated as the defendant. It would be rather unrealistic to try to invoke in these cases the principle of an independent judiciary and its separation from the executive power of the same country. After all, for instance, in a discussion (unpublished) in the « investment protection » section at the International Academy of Comparative Law Congress in July 2010 in Washington D.C., the following comments were made (free interpretation), « *We all know this is not the most suitable procedure, but currently there is no better alternative and nobody can be expected to apply to the courts of the host state* ».

[11] See Cymie Payne, *Are International Institutions Doing Their Job? International Arbitration*, 90 Am. Soc'y Int'l L. Proc 244 (1996); Jeffrey W. Sarles, *supra* note 9, at 10. See also, for instance, Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 (1) Vanderbilt Journal of Transnational Law 79 (2000) et al.

[12] See Also, for instance, Karel Marek, *K obchodním zvyklostem v systému pramenů a pravidel obchodního práva* (*Regarding Business Usages in the System of Sources and Rules of Commercial Law*), 16 (4) Právní rádce i-viii (2008) et al.

confidentiality/publicity of arbitration. A number of principles designated as "international practice" in *common law* countries would stand no chance of success in even the most important arbitration disputes settled in civil law countries. The author believes that it is advisable to handle expressions like "international practice" or even "prevalent international practice" or "prevailing opinion" very carefully, and to only employ such terms after a meticulous comparative analysis.

II.2.2. Examples of Approach Adopted by Certain Selected Countries

2.04. **Austrian law**[13], for instance, has no rules regarding the confidentiality of information relating to arbitration, although it does allow the application of provisions on the protection of privacy incorporated in the General Civil Code [ABGB]. Although opinions differ, Austrian law and practice hardly allow the parties to be forced to accept the duty of confidentiality with respect to arbitration, and especially with respect to the arbitral award, claiming that it is a *quasi*-natural characteristic of arbitration. The reason is that Austrian law also provides for certain obligations that can even bind the parties to provide certain information, for instance, to their own shareholders[14]. The parties are expected to act with a reasonable degree of confidentiality. There is, however, no enforceable duty of confidentiality, unless agreed between the parties.

2.05. **The Czech Republic** stipulates that arbitration proceedings are private (confidential)[15]. In practice, however, the parties are not bound by any obligation of confidentiality, and the private nature of arbitration is interpreted as proceedings with the exclusion of the public and a strict obligation of confidentiality binding on the arbitrators.

2.06. **Hungarian law** does not stipulate any express or implied confidentiality of arbitration. In proceedings before the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, the parties at the first hearing usually sign a statement whereby they undertake to maintain the confidentiality of the arbitration proceedings.

2.07. In **France**, however, we can already note an obvious shift towards confidential arbitration proceedings and obligations binding on the parties in this regard, despite the fact that the applicable laws explicitly only stipulate the absolute privacy (confidentiality) of the deliberations of the arbitral tribunal[16]. This can be demonstrated especially by the ruling in *G. Aïta* v. *A. Ojjeh*[17], in which the tribunal awarded damages on the basis

[13] Austria belongs to a group of countries with a long-term and internationally recognized tradition of arbitration and a stable *lex arbitri* and jurisprudence.

[14] Alice Fremuth-Wolf, *Confidentiality in Arbitration*, *in* ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE, New York: JurisNet, LLC 661, 670-671 (S. Riegler, A. Petsche, A. Fremuth-Wolf, M. Platte & C. Liebscher eds., 2007).

[15] Act [CZE] No. 216/1994 Coll., On Arbitration and Enforcement of Arbitral Awards, as subsequently amended, Section 6(1) and Section 19(3).

[16] See Article 1469 of the new Code of Criminal Procedure [FRA].

[17] Published in: REV. ARB. 583 (1986).

of the defendant's counterclaim lodged against the plaintiff's claim for the annulment of the arbitral award. The claim for damages was based on the alleged breach of the duty of confidentiality regarding the terms of the arbitral award. The French Court of Appeal criticized the approach of the party that applied for the annulment of the arbitral award in France, with a French court, despite the fact that the jurisdiction of the French courts was not established. The court not only rejected the motion for the annulment of the arbitral award, but it also awarded damages for the breach of confidentiality[18]. In *Bleustein*[19] the court derived confidentiality from general principles and characteristic features of arbitration, and concluded that confidentiality even applies to the pleadings of the parties[20].

2.08. **Swedish** practice is well represented by the well-known case of *Bulbank*[21]. Both the Court of Appeal and the Supreme Court unequivocally stated that confidentiality could not be implied. On the contrary, both courts maintained that only hearings were confidential under Article 29 of the SCC Rules. It is worth noting that, in that regard, Sweden belongs among those countries with a very long tradition and a friendly approach toward arbitration. Conversely, **Denmark** is based on a principle similar to the English practice (confidentiality of arbitration).

2.09. The **English** practice is based on the confidentiality of arbitration[22] as its fundamental principle. Nonetheless, it does allow several exceptions[23]. This approach takes account of the scope of protection extended by English law to confidentiality in arbitration proceedings and the limitations thereof, especially as concerns matters regulated by criminal law.

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[18] The author is quite surprised that, except for a single identified opinion, this decision has received rather positive acceptance. The author considers this decision most surprising. It is a pity that France, rightfully boasting an indeed excellent tradition of arbitration, can come up with many very surprising court judgments with, on top of that, rather brief reasoning (in accordance with the French practice). Probably the only critical comment, of which the author approves, was voiced *in* Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 (3) Arb. Int. 312 (1995).

[19] *Bleustein et al v. Société True North & Société FCB International Tribunal de commerce de Paris* (dec.), February 22, 1999.

[20] Decision annotated, for instance, *in* (1) Rev. Arb 189-198 (2003).

[21] *A. I. Trade Finance Inc.*[USA] - *Bulgarian Foreign Trade Bank* [BUL] - *GiroCredit Bank Aktiengesellschaft der Sparkassen* [AUT], Svea Supreme Court (Dec.), N T 1881-99 (2000).

[22] For example: (i) *Ali Shipping Corporation* v. *Shipyard Trogir* [1998], 2 All ER 136; [1999] 1 WLR 136; [1998] 1 Lloyd's Rep 643, CA; (ii) *Dolling-Baker* v. *Merrett* [1990], 1 WLR 1205 ; [1991] 2 All E.R. 891 CA; (iii) *Hassner Insurance Co. of Israel* v. *Mew*, 2 Lloyd's Rep. 243 (Q.B. 1993), although the court extended here the range of exceptions articulated in *Associated Electric & Gas Insurance Services Ltd.* v. *European Reinsurance Company of Zurich*, [2003] UKPC 11, and many other decisions, partially also in connection with *estoppel* and other issues.

[23] Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, London: Sweet & Maxwell 27 (2004); see also the Departmental Advisory Committee Report on the Arbitration Bill (explanatory report to the Arbitration Act) from February 1996 (DAC-Report), marg. 10-17.

II.3. No Absolute Duty of Confidentiality Binding on Parties as Internationally Recognized Rule in Commercial and Investment Arbitration

2.10. We can often encounter opinions claiming that, as opposed to commercial arbitration, in which confidentiality is considered to be a *standard rule*, no such statement can be made about investment arbitration[24]. Such opinions can only be accepted to a certain extent. We can definitely conclude that there is no basis in investment disputes from which the absolute confidentiality of proceedings could be inferred, but it would be a mistake to believe that confidentiality is a common characteristic feature of commercial arbitration. There are many countries with a long tradition of arbitration in which absolute confidentiality (i.e. also applicable to the conduct of the parties) is by no means regarded as self-evident[25]. Opinions advocating absolute privacy of arbitration as a principle usually rely on the contractual and private-law basis of arbitration (the arbitration agreement)[26]. The author disagrees with these opinions. Arbitration always occupies only as much space as public authority in the seat of arbitration allows. It is public authority that delimits the autonomy of the parties *vis-à-vis* arbitration agreements and *vis-à-vis* the course of arbitration proceedings[27].

2.11. The only common and perhaps, more or less, uniformly recognized standard applicable to arbitration as a *"universal procedural dispute resolution mechanism"*, irrespective of the type of dispute and the seat of arbitration, is the exclusion of the public at hearings. The same probably holds true for the absolute obligation of confidentiality binding exclusively on the arbitrators. In that connection, an interesting question arises when one and the same arbitrator is involved in two associated disputes[28]. In *Encana v. Ecuador* (parallel case *Occidental* [USA] *v. Ecuador*)[29], the tribunal

[24] See Todd Weiler, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, London: Cameron May 196 (2005).

[25] It needs to be said that even the last mentioned author is somewhat careful in this regard when he says (cit.) *[t]he well known, albeit variably dense, norms governing confidentiality in international commercial arbitration [...].(Ibid.).*

[26] Julian D. M. Lew & Loukas A. Mistelis & Stephan Kröll, Comparative International Commercial Arbitration, Den Haag: Kluwer Law International 953 (2003) et al.

[27] The author insists that we must consider these two matters separately. Public power in the seat of arbitration and in relation to the particular parties also defines the overriding mandatory rules applicable to a particular entity separately.

[28] As concerns related disputes, see also *Eureko* [NED] v. *Poland*; see *inter alia* Partial Award of August 19, 2005 available at: http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf (accessed on January 3, 2010). In that case, the investor invoked confidentiality of information from parallel proceedings.

[29] The arbitrator was Dr. Patrick Barrera Sweeney. Also in the *Occidental* case. Regarding the disclosure of certain procedural documents in the *Occidental* case (*inter alia*), see also Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 (1) Arb. Int'l 27 (2006).

did not classify this situation as grounds for challenging (excluding) the arbitrator, although it is clear that the fact had to be disclosed; at the same time, it is not possible to deny that such an arbitrator can hardly fully distinguish between the individual cases. Nonetheless, the author agrees that such a situation does not constitute a breach of confidentiality on the part of the tribunal (the particular arbitrator). The parties are often free from any such obligation, however. Exceptions include situations when such an obligation is expressly agreed by the parties or stipulated by the rules applicable, to a varying degree, to the particular dispute. Therefore, if we conclude that the approaches to the confidentiality obligation of the parties are highly diverse, we are all the more prevented from imposing any confidentiality obligation on the parties to investment arbitration, arguing that it is a duty naturally inherent to arbitration.

2.12. As concerns investment disputes, only in exceptional cases can we deem it contentious that confidentiality does not apply to general information, such as (i) the fact that the arbitration proceedings are pending, (ii) the identification of the parties to the arbitration proceedings, and probably, (iii) the composition of the arbitral tribunal[30]. The author believes that we can definitely presume that confidentiality neither applies to (iv) basic information on the subject matter of the dispute, i.e. at least the general specification of the investment over which the dispute is waged. The author does maintain, however, that the same conclusion that we have drawn in relation to commercial arbitration and investment arbitration (treaty arbitration) could apply to the obligations of the parties regarding the confidentiality of the proceedings.

III. Significance of Seat of Arbitration

2.13. The author believes that the crucial factor in international commercial arbitration is the seat of the particular proceedings. According to the author, the influence of the seat of arbitration is of principal importance; the author also denies any claims of the denationalization of arbitration. Arbitration, national *lex arbitri*, as well as national and international practice is undoubtedly strongly influenced by the extensive international practice. But the current state of affairs confirms that arbitration loses its appeal entirely if a certain level of support by public authority is not guaranteed in the course of arbitration, and especially for the mechanisms of control in the form of the conditions for the annulment and enforcement of arbitral awards with the use of public enforcement mechanisms. Any contrary approach borders on turning a blind eye to reality, however painful and sour. Only public authority therefore determines the attractiveness of this method of dispute resolution for the parties.

[30] The author believes that there is no good reason to disclose the names of the parties' representatives to the public.

2.14. Logically, we have to ask what part the seat of arbitration plays in investment disputes. According to the author, it is necessary to emphasize that the significance of the seat of arbitration in investment disputes is very similar to international commercial arbitration. This principally applies to the support provided during the proceedings, as well as to certain controlling powers of the courts, specifically the possibility to set aside arbitral awards. The fact that in the last two respects the principal differences between commercial arbitration and investment arbitration (pursuant to the UNCITRAL Rules) only manifest themselves very seldom in any particular proceedings[31] corroborates the private nature of arbitration as a universal procedural mechanism. The seat of arbitration in investment disputes is therefore less significant than in commercial disputes, although naturally there do exist certain qualitative differences. These differences include, in particular, the substantive standards for the assessment of the merits of the case (the subject matter of the dispute) and the method of application of these standards; only minor differences exist in the procedural mechanisms by which these standards are applied. Confidentiality and public access to the proceedings are also significantly influenced by procedural standards of the seat of [investment] arbitration. Naturally, it is important to distinguish whether the arbitration proceedings are held before the ICSID or before any permanent court of arbitration, or whether the arbitration proceedings are conducted pursuant to the UNCITRAL Rules. Commentaries logically analyze the ICSID case law in particular. As concerns investment arbitration against the countries of Central and Eastern Europe, however, the key role is played by UNCITRAL arbitration. Although some authors sometimes claim that UNCITRAL arbitration is subject to a more stringent duty of confidentiality than ICSID arbitration, after a thorough analysis of the individual applicable rules, we come to the obvious conclusion that the differences in confidentiality and public access are negligible. Nonetheless, it is true that a number of investment arbitration proceedings pursuant to the UNCITRAL Rules have been subject to strict confidentiality[32], and not all proceedings have actually entered the public domain.

[31] Naturally, this conclusion would have to be modified in ICSID arbitration.

[32] For instance, the only dispute that has so far been registered against the *United Kingdom* was subject to strict confidentiality (claimant Mr. *Ashok Sancheti*, an Indian lawyer), and the only disclosed piece of information is that the case was settled. The Government of the United Kingdom refused to provide any information, arguing that it could be penalized by sanctions imposed by the arbitral tribunal. Due to the lack of any more specific information, any argument would be mere speculation, but we cannot rule out the possibility that this opinion was based on the prevailing English doctrine of confidentiality of arbitration.

IV. Practice in Investment Arbitration[33]

2.15. In *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*[34], the Tribunal stated that there were no provisions imposing a general duty of confidentiality in arbitration pursuant to the ICSID Convention, nor is such obligation stipulated by any provision of the Rules generally applicable to such proceedings. Likewise, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of the abovementioned sources.

2.16. In *Giovanna A Beccara et al. v. Argentina*[35], the tribunal ruled that the issue of confidentiality must (at least in ICSID arbitration) be examined on a case-by-case basis. The most contentious issue was the disclosure of personal information regarding the creditors (claimants)[36]. They were willing to provide the information, but subject to Argentina's consent with a confidentiality agreement. The terms of this agreement were, however, not agreed by both parties. The dispute regarding this issue escalated in the spring of 2009, when Argentina submitted some of the documents provided by the claimants in different proceedings (litigation in court) for the purpose of preparing for the hearing (especially witness and expert witness deposition). The claimants objected that Argentina was ignoring the principle of the confidentiality of arbitration and the strict separation of the individual proceedings, which were independent and confidential. Argentina denied the disclosure of the information and argued that there was no general rule of confidentiality in ICSID arbitration, and that Argentina had therefore never been prevented from using documents from one arbitration in another. Having accepted its jurisdiction to hear and decide the issue of the confidentiality of the proceedings[37], the arbitral tribunal divided the matters into the following categories: (i) confidentiality as to the records of the proceedings, (ii) confidentiality as an instrument of protection of information provided by the claimants,

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[33] Other cases different from those mentioned in this chapter are referenced in other sections of this article.

[34] *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania,* ICSID Case No. ARB/05/22. Regarding *confidentiality,* see Procedural Order No. 3 of September 29, 2006, para. 121; electronic version available at:
http://ita.law.uvic.ca/documents/Biwater-PONo.3.pdf
(accessed on September 15, 2010). Indeed, this decision was also invoked by the arbitral tribunal in *Beccara v. Argentina* (see below). See also a comparative analysis in: Gary Born & Ethan Shenkman, *Adequacy of Existing Rules for Investor-State Arbitration, in* THE FUTURE OF INVESTMENT ARBITRATION, Oxford: Oxford University Press (C. A. Rogers, R.P. Alford eds., 2009). G. Born was also on the arbitral tribunal in *Biwater v. Tanzania*.

[35] It was one of the many cases caused by the financial crisis in Argentina.

[36] The issue in dispute was basically the form in which the information was and/or should have been provided.

[37] *Procedural Order No. 3. Available at:*
http://ita.law.uvic.ca/documents/BeccaraConfidentialityOrder.pdf
(accesed on November 27, 2010).

and finally (iii) the admissibility of providing certain information for the purposes of other proceedings. Regarding the records of the proceedings and the confidential nature thereof, the tribunal declared that it was necessary to assess the nature of the particular materials; the tribunal did not, therefore, adopt any general opinion on this issue. The arbitral tribunal limited the permission to disclose information to certain types of information. For instance, the tribunal permitted the disclosure of general information regarding the dispute. In any case, it is important to prevent any public discussion and the consequent undue influence on the resolution of the dispute[38]. The author considers this award questionable, to say the least. Considering the specifics of these proceedings, with multiple claimants and other unique aspects of the proceedings, it is justified to have serious doubts that the conclusions of the tribunal in this case would represent an important benchmark in international practice.

2.17. The conclusion that no major differences exist between the individual forums and that there is no specific legal basis for any particular investment dispute is supported, for instance, by the decision of the tribunal in *S. D. Meyers* v. *Canada*, proceedings held pursuant to the UNCITRAL Rules (a NAFTA dispute). The tribunal confirmed that there was no general imperative for the protection of information in investment disputes. Nonetheless, the tribunal ordered that the submissions of the parties be kept confidential. The submissions were subjected to the confidentiality regime under Article 25(4) of the UNCITRAL Rules. The author believes that the scope of Article 25(4) of the UNCITRAL Rules is much narrower, but he admits that it is a controversial issue, and it is obvious that individual tribunals may arrive at different conclusions.

V. Confidentiality and Public Access to Information (Definition of "Public")

2.18. The question of whether the privacy (confidentiality) of arbitration is an inherent feature thereof can also be reversed, i.e. *is it possible to agree on public arbitration proceedings*? If we arrive at the conclusion that the globally universal rule is the privacy (confidentiality) of hearings, we must indeed formulate the question in the following manner: "Is it possible to agree that the public will be allowed to attend the hearings?" The author argues that this is not possible, and a prior general waiver of the privacy (confidentiality) of arbitration is indeed null and void if the privacy (confidentiality) of hearings is stipulated as a principle by the applicable norm, or at least a procedural rule, or if we consider the privacy of the proceedings to be an inherent and natural component of arbitration.

[38] See, for instance Ugo Ukpabi, *ICSID tribunal applies ad hoc approach to confidentiality in arbitral proceedings*, ITN (March 11, 2010). Available at: http://www.iisd.org/itn/2010/03/10/icsid-tribunal-applies-ad-hoc-approach-to-confidentiality-in-arbitral-proceeding (accessed on September 27, 2010).

With the consent of all parties and all arbitrators, the presence of certain (specific) persons can be allowed in exceptional cases[39]. The rejection of confidentiality at hearings can therefore only apply to a particular category of persons and certain specific procedural steps (taking evidence, hearings, etc.). These situations cannot, however, be described as public access. We must distinguish between the presence of a particular person, who otherwise does not belong to the category of individuals with a qualified procedural status in the proceedings, and the public. In the opinion of the author, the "public" implies a non-specific group of persons limited by no quantitative restrictions, and (often) no qualitative restrictions either. Unless these two concepts actually describe two completely separate categories, we can definitely conclude that the "*public*" is a much broader category than *other* (particular) persons without any qualified procedural status in the proceedings. "*Public*" is derived from the word "*publica*", or even "*res publica*" in its natural form. The principle of the absolute exclusion of public access to hearings, which must be regarded as a global principle that is indeed inherent to arbitration, must – together with the private (confidential) nature of hearings (so-called "*in curia*" proceedings) – also encompass procedures such as the service[40] of notifications to parties[41] and certain other procedures.

2.19. However, if the same question articulated in the opening sentence of the preceding paragraph is posed in relation to the obligations of the parties regarding the disclosure of information concerning arbitration, the

[39] This issue is dealt with exclusively in Article 32 of the ICSID Rules. It is true that Article 32 explicitly makes the presence of other parties at hearings contingent only upon the consent of the parties, but the author believes that the presence of third parties principally requires the arbitrators' consent as well, because, after all, the arbitrators decide on the third parties' right to participate in the hearings in the form of the applicable procedural mechanism. Nonetheless, it is hard to imagine that the arbitrators would deny attendance to a third party if the parties grant their consent. Similarly also in Article 25 (4) of the UNCITRAL Rules. Despite the fact that, in the author's opinion, hearings are principally private, even under the UNCITRAL Rules, the arbitral tribunal in *Chemtura Corporation* [USA] *v. Canada* (a NAFTA dispute) rendered an explicit procedural resolution on that matter. At the same time, though, the tribunal accepted that the parties could reach a different agreement and implied that it would only allow public access in such cases. See Luke Eric Peterson, *Schedule set for chemical company's case against Canada; hearings to be closed to the public*, 1 (2) INVESTMENT ARBITRATION REPORTER especially para. 6 (June 3, 2008).

[40] Alexander J. Bělohlávek, *Service in International Arbitration in Light of Articles 2 and 23 of the UNCITRAL Rules and International Practice*, 24 (4) ASA BULL. 678 (2006); Hans van Houtte, *The Delivery of Awards to Parties*, 2 ARB. INT. 177 (2005); Andreas Reiners, *Terms of Reference: The Function of the International Court of Arbitration and Application of Article 16 by the Arbitrators*, 7 (2) ICC BULL. 11 (1996).

[41] It is therefore hardly possible to allow the service of documents analogous to certain procedures used in court proceedings, i.e. service by a public announcement or any other *method that allows the public, as a non-specific group of persons without any qualified procedural status in the proceedings, to get acquainted with the contents of the delivered message.*

answer is by no means so unequivocal. In commercial arbitration, this question significantly depends on local laws and local customs, while in investment disputes there is hardly anything to support the conclusion that the parties are bound by the duty of confidentiality with respect to information regarding arbitration and arbitration proceedings as such.

2.20. The author believes that we must distinguish between the two concepts, which are often confused with one another. On the one hand, it is the permission authorizing particular persons to attend the proceedings, the disclosure of particular information about the proceedings, and the provision of documents for specific purposes, permission to attend the hearing granted to a person who does not enjoy any qualified procedural status and/or the admission of a third party to the proceedings[42]. On the other hand, there is a different category, i.e. allowing public access to information about the course of the proceedings (i.e. disclosure of this information to an unspecified group of persons) and especially duties of the parties in that respect. A strict differentiation between these two categories, albeit essential (according to the author), is missing in certain commentaries[43]. Such a distinction, together with a clear definition of the term *"public"* is, however, necessary, especially in investor v. state arbitration. Otherwise, it is not possible to arrive at any qualified conclusion regarding the *"public interest"*, which in that context is specifically used as an argument in treaty arbitration.

VI. Public Interest in Investment Treaty Disputes

2.21. The international practice has a more or less uniform approach to the role of arbitrators in commercial arbitration, by which they are not regarded as guardians of the public interest. The author agrees that the disclosure of information about the proceedings (at least the hearings) could in exceptional cases and depending on the specifics of national law be permitted, even with respect to the arbitrators, based on a decision rendered by public authority – for instance, as concerns records from the arbitration proceedings (the file)[44]. However, the exceptional nature of such measures means that the reasons for adopting these measures ought to be specifically qualified and established. At the same time, we can agree that it is more than controversial whether and how the arbitrators ought

[42] For instance, Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 Arb. Int. 211, 211-212 (2005); L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 Arb. Int'l 131, 139 (1999) etc.

[43] For a precise differentiation, see, for instance, Procedural Order No. 5 rendered in *Biwater Gauff v. Tanzania*, marg. 69–72.

[44] For a detailed look at this issue, see, for instance, Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 (1) Arb. Int. 59 (2005).

to take account of public interest in treaty arbitration[45]. Voices demanding the disclosure of information about investor v. state arbitration place an emphasis on such type of public interest (involved in these investment disputes), the quality of which differs from the public interest involved in commercial disputes, and demand the disclosure of this information to an unlimited group of persons. They stress that the requirement of public access to the information is justified by the very fact that the proceedings are subject to the principles of *public international law*[46]. Without disputing the possibility of the existence of such a qualified public interest in treaty arbitration, the author nonetheless has to reject such reasoning. This is a verbal balancing act bordering on reasoning that one would expect from journalists, rather than lawyers. It is rather intriguing that opinions emphasizing public interest supported by the word "public" in "public international law" are voiced by authors from countries whose doctrinal approach usually only employs the expression "international law". We must therefore reject such reasoning for lack of any material justification. According to the same reasoning, we could indeed argue that if a claim is regulated under international law, despite arising from a bilateral international treaty, the claim could be made by any entity belonging to the international community, simply because that entity is also a subject of *international law*. Or, using reasoning that is similar in nature and just as inconclusive, we could, for instance, conclude that the public ought only to have access to such information, the decision on which is made according to the principles of international law – and conversely be denied access to information the decision on which was made according to the national laws of the host state. No one is likely to refute that such reasoning would run counter to any, even a minimum level of logic. Nonetheless, such arguments would be of the same kind as the reference to the word "public" in "public international law", the subject matter of which is the settlement of investment disputes and the principles of which must be taken into account and applied in these proceedings[47].

2.22. Some authors maintain that the public-law nature of the dispute between an investor and a state and the related public interest have caused a shift from confidentiality to transparency[48]. Despite the indisputable public element involved in these proceedings, the author believes that

[45] See International Commercial Arbitration: Important Contemporary Questions. 11 ICC Congress Series, The Hague: Kluwer Law International 355 (A. J. van den Berg ed., 2003). Identically Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 (2) OGEL (2003); electronic version available at: http://www.ogel.org/article.asp?key=142 (accessed on October 17, 2010).

[46] *Methanex Corporation v. USA.*

[47] See, for instance, Alexander J. Bělohlávek & Filip Černý, *Právo použitelné pro řešení tzv. investičních sporů v mezinárodním rozhodčím řízení – (Law Applicable to Resolution of Investment Disputes in International Arbitration)*, 148 (4) Právník 389 (2009).

[48] See Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 Arb. Int'l 143 (2003).

we cannot conclude that the proceedings themselves, as a procedural mechanism, would be of a public-law nature. Only the jurisdiction of the *forum* and the claims submitted to arbitration (the subject matter of the proceedings) are based on public international law. But the author is of the opinion that we must strictly distinguish between two categories, the first having a public-law basis (especially the jurisdiction of the tribunal and the nature of the claims submitted to arbitration), on the one hand, and the proceedings as such (the course of the proceedings and the applied procedures) as a principally (generally) typical private mechanism, on the other hand. The fact that the state is a party to arbitration does not give the arbitrators the status of public officers or subjects of public law, let alone [public] international law, nor do these circumstances affect the status of the investor as a private party to arbitration. For instance, whereas the information that a particular dispute is pending is definitely a piece of information the disclosure of which is justified by the public interest[49], pleadings, and especially documents submitted in the proceedings, usually do not have to be subject to such a *justified interest*. An investment dispute (just like commercial arbitration) is always a dispute (proceedings) between two (or more) independent entities, and the extent of information about such a dispute the disclosure of which can be demanded is not regulated under international law. We have to ask **who benefits from such an [public] interest in disclosure.** The interest in the disclosure of information **in investment disputes can principally (also subject to certain exceptions) only benefit nationals of the state party to the proceedings, in whose [legitimate] interest the state acts. The author is of the opinion that only these nationals could demand the disclosure of information regarding the particular dispute directly from the state and according to the mechanisms that the particular state employs for the purpose of the disclosure of information by the state (legislation regulating access to information, etc.).** The author has serious doubts as to the power and the entitlement or authorization of arbitrators to make broad decisions on the disclosure of information concerning the particular proceedings by one of the parties.

[49] The author is of the opinion that even the disclosure of the fact that a particular commercial dispute is pending can breach a legitimate interest of the parties in the privacy (confidentiality) of arbitration. Similarly, for instance, NADĚŽDA ROZEHNALOVÁ, ROZHODČÍ ŘÍZENÍ V MEZINÁRODNÍM A VNITROSTÁTNÍM OBCHODNÍM STYKU (*International and Domestic Commercial Arbitration*), Praha: ASPI Publishing (2002) et al. However, the obligation to keep such information confidential can only be imposed on the arbitrators, who are usually bound by absolute confidentiality; the parties can only be required to maintain confidentiality about this and other pieces of information if it is agreed, stipulated by a law or regulation, procedural rule or any analogous generally binding imperative, and taking into account the highly diversified, territorially conditioned differences.

VII. Jurisdiction of Forum over Proportionality of Interests regarding Publicity of Investment Disputes

2.23. The arbitrators, who are naturally bound by the duty of confidentiality, must principally secure the following: (i) the confidentiality of documents that they themselves have at their disposal, ever since they were submitted to them, (ii) the confidentiality of announcements delivered to them and of information delivered by them to the parties, from and to the moment such information is exclusively at their disposal, and naturally (iii) the confidentiality of the hearings. However, it is legitimate to doubt whether the arbitral tribunal is authorized to make decisions on the confidentiality duties of the parties, as well as – conversely – on the obligation to disclose any information, unless such authorization is either incorporated in the agreement of the parties or in the provisions and rules applicable to the particular proceedings in the seat of arbitration. *Lex arbitri* in the seat of arbitration has the same [binding] effect on the proceedings in investor v. state arbitration as on international commercial arbitration, unless the applicable instrument of international law clearly stipulates a different regime. The disclosure of information should generally (except for the abovementioned exceptions) be subject to the decision of the parties alone; otherwise, it is only up to the person authorized to demand and receive such information to request it (if interested) in a manner prescribed by the law for such procedure (usually the laws applicable in the *host state* that is a party to the dispute). Making decisions on the confidentiality or, conversely, transparency of investment arbitration, except in the abovementioned exceptions, is in the author's opinion an inadmissible extension of the powers (jurisdiction) of the arbitral tribunal, because it thereby makes decisions on the rights of persons who are not a party to the dispute, and who cannot even be a party to the arbitration agreement entered into as described above. If, therefore, the requirement of the public accessibility of information about international treaty arbitration is being supported by the argument that a decision on the particular dispute could have a significant impact on parties not involved in the particular dispute[50], it remains to advise the persons to whom the interest benefits or who claim the existence of such an interest to demand the enforcement of that interest through the use of national mechanisms. Although it is quite clear that public interest has a completely different scope in investment disputes[51] than in commercial arbitration, decisions on such interest

[50] *Methanex Corporation* v. *United States*; proceedings under Chapter 11 of the NAFTA. The final award was rendered on August 3, 2005 and is available at: http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf (accessed on September 14, 2010).

[51] *Methanex Corporation* v. *United States*, decision on *amici curiae* submissions, marg. 46 and 49. However, in the same decision [marg. 43], the arbitral tribunal

should not be made by arbitrators. They can therefore neither allow nor prohibit such public disclosure of information.

2.24. This conclusion could be undermined if the investor himself/herself were not allowed to exercise his or her rights regarding the confidentiality of information through national mechanisms for public access to information. The investor's access to such proceedings might, in theory, be impeded by obstacles incorporated in national procedural laws. Indeed, the investor is usually considered a *foreigner* (*non-resident*) in his or her relation to the host state, and the national court (or any other public authority) is dealing with a *claim* the merits of which differ from a claim involved in an investment dispute handled at the national level; moreover, the *claim* is made by a different person. Both proceedings are related materially, but not as to the factual circumstances, and definitely not as to the nature of the submitted claims. Besides, these proceedings involve procedural mechanisms of different kinds. Nonetheless, the international tribunal should not assess the public interest in the disclosure of information in these cases either. In the practice of most countries, however, it is only rare that this exceptional situation just described is even conceivable.

2.25. Doubts about the very authorization of arbitral tribunals to make decisions on the disclosure of information by the parties can be supported, for instance, by the ICSID Rules[52] and the interpretation thereof. The reason is that the ICSID Rules contain no imperative regarding the disclosure of information to the public by the parties. Indeed, this conclusion was correctly articulated by the arbitral tribunal in *Biwater Gauff v. Tanzania* with reference to the *official commentary* on the original version of the ICSID Rules. The *tribunal* added that [the parties] could agree on confidentiality [especially][53] if disclosure could result in an escalation of the dispute[54]. The author is of the opinion that the fact that the parties are entitled to restrict or prohibit the disclosure of information on the basis of their autonomy implies not only that in the absence of such agreement the parties are not subject to any such restriction, but also that the arbitral tribunal in ICSID arbitration is not entitled to make any decisions regarding that issue.

2.26. The only exception under which the arbitrators are, in the author's opinion, entitled to make decisions on eventual restrictions of the disclosure of information (apart from an express authorization by the

admitted that it was a controversial issue and that there existed contrary opinions.

[52] Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

[53] The reasons can be any, and the parties are not subject to any restrictions when concluding such an agreement. The only restriction could be a danger to the purpose of the arbitration proceedings. If the confidentiality agreement of the parties (as an agreement on further progress in the proceedings) jeopardized the proceedings and the attainment of the purpose of the proceedings, we would have to ask whether such agreement perhaps does not negate or limit the scope of jurisdiction of the *forum* in the dispute.

[54] Procedural Order No. 3 rendered in *Gauff v. Tanzania*, marg. 125.

parties) is a situation in which the disclosure of specific information could jeopardize the arbitral proceedings as such, i.e. the proceedings for which the arbitrators are responsible. Nonetheless, the arbitrators should only adopt such measures in exceptional cases, and only if the danger to the proceedings and the purpose of the proceedings resulting from the disclosure of information by any of the parties is concrete and imminent. The arbitrators cannot, however, order the parties to disclose any information, i.e. to *make it accessible to the public*.

2.27. The proportionality of the protected interests is the main criterion in assessing the extent to which a party may, exercising its autonomy, waive what the international practice and the national practice in the individual countries consider fundamental principles of finding and applying the law in contentious proceedings before courts and other public authorities. The same criterion (proportionality) must necessarily apply to the assessment of confidentiality and publicity, both in commercial arbitration and in *investor* v. *state* disputes. But the author believes that if this proportionality is being assessed by the *forum* appointed in an investment dispute, the forum in most cases is exceeding its jurisdiction.

VIII. Publication of Arbitral Award

2.28. Article 48(5) of the ICSID Rules restricts the publishing of the award in the absence of the parties' consent. Publishing the award without the required consent granted in ICSID arbitration, if committed by the state being a party to the arbitration, can be considered a breach of the state's obligation under international law; if the same is done by the investor, it can be considered a breach of a similar obligation assumed by invoking the jurisdiction of the *forum* under the applicable international treaty, despite the fact that the investor, as such, is not a subject of international law. The author is of the opinion that this obligation owed to the party (investor) results from the nature of the provisions incorporated in instruments of international law on investment protection, which regulate the settlement of disputes between the investor and the state. Such provisions represent an offer to enter into an arbitration agreement proposed by the state and extended to an unlimited group of persons (investors) who meet the subjective and objective conditions defined in the same instrument (the definitions of *investor* and *investment*). *Ratione temporis*, the state's offer is limited by the duration of the state's obligations arising from the respective convention or treaty. The investor accepts the offer at the moment he or she initiates the formal procedure set down by the international treaty for the purpose of settling the investor's (alleged) investment protection claims, in particular, at the moment the investor clearly specifies (with irrevocable effect) which method of dispute resolution he or she invokes (if the investor can choose from multiple alternatives). In comparison to commercial arbitration, this particular moment can be considered to be similar to the moment at which the parties enter into an arbitration agreement in commercial matters.

2.29. There is a significant difference between the UNCITRAL Rules and the ICSID Convention: whereas in ICSID arbitration, the Centre has an obligation to at least publish the legal reasons underlying the decision, Article 32(5) of the UNCITRAL Rules always makes the publishing of the award (i.e. even parts of the award or the summary of the legal reasons) subject to the consent of the parties. Nonetheless, the parties in UNCITRAL arbitration are only limited *vis-à-vis* the outcome of the proceedings, and in the author's opinion, only after they are notified of the outcome. The emphasis on the autonomy of the parties and the very cautious approach adopted by the UNCITRAL Rules to these matters can hardly be interpreted as the acceptance of absolute confidentiality[55]. It is no secret that certain countries (namely Canada) initiated a certain breakthrough as concerns the publicity of proceedings according to the draft revised UNCITRAL Rules. In *Oxus v. Kyrgyz Republic,* the tribunal ruled that Article 32(5) applied to all awards rendered in the proceedings after the investor made the jurisdictional award public[56].

Summaries

FRA [***Confidentialité et publicité dans les procédures d'arbitrage des litiges d'investissement, intérêt public et limites de compétence des chambres d'arbitrage***]

Le fait que l'État soit l'une des parties à une procédure d'arbitrage ne fait pas des arbitres des agents publics ni des sujets de droit public et encore moins de droit international (public). La procédure d'arbitrage est avant tout un mécanisme universel de procédure. Les spécificités fondamentales de la procédure dans les différends relatifs aux investissements concernent tout d'abord l'application des standards de droit matériel. La confidentialité et la publicité sont essentiellement des questions de procédure. L'affirmation relative au principe mondial, internationalement reconnu, de confidentialité propre à la procédure d'arbitrage est un mythe. Les standards de la confidentialité sont soumis à des écarts territoriaux importants en fonction du lieu de la procédure. Il n'y a que le principe de confidentialité des audiences et la discrétion des arbitres qui soient universellement reconnus. C'est un principe qui s'applique non seulement aux procédures internationales d'arbitrage dans les affaires commerciales mais aussi aux procédures

[55] As opposed to P. Sanders, who claims that this is a principle of arbitration, referring to a customary rule. See PIETER SANDERS, QUO VADIS INTERNATIONAL ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTISE, A COMPARATIVE STUDY, The Hague: Kluwer Law International 451 (1999). The author is strictly against the opinion (and in this regard against P. Sanders) that the restriction of the parties with respect to the disclosure of information about arbitration is a globally recognized principle.

[56] *Oxus Gold* [UK] *v. Kyrgyz Republic*, procedural order, March 28, 2008. Luke Eric Peterson, *Kyrgyz Republic settles BIT claim with UK miner, Oxus*, 1 (5) INVESTMENT ARBITRATION REPORTER para. 7 (May 16, 2008).

dans les différends relatifs aux investissements. Même dans les différends relatifs aux investissements, les parties jouissent d'un haut degré d'autonomie concernant la confidentialité et la publication des informations.
Même s'il est impossible de nier l'existence d'un intérêt public qualifié dans les différends relatifs aux investissements, cette question ne devrait pas avoir d'effet sur la confidentialité, la publicité ou la publication des informations. Un éventuel intérêt à publier des informations dans les affaires de protection des investissements profite par principe aux citoyens de l'État hôte. D'après l'auteur, ces citoyens pourraient exiger la publication des informations relatives au litige en question, et ce directement vis-à-vis de l'État hôte et conformément aux mécanismes que l'État concret prévoit pour la mise à disposition des informations par ce dernier (lois relatives à l'accès aux informations, etc.). C'est pourquoi l'auteur exprime un doute de principe au sujet de la compétence et de la légitimité des arbitres à décider dans une large mesure au sujet de la publication (droit à la mise à disposition), par une des parties, d'informations concernant une procédure. Ils ne peuvent pas juger des intérêts de celui qui n'est pas partie à la procédure. Les cas où les parties limitent la publication d'informations tout à fait concrètes, dans des situations de procédure menaçant le déroulement ou l'objectif de la procédure, représentent une exception. Il n'y a que cela qui relève de la compétence des arbitres dans le cadre de la question de la publication. Il devrait cependant s'agir de mesures d'exception dans des cas de risque concret et réel.

CZE [***Důvěrnost a neveřejnost v rozhodčím řízení v investičních sporech, veřejný zájem a rozsah oprávnění rozhodčích senátů***]
Skutečnost, že jedním z účastníků rozhodčího řízení je stát, ještě nečiní z rozhodců veřejné činitele ani subjekty veřejného práva, o to méně mezinárodního práva [veřejného]. Rozhodčí řízení je především univerzální procesní mechanismus. Zásadní specifika řízení v investičních sporech se projevují především ohledně aplikace hmotněprávních standardů. Důvěrnost a veřejnost jsou především otázky procesní. Tvrzení o globálním mezinárodně uznávaném principu důvěrnosti vlastním rozhodčímu řízení je mýtus. Standardy důvěrnosti podléhají významným teritoriálním rozdílům podle místa řízení. Za univerzálně přijímanou lze zřejmě považovat pouze zásadu důvěrnosti ústních jednání a mlčenlivost rozhodců. To platí nejen pro mezinárodní rozhodčí řízení v obchodních věcech, nýbrž i pro řízení v investičních sporech. Strany požívají i v investičních sporech vysokou míru autonomie ohledně důvěrnosti a zveřejňování informací.
Ackoliv existenci kvalifikovaného veřejného zájmu v investičních sporech popřít nelze, neměla by tato otázka mít vliv na důvěrnost, veřejnost, resp. zveřejňování informací. Případný zájem na zveřejnění informací totiž ve věcech ochrany investic zásadně svědčí občanům hostitelského státu. Podle autora tito občané by se mohli domáhat zveřejnění informací o předmětném sporu, a to přímo vůči hostitelskému státu a podle mechanismů, které konkrétní stát předvídá pro poskytování informací státem

(předpisy o přístupu k informacím a pod.). Autor proto vyjadřuje zásadní pochybnost o pravomoci a oprávnění rozhodců rozhodovat v široké míře o zveřejňování (právu na poskytnutí) informací týkajících se daného řízení stranou. Nemohou posuzovat zájmy toho, kdo není stranou řízení. Výjimku představují případy, kdy omezí strany ve zveřejnění zcela konkrétních informací v procesních situacích, kde by tím mohlo dojít k ohrožení průběhu a účelu řízení. Jen toto totiž v souvislosti s otázkou zveřejňování spadá do pravomoci rozhodců. Mělo by se však jednat o opatření výjimečná v případech konkrétního a reálně hrozícího rizika.

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POL [***Poufność i elementy niejawne w postępowaniu arbitrażowym w sporach inwestycyjnych, interes publiczny i zakres uprawnień trybunałów arbitrażowych***]

Całkowita poufność postępowania arbitrażowego nie jest bynajmniej uniwersalnym standardem międzynarodowym. Ma ona charakter terytorialny. Poufne jest jedynie postępowanie ustne. W sporach inwestycyjnych trudno znaleźć podstawy do zachowania absolutnej poufności informacji o przebiegu postępowania. Poszczególne wyjątki wynikają wyłącznie z mających zastosowanie reguł i z ewentualnego porozumienia stron. Arbitrzy w sporach inwestycyjnych mogą ograniczyć autonomię stron w zakresie ujawniania informacji wyłącznie w przypadku zagrożenia celu i przebiegu postępowania.

DEU [***Vertraulichkeit und Nichtöffentlichkeit im Schiedsverfahren über Investitionstreitigkeiten, öffentliches Interesse und Ausmaß der Berechtigungen der Schiedssenate***]

Absolute Vertraulichkeit des Schiedsverfahrens ist kein universeller internationaler Standard. Es geht um eine territorial bedingte Frage. Vertraulich ist lediglich die mündliche Verhandlung. In Investitionsstreitigkeiten lässt sich kein Anhalt für strikte Vertraulichkeit von Informationen über den Ablauf des Verfahrens finden. Individuelle Ausnahmen resultieren aus den anwendbaren Regeln und einer etwaigen Vereinbarung der Parteien. Die Schiedsrichter sind berechtigt, in Investitionsstreitigkeiten die Autonomie der Parteien hinsichtlich der Veröffentlichung ausnahmsweise dann einzuschränken, wenn Zweck und Ablauf des Verfahrens gefährdet sind.

RUS [***Конфиденциальность и гласность в арбитражном разбирательстве (третейском процессе) по инвестиционным спорам, общественный интерес и сфера компетенций составов арбитражных судов***]

Абсолютная конфиденциальность арбитражного разбирательства (третейского процесса) не является универсальным международным стандартом. Это территориально обусловленный мо-

мент. Конфиденциальным является лишь слушанье. В инвестиционных спорах невозможно найти поддержку для строгой конфиденциальности информации в ходе разбирательства. Отдельные исключения следуют из применяемых правил и из возможного соглашения между сторонами. В инвестиционных спорах арбитры имеют право ограничить автономию сторон в отношении предания гласности исключительно при наличии угрозы цели и ходу процесса.

ES [***Confidencialidad y publicidad en el procedimiento de arbitraje en los pleitos de inversión, interés público y alcance de los poderes inalienables de los tribunales arbitrales***]

La absoluta confidencialidad del procedimiento de arbitraje no constituye una norma internacional universal. Se trata de un tema condicionado por el territorio en cuestión. Solo la vista oral es confidencial. En los pleitos de inversión no puede hallarse soporte para una estricta confidencialidad de las diligencias. Las excepciones individuales se desprenden de las reglas aplicables y los eventuales acuerdos entre las partes. En los pleitos de inversión los árbitros tienen derecho a limitar la autonomía de las partes con respecto a la divulgación en casos excepcionales únicamente cuando peligran el propósito y el transcurso de las diligencias.

Marcin Czepelak

Contractual Choice of Forum in International Investment Arbitration

Key words:
foreign investment | jurisdiction | arbitration | dispute-settlement | dispute resolution clauses (DRCs) | bilateral investment treaties (BITs) | BIT arbitration | treaty claims | contract claims | domestic law | international law | umbrella clause | consent | choice of court (agreement, clause) | forum selection (agreement, clause)

***Abstract** | Bilateral investment treaties (BITs) establish standards of the treatment of international investments. These treaties vest arbitration with the jurisdiction over alleged breaches thereof. Consequently, the jurisdiction of treaty tribunal is a logical corollary of guarantees stipulated in the treaty. This is not the case of contract claims, where a treaty tribunal is only one of conceivable fora to whom jurisdiction may be conferred by the parties. Although BIT tribunals can be vested with the jurisdiction over contract claims, it will be a kind of additional facility to adjudicate on them. Thus, as far as contract claims are at issue treaty tribunal are on the same footing as domestic courts or international commercial arbitration tribunals. It follows from the case-law of tribunals based on bilateral investment treaties that they were unwilling to decline jurisdiction over treaty claims, but they were seriously concerned about the enforceability of contractual selection clauses when contract claims were at issue. In some cases they narrowly construed the scope of a DRC, in other they used the concept of inadmissibility.*

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I. Exclusive Choice of Court Agreements

3.01. If something goes wrong with an international contract then the question of jurisdiction becomes the key issue of the forthcoming dispute, and this is why drafting a choice of court clause constitutes one of the parties' primary concerns. By means of such an agreement parties to a contract seek to confer jurisdiction to the courts of one of States which could be potentially competent. The prorogation of jurisdiction (*prorogatio fori*) constitutes a positive aspect of a choice of court agreement. Often it is also supplemented with the derogation of jurisdiction of courts of any other State (*derogatio fori*). This negative aspect makes the parties' choice exclusive. Indeed, both aspects: positive – i.e. determination of the competent courts and negative – i.e. exclusion of any other jurisdiction, are essential from the perspective of legal security, forseeability and the parties' commercial expectations. Accordingly, such an exclusive choice of court clause will be successful if it passes two kinds of test. Firstly, its positive aspect must be effective under the law of chosen jurisdiction. It provides that if parties have chosen by means of an agreement (usually a clause in their contract) English courts to decide any disputes arising between them, then this agreement is to be valid under English procedural law. Secondly, its negative aspect must be effective under the procedural laws of any other State which might be involved. In the example given above, the exclusive choice of court will be successful if any courts other than an English court decline their jurisdiction. Similar conclusions can be reached for the arbitration clauses as they are also tested against procedural law of potentially competent State courts. It follows that what will be discussed below *a propos* choice of court agreements applies *mutatis mutandis* to arbitration agreements[1]. Accordingly, this paper will focus on negative effectiveness of the exclusive choice of court and arbitration agreements. However, instead of discussing when they are recognised by national courts, the aim of this article is to discuss when and why they are (dis)respected by the arbitral tribunals established by bilateral investment treaties (hereafter: BITs). They constitute other *fora* that are confronted with exclusive choice of court clauses inserted in investment contracts.

[1] *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of January 29, 2004, para. 138, (*SGS v Philippines Decision on Jurisdiction*) available at: http://ita.law.uvic.ca (accessed on December 10, 2010): 'it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in *SGS v. Pakistan*) or some other form of arbitration, e.g. pursuant to the UNCITRAL or ICC Rules. The basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.'

II. The Curial Law of BIT Arbitration

3.02. Tribunals established by BIT (hereafter BIT tribunals) apply their own curial law (*lex fori processualis*) i.e., generally speaking, public international law in order to ascertain the effect of choice of court clauses. In *Lanco*[2] procedural law of the BIT tribunal was USA-Argentina BIT and ICSID Convention. Accordingly the tribunal analysed what were the effects (if any) of the choice of court clause of the concession agreement[3] concluded between the Argentine Republic and the company in which the investor had his equity shares.

3.03. Firstly, the tribunal surveyed whether this stipulation could be considered a 'previously agreed dispute-settlement procedure' in the meaning of Article VII (2) (b) of the USA-Argentina BIT. However, the clause was denied this character by reference to the domestic (*in casu* Argentine) law, concluding that: 'As the contentious-administrative jurisdiction cannot be selected or waived, submission to the contentious-administrative tribunals cannot be understood as a previously agreed dispute-settlement procedure'[4].

3.04. Secondly, the BIT tribunal tested the choice of court clause against Article 26 of the ICSID Convention stating that 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'[5]. *According to the tribunal's interpretation, it follows from* the said provision that the contractual stipulation 'does not replace any consent, but instead dilutes the presumption as to the exclusivity of ICSID arbitration'. Once more the tribunal referred to the domestic law stating that 'the alleged selection of jurisdiction, as a possibility that may be envisaged by Argentine law, has not been shown by the Respondent'.

3.05. One may wonder why the *Lanco* tribunal invoked the domestic law, so it might have been seen as its evaluation of the choice of court clause had not been based exclusively on the *lex fori processualis*. Indeed, under Argentinian law the jurisdiction of administrative tribunals might be compulsory, however it was not the effectiveness of the choice of court clause in terms of Argentinian law, but rather in terms of Argentina-US BIT, that was at issue. For the purposes of treaty based arbitration the effects of the contractual choice of court are to be considered on the basis of the relevant norms of international law, i.e. *lex fori processualis* that

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[2] *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of December 8, 1998, 40 ILM 457 (2001) (*Lanco v. Argentina, Preliminary Decision on Jurisdiction*).

[3] The concession agreement of signed on 6 June 1994 provided: 'For all purposes derived from the agreement and the Bid Conditions, the parties agree to the jurisdiction of the Federal Contentious Administrative Tribunals of the Federal Capital of the Argentine Republic'.

[4] *Lanco v. Argentina, Preliminary Decision on Jurisdiction* at § 26.

[5] *Ibid.*, at § 38.

governs effect of the waiver of jurisdiction of the BIT tribunal, the 'fork in the road' provisions and waiting periods. Accordingly, in the *Lanco* case the tribunal implicitly assumed that 'a previously agreed dispute-settlement procedure' in terms of Argentina-US BIT demands that the jurisdiction of the court chosen by the parties can be appointed by virtue of an agreement under the law of this court[6]. The possibility to choose the jurisdiction was as such only the option offered by the Argentina-US BIT, not the requirement concerning the chosen jurisdiction. It follows that the questions were threefold. Firstly: were the parties free to agree on the jurisdiction of the domestic courts? This question was to be answered on the basis of the Argentina-US BIT. Secondly: did the parties conclude such an agreement? Once more this question was to be answered on the basis of the Argentina-US BIT. Thirdly: were the administrative tribunals competent to adjudicate on the alleged violations of the said treaty? This question was to be answered on the basis of Argentinian law. From an international law perspective (and the basis of the Argentina-US BIT) it was relevant to establish whether the court chosen by parties was bound to assume jurisdiction. However it was irrelevant as to whether it would assume its jurisdiction on the basis of the parties' agreement or on the basis of a mandatory rule of domestic law. The last issue might have been only considered as the indication of parties' will. It follows that the tribunals in *Lanco* and in *Salini v Morocco* set aside the well established rule which provides that

> *Each court is obliged to determine the validity of the agreement on the choice of court in relation to its own law, not in relation to the law chosen*[7].

In consequence no effect was given to the parties' express stipulation conferring jurisdiction to the domestic courts, although another principle, this time concerning interpretation, recommends construction of contractual clauses *ut res magis valeat quam pereat*. Accordingly the conclusions of the tribunals in *Lanco* and in *Salini v Morocco* seem to be hardly justifiable without further determination of what parties effectively agreed in the concession contract. Nevertheless the reference to the domestic law is likely to be necessary to scrutinise some issues of the parties' consent to the choice of court agreement which in turn are relevant to establish the scope and the content of the consent to the treaty arbitration.

[6] The very same reasoning can be found in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001, para. 27 (*Salini v. Morocco*), 42 ILM 609, 615-616 (2003): 'As the jurisdiction of the administrative courts cannot be opted for, the consent to ICSID jurisdiction described above shall prevail over the contents of Article CCAG, since this Article cannot be taken to be a clause truly extending the scope of jurisdiction and covered by the principle of the Parties' autonomy'.

[7] Mario Giuliano, Paul Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' O.J. 1980 C 282, para. 2. 5.

III. Scope of the Consent to Treaty Arbitration

3.06. It is common ground that a treaty provision by which a host State submits itself to the jurisdiction of the BIT tribunal constitutes standing general offer of an arbitration agreement to the investors from the other contracting State. An investor by instituting the proceedings accepts this offer and therefore the arbitration agreement is concluded. A contractual exclusive choice of court constitutes another agreement and, as it is often conceded by states, it might give rise to the question of whether the investor's consent to the latter prevents him from relying on the BIT dispute resolution clause. This question could be rephrased to read: what is the scope of the contractual arbitration agreement? The case-law from the ICSID tribunals has answered it by means of the distinction between treaty claims and contract claims. The former concern breach of a standard of treatment established by the BIT, the latter concern breach of contract. It follows that by concluding the choice of court agreement an investor consents to submit only his claims in contract and therefore claims based on the breach of treaty standard are left outside the scope of the choice of court agreement. This approach was adopted by the first *Vivendi* tribunal, which stated: 'In this case the claims (...) are based on violation by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT. (...) Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT'[8]. The reasoning on this point was approved by the *ad hoc* Committee[9] and generally followed by other ICSID tribunals[10].

[8] *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine*, ICSID Case No. ARB/97/3, Award of November 21, 2000, paras. 53 and 54, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

[9] *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002 (*Vivendi v Argentina, Decision on Annulment*).

[10] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003); *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of August 6, 2003; *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of December 8, 2003; *IBM World Trade Corp. v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction of December 22, 2003; *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of January 14, 2004;

It is important to bear in mind that the distinction between treaty claims and contract claims was made in order to leave treaty dispute resolution clauses unaffected by exclusive choice of court agreements. As it was phrased by the *ad hoc* Committee in *Vivendi I* arbitration:

'...*where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard*'[11].

This might suggest that the contractual choice of court deprives BIT tribunal form assuming its jurisdiction over contract claims. This is however arguable and consequently will be discussed bellow. Still, it is important to notice that the very beginning of this controversy is the jurisdiction of BIT tribunals over contract claims. It is conceded that it results either from broad dispute resolution clauses (hereafter: DRC) or so-called 'umbrella clauses'.

IV. Dispute Resolution Clauses

3.07. Bilateral investment treaties establish standards of the treatment of international investments. Most commonly a BIT safeguards foreign investments from expropriation and discrimination. Additionally a host State binds itself to adopt fair and equitable treatment of foreign investors and to ensure them full protection and security. Often this protection is referred to some other standards so that foreign investors are to receive the same treatment as enjoyed by nationals of the host State (so called National Clause) or no less favourable than nationals from any other country (the Most Favoured Nation Clause). All these guarantees would remained inoperative if there were no possibility to enforce them against a State which had broken it. That is why many BITs encompass DRCs.

Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004; *SGS v. Philippines Decision on Jurisdiction*; *Salini Costruttori S.p.A. and Italstrade S.p.A. v.Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 9, 2004 (*Salini v. Jordan*); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of April 22, 2005; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of April 26, 2005; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction of May 11, 2005; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction of October 21, 2005; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006; *National Grid plc v The Argentine Republic* (UNCITRAL arbitration), Decision on Jurisdiction of June 20, 2006; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 Award of August 2, 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award of August 16, 2007; these case-law is available at: http://ita.law.uvic.ca (accessed on December 10, 2010).

[11] *Vivendi v. Argentina, Decision on Annulment*, para. 101.

On the basis thereof investors are enabled to put a State on trial before a BIT tribunal. A DRC does not constitute an independent standard of treatment of foreign investments. It does not establish any substantive criteria, rather it is their procedural equivalent that opens the way for a remedy for a breach of BIT standard. It would logically follow that a scope of the DRC is the same as the scope of BIT's substantive provisions. In other words, a tribunal established by the BIT should have jurisdiction over claims concerning a breach of any standard established by this BIT. However, sometimes the scope of a DRC is expressly limited (so that not all BIT standards are covered) and sometimes it is considered to be broader, i.e. a DRC covers also disputes between a State and a foreign investor when the latter is not contending breach of the treaty but a breach of the investment contract. By this mean a BIT tribunal assumes jurisdiction over a contractual dispute, that is a dispute where not a breach of substantive treaty standard (i.e. treaty claim) is at stake but a breach of the investment contract (i.e. contract claim). Accordingly, if a scope of a DCR is construed in a manner which covers contractual as well as treaty claims, it constitutes not merely a procedural equivalent of the material scope of the BIT but also an additional procedural guarantee for an investor, who by these means is enabled to go to tribunal based on the BIT in order to get remedy for a breach of contract.

V. Broad Interpretation of Dispute Resolution Clauses

3.08. Broad construction of DRC is one of the most disputed issues in international investment arbitration. There is neither need nor possibility to discuss this matter exhaustively in this paper, however it will be illustrative for further analysis to summarize briefly the current state of the debate. It might be said that is focused on three rules of treaty interpretation which can be derived from Article 31.1 of the Vienna Convention on the Law of Treaties. It says that: A treaty shall be interpreted in good faith ...

V.1. ... in Accordance with the Ordinary Meaning to be Given to the Terms of the Treaty

3.09. First and foremost the broad interpretation of the provisions on jurisdiction of BIT tribunals is underpinned by the reference to the literal meaning of 'all disputes' which is popular phrase denoting the scope of a generic DRC. It is contended that they must be construed in a way which encompasses also contract claims, otherwise they would remained ineffective[12]. From a purely logical point of view confining the scope of a widely drafted DRC to treaty claims does not deprive it of the *effet utile*, which is precisely a legal

[12] John P. Gaffney, James L. Loftis, *The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims*, 8 (1) The Journal of World Investment & Trade 23-27 (2007).

base for jurisdiction over treaty claims[13]. It is not necessary to give words their broadest possible meaning to make them effective. It is however fair to say that a DRC would be less effective (or half-effective), should it be construed in a way that excludes contract claims from the jurisdiction of a BIT tribunal. It follows that the effectiveness of a DRC is a matter of its object rather than the question of ordinary meaning of the phrase 'all disputes' or the like which is nevertheless still important.

3.10. It is just as important not to confuse the 'ordinary meaning' with the literal meaning. That is why the latter is sometimes corroborated by the *a contrario* reasoning and the phrase 'all disputes' or simply 'disputes' is construed in opposition to a DRC, whose scope is restricted to some of the BIT standards. The problem is that *argumentum a contrario* does not guarantee doubtless results. Indeed, a DRC limited to breaches of only some BIT standards can be as well opposed to 'all disputes' meaning the disputes concerning breaches of all the BIT standards. Therefore the problem cannot be solved without establishing a proper context of these words.

V.2. ... in Their Context

3.11. Whilst discussing the context of a treaty provision one spontaneously inclines toward Article 31.2 of the Vienna Convention on the Law of Treaties. It follows from the said provision that:

> *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

This norm draws attention to what is to be considered 'in addition to the text' and what can be defined as a further context. Accordingly, the text of a treaty forms a closer context for a particular term or, more particularly, substantive provisions of a BIT constitute the context for a DRC. Therefore it could be understood that State-parties to a treaty firstly defined a notion of investment, established standards of their treatment and finally agreed on arbitration in case a of 'any dispute' concerning these standards. It would mean that 'dispute concerning investment' is tantamount to 'any dispute concerning the standard of treatment of investments'. Surely, this reasoning is far from removing all doubts and obviously it cannot be applied to all widely drafted DRCs. However, it explains why the principle *ubi lex non distinguit nec nos dintinguere debemus* is not likely to have the final word in this case. This adage insists on literal meaning, whilst the 'closer' context (as defined above) suggests that it is more sound to

[13] *Cf. SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of August 6, 2003, para. 150, (*SGS v. Pakistan, Decision on Jurisdiction*), available at: http://ita.law.uvic.ca (accessed on December 10, 2010).

harmonize the substantive and procedural scope of the BIT. Indeed, the famous divergence in the SGS cases results from different placement of accents. The tribunal in *SGS v Pakistan* gave preference to the contextual (and therefore restrictive) interpretation of the DRC[14], whilst the tribunal in *SGS v Philippines* stuck to the literal meaning of 'all' as denoting disputes arising out of *lege non distinguente* all causes of action[15]. It is however important to notice that, as a consequence, both of them differently defined the object of the given DRC.

V.3. ... and in the Light of its Object and Purpose

3.12. Although in *SGS v Pakistan* the tribunal did not addressed this issue explicitly, which can hardly be an advantage, its view results implicitly from the following passage:

> *We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT.*

It presupposes that the BITs deal with substantive standards of treatment of foreign investments and as such they do not aim to provide investors with additional facilities in the field of international commercial arbitration. This view confines the realm of BITs to international standards of protection of foreign investments on both – substantive and procedural level. In other words, treaty-based tribunals are courts created by the public international law and called to do the 'international' justice not the 'contractual' justice. Therefore, it was observed that

> *There is always a danger in divorcing the jurisdictional provisions from the substantive terms of the same treaty in that it may suggest that the arbitral tribunal has jurisdiction but is invited to rule in vacuum*[16].

Accordingly, this view which says that the scope of a DRC should be adequate to the scope of the material standards of the BIT, or in other words, that a BIT tribunal should in principle have jurisdiction only in cases when the breach of the BIT is at stake is driven by the need of coherent interpretation of the BIT as a whole. Otherwise, it maintains, treaty becomes 'a mere vehicle for an arbitration clause'[17].

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[14] *Cf. SGS v. Pakistan, Decision on Jurisdiction*, para. 161.

[15] *SGS v. Philippines, Decision on Jurisdiction*, para. 132. However it must be noted that the tribunal also confronted wording of other provisions of Swiss – Philippines BIT of 1997 and took contextual aspect into account.

[16] Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims, in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL INVESTMENT TREATIES AND CUSTOMARY INTERNATIONAL LAW, London: Cameron May 325, 336 (T. Weiler ed., 2005).

[17] *UNCITRAL Case CME Czech Republic BV v Czech Republic*, separate opinion of Sir Ian Brownlie on the issues of quantum to the Final Award of March 14, 2003, para. 72, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

3.13. Contrary to implicit consideration in *SGS v Pakistan*, the tribunal in *SGS v Philippines* developed teleological argumentation giving two reasons.

3.14. Firstly, from two possible interpretations, it chose that one which favours investors.

The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments[18].

Although it goes without saying that encouragement, promotion and protection of foreign investment are explicit objectives of BITs, *in dubio pro investor* could hardly be the right conclusion in all cases. This approach (not uncommon in international investment arbitration) was criticised on the basis of its incoherency with the rules established in Article 31 of the Vienna Convention on the Law of Treaties:

An interpretative approach that systematically favours the interests of one of the disputing parties need only be articulated to be proven unsound. Can reference to the policy of promoting foreign investment ever result in an interpretation favourable to the state party's defence? If the answer is no, both as a matter of experience (based on the record of past decisions) and as a matter of logic, then something is wrong with the interpretative approach and the idea that is supported by Article 31 of the Vienna Convention on the Law of Treaties is untenable[19].

3.15. Secondly, the tribunal in *SGS v Philippines* referred to practical consequences of excluding contract claims from the scope of DRC established by the Swiss-Philippines BIT:

By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions in some cases, but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum[20].

3.16. It is worth noting that the integration of different legal causes of actions in the framework of one single jurisdiction of treaty-based tribunal constitutes most frequently invoked argument supporting broad construction of generic DRCs[21]. This reasoning justifies judicial decision

[18] *SGS v. Philippines, Decision on Jurisdiction*, para. 116.

[19] Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 (1) ARBITRATION INTERNATIONAL 27, 51 (2006).

[20] *SGS v. Philippines, Decision on Jurisdiction*, para. 132.

[21] Christoph Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered, in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL INVESTMENT TREATIES AND CUSTOMARY INTERNATIONAL LAW, London: Cameron May 281, 299

by its practical consequences, of course with the proviso, that it is the efficiency resulting from the conferring jurisdiction over treaty as well as contractual disputes to BIT tribunals which is to be preferred. This is naturally not unsound, however it might be not entirely convincing, at least not in all cases, as indeed this depends on construction of a given BIT and must be done with the reference to the parties' legitimate interests.

VI. Lessons from Case-Law

3.17. This brief study of case-law shows, as a first conclusion, that majority of BIT tribunals incline to consider that genuine DRCs provide a ground of jurisdiction over contract claims. Two different approaches as to the scope of broad DRCs are driven by opposite teleological considerations. The first attaches the genuine wording to the aim of a BIT as it results from the standard of investment protection established by thereof and presumes that if something more than that was meant (i.e. contract claims), then an additional evidence is needed. The second attaches the genuine wording to the general aim of BIT as defined by its title and presumes that if not the most far-reaching conclusion was meant, then an additional evidence is needed.

3.18. Instead of solving the problem of the preferable interpretation of genuine DRCs which, although important, are not the subject of this article, it will be more instructive to consider how both approaches treat contractual exclusive choice of forum clauses. At the level of legal construction the difference is striking. The narrow interpretation clearly favours contractual forum selection clauses by excluding contract claims from the scope of treaty DRCs. The broad interpretation by including contract claims in the scope of treaty DRCs opens the question of concurrence contractual and treaty jurisdiction. However, in such situations the case-law appears to give priority to the exclusive contractual choice of court agreements. As results from the decision of the *ad hoc Committee* in *Vivendi I*:

> '*In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract*'[22].

3.19. In *SGS v Philippines* the effectiveness of the contractual choice of court agreements was safeguarded by majority of the tribunal by means of the concept of admissibility and the principle *generalia specialibus non derogant*. Apparently, each of these considerations presupposes a different

(T. Weiler ed. 2005); Pierre Mayer, *Contract claims et clauses juridictionelles des traités relatifs à la protection des investissements*, 136 JOURNAL DE DROIT INTERNATIONAL (CLUNET) 71, 78-79 (2009); Anthony Sinclair, *Bridging the Contract/Treaty Divide*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY. ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, Oxford: Oxford University Press 92, 102 (C. Binder, U Kriebaum, A. Reinisch, S. Wittich eds., 2009).

[22] *Vivendi v. Argentina, Decision on Annulment*, para. 98.

approach to the legal status of a DRC. This will be discussed below. Now it is enough to notice that at the level of values decisions in both SGS cases were driven by the very same concern, i.e. the effectiveness of the contractual forum selection. Despite the broad construction of the DRC, the tribunal in *SGS v Philippines* fully agreed

> '*that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements*'[23].

Accordingly, as a second conclusion, it follows from the case law that there is serious concern about effectiveness of the contractual choice of court.

3.20. Firstly, there is positive or direct evidence, i.e. BIT tribunals declare that contractual forum selection agreements shall be enforceable in BIT arbitration. As it has been shown above the BIT tribunals in both SGS cases safeguarded this effectiveness although by means of different conceptual constructions. These two cases, seen from the purely pragmatic perspective, reveal that choice of court agreements are recognised by the curial law of BIT arbitration.

3.21. Secondly, there is a negative or indirect evidence, namely the distinction between treaty claims and contract claims has been invented in order to explain why contractual choice of court clauses cannot evade a treaty DRC. For this reason choice of court agreements were restricted to claims arising from a contract. There is no other explanation for well-established distinction between treaty claims and contract claims, unless, of course, one favours the narrow interpretation of DRCs. If, however, the broad interpretations is to be preferred, then

> '*The distinction between contract claims and BIT claims does not mean that claims must be presented in different forums*'[24].

3.22. Indeed '*in the interests of the efficient resolution of investment disputes*'[25], as it has already been mentioned above, the distinction between treaty claims and contract claims should be avoided as far as possible. Thus, the only compelling argument for distinguishing a contract dispute from 'any dispute' is to respect sanctity of jurisdiction agreements, or in other words it was a solution for making them enforceable under curial law of BIT arbitration.

3.23. Although the case-law appears to support the enforceability of the forum selection agreements, the doctrine has developed two different lines of

[23] *SGS v. Philippines, Decision on Jurisdiction*, para. 134.

[24] Christoph Schreuer, *supra* note 21, at 299.

[25] *SGS v. Philippines, Decision on Jurisdiction*, para. 132.

reasoning, both leading to the conclusion that a treaty DRC overrides a contractual choice of court. Accordingly, two theoretical approaches will be discussed below. The first considers that a DRC is a contractual offer, and the second maintains that it is a treaty commitment. Each of these approaches considers the effectiveness of the contractual choice of court from a completely different perspective based on different theoretical assumptions.

VII. First Theoretical Approach: A DRC Defined as a Contractual Offer

3.24. The first approach considers a DRC to be a kind of contractual offer disguised as a treaty provision. It seems to be commonplace that 'The basic working of the dispute settlement mechanisms of the treaties is a reminder of theories underlying the conclusion of contracts by way of offer and acceptance. The consents containing the so-called "offer" vary greatly though. While a number of them are explicit and unconditional offers to submit to arbitration, others subject the offer to arbitrate to a variety of conditions such as exhaustion of local remedies; upon their fulfilment the offer is perfected and there will be an arbitration agreement between the parties. Alternatively, the consent provision may limit the scope of the disputes that can be submitted to arbitration. Ultimately, there is no hard and fast rule for determining whether a particular consent provision constitutes a unilateral offer to arbitrate. Each clause must be interpreted in light of the provisions of the Vienna Convention on the Law of Treaties'[26].

3.25. There are three underpinning arguments for accepting the theory of a standing offer to arbitrate and acceptance through filing for arbitration in the context of foreign investment disputes[27]. Firstly, it is an agreement which is the essence of arbitration, thus 'like any form of arbitration, investment arbitration is always based on an agreement'[28]. Secondly, in case of ICSID arbitration, consent in writing is required as a ground of jurisdiction[29]. Thirdly, investment arbitration awards are enforceable

[26] Gordon Blanke, Borzu Sabahi, *The New World of Unilateral Offers to Arbitrate: Investment Arbitration and EC Merger Control*, 74 (3) ARBITRATION 211, 218 (2008).

[27] Bernardo M. Cremades, David J. A. Cairns, *Contract and Treaty Claims and the Choice of Forum in Foreign Investment Disputes, in* ARBITRATING FOREIGN INVESTMENT DISPUTES. PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS, The Hague: Kluwer Law International 325, 346 (N. Horn ed., 2004).

[28] Christoph Schreuer, *Consent to Arbitration, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford: Oxford University Press 831 (P. Muchlinski, F. Ortino, Ch. Schreuer eds., 2008).

[29] Article 25.1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed in Washington on 18 March 1965 provides: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed on 10 June 1958, which in turn requires 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them'[30].

3.26. This 'consensual' approach is clearly favoured not only by the BIT tribunals, but also by domestic courts. Perhaps the most complex legal analysis is to be found in the judgement of the Court of Appeal in *Occidental v Ecuador*[31]. Whilst dealing with the restraint of non-justiciablity, which according to a principle stated in the *Tin Council* case, precludes United Kingdom courts from enforcement of unincorporated 'treaty rights and obligations conferred or imposed by agreement or by international law'[32], the court stated that the Ecuador-US BIT 'does in fact generate an "consent in writing" and …

'that the consensual aspect of the arbitration contemplated in the Article VI of the Treaty is a matter of mere form. It must, as it seems to us, have been intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty.

(…) the agreement to arbitrate which results by following the Treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant State on the other'[33].

The court went a step further by holding that

'It is, we suspect, even conceivable that a valid agreement to arbitrate could result from the operation in good faith of the terms of a Treaty which for some reason subsequently proved not to have been validly executed'[34].

Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.'

[30] Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed on 10 June 1958 provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[31] *Occidental Exploration & Production Company v The Republic of Ecuador* [2005] EWCA Civ 1116 (*Occidental v. Ecuador*).

[32] *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476H-477A, 480D-E, per Lord Templeman.

[33] *Occidental v Ecuador*, para. 32-33.

[34] *Ibid.*, para. 44.

3.27. Accordingly, it was upheld that a DRC constitutes an agreement independent from a treaty, at least as far as validity of jurisdiction agreement is at issue. One can hardly overlook here the idea of the well-established principle of severability of arbitration agreement[35]. This assumption enables departure from the inter-state perspective and adopting the contractual approach. Once more it will be instructive to quote the court holding:

> '*Here, the provisions of the present Treaty between the two States contemplate and have led, as between one of the States and an investor, to an agreement – recognised under English private international law principles – to arbitrate a dispute which may cover the interpretation of any aspect of the Treaty, including aspects going to the arbitrators' jurisdiction. That agreement to arbitrate, recognised under English private international law, gives rise to rights between the parties to it, including the right to have disputes arbitrated within its terms and not to have disputes arbitrated which fall outside its terms*'[36].

3.28. It follows from the case-law that the scope of the commitment to arbitrate made by a State is a matter of interpretation and is considered to be different in case of treaty claims and contract claims. Thus, as ruled by the tribunal in *Salini v. Morocco* an offer to arbitrate does not 'extend to breaches of a contract to which an entity other than a state is a named party'[37]. This reasoning was upheld by in many other cases[38]. It reveals that in order to interpret a DRC BIT arbitration as well as domestic courts should apply the logic of contract law rather than the logic of treaty law. It is exactly a paradigm of a contract that enables to decide on relation between a treaty DRC and a contractual choice of court agreement by means of the principle *generalia specialibus non derogant*. It is applicable only in the presence of two instruments having the same legal status, or regarded as being on the same footing.

3.29. This argument was presented in *SGS v Philippines*, where the tribunal stated:

> '*The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties*'[39].

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[35] See Andrew Tweeddale & Karen Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice, New York: Oxford University Press 122-127 (2005).

[36] *Occidental v. Ecuador*, para. 40.

[37] *Salini v. Morocco*, para. 61.

[38] *Consortium RFCC v Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction of July 16, 2001, para. 68; *Salini v. Jordan*, para. 100; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of April 22, 2005, para. 214; *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8, Award of February 6, 2007, para. 205.

[39] *SGS v. Philippines, Decision on Jurisdiction.*

To support the tribunal quoted a passage from an unquestionably respectable authority, which observed that

> *"[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application"*[40].

3.30. It is not without irony that it was exactly the very same learned author, who sharply criticised the application of the principle of *generalia specialibus non derogant* in this case. He noted:

> *'The Tribunal's reasoning ignores the fact that the dispute settlement clause in the BIT is merely a standing offer to investors. By accepting that offer an investor perfects arbitration agreement. While the contract clause refers to any dispute arising form the contract, the ICSID arbitration agreement, as perfected through the institution of proceedings, applies only to the specific dispute. It follows that the ICSID arbitration agreement is the more specific one. Therefore, the principle generalia specialibus non derogant that the Tribunal invoked should work against the contractual forum selection clause and in favour of ICSID'*[41].

3.31. Accordingly, the question in issue is whether it is an offer or its acceptance that decide about the criterion of specificity. Yet, this problem requests to be embedded within the wider contractual perspective. Consequently, that which was 'individually negotiated' is decisive as this should be considered as more specific. It should not be forgotten that the very purpose of every rule on interpretation of contracts is to figure out what parties have actually agreed on. In that case it is usually at the time of the formation of the investment contract when the parties agree on specific dispute resolution procedures concerning that particular undertaking. Therefore, if the principle *generalia specialibus non derogant* is to be decisive, then it should operate in favour of a contractual exclusive choice of court agreement.

VIII. Second Theoretical Approach: A DRC Defined as a Treaty Commitment

3.32. Despite its case-law support the contractual approach was criticised on the basis that it ignores difference between source of two agreements – a treaty DRC and a contractual forum selection agreement. It was contended that

> *'Cette façon de raisonner ne tient pas compte de la fonction des clauses jurisdictionelles des traités. Elle ne se borne pas à offrir la compétence d'un tribunal arbitral, offre que pourrait rendre caduque une offre plus*

[40] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, Cambridge: Cambridge University Press 362 (2001).

[41] Christoph Schreuer, *supra* note 21, at 281, 294.

précise. (...) Les deux clauses ne se situent donc pas sur le même plan. En raison de son origine et de sa finalité propres, l'offre de compétence contenue dans le traité doit s'interpréter comme demeurant en viguer, au profit des investisseurs qui voudraient s'en prévaloir, sauf renonciation suffisamment claire'[42].

3.33. This view was also expressed in the case-law. As it has already been discussed, in *SGS v Philippines* the effect was given to the contractual jurisdiction agreement by means of the principle *generalia specialibus non derogant*. However the Tribunal developed alternative argumentation on the basis of opposed theoretical position, where the treaty and contract dispute resolution mechanisms were not considered to be on the equal footing. It stated that

'*It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract*'[43].

Therefore, in order to make the contractual choice of court clause enforceable, the tribunal distinguished between jurisdiction and admissibility and although it upheld its jurisdiction over the contract claims it found them inadmissible.

3.34. Conceptually, the idea of the irrevocable and enforceable rights conferred upon individuals by international treaties and defining jurisdiction of a BIT tribunal in terms of contract are not incongruous. On the contrary, they were two underlying principles confirmed in *Occidental v Ecuador*[44]. It is not without reason[45] that the principal authority quoted by the Court of Appeal was a decision of the Permanent Court of International Justice in the case *Jurisdiction of the Courts of Danzig*[46]. However in *Occidental v Ecuador* the Court did not accept the submission that 'the consensual aspect of the arbitration contemplated in Article VI of the Treaty is a matter of mere form'[47]. From the 'consensual perspective' there is no place for hierarchical distinction between two agreements.

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[42] Pierre Mayer, *Contract claims et clauses juridictionelles des traités relatifs à la protection des investissements*, 136 Journal de Droit International (Clunet) 71, 92 (2009).

[43] *SGS v. Philippines, Decision on Jurisdiction*, para. 154.

[44] *Occidental v. Ecuador*.

[45] It was even characterised as 'striking' – James Crawford, *Continuity and Discontinuity in International Dispute Settlement*, *in* International Investment Law For The 21st Century. Essays in honour of Christoph Schreuer, Oxford: Oxford University Press 801, 805 (C. Binder, U. Kriebaum, A. Reinisch, S. Wittich eds., 2009).

[46] (1928) PCIJ Rep Series B No. 15, p. 1.

[47] *Occidental v. Ecuador*, para. 33.

Accordingly

'It is important to realise that the parties' consent to investment treaty arbitration is no more 'solemn' than their consent to the submission of their contractual disputes to a different forum'[48].

Therefore, what parties have actually agreed on is crucial. For this reason a treaty commitment to arbitrate cannot as such override a contractual commitment to arbitrate. Indeed, if the latter has no bearing on the former, then there is no sense in establishing which of them is more specific and the principle *generalia specialibus non derogant* is of no avail.

IX. Umbrella Clauses

3.35. As it has been already mentioned above, these are so-called 'umbrella clauses' which, apart of generic DRCs, are considered to provide a ground of jurisdiction of BIT tribunals over contractual disputes. One of the most common formulations of a provision of this kind is the following:

Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party[49].

3.36. Generally speaking, the wording of these clauses, whose origins were carefully traced[50], have become a subject of acute doctrinal debate as they have provided a rich source of different approaches to their interpretation. It will be useful to rely here on the overall classification already articulated elsewhere[51]. Accordingly, four concepts of interpretation can be distinguished. Two of them constitute diametrically opposite views on the meaning of umbrella clauses. The first interpretation transforms contractual rights into treaty rights, so that a breach of a contract becomes automatically a breach of a treaty and, as such, a matter of public international law[52]. This approach was adopted by BIT tribunals in *Eureko*

[48] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge: Cambridge University Press 365 (2009).

[49] For example: Art. 2(2) *in fine* of the Polish-British BIT, DZIENNIK USTAW RZECZYPOSPOLITEJ POLSKIEJ (Polish Official Journal – hereafter: Dz.U.) 1988, number 12, position 93; art. 3 (5) of the Polish-Dutch BIT, Dz.U. 1993, number 57, position 235.

[50] Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 (4) ARBITRATION INTERNATIONAL 411, 411-434 (2004); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 (1) GEORGE MASON LAW REVIEW 135, 142 (2006).

[51] James Crawford, *Treaty and Contract in Investment Arbitration*, 24 (3) ARBITRATION INTERNATIONAL 351, 367-368 (2008).

[52] *Cf. obiter dictum* in *Consortium Groupement L.E.S.I. – DIPENTA v People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award of January 10, 2005, par. 25, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010): 'Certains traites contiennent en effet ce qu'il est convenu d'appeler des clauses de respect des engagements ou "*umbrella clauses*". Ces clauses ont pour effet de transformer les

v Poland[53] and *Noble Ventures v Romania*[54]. The second interpretation, by contrast, considers that

> *it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection (...)*[55]

3.37. Between these two extremes two more subtle approaches are to be found. The first limits the operation of an umbrella clause to the breaches of contract caused by a host State acting in the exercise of sovereign authority (*acta iure imperii*). Supported by some authors[56], criticised by others[57], this interpretation was followed by BIT tribunals in *El Paso v Argentine Republic*[58] and *Pan American v Argentine Republic*[59]. Second from these two approaches occupying middle ground between two radical views construes umbrella clause in a way which covers contractual claims however does not change their legal status, i.e. the liability of a host State arises only under the law applicable to the contract in question. This was a position of the *ad hoc* Committee in *CMS v Argentina*, who ruled that

> *'The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is*

violations des engagements contractuels de l'État en violations de cette disposition du traité et, par là même, de donner compétence au tribunal arbitral mis en place en application du traité pour en connaître'.

[53] Partial award of 19 August 2005 issued by ad hoc tribunal under UNCITRAL Rules composed of L. Yves Fortier (Chairman), Jerzy Rajski (dissenting opinion) and Stephen M. Schwebel, par. 244-260, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010). This case involved interpretation of the umbrella clause set up in Art. 2(2) *in fine* of the Polish-British BIT cited above in *supra* note 49.

[54] *Nobel Ventures Inc. v Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005, par. 46-62, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

[55] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award of August 6, 2004, par. 81, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

[56] Marek Świątkowski, Naruszenie Przez Panstwo Umowy z Inwestorem Zagranicznym w Świelte Traktatów Inwestycyjnych, Warszawa: C. H. Beck 85-100 (2009); Ahmed Al-Kosheri, *Contractual Claims and Treaty Claims within the ICSID Arbitration System, in* Parallel State and Arbitral Procedures in International Arbitration, Paris: ICC Publishing 43, 57 (B. Cremades, J. Lew eds., 2005); David Foster, *Umbrella Clauses – A Retreat from Philippines*, 9 International Arbitration Law Review 100, 107 (2006).

[57] James Crawford, *supra* note 51, at 367-370.

[58] *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of April 27, 2006, para. 70-86, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

[59] *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No. ARB/03/13, Decision on preliminary objections of July 27, 2006, para. 108-116, available at: http://ita.law.uvic.ca/ (accessed on December 10, 2010).

unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause'[60].

3.38. The choice of one of these theoretical approaches has a practical impact on the effects of contractual forum selection agreement in BIT arbitration. As considered by the tribunal in *SGS v Pakistan*:

'A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT. Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to "elevate" its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claims to this Tribunal for resolution and decision' [61].

3.39. Once more the concern about the effectiveness of the contractual forum selection has been clearly shown. It would be undermined, if an investor could by means of an "umbrella clause" simply 'relabel' a contract claim into a treaty claim and take the advantage of jurisdictional consequences of the distinction between those two types of actions. Above all, it must not be overlooked that an umbrella clause, as such, creates a legal vacuum, in the meaning that it does not (and cannot) determine either whether a State actually assumed obligation, or what is the content of this obligation. From a purely pragmatic perspective, such an 'observance of undertakings clause' can operate only after breach of the State commitment has been ascertained on the basis of the law applicable to this obligation. It logically follows that under the umbrella clause a State binds itself to observe an obligation (other than resulting from the BIT itself) *en tant que telle*, not as something else. Therefore, so-called 'integrationist view" is to be fully endorsed. As explained by one of the leading international lawyers:

'In short, under the integrationist view as applied to standard umbrella clauses the claims are still contractual and they are still governed by their own applicable law. The distinction between treaty and contract is maintained. The purpose of the umbrella clause is to allow enforcement without internationalization and without transforming the character and content of the underlying obligation'[62].

[60] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment of September 25, 2007, para. 95 (c).

[61] *Cf. SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of August 6, 2003, para. 161, available at: http://ita.law.uvic.ca (accessed on December 10, 2010).

[62] James Crawford, *supra* note 51, at 370.

The question is, however, whether an umbrella clause as 'an extra mechanism for the enforcement of claims'[63] should override a contractual choice of court agreement. The same question was previously asked about genuine DRCs. It will be shown, that there are good reasons to answer them in negative.

X. Why Should Contractual Choice of Court Be Enforceable under the Curial Law of the BIT Arbitration?

3.40. Let us commence with the general observation that in case of foreign investment the assessment and management of litigation risk play a crucial role. Litigation risk comprehends venue and enforcement risk. The former arises when a party is to commence legal proceedings or is sued in an unfavourable forum[64]. This is why a contractual choice of forum forms an essential part of an international transaction and is an important bargaining element. Accordingly, they cannot be detached from the investment contract seen as a whole without a risk of serious injustice to the parties' legitimate expectations. It should be constantly borne in mind that the contractual interests are not only those of an investor. What a State risks, if contractual choice of forum could be disregarded by a BIT tribunal, is not only the increasing cost of arbitration, but also an increased 'likelihood that the proper law of the contract will be ignored or given insufficient weight by the international tribunal, thereby depriving the state party of a possible contractual defence of counterclaim'[65]. Accordingly, it was aptly remarked by the tribunal in *SGS v Philippines* that a BIT constitutes

> '*a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State*'[66].

3.41. Therefore, for the sake of integrity of the transaction and its legal security the contractual exclusive forum selection agreement is to be observed by parties and given effect by the court. It is a well-established principle in common law[67] as well as continental and European law[68]. It was also confirmed by Articles 5-6 of the Hague Convention on choice of court

[63] *Ibid.*

[64] RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION, Oxford: Oxford University Press 7 (2010).

[65] ZACHARY DOUGLAS, *supra* note 48, at 365-366.

[66] *SGS Societé Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of January 29, 2004, para. 141.

[67] ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW, Oxford: Oxford University Press 193-235 (2008).

[68] See Article 23 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12/1.

agreements[69]. Supported by many authors[70], this principle was endorsed by plethora of BIT tribunals in cases where DRCs as well as umbrella clauses were at issue. As stated by the tribunal in *SGS v Philippines*:

> *'In accordance with general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound ab exteriore, i.e., by some other law, not to do so. Moreover it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in SGS v. Pakistan) or some other form of arbitration, e.g. pursuant to the UNCITRAL or ICC Rules. The basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision'*[71].

3.42. Accordingly, there is enough evidence to incline to the view that giving effect to contractual choice of court in case of a contractual dispute before a BIT tribunal is a general principle of law recognized by civilized nations.

3.43. Moreover, suing in a court other than that which was chosen by the parties' agreement is, in common-law systems, considered to be as coming to equity with filthy hands[72]. This principle of equity was mirrored by the concept of inadmissibility as defined by the tribunal in *SGS v Philippines*. It ruled that

> *'the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim'*[73].

3.44. Although the ICSID case law seems to be inconsistent, in the majority of cases treaty-based tribunals recognised the effects of the contractual exclusive forum selection clauses and accepted that they were divested of jurisdiction over contract claims[74]. In that context the distinction between treaty and contract claims is of great importance. In case of the former, the assumption of jurisdiction by the BIT tribunal seems to be necessary in order to enforce standards of protection of foreign investments established by the treaty. Consequently, it can be said that the jurisdiction

[69] The text of this Convention is available at: http://www.hcch.net (accessed on December 10, 2010).

[70] James Crawford, *supra* note 51, at 351, 369, Campbell McLachlan, Laurence Shore, Matthew Weiniger, International Investment Arbitration. Substantive Principles, Oxford: Oxford University Press 129–130 (2008); Zachary Douglas, *supra* note 48, at 363–396.

[71] *SGS v. Philippines, Decision on Jurisdiction*, para. 138.

[72] Adrian Briggs, Agreements on Jurisdiction and Choice of Law, Oxford: Oxford University Press 224–226 (2008).

[73] *SGS v. Philippines, Decision on Jurisdiction*, para. 154.

[74] Yuval Shany, Regulating Jurisdictional Relations Between National and International Courts, Oxford: Oxford University Press 63–77, 146–150 (2009).

of a treaty tribunal is a logical corollary of guarantees stipulated in the treaty. This is not the case of contract claims, where a treaty tribunal is only one of the conceivable *fora* to whom jurisdiction may be conferred by the parties. Although BIT tribunals can be vested with the jurisdiction over contract claims, it will be a kind of additional facility to adjudicate thereon. Thus, as far as contract claims are at issue treaty tribunal are on the same footing as domestic courts or international commercial arbitration tribunals. Naturally, treaty tribunals after lessons from the Calvo clause litigations were unwilling to decline jurisdiction over treaty claims[75], but they were seriously concerned about the enforceability of contractual selection clauses when contract claims were at issue. In some cases they narrowly construed the scope of a DRC, in other they used the concept of inadmissibility.

3.45. Last but not least, the enforceability of a contractual exclusive choice of court agreement before BIT tribunal seems to be a question of pure logic. As it was noted by the tribunal in SGS v Philippines:

> '*On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements*'[76].

Indeed, if treaty based jurisdiction over contractual claims overrides contractual forum selection agreements, then what sense does it make to conclude the latter? Additionally, one should not overlook the fact that, as it has already been shown above, in case of contract claims BIT tribunals do not have jurisdiction *ratione personae*, when the contract at stake was concluded by a legal entity distinct from a state. Thus, if an investor, marching logic to its ultimate unreality (to use the words of Lord Steyn in the *Kuwait Airways* case [77]), is allowed to evade the exclusive choice of court clause inserted in the contract concluded with the State, then States should be advised to not to conclude investment contracts themselves, but instead to use separate entities for that purpose.

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[75] ZACHARY DOUGLAS, *supra* note 48, at 366-370.

[76] *SGS v. Philippines, Decision on Jurisdiction*, para. 134.

[77] *Kuwait Airways Corporation v Iraqi Airways Company & others* (consolidated appeals) [2002] UKHL 19, para. 114.

Summaries

DEU [***Vertragliche Gerichtsstandswahl in Schiedsverfahren wg. internationaler Investitionen***]

Bilaterale Investitionsschutzabkommen (BIT) setzen Maßstäbe für die Behandlung internationaler Investitionen. Diese Abkommen räumen der Schiedsgerichtsbarkeit eine Zuständigkeit für behauptete Verletzungen des jeweiligen Abkommens ein. Von daher ist die Zuständigkeit von BIT-Panels eine logische Konsequenz der im Abkommen festgesetzten Garantien. Bei vertraglichen Ansprüchen ist dies insofern nicht der Fall, als ein BIT--Schiedsgericht nur eines der denkbaren ‚Fora' darstellt, denen die Parteien ihre Streitigkeit zur Entscheidung anvertrauen können. Zwar kann BIT-Schiedsgerichten die Zuständigkeit zur Entscheidung auch von vertragsbezogenen Klagen eingeräumt werden; dabei handelt es sich aber um eine Art ‚ergänzende Kompetenz'. Soweit vertragliche Ansprüche zur Entscheidung anstehen, sind BIT-Panels deshalb staatlichen Gerichten oder internationalen Schiedsgerichten in Handelssachen gleichgestellt. Das Fallrecht von BIT-Schiedsgerichten deutet darauf hin, dass letztere nicht willens waren, sich als unzuständig für Schiedsklagen wegen einer Verletzung des BIT zu erklären, aber ernstliche Vorbehalte hinsichtlich der Durchsetzbarkeit vertraglicher Gerichtsstandsklauseln hatten, soweit es um Schiedsklagen wegen einer Verletzung des Vertrags zwischen den Parteien ging. In manchen Fällen haben sie deshalb zu einer eng gefassten Interpretation der Entscheidungskompetenzen einer Schlichtungsstelle (DRC – Dispute Resolution Center) gegriffen, in anderen wiederum das Konzept der Unzulässigkeit herangezogen.

CZE [***Smluvní volba fora v mezinárodním investičním rozhodčím řízení***]

Dvoustranné dohody o podpoře a ochraně investic (Dohody) zavádějí standardy zacházení s mezinárodními investicemi. Tyto Dohody propůjčují rozhodčímu řízení pravomoc k rozhodování o údajných porušeních těchto Dohod a záruk Dohodami stanovených. V důsledku toho je pravomoc rozhodčího senátu daná Dohodou logickým výsledkem záruk stanovených Dohodou. Tak tomu ovšem není v případě smluvních nároků, kdy je rozhodčí senát pouze jedním z myslitelných for, *jemuž mohou účastníci řízení příslušný spor svěřit. Přestože může být tribunálům ustanoveným Dohodou svěřena pravomoc k řešení nároků plynoucích z (porušení) Dohod, bude rozhodování o těchto nárocích svým způsobem dodatečným nástrojem. Proto v rozsahu, v němž jsou zvažovány smluvní nároky, jsou rozhodčí senáty určené dohodou stran ve stejné pozici jako domácí soudy nebo mezinárodní obchodní rozhodčí soudy. Z judikatury rozhodčích senátů jmenovaných dle Dohod vyplývá, že tyto nebyly ochotny odmítnout svou příslušnost k rozhodování o nárocích plynoucích z porušení příslušné Dohody, ovšem vážně se zabývaly vymahatelností doložek o volbě fora v případech, kdy se jednalo o smluvní nároky. V některých případech rozhodčí senáty vykládaly rozsah rozhodčích doložek přímočaře, v jiných využily princip nepřípustnosti.*

POL [***Umowy o wybór sądu w międzynarodowym arbitrażu inwestycyjnym***]
Skuteczność klauzul jurysdykcyjnych zawieranych w ramach kontraktów inwestycyjnych w postępowaniu przed trybunałem ustanowionym na podstawie dwustronnej umowy o ochronie inwestycji zagranicznych nie jest jednolicie oceniana przez poszczególne sądy arbitrażowe. Wydaje się jednak, że w większości spraw przyjmują one, że zawarty w umowie wybór sądu nie wyłącza ich jurysdykcji do rozpoznania skargi o naruszenie któregoś z materialnoprawnych postanowień traktatu. Natomiast w przypadku, gdy podstawą żądania inwestora jest naruszenie kontraktu inwestycyjnego, wówczas trybunały arbitrażowe respektują skuteczność zawartych w tych kontraktach umów o wybór sądu (lub też umów arbitrażowych).

FRA [***Contrats relatifs au choix des tribunaux dans l'arbitrage international d'investissement***]
L'effet des clauses attributives de juridiction, définies dans le cadre des contrats d'investissement dans la procédure devant un tribunaldésigné sur la base d'un contrat bilatéral relatif à la protection des investissements étrangers ne bénéficie pas d'un jugement uniforme des différents tribunaux d'arbitrage. Il semblerait cependant que dans la majorité des affaires, les tribunaux d'arbitrage considèrent que le choix du tribunal figurant dans le contrat n'exclut pas la compétence de leur juridiction pour examiner une plainte pour infraction à l'une des dispositions matérielles et juridiques de l'accord. Toutefois, lorsque le fondement de la demande de l'investisseur concerne une violation du contrat d'investissement, les tribunaux d'arbitrage appliquent les clauses désignant le tribunal (ou les accords d'arbitrage) figurant dans lesdits contrats.

RUS [***Соглашения о выборе судов в международных инвестиционных арбитражах***]
В ходе судебных разбирательств в судах, выбранных на основе двустороннего соглашения о защите иностранных инвестиций, арбитражные суды по-разному рассматривают действие юрисдикционных оговорок, которые используются в инвестиционных контрактах. Однако представляется, что в большинстве случаев они придерживаются мнения, что выбор суда, указанный в контракте, не исключает их правомочие рассматривать иски в связи с нарушением любого материально-правового положения соглашения. Но в том случае, когда основа требования инвестора заключается в нарушении инвестиционного контракта, арбитражные суды учитывают действие соглашений об определении суда (или также арбитражных соглашений), изложенных в этих контрактах.

ES [***Acuerdos sobre la elección del tribunal de arbitraje internacional de inversión***]
La eficacia de las cláusulas jurisdiccionales concluidas dentro del marco de los contratos de inversión en los procedimientos ante juzgados, elegidos a raíz de un contrato bilateral sobre la protección de inversiones extranjeras, no siempre queda enjuiciada de manera uniforme por los respectivos tribunales de arbitraje. No obstante, parece que en la mayoría de los asuntos éstos suponen que la elección del juzgado mencionado en el contrato no excluye su propia jurisdicción a la hora de enjuiciar una demanda por violación de alguna de las disposiciones materiales legales del tratado. Sin embargo, en el caso de que la demanda del inversor se base en la violación del contrato de inversión, los tribunales de arbitraje respetarán la vigencia de los acuerdos relativos a la elección del tribunal (así como de los acuerdos arbitrales) mencionados en dichos contratos.

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Application of Most Favoured Nation Clause to Jurisdiction Provisions in Light of the Award in *Austrian Airlines v. Slovakia*

Key words:
arbitral tribunal | dispute resolution provisions | expropriation | investment treaty | investment disputes | jurisdiction provisions | MFN | most favoured nation clause |

Abstract | *This paper discusses the issue of whether investors who raise claims on grounds of a violation of BIT obligations by the state may take recourse to the most favoured nation clause with respect to the jurisdiction of the arbitration tribunal. Case law and scholarly literature provide divergent opinions regarding this question. The case law in the form of previous arbitral awards shows that most arbitration courts have been inclined to permit such recourse in cases in which investors invoked the MFN clause because they wished to avoid procedural requirements which would have resulted in substantial protractions for the arbitration procedure. Conversely, arbitration courts have refused (with one single exception) to allow the "import" of new arbitration clauses into the main contract.*
Part I of the paper provides an overview of the issue, and offers reasons for the existence of such highly divergent positions. Part II describes the existing relevant jurisprudence. Part III analyses the most recent award in Austrian Airlines vs. Slovakia. The authors also attempt an assessment (in Part IV) whether the cited award might lead to a more consistent administration of justice in this area, and thus make arbitration in investment treaty cases more predictable.

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I. Introduction

4.01. The majority of investment treaties (if not all) contain a most favoured nation clause[1]. Based on this clause the host state undertakes to treat investments of entities from the other contracting state no less favourably than investments from other states. If investors from another state are to be assured a favourable standard of protection for their investments, then under this clause a given investor could demand a standard "better" than that under the basic treaty. The purpose of MFN clauses is to avoid discrimination against nationals of other countries[2]. The traditional approach is that an MFN clause applies to the material provisions of treaties.

4.02. In practice, it sometimes happens that when claiming compensation from a state for breach of an investment treaty an investor relies on the jurisdiction provisions of a treaty executed between the host state and a state other than that from which the investor originates and which treaty provides more favourable solutions than those under the relevant treaty. In doctrine some scholars find nothing to prevent the clause being applied in the above said instances too[3].

4.03. The wording of the clauses in most investment treaties is so general that a literal interpretation does not help to allay the above doubts. There are several reasons for this: the exceptions specified in the treaties regarding the scope of the clause do not apply to procedural matters. It could thus be said that whilst procedural matters are not explicitly excluded, they are covered by the clause. It can, however, be argued that an MFN clause applies by its very nature only to material provisions and thus exceptions in procedural provisions do not have to be listed.

4.04. In light of these interpretational problems the necessity arises of having to choose which of the treaty interpretation rules specified in article 31.1 of the Vienna Convention on the Law of Treaties take priority[4].

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[1] When referring to most favoured nation clause, in this study we use the terms "clause" or "MFN".

[2] Stanley Hornbeck, *The Most-Favored Nation Clause*, 3 AM. J. INT'L L. 395, 397 (1909); Dana H. Freyer, David Herlihy, *Most-Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favoured" is "Most-Favoured"*, 20 ICSID REV. 58, 62-63 (2005).

[3] John Savage, *Investment Treaty Arbitration and Asia: survey and comment*, 1 A.I.A.J. 3, 31-32 (2005); Peter Turner, Mark Mangan, Alex Baykitch, *Investment Treaty Arbitration: An Australian Perspective*, 24 J.INT'L ARB. 103, 118 (2007); Stephan W. Schill, *Most-Favored-Nation Clauses as a basis of Jurisdiction in Investment Treaty Arbitration, Arbitral Jurisprudence at a Crossroads*, 10 J.W.I.T 189, 192 (2009); Guido S. Tawil, *Most Favored Nation Clauses And Jurisdictional Clauses in Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOR OF CHRISTOPH H. SCHREUER, New York: Oxford University Press Inc. 29 (C. Binder, U. Kriebaum, A. Reinisch, S. Wittich eds., 2008).

[4] Okezie Chukwumerije, *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*, 8 J.W.I.T 597, 643-644 (2007).

If the treaty contains no restrictions on the scope of the clause or if the exclusions do not apply to jurisdiction provisions, based on the principle of "ordinary meaning to be given to the terms of the treaty", it can be argued that the clause does not apply to procedural issues. As regards jurisdiction provisions, emphasis could be given to the second part of article 31.1 of the Vienna Convention on the Law of Treaties, namely that the clause should be interpreted based on the "context" of the treaty. The aim of the clause would then be to assure investors equal treatment to the extent guaranteed by the treaty's material provisions, while procedural provisions would be excluded. Given their specific nature, jurisdiction provisions have in each case been negotiated by the state for the purpose of each specific treaty. If it is not clearly stated in the basic treaty that such provisions apply to the resolution of disputes arising under treaties with third countries, then – one may argue – they cannot be relied on based on a broadly defined clause. If, however, the starting point for interpretation is the "object and purpose" of the treaty (as in article 31.1 of the Vienna Convention on the Law of Treaties), the fact that there are no restrictions on the scope of the clause could be interpreted in such a way that it also covers procedural provisions. The object and purpose are usually set out in the preamble, stating that the treaty is entered into in order to promote and protect investments made on the territory of the contracting states by nationals of the second contracting state. Accordingly, it could be said that the basic treaty should be interpreted to mean that it encourages investment protection by, *inter alia,* allowing use of the most "favoured" procedural provisions contained in treaties with third states.

4.05. One thing is, however, sure: conflicting awards with respect to the matters discussed above undermine the predictability and stability of international investment law and arbitration[5], which is not a comfortable situation for either investors or respondent states.

II. Analysis of Case Law

4.06. Before moving on to a more detailed analysis, it is worth noting that International Court of Justice decisions are frequently cited in literature. However, the conclusions set out therein do not give clear answers to the questions raised here[6]. This is because the International Court of Justice's deliberations in the context of the clause relate to a slightly different type of matters (i.e. consular protection). The necessity of referring to

[5] Stephan W. Schill, *supra* note 3, at 190.

[6] In particular: *Rights of Nationals of the United States of America in Morocco* (France/United States of America), Judgment of 27 August 1952, I.C.J. Reports 1952, p. 176; *Anglo-Iranian Oil Co.* (United Kingdom/Iran), Judgment of 22 July 1952 , I.C.J. Reports 1952, p. 109; Award of the Commission of Arbitration of 6 March 1956 in *Ambatielos Case* (Greece/United Kingdom), 12 U.N.R.I.A.A. 107 (1963).

International Court of Justice decisions has been ousted by more up-to-date adjudications in disputes arising under investment treaties, giving one more reason for them to be bypassed in further parts of this study.

4.07. The first case in which a tribunal had to decide on the admissibility of applying an MFN clause contained in an investment treaty to procedural matters was the dispute between Maffezini and Spain[7].

4.08. The dispute arose from action taken by Spain that led to an alleged breach of treaty guarantees provided to the Argentinian citizen in connection with his investment in Spain. Spain claimed that the arbitral tribunal had no jurisdiction, stating that *Maffezini* had not first submitted the dispute to local courts pursuant to the Argentina-Spain treaty. Although *Maffezini* admitted that he had not applied to a Spanish court before instigating arbitration proceedings, he argued that he was in fact not obliged to do so as the clause in the Argentina-Spain treaty allowed him to demand that the dispute be heard according to the more beneficial procedural provisions set out in the Chile-Spain treaty. Unlike in the treaty with Argentina, Spain's treaty with Chile did not provide for the obligation to submit the investment dispute to Spanish courts before taking the case to arbitration.

4.09. In article 4 of the Argentina-Spain treaty, after the section on fair and equitable treatment, the parties agreed that "in all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country". The primary issue that needed to be considered here was the meaning of the phrase "all matters", particularly whether this covers only material treaty provisions or whether it also extends to procedural provisions. First of all, the tribunal indicated the need to apply the *eiusdem generis* principle, meaning that the MFN clause could only refer to the same category of cases as those specified in the clause itself[8]. It then admitted, however, that this principle did not have to be interpreted narrowly and to this end, applied the interpretational directive contained in the *Ambatielos* judgment.

4.10. The tribunal decided that the basic treaty was that concluded by Argentina and Spain. It found that as a result, if given cases are treated more favourably in a treaty concluded with a third state, then under the clause this treatment also covers a beneficiary of the basic treaty. If, however, the third state treaty refers to a matter not dealt with in the basic treaty, this matter is *res in alios acta* and accordingly the basic treaty does not apply to the clause beneficiary[9]. The tribunal went on to state *[t]hat the second major issue concerns the question whether the provisions on*

[7] *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[8] *Ibid.*, para. 49.

[9] *Ibid.*, para. 45.

dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favoured nation clause applies (...)"[10]. On the assumption that dispute resolution provisions are inextricably linked to the protection of foreign investments[11] and because international arbitration and other dispute resolution measures are needed to protect the rights guaranteed in treaties[12], the tribunal considered that "if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *eiusdem generis* principle"[13].

4.11. In its summary the tribunal concluded that as a rule the clause covered procedural matters unless the intention of the treaty parties was different. In the case at hand, the parties demonstrated no other intention, quite the opposite in fact as the tribunal found elements supporting the general rule, namely that the clause provided that it applied to "all matters"; no other treaty concluded by Spain contained the same wording and in Argentinian treaties the wording is used in only some of them.

4.12. To guard against the rule being interpreted too broadly the tribunal indicated certain public policy restrictions on the use of the clause, though these restrictions did not apply to the case in question.

4.13. In *Siemens v. Argentina*[14] the tribunal generally upheld the argumentation put forward in the *Maffezini* case and deemed that the clause in the Argentina-Germany treaty entitled the investor to file a claim with the arbitral tribunal without the need of waiting 18 months. In this respect *Siemens* relied on the Argentina-Chile treaty, which was more favourable as it did not contain this requirement.

4.14. The approach taken by the court to analyse the problem was different from that of the tribunal in the *Maffezini* case as it focused on the purpose of the treaty expressed in its title and preamble. It showed that the treaty was to protect and promote investments[15]. The tribunal then made an analysis of article 3 of the treaty which stipulated that the MFN clause extended to the treatment of investments and activities relating to investments, subject to the exceptions listed. By deciding that: (a) "*[t]he term 'treatment' is neither qualified nor described except by the expression 'not less favourable"; (b) "[t]he term 'activities' is equally general"; and (c) "[t]he need for exceptions confirms the generality of the meaning of*

[10] *Ibid.*, para. 46.

[11] *Ibid.*, para. 54.

[12] *Ibid.*, para. 55.

[13] *Ibid.*, para. 56.

[14] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[15] *Ibid.*, para. 81.

treatment or activities rather than setting limits beyond what is said in the exceptions"[16], the tribunal concluded, based on the purpose of the treaty and on the ordinary meaning of the phrases used, that the scope of the clause could not be restricted to protection of the investment itself but that it also extended to provisions enabling the investor to exercise treaty guarantees by allowing access to international arbitration[17]. In other words, it constituted one of the elements of protection guaranteed by the treaty included in the concept "treatment"[18].

4.15. The decisions of both tribunals from the perspective of *Maffezini* and *Siemens* as claimants are identical. However, the conclusions reached by the second tribunal are far reaching. Firstly, the MFN clause in the Argentina-Germany treaty does not contain the words "all matters covered by the contract", which is why the tribunal diverged from the analysis of the purpose of the treaty and the meaning of the concept "treatment". Secondly, in respect of Argentina's claim that the dispute resolution provisions had been negotiated solely for the purpose of a specific treaty and thus could not be modified on the basis of the clause, the tribunal stated that "the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2"[19]. Such stance is supported by Emmanuel Gaillard, who points out that: "the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third county, including the right to the neutral and effective settlement of their investment disputes through international arbitration rather than through the judicial organs of the host state itself"[20].

4.16. This issue was covered by the judgment in the case between Camuzzi and Argentina[21]. The dispute related to claims under the Argentina-Luxembourg treaty. As in the cases analysed above, the claimant, relying on the clause contained in the treaty and indicating in this respect the more favourable treatment under the Argentina-USA treaty, stated that it was not obliged submit the case before local courts. The tribunal upheld the argumentation put forward earlier in the *Siemens* case.

[16] *Ibid.*, para. 85.

[17] *Ibid.*, para. 86.

[18] *Ibid.*, para. 102.

[19] *Ibid.*, para. 106.

[20] Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, 233 N.Y.L.J. 1, 3 (2005); see also: Jürgen Kurtz, *The MFN Standard and Foreign Investment, An Uneasy Fit?*, 5 J.W.I.T 861, 885 (2004).

[21] *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction of June 10, 2005, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

4.17. In the *Gas Natural* case[22], the tribunal considered the same doubt, i.e. whether the case could be taken to arbitration before it is resorted to local courts, as in the *Maffezini* case. Both cases concerned a clause in the same Argentina-Spain treaty. The arbitrators not only upheld the opinion expressed in previous judgments but they unequivocally found that unless it clearly appeared that a state party to a treaty or party to a specific investment agreement settled on a different method for resolving any disputes that could arise, the MFN clause would be applicable to dispute settlement[23]. If in the text of a treaty jurisdictional matters are not excluded from the scope of the clause, it is likely that the parties' intention was for them to be covered by the clause.

4.18. Conclusions the same as those in the *Gas Natural* case were reached by tribunals[24] ruling on disputes between *Suez, Sociedad General de Aguas de Barcelona and Interagua Servicios Integrales de Agua v. Argentina*[25], *Suez, Sociedad General de Aguas de Barcelona, Vivendi Universal AWG v. Argentina*[26] *and National Grid plc v. Argentina*[27].

4.19. A different standpoint was taken in *Salini v. Jordan*[28]. *Salini*, relying on the clause, attempted to show that the arbitral tribunal had jurisdiction to hear claims under the investment treaty despite the clause providing for the jurisdiction of Jordanian domestic courts. Moreover, the part of article 9.2 of the Italy-Jordan treaty dealing with dispute resolution stated that: "[i]n case the investor and an entity of the Contracting Parties have stipulated an Investment Agreement, the procedure foreseen in such investment Agreement shall apply"[29]. Given the foregoing, Jordan argued that as the parties (i.e. *Jordan* and *Salini*) were linked by an investment agreement *Salini* could only bring contractual claims in domestic courts,

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[22] *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction of June 17, 2005, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[23] *Ibid.*, para. 49.

[24] Rudolf Dolzer, Christoph H. Schreuer, Principles of International Investment Law, New York: Oxford University Press Inc. 256 (2008).

[25] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006, para. 66, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[26] *Suez, Sociedad General de Aguas de Barcelona, S.A., Vivendi Universal S.A. and AWG Group Ltd. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of August 3, 2006, para. 68, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[27] *National Grid plc v. Argentine Republic*, Case No. 1:09-cv-00248-RBW, para. 93, Decision on Jurisdiction of June 20 2006, available at: www.investmentclaims.com (accessed on November 13, 2010).

[28] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 15, 2004, available at: www.investmentclaims.com (accessed on November 13, 2010), (*Salini Decision on Jurisdiction*).

[29] *Ibid.*, para. 66.

while the claimant stated that the clause in the basic treaty entitled it to rely on the more favourable dispute resolution provisions in other treaties to which Jordan was a party. The treaties concluded with the USA and Great Britain, in *Salini's* opinion, allowed the arbitral tribunal, on the grounds of the broad wording of the provision on jurisdiction, to hear disputes under these treaties too. Accordingly, the claimant argued that it was admissible to bring a claim for breach of the treaty before the arbitral tribunal regardless of the content of article 9.2 of the Italy-Jordan treaty and the court selected in the investment agreement.

4.20. Referring to the judgment in the *Maffezini* case, the tribunal stated that it "(...) shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping"[30].

4.21. The tribunal concluded that the facts were different from those in the *Maffezini* case as the MFN clause did not contain phrases such as "all rights" and "all matters" specified in the treaty. "Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to disputes settlement. It does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement"[31].

4.22. The tribunal seemed not to accept a presumption that generally worded MFN clauses apply to jurisdiction provisions[32]. Consequently, the tribunal stated that: "the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements"[33].

4.23. The dispute between *Plama* and *Bulgaria*[34] concerned the purchase by a Cypriot investor of shares in the Bulgarian company Nova Plama running an oil refinery in Bulgaria. The claimant initiated proceedings before the ICSID tribunal pursuant to chapter 5 of the Energy Charter and the treaty between Bulgaria and Cyprus. A doubt arose over the second legal basis for the claim, i.e. the treaty provision on jurisdiction provided only for *ad hoc* arbitration (UNCITRAL) and limited the tribunal's jurisdiction to deciding the level of compensation for expropriation once the dispute had

[30] *Ibid.*, para. 115.

[31] *Ibid.*, para. 118.

[32] RUDOLF DOLZER, CHRISTOPH H. SCHREUER, *supra* note 24, at 255.

[33] *Salini Decision on Jurisdiction*, para. 118.

[34] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8 2005, available at: www.investmentclaims.com (accessed on November 13, 2010), (*Plama Decision on Jurisdiction*).

been decided on the merits in accordance with the procedure provided for in Bulgarian law. The investor did not commence proceedings in Bulgarian courts in order for the dispute to be decided on the merits. In order to avoid procedural restrictions *Plama* indicated the clause in the Bulgaria-Cyprus treaty arguing that it covered all "treatment", together with dispute settlement rules and thus enabling claims to be brought according to the more favourable provisions contained in other treaties entered into by Bulgaria. When citing the *Maffezini* precedent, the claimant argues that more favourable treatment as regards procedural matters was guaranteed by the treaty between Bulgaria and Finland, which indicated the arbitral tribunal at the ICSID as the authority entitled to settle disputes and also defined its jurisdiction in a much broader way. According to the Bulgaria-Finland treaty the arbitral tribunal had the power to hear disputes over treaty breaches and not only the level of compensation after liability had been established by a Bulgarian domestic court. The tribunal did not uphold this argument stating that: "[i]t is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism. (...)"[35]. The tribunal's deliberations in the *Plama* case can be summarised as follows: (a) jurisdiction of an arbitral tribunal can only be based on the agreement between the parties in which the parties agree to disputes being settled in this way, (b) Bulgaria's consent to disputes being heard by an arbitral tribunal in an unusually limited scope was the outcome of negotiations between Bulgaria and Cyprus, (c) if a state concludes a treaty with a specific arbitration clause it cannot be presumed that it has agreed to it being replaced in the future with different mechanisms contained in other treaties through the operation of MFN clause, (d) presumption of lack of consent can be challenged by indicating a clear treaty provision or the practice of the parties[36]. This stance was shares by Stephen Fietta: "As a result, claimants will only be able to use MFN clauses as a means incorporating the more favourable dispute resolutions provisions of BITs with third states where the circumstances indicate that the state parties to the basic treaty clearly intended this to be possible. (...) This approach is best summarised by the statement of principle set out in para. 223 of the *Plama* decision"[37]. An interesting point here though is that the tribunal could have come to the same conclusions on the basis of one of the public

[35] *Ibid.*, para. 209.

[36] Locknie Hsu, *MFN and Dispute Settlement, When the Twain Meet*, 7 J.W.I.T 25, 32-33, 36 (2006); the author approves the conclusions reached in the *Plama* case, though he thinks that the tribunal could have used more pertinent argumentation.

[37] Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 2 INT.A.L.R. 131, 137-138 (2005); see also CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, New York: Oxford University Press Inc. 256 (2007).

policy restrictions in the MFN clause proposed in the *Maffezini* case. It did not do so, seemingly deliberately, as it deemed that the absence of a clear provision in the treaty stating that the clause covered procedural questions should be interpreted as lack of consent[38]. Tribunals in *Maffezini* and *Siemens* made contrary assumptions. The tribunal did not say, however, how it understood the concept of clear provision[39]. It cited, for example, the model Great Britain treaty which clearly states that a clause also covers dispute resolution.

4.24. In *Berschader v. Russia*[40] similar conclusions were reached by the tribunal which under the Belgium-Russia treaty only had the power to decide on the level of compensation for expropriation, not on whether expropriation ever actually occurred. The claimant argued that as long as the MFN concerned "all matters covered by the present Treaty" then it also covered jurisdiction provisions. The tribunal's reasoning was as follows: in the first place the tribunal dismissed the theory put forward in the *Gas Natural* case that as a matter of principle MFN should be understood to be applicable to dispute resolution provisions unless it appeared clearly that the parties intended otherwise[41]. The tribunal then stressed that although the phrase "all matters covered by the present Treaty", based on the ordinary meaning of the words, was clear, it did not mean that its interpretation in the context of MFN was unequivocal. An analysis of provisions of individual treaties shows that the MFN cannot automatically apply to all the provisions. For example, the clause will not apply to treaty provisions on relations between states or those that do not set standards for investor treatment[42]. Accordingly, the phrase "all matters covered by the present Treaty" certainly cannot be understood literally. Moreover, the tribunal indicated that the parties themselves seemed to be aware of the ambiguity of this expression, since they had added the clarification that the clause would apply "particularly to Articles 4, 5 and 6", which embrace the classic elements of substantial investment protection (i.e. expropriation, fair and equitable treatment, etc.)[43]. An article containing dispute resolution provisions was not included in this clarification. Additionally, it was determined that the Soviet Union had pursued a very consistent policy to the effect that it never consented to arbitration over whether or not an act of expropriation had occurred[44]. This substantiated the theory that the intention of the treaty parties was not to enable all disputes arising under the treaty to be taken to arbitration. In its conclusion, the tribunal stated

[38] *Plama Decision on Jurisdiction*, para. 223.

[39] Okezie Chukwumerije, *supra* note 4, at 640.

[40] *Vladimir Berschader and Moise Berschader v. Russian Federation*, SCC Case No. 080/2004, Award of April 12, 2006, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[41] *Ibid.*, para. 181.

[42] *Ibid.*, para. 184-189.

[43] *Ibid.*, para. 193, 194.

[44] *Ibid.*, para. 203.

that "the starting point in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties (...) MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties"[45].

4.25. The standpoint taken in the *Plama* case was shared by the tribunal hearing the dispute between *Telenor* and *Hungary*[46]. The Norway-Hungary treaty provided that the jurisdiction of the arbitral tribunal was restricted to questions related to the amount of compensation for expropriation. The claimant argued that the provision gave the right to rely on the jurisdiction provisions contained in other treaties to which Hungary was a party and thus that jurisdiction of the tribunal extended to all disputes arising from breach of the basic treaty. The tribunal did not share this opinion, using four arguments in support of its theory. It deemed that in light of the directives contained in the Vienna Convention on the Law of Treaties, the provision in the treaty between Norway and Hungary should be interpreted in such a way that it applied solely to material, not procedural, provisions[47]. Secondly, a wide interpretation of the clause would lead to "*treaty shopping*" and to the tribunal's jurisdiction being extended to cover matters not agreed by the parties to the basic treaty[48]. Thirdly, this would give rise to instability and uncertainty in the sense that the dispute resolution method agreed by the state for the purpose of a specific treaty would be replaced by different solutions contained in other treaties[49]. Finally, a key factor, in the tribunal's opinion, was the intention of the treaty parties – if they had agreed on a specific dispute resolution mechanism then, in the absence of evidence to the contrary, it could not be accepted that their intention was that it could be replaced by another mechanism contained in any treaty[50].

4.26. Some authors believed that until that moment jurisprudence was consistent. The tribunals were willing to apply MFN clauses to dispute resolution provisions where it concerned procedural matters (e.g. shortening the waiting period) and not for the purpose of extending the competence of the tribunal to disputes which it was not empowered to resolve pursuant to the basic treaty. Others argued that such a distinction, in the light of treaty interpretation rules is not justified[51]. This situation

[45] *Ibid.*, para. 206.

[46] *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of September 13, 2006, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[47] *Ibid.*, para. 92.

[48] *Ibid.*, para. 93.

[49] *Ibid.*, para. 94.

[50] *Ibid.*, para. 95.

[51] Dana H. Freyer, David Herlihy, *supra* note 2, at 58, 83.

has changed following decisions in *Wintershall* and *RosInvestCo*, thus creating even more uncertainty[52].

4.27. In *RosInvestCo v. Russia*[53] the claimant alleged that Russia had expropriated its investment. As in the *Berschader* case, article 8 of the treaty between Great Britain and Russia stipulated that the arbitral tribunal only had jurisdiction to decide on the level of compensation payable to the investor for the expropriation. Given the foregoing, on the basis of the MFN clause the claimant relied on a jurisdiction provision broadly describing the tribunal's jurisdiction contained in the Denmark-Russia treaty[54], and the tribunal, without carrying out a detailed analysis, upheld this stance[55]. It seems that the arbitrators deemed that as long as the MFN clause covered provisions on expropriation, there was no reason for procedural provisions relating to expropriation to be excluded[56]. In an attempt to clarify the divergence that could arise on the one hand between the parties' intention to confine arbitration to the specific matters listed in article 8 and a broad interpretation of MFN, the tribunal stated that: "While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty[57].

4.28. An extensive analysis of the issue in question was set out in the award in *Wintershall v. Argentina*[58]. *Wintershall* tried to avoid the eighteen months waiting period before applying for arbitration. The tribunal concluded that unless clearly stated, the MFN clause did not apply to the treaty's jurisdiction provisions and presented the following argumentation. Firstly, jurisdiction provisions of the treaty constitute an offer made by the state concerning dispute resolution which the investor can at its discretion accept or not. If the investor decides to accept the offer, his statement can only concern the entire offer, not individual elements. The obligation to resort to local courts constitutes a key component of the offer that cannot be bypassed[59]. Secondly, the state's consent to specific disputes being taken to arbitration must be explicit, not inferred. This requirement is not met if the MFN clause does not unequivocally mention procedural

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[52] Okezie Chukwumerije, *supra* note 4, at 643-646; RUDOLF DOLZER, CHRISTOPH H. SCHREUER, *supra* note 24, at 256.

[53] *RosInvestCo Uk Ltd v. Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of October 5, 2007, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[54] *Ibid.*, para. 124.

[55] *Ibid.*, para. 133.

[56] *Ibid.*, para. 130.

[57] *Ibid.*, para. 131.

[58] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of November 8, 2008, available at: http://www.investmentclaims.com (accessed on November 13, 2010).

[59] *Ibid.*, para. 160.

provisions[60]. It is one thing to make use of the best treatment provided for in another treaty and another to rely on an MFN clause in order to avoid procedural requirements, if this was not explicitly provided for in the basic treaty[61]. Thirdly, according to the third exception indicated in *Maffezini*, the investor cannot, on the basis of an MFN clause, demand that a dispute be heard in a forum different from that provided for in the basic treaty. In the case at hand, the tribunal deemed that replacing a jurisdiction provision contained in the Germany-Argentina treaty with a provision in the USA-Argentina treaty specifying other (additional) dispute resolution fora was inadmissible[62]. Fourthly, regardless of the arguments set out above, the tribunal found that the MFN clause was to be applied solely to the issues listed therein, and a jurisdiction provision was not among them[63].

4.29. In the *Renta 4 v. Russia* case[64], the majority of the tribunal members found[65] that MFN did not apply to dispute resolution provisions, though this was based on the rather specific phrasing of the clause. As in the *RosInvestCo* and *Berschader* cases, the treaty tribunal's jurisdiction only covered issues relating to the level of compensation for expropriation. Under article 5.2 of the Spain-Russia treaty, the MFN clause applied to the treatment specified in article 5.1 which contained a standard fair and equitable treatment provision. Consequently, the tribunal ruled that an MFN referring to fair and equitable treatment did not enable the investor to rely on more favourable jurisdiction provisions contained in other treaties signed by Russia[66]. The tribunal also stated that in other circumstances (i.e. differently worded provisions) MFN may in principle include access to international fora.

III. *Austrian Airlines* v. *Slovakia*[67]

4.30. In all the decisions analysed tribunals have found that the scope of the clause in question is not generally restricted to material provisions and consequently that foreign investors can also rely on the clause in respect of certain dispute resolution provisions, unless of course a given investment treaty contains a provision explicitly excluding procedural matters from the scope of dispute resolution. It could be said that as regards the

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60 *Ibid.*

61 *Ibid.*, para. 168.

62 *Ibid.*, para. 173, 174.

63 *Ibid.*, para. 163, 164.

64 *Renta 4 SVSA et al v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections of March 20, 2009, available at: http://www.investmentclaims.com (accessed on November 13, 2010), (*Renta 4 Award on Preliminary Objections*).

65 The divergent voice was that of Charles N. Brower.

66 *Renta 4 Award on Preliminary Objections*, para. 119.

67 *Austrian Airlines v. Slovak Republic*, Case No. reducted, Final Award of October 9, 2009, available at: http://www.investmentclaims.com (accessed on November 13, 2010), (*Austrian Airlines Final Award*).

admissibility of the clause being applied in procedural matters, a uniform line of judgment has been preserved and is fully justified. Thus there is no reason for it to be deemed a "worse" category of guarantee than those resulting from material provisions. Tribunals also found that in order to answer the question at hand the intention of the states being parties to the treaties needed to be examined. This is the decisive element. Up to this point conformity reigned in case law.

4.31. Material differences appear, however, in the process in which tribunals establish the real intention of the parties, i.e. criteria that are key in specifying the intention of the states in relation to the scope of the said MFN[68]. It is from this perspective that case law is patchy, as shown by the divergent decisions discussed above.

4.32. The decision in the dispute between *Austrian Airlines* and *Slovakia* was issued against the background of such state of affairs. Proceedings were initiated under the investment treaty between Austria and Slovakia. The part of the award which was not redacted by the parties shows that the dispute arose in respect of a tri-lateral agreement executed, inter alia, by *Austrian Airlines.*

4.33. According to the treaty provisions, the tribunal's jurisdiction covered "Any disputes arising out of an investment between a Contracting Party and an investor of the other Contracting Party concerning the amount or the conditions of payment of compensation pursuant to Article 4 of this Agreement or the transfer of obligations pursuant to Article 5 of this Agreement" (article 8 of the treaty)[69]. The cited provision shows, based on its literal meaning that the tribunal does not have jurisdiction to hear disputes other than those listed therein.

4.34. An MFN clause was incorporated in article 3.1 of the treaty according to which: "Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third states and their investments." The claimant showed that under the MFN it could rely on dispute resolution provisions broadly defining jurisdiction of the tribunal set out in another treaty to which Slovakia was a party.

4.35. The tribunal started its analysis from two observations of a general nature. The tribunal stated that it did not consider that provisions embodying a state's consent to arbitration must be strictly interpreted and noted that the contrary view adapted by tribunals in *Plama, Telenor, Berschader* and *Wintershall* was not an accurate reflection of *international law*[70]. Thus the tribunal clearly considered that there was no rule of international law under which it was obliged to adopt a restrictive interpretation of an agreement to arbitrate. The rules binding on the tribunal are those on

[68] See also Dana H. Freyer, David Herlihy, *supra* note 2, at 61-62.

[69] *Austrian Airlines Final Award*, para. 92.

[70] *Ibid.*, para. 119.

treaty interpretation set forth in the Vienna Convention on the Law of Treaties. It may seem that this conclusion is contrary to the hypotheses put forward in literature that arbitration agreements should be worded precisely[71], especially if one of the parties is a state. Some authors indicate that under an arbitration agreement a state waives part of its sovereign rights and thus that special care should be taken when interpreting it[72], especially as states generally appear to be unwilling to take cases to arbitration[73]. It does not, however, seem that the above finding of the tribunal influenced the final decision.

4.36. Secondly, the tribunal underlined – leaning towards approaches consistently taken in earlier judgments – that there were no arguments for the stance that the MFN would have by its very nature to be limited to substantive treaty provisions[74]. However, it did not refer to whether there exists (as the tribunals did in, e.g. the *Siemens* and *Gas Natural* cases) a presumption that MFN clause covers procedural provisions (unless intention to the contrary is proved). The tribunals in, e.g. the *Maffezini, Salini, Plama, Telenor, Berschader,* and *Wintershall* cases, took the view that the purpose set out in the title and preamble of a treaty is not sufficient to establish such a presumption and that the investor must show that the real intention of the treaty parties was to extend the clause to jurisdiction provisions.

4.37. Slovakia argued that the MFN did not cover procedural provisions, as in article 3.1 the word "treatment" (not, e.g. "rights") was used, showing that the treaty parties actually intended to limit application of the clause to material provisions. The tribunal did not uphold this stance and found that other elements should be examined in order to clear the ambiguity[75].

[71] Article 7.1 of UNCITRAL Model Law on International Commercial Arbitration of 1985; *see* Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisprudence, London: Sweet&Maxwell 77 (2nd ed. 2005); Bernardo Cremades, *Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties, in* Law of International Business and Dispute Settlement in the 21st Century-Liber Amicorum Karl-heinz Böckstiegel, Koln et al.: Carl Hezmanns Verlag 162 (R. Briner, Y. Fortier, K.P. Berger, J. Bredow eds., 2001); Lucy Reed, Jan Paulsson, Nigel Blackaby, Guide to ICSID Arbitration, The Hague: Kluwer Law International 35 (2004); Christoph H. Schreuer, The ICSID Convention: A Commentary, Cambridge: Cambridge University Press 192 (2nd ed. 2009); Surya P. Subedi, International Investment Law, Reconciling Policy and Principle, Portland: Hart Publishing 149 (2008).

[72] Hazel Fox, *States and the Undertaking to Arbitrate, in* Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration, The Hague: Kluwer Law International 17 (J. Lew, L. Mistelis eds., 2007); Bernardo Cremades, *supra* note 71, at 151; Campbell McLachlan, Laurence Shore, Matthew Weiniger, *supra* note 37, at 256.

[73] Christine Gray, Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 64 BYBIL 100, 101 (1993).

[74] *Austrian Airlines Final Award*, para. 124.

[75] *Ibid.*, para. 126, 127.

4.38. Neither was the tribunal convinced by the claimant stating that although article 3.2 gave an exhaustive list of exceptions to the MFN clause which did not cover jurisdiction provisions, therefore dispute resolution provisions were covered by the MFN. This is because the tribunal found that the *expressio unis* principle was only a supplementary means of interpretation that could not alone determine the outcome of the interpretation when a treaty contained other relevant elements[76].

4.39. What therefore was the decisive factor? In the opinion of this tribunal and other tribunals considering the issue in question, the decisive factor is the intention of the parties to the treaty. The tribunal took the view that the content of other provisions clearly showed that Slovakia and Austria's intention was to introduce restrictions on matters that were taken to arbitration, as under article 8 of the treaty the tribunal's jurisdiction only covered matters relating to the level of compensation for expropriation and transfer of obligations. Disputes over other treaty provisions were to be resolved by the competent common courts. Although the parties decided in article 8 to restrict arbitration to the issues listed in detail, it is hardly logical that in the same treaty they would also have decided to extend it to cover all other provisions based on the MFN clause contained in article 3.1. "Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation (...), it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause"[77]. In support of this theory the tribunal also found evidence in *travaux préparatoires*.

4.40. Some authors believe that if the MFN clause applies to an "investment", not to an "investor", it may be argued that it does not cover jurisdiction provisions[78]. They believe it is the investor, not the investment, that can initiate and be party to arbitration proceedings. In the case at hand, the tribunal did not have to deal with this issue as article 3.1 of the treaty referred to both "investors of the other Contracting Party" and also "their investments."

4.41. To end with, one more issue can be raised which in the tribunal's opinion was not worth analysing in detail. Tribunals that have faced the problem of whether it is admissible to rely on the clause in jurisdiction matters have analysed this issue in terms of the possibility of bypassing the requirement that disputes be first submitted to local courts before taking the case to arbitration (*Maffezini, Siemens, Gas Natural, Camuzzi,* both *Suez* cases, *National Grid, Wintershall*) and the possibility of broadening the jurisdiction of the arbitral tribunal (*Salini, Plama, Telenor, Berschader, RosInvestCo, Renta 4*). It is indicated in literature (until the decisions in

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[76] *Ibid.*, para. 130, 131.

[77] *Ibid.*, para. 135.

[78] Noah Rubins, *MFN Clauses, Procedural Rights, and a Return to the Treaty Text, in* Investment Treaty Arbitration and International Law 225 (T. J. Grierson Weiler ed., 2008).

the *Wintershall* and *RosInvestCo* case) that from this perspective the line taken in these decisions is generally uniform[79]. The possibility of an investor relying on an MFN clause in order to make use of a more convenient solution of a procedural-technical nature (e.g. shortening the waiting period) is one thing, while the right to extend an arbitral tribunal's jurisdiction to cover matters not reserved for arbitration in the basic treaty is another. Based on diverse arguments (sometimes the consequence of an MFN clause and sometimes of the arbitrators' convictions) tribunals allowed the application of an MFN clause for the first category of provisions and refused to allow it in the case of the second.

4.42. Generally consistent case law (as some argue) was upset by the decisions in the *Wintershall* and *RosInvestCo* cases. In the first case, the tribunal did not agree to the claimant bypassing, on the basis of MFN, the waiting period, and in the second it allowed the scope of the arbitral tribunal's jurisdiction to be extended to cover matters that *expressis verbis* had not been provided for in jurisdiction provisions.

4.43. Thus the question remains of whether the lack of analysis from the perspective referred to above means that the tribunal basically concurred with the approach taken in the *Wintershall* case or whether given the specific wording of the treaty at hand, any such analysis was unnecessary.

4.44. A separate opinion was presented by Charles N. Brower, who took the view that the only exceptions to the MFN in question were contained in article 3.2 and thus that there were no other implied exceptions, in particular those listed in article 8. Consequently, the arbitrator was of the opinion that there was nothing to prevent the investor, based on article 3.1, incorporating into the Austria-Slovakia treaty the broader consent given by Slovakia to Danish investors under article 9.2 of the Denmark-Slovakia treaty.

IV. Conclusions

4.45. While it is universally agreed that the very essence of an MFN clause in a treaty is to afford investors all material protection provided by subsequent treaties, it is much more uncertain whether such clauses should be understood to extend to dispute resolution provisions. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive case law on the subject.

4.46. Therefore, the question is whether the award in *Austrian Airlines v. Slovakia* will be deemed a landmark as regards relation of MFN to jurisdiction provisions? Landmark in the sense that the arguments put forward by the tribunal are so convincing that it will lead to unification of the line taken in judgments and doctrinal approach. In the authors' view, the answer is negative, for reasons stated below.

[79] Okezie Chukwumerije, *supra* note 4, at 643-646; RUDOLF DOLZER, CHRISTOPH H. SCHREUER, *supra* note 24, at 256.

4.47. Firstly, the problem of differing decisions in the scope discussed does not result from the absence of a suitable concept under which justification of this or any other solution would be convincingly put forward. This is a consequence of tribunals taking different stances on the analysis of the same elements of the facts. Or in other words, making different choices of which rules for interpreting treaties set out in the Vienna Convention on the Law of Treaties should take priority, as all tribunals dealing with this problem have found that the key factor is the intention of the parties to the treaty. In the search for an answer to what the true intention of the states were when executing the treaties, some tribunals deem certain method of treaty interpretation as decisive while another assess it as second ranking.

4.48. Secondly, the decision in question was passed on the basis of a treaty that provided for arbitration on compensation for expropriation and transfer of obligations only. This was the factor that for the tribunal was decisive in establishing that the MFN clause did not cover dispute resolution provisions. It is therefore unclear whether if the Austria-Slovakia treaty had allowed all disputes arising thereunder to be settled through arbitration, the tribunal's conclusions would have been the same. Consequently, its "universal" nature for the development of judicial decisions is doubtful.

4.49. Thirdly, Charles N. Brower wrote a separate opinion, from which it can be assumed that doctrinal representatives will continue in their approach.

4.50. Therefore, the view of Kaj Hober (expressed before *Austrian Airlines* award) that it is unlikely we have reached the end of the road as regards the debate about the effects of MFN clauses is to be shared[80]. The downside of such situation is, as stated by Susan D. Franck, that the conflicting awards on such matters proves that process of resolving investment disputes through arbitration is creating uncertainty about the meaning of public international law[81].

Summaries

DEU [***Die Anwendung der Meistbegünstigungsklausel auf Zuständigkeitsbestimmungen im Lichte des Schiedsspruchs in der Sache Austrian Airlines v. Slowakei***]
Der Aufsatz behandelt die Polemik, ob es zulässig sei, dass sich die Investoren, die ihre Ansprüche wegen Verletzung durch den Staat der sich aus Investitionsschutzabkommen ergebenden Verpflichtungen geltend machen,

[80] Kaj Hober, *MFN Clauses and Dispute Resolution in Investment Treaties: have we reached the end of the road, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOR OF CHRISTOPH H. SCHREUER, New York: Oxford University Press Inc. 41 (C. Binder, U. Kriebaum, A. Reinisch, S. Wittich eds., 2008).

[81] Susan D. Franck, *The Legitimacy Crises in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005).

auf die Meistbegünstigungsklausel im Hinblick auf die Zuständigkeit des Schiedsgerichtes berufen. In der Rechtsprechung und in der Literatur gibt es unterschiedliche Meinungen. Aus den vorhandenen Schiedssprüchen ergibt sich, dass die meisten Schiedsgerichte bereit sind, solche Möglichkeit zuzulassen, wenn der Investor durch Berufung auf die MFN-Klausel die Verfahrensanforderungen meiden will, welche die Verfahrensdauer wesentlich verlängern können. Andererseits widersprachen die Schiedsgerichte (außer in einem Fall) der Importierung neuer Schiedsklauseln in das Hauptabkommen. Im Teil I wird die Frage erläutert sowie die Gründe für das Bestehen solcher erheblichen Abweichungen angegeben. Teil II schildert die bisherige Rechtsprechung. Im Teil III hingegen wird das letzte Urteil in der Sache Austrian Airlines v. Slovakia analysiert. Die Verfasser versuchten auch (im Teil IV) zu beurteilen, ob das genannte Urteil zur Gestaltung einer einheitlichen Rechtsprechung in dieser Angelegenheit führen und somit zur Erhöhung der Voraussichtlichkeit der Investitionsschiedsgerichtbarkeit beitragen wird.

CZE [***Aplikace doložky nejvyšších výhod na ustanovení o soudní příslušnosti ve světle rozhodčího nálezu ve věci Austrian Airlines v. Slovensko***]
Tento příspěvek zkoumá otázku, zda je přípustné, aby se investoři, kteří uplatňují své nároky z porušení závazků vyplývajících z dohody o ochraně a podpoře investic ze strany státu, dovolávali použití doložky nejvyšších výhod s ohledem na příslušnost rozhodčího soudu. V judikatuře i ve vědecké literatuře lze k tomuto tématu nalézt různé názory. Z dosavadních rozhodčích nálezů vyplývá, že většina rozhodčích soudů byla ochotna takovou možnost připustit, jestliže se chtěl investor svým odvoláním k doložce nejvyšších výhod vyhnout procesním požadavkům, které by znamenaly výrazné prodloužení rozhodčího řízení. Na druhou stranu rozhodčí soudy odmítly (s výjimkou jednoho případu) možnost „vložení" nových rozhodčích doložek do hlavní smlouvy.
První část tohoto příspěvku přináší přehled této problematiky a také uvádí důvody existence tak významně rozdílných názorů. Část II shrnuje odpovídající dosavadní judikaturu. V části III je pak analyzován poslední nález ve věci Austrian Airlines v. Slovensko. Autoři se také pokusili (část IV) posoudit, zda by uvedené rozhodnutí mohlo vést k jednotnějšímu judikatuře v této právní oblasti, a tudíž učinit oblast investičního rozhodčího řízení předvídatelnější.

POL [***Stosowanie klauzuli największego uprzywilejowania dla postanowień dotyczących jurysdykcji w świetle orzeczenia Austrian Airlines vs Słowacja***]
Przedmiotem niniejszego artykułu jest analiza dopuszczalności stosowania klauzuli najwyższego uprzywilejowania do przepisów jurysdykcyjnych zawartych w traktach inwestycyjnych. W orzecznictwie i literaturze istnieją rozbieżne poglądy na ten temat. Autorzy prezentują dotychczasowy dorobek sądów arbitrażowych oraz podejmują próbę odpowiedzenia na pytanie, czy ostatni wyrok w sprawie Austrian Airlines v. Slovakia case doprowadzi do ukształtowania się jednolitej linii orzecznictwa w tej kwestii, a zarazem czy przyczyni się do wzrostu przewidywalności arbitrażu inwestycyjnego.

FRA [***Application de la clause de la nation la plus favorisée aux dispositions de compétence au regard de la sentence rendue dans l'affaire « Austrian Airlines v. Slovaquie ».***]
Cet article aborde la question de l'application de la clause de la nation la plus favorisée aux dispositions de règlement des litiges dans les traités d'investissement. La jurisprudence en la matière est incohérente et la littérature propose des points de vue divergents. Les auteurs présentent une vue d'ensemble des sentences rendues par les tribunaux arbitraux et tentent de répondre à la question consistant à déterminer si la sentence prononcée dans l'affaire « Austrian Airlines v. Slovaquie » mettra un terme à la controverse portant sur les effets de la clause de la nation la plus favorisée, en augmentant de fait le caractère prévisible du droit des investissements internationaux.

RUS [***Применение положения о режиме наибольшего благоприятствования в торговле по отношению к положениям о юрисдикции в свете решения по делу Austrian Airlines против Словакии***]
В настоящей статье рассматривается применение положений о режиме наибольшего благоприятствования в торговле по отношению к положениям о разрешении споров, содержащимся в инвестиционных соглашениях. Судебная практика в этом отношении непоследовательна, и в литературе встречаются различные точки зрения. Авторы дают обзор текущих решений, вынесенных арбитражными судами, и пытаются дать ответ на вопрос о том, положит ли решение по делу Austrian Airlines против Словакии конец разногласиям относительно применения положений о режиме наибольшего благоприятствования в торговле, повысив тем самым предсказуемость применения законодательства о зарубежных инвестициях.

ES [***Aplicación de la cláusula de la nación más favorecida a las provisiones sobre jurisdicción en vista del laudo en Austrian Airlines vs. Eslovaquia.***]
Este artículo debate la aplicación de las cláusulas de la nación más favorecidas a las provisiones sobre resolución de disputas en los tratados de protección inversión. La jurisprudencia en esta materia es inconsistente y la documentación presenta puntos de vista divergentes. Los autores proporcionan una descripción general actual de los laudos proferidos por los tribunales de arbitraje e intentan responder a la pregunta de si el laudo en Austrian Airlines vs. Eslovaquia terminará con la controversia acerca de los efectos de las cláusulas de la nación más favorecida aumentando, por tanto, la previsibilidad de la ley sobre inversiones internacionales.

Leonila Guglya

International Review of Decisions concerning Recognition and Enforcement of Foreign Arbitral Awards: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (*with Emphasis on the Developments within the International Investment Arbitration Setting*)

Key words:
Arbitration | International Investment Arbitration | Recognition and Enforcement of Foreign Arbitral Awards | Execution | New York Convention | ECHR | ECtHR | ICSID | BIT | UNCITRAL | Jurisdiction | Denial of Justice | Fair Trial | Expropriation

***Abstract** | The article explores the possibilities of review of the decisions of national courts pertaining to the recognition and enforcement of foreign arbitral awards by the international investment arbitration tribunals – a relatively new development, arguably limiting the sovereignty of the judiciaries of the host states further by creating a new "appellate" mechanism, verifying the "appropriateness" of their respective verdicts. The scrutiny, based on the case law analysis, demonstrates that, while overall the international dispute settlement mechanism concerned does feel certain reluctance in dealing with the reviews of the kind, in principle, taken that jurisdictional preconditions are met, it should be considered as a possible venue for the reexamination of the respective national judgments and could potentially be addressed by the parties raising expropriation, denial of justice and similar claims, arising out of the relevant context. The controversies, however, promise to present quite a challenge to the investors as far as the merits phase is concerned in light of [potential]existence of the alternative enforcement fora (arguably eliminating the expropriation claim) or the need to exhaust all available national judicial remedies (for the cases of denial of justice). Additionally, the enforcement prospects for the international investment arbitration awards resolving the post-award phase controversies, rendered outside of the ICSID context, are so far unclear. They might risk following the fate of the awards with the successful or failing recognition and enforcement of which they are concerned.*

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Introductory Note

5.01. Nowadays the boundaries of international dispute settlement are clearly subject to extension. Consent given by the state to the submission of their disputes with investors to international investment arbitration has the potential to subject the latter to arbitrating much broader scope of issues (as compared, say, to similar developments that took place a decade ago). Whilst the allegations of denial of justice to the investor by the national judicial systems, as well as of similar violations of the investor's rights by the national courts, could hardly be seen as a novelty[1], a somewhat "*grey*" area currently surrounds the issues of responsibility of the host states arising out of the decisions granting recognition and enforcement, or, as the case may be, denying such to foreign arbitral awards rendered in favour of or against investors, within the framework of international investment instruments. The outlined context clearly gives rise to at least several important dilemmas, ranging from the case of conflicting obligations of the host state within the exact recognition and enforcement domain, originating from the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards ("*New York Convention*")[2] (on one side) and relevant investment treaties or the other enactments (on the other), to the overall architecture of this special subtype of the claims and the enforcement perspectives for the international arbitration awards dealing with the above issues to be rendered. Moreover, upon a closer look it might be seen as a step towards even further reserved approach to the judicial sovereignty of the host state – a development that might have far-reaching consequences for the future of the international investment arbitration as a dispute settlement mechanism.

5.02. Most broadly phrased, the questions this article will attempt put forth and, to the extent, to answer are: "*Could the decisions granting or denying recognition and enforcement of foreign arbitral awards [under the New York Convention] made by the state judiciaries, including possible mismatches therein, be looked at and, ultimately, de facto, re-examined internationally, in particular, within the system of the international investment arbitration? And, if they could be so reviewed, should they be?*"

[1] Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809 (2005); Benjamin Klafter, *International Commercial Arbitration as Appellate Review: NAFTA's Chapter 11, Exhaustion of Local Remedies and Res Judicata*, 12 U.C. DAVIS J. INT'L L. & POL'Y 409 (2006), etc.

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3. For the current status of the Convention, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on December 20, 2010).

I. Denials of Recognition and Enforcement under the New York Convention: Some Traits for the "*Picture*"

5.03. When submitting their controversies to arbitration, the parties reasonably expect to get an enforceable award. Nonetheless, even though the majority of the awards rendered are complied with voluntarily or, if not, – recognized and enforced, at times recognition and enforcement is denied. Nowadays, with some 145 states worldwide being member states to the New York Convention, the "*denial*" grounds (reflected in the Art. V. of the Convention) are highly systemized and rather limited. Providing, in addition, quite detailed requirements concerning the documents to be presented to the enforcing court, the Convention, seemingly, should preclude any potential cases of [arguably] *unjust* or *erroneous* denials of recognition and enforcement. Nevertheless, the latter still do occur[3].

5.04. It should be fair to admit that by far not all denials of recognition and enforcement should bear the "*unjust*" label. Most of them are so-called "*intelligent*" denials (e.g. those carried out "*for all the right reasons*")[4], certain, nevertheless, being products of a *sui generis* interpretation of the Convention by the judiciaries of the enforcing states, or "*victims*" of the divergences between the equally authentic[5] different language versions of the Convention[6]. This is the price to pay for the existence of the decentralized recognition and enforcement "*net*"– alas, the only feasible solution, as the idea of concentration of the recourse against arbitral awards within one special global "*court*" has not gained enough support for its realization[7].

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[3] Eventually, the 52-year-old Convention, even despite its popularity and frequent use, could be improved, *inter alia* via making the language of its provisions more precise and so – easy-to-use – in practice. This has been demonstrated, for instance, via the newly-introduced "*Miami*" (or, as named prior, "*Dublin*") Draft of the [new] New York Convention, developed by Professor Albert Jan van den Berg. The instrument is rather a *sui generis* interpretation of the existing Convention, its "*savior brother*", than the project of its successor. The text of the Draft is available at:
http://www.newyorkconvention.org/draft-convention/
(accessed on December 20, 2010).

[4] Quentin Tannock, *Judging the Effectiveness of Arbitration Through the Assessment of Compliance with and Enforcement of International Arbitration Awards*, 21 (1) ARBITRATION INTERNATIONAL 84-85 (2005).

[5] See Art. XVI(1) of the New York Convention.

[6] A good example here is Art. V(1)(c) of the New York Convention, which refers to the "*scope of submission to arbitration*" in its English version, yet, to the "*scope of the arbitration agreement*" in Russian, with the "*median*" solution referring to the "*scope of the arbitration agreement*" in one part of the provision and "*scope of the submission to arbitration*"- in the other - in both, French and Spanish versions of the text.

[7] Howard H. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*; Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, both *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE, ARBITRATION INTERNATIONAL, London: Graham and Trotman/Martinus Nijhoff (1995).

II. A Concurrent Development: Enforcement-Related Hurdles before the ECtHR

5.05. The Strasbourg jurisprudence, rich in the matters pertaining to the scrutiny of the procedural dilemmas faced by the national judiciaries, in particular, *inter alia*, within the due process and fair trial contexts of the Art. 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms ("*ECHR*")[8] is an appropriate starting point for uncovering the instances when the recognition and enforcement proceedings, carried out by national courts, are looked at from the perspective of the other than national legal order. Nonetheless, the European Court of Human Rights (ECtHR), an international judicial body that rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights[9], has never handled the issues of denial of the leave to enforce the award by the national judiciary.

5.06. Several ECHR-based cases that might be of some relevance to this discussion dealt, rather, with the execution of the arbitral awards by the bailiff systems of the states – a step, that normally follows the enforcement proceedings in courts (if those are necessary). Among those (chronologically) – *Stran Greek Refineries and Stratis Andreadis v. Greece*[10], *Regent Company (Seychelles) v. Ukraine*[11], *Sedelmayer v. Germany*[12] and *Kin-Stib and Majkić v. Serbia*[13]. While *Stran* has been concerned with the award rendered by the domestic arbitration tribunal (nonetheless in the investment arbitration – involving the state and an investor, who is the national of the same state), the other cases – *Regent*, *Sedelmayer* and *Kin-Stib* – involved international commercial arbitration awards[14] rendered in proceedings carried out according to the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine ("*ICAC*"), Stockholm Arbitration Institute ("*SCC*") and the Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce ("*FTAC*") respectively[15].

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[8] Convention for the Protection of Human Rights and Fundamental Freedoms, November 11, 1950,U.N.T.S. 222.

[9] For more information see: www.echr.coe.int (accessed on December 20. 2010)

[10] ECtHR Judgment of December 9, 1994, Series of A, no. 335-A.

[11] 45 E.H.R.R. SE8 (2007).

[12] Applications Nos 30190/06 and 30216/06 of 25 October 2005. Ruled inadmissible by the 5th Section of the Court on November 10, 2009.

[13] ECHR, No. 12312/05, 20 April 2010.

[14] Award of ICAC of Ukraine, dated December 23, 1998.

[15] As a matter of a brief recap of the relevant fables, in *Stran*, the essence of the problem was in the promulgation of the amendments to the law, which, finally and unconditionally, barred the arbitral award from the execution by virtue of the *ab initio* nullification of the arbitration agreement. In *Regent*, whilst, according to the national law, the arbitral award concerned was automatically enforceable at the seat of arbitration, execution thereof was not proceeding smoothly, *inter alia* due to the moratorium on the debt repayment, exercised over the award-based debtor's estate in course of the insolvency proceedings. In *Kin-Stib*, where a leave to enforce the award

5.07. In three of the four cases (*Stran*, *Regent* and *Kin-Stib*) the ECtHR found the states concerned liable for their failure to ensure the execution of the awards. In *Sedelmayer*, however, the applications were ruled inadmissible, *inter alia* due to the finding that the non-execution of the award in practice was only caused by an unlucky choice of assets, attachment of which the claimant sought – those protected by the sovereign immunity of the Russian Federation. The ECtHR seemed to have implied that should that choice have been different, its judgment could also have been different[16]. The major details pertaining to the four cases are summarized in the Table 1 immediately below.

was also granted by the state judiciary, the award-based debt has been repaid only in part. Finally, in *Sedelmayer*, the award-based creditor challenged the failure of German bailiff system to execute an SCC award.

[16] For more details on the *Sedelmayer* controversy, see, for instance, Franz J. Sedelmayer, *Sedelmayer v. Germany, European Court of Human Rights*, 2 (5) TRANSNATIONAL DISPUTE MANAGEMENT 30 (2005), Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors In Russia: Analysis Of Present Issues And Implications*, 10 PEPP. DISP. RESOL. L. J. 595 (2010); Alexis Blane, *Sovereign Immunity As A Bar To The Execution Of International Arbitral Awards*, 41 N.Y.U. J. INT'L L. & POL. 453 (2009); Andrea Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards, in* INTERNATIONAL INVESTMENT LAW FOR THE TWENTY-FIRST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, Oxford: Oxford University Press 302 (C. Binder, U. Kriebaum, A. Reinisch & S. Wittich eds., 2009). A situation quite similar to that of the *Sedelmayer* case arose in the so-called "*Noga Saga*", pertaining to the attempts of the French company (*Noga*) to enforce the SCC award against the assets of Russian Federation.

[17] Referred to the ECtHR by the Commission.

Table 1. ***The ECHR Case Law Dealing with the Hurdles in Enforcement of Arbitral Awards***

Case Name/ Considered by	Commenced/ Decided		State of the Claimant	Arbitration Rules/ Seat	Sphere (Main transaction)	ECHR Provisions relied on	Findings of violations
Stran Greek Refineries and Stratis Andreadis v. Greece/ Chamber	1987[17] 1993	1994	Greece	Ad hoc/ Greece	Oil refineries	Art. 6(1); Protocol I, Art. 1	6(1) [fair trial context]; Protocol I
Regent Company v. Ukraine/ 5th Section	2002	2008	Seychelles	ICAC/ Ukraine	Processing of raw materials	Art. 6(1); Protocol I, Art. 1	6(1); Protocol I, Art. 1
Kin-Stib and Majkić v. Serbia/ 2nd Section	2005	2010	Congo DR, Serbia	FTAC/ Serbia and Montenegro	Casino business	Art. 6(1); Protocol I, Art. 1	Protocol I, Art. 1 , not dealt with 6(1)
Sedelmayer v. Germany/ 5th Section	2005	2009	Germany	SCC/ Sweden (Investment Arbitration)	Supply of goods/ services for the police service	Art. 6(1); 13, 14 Protocol I, Art. 1.	No violations

5.08. Even though the cases referred to above are not directly germane to the issues analysed further in this article, several of their peculiarities could be of relevance. Namely, all the cases concerned had an investment background, with *Regent* arising out of the same factual framework as the *GEA Group Aktiengesellschaft v. Ukraine*[18] controversy, arising out of the denial of Ukrainian courts to enforce the ICC arbitral award, which is currently subject to consideration by ICSID tribunal and will be dwelled on below. Moreover, it is notable that all four cases have centred around the same combination of the ECHR provisions, namely, ECHR Art. 6(1) and Art. 1 of the Protocol No. 1 (dealing with peaceful enjoyment of property)[19]. Nonetheless, except for, to the extent, in *Stran*, where the actions of the

[18] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award of March 20, 2009.

[19] Even more so, the ECtHR itself found the above grounds interconnected within the context of alleged violations in course of execution of arbitral awards. In *Kin-Stib* this connection has been deemed so strong, that after establishing the infringement of the Art. 1 of the Protocol, the Court found it unnecessary to analyse the facts again for the purposes of making an ECHR Art. 6(1) – based conclusion. See *Kin-Stib*, para. 86.

court of cassation instance denying enforcement to the award were (in part) at stake, and *Sedelmayer*, concerned with the refusal of the German judiciary to attach property covered by the diplomatic immunity of the Russian Federation, ECHR Art. 6(1) was only used to give due legitimacy to the arbitral award in establishing the property title[20]. The situation, thus, was looked at not through the denial of justice prism *per se*, yet, as an encroachment of the property rights, established in course of the earlier dispute settlement procedure.

5.09. The three-pronged structure of the ECtHR's reasoning in each of the cases concerned is consistent with the above logic. First, the Court was inclined to establish whether the determination of the civil rights and obligations was at stake in the case, at this stage usually arriving at an affirmative conclusion. For instance, in *Stran* it explained:

> *[the] right under the arbitration award [is] "pecuniary" in nature. [...] the right to recover sums awarded by the arbitration court is therefore a "civil right" within the meaning of Article 6. [...] It follows that the outcome of the proceedings brought in the ordinary courts by the State to have the arbitration award set aside [is] decisive for a "civil right"*[21].

Next, the Court assessed whether any interference with civil rights has taken place and, thirdly, if so – how could the latter be justified. In the meantime, as noted above, in *Stran* and *Sedelmayer*, parts of the reasoning were indeed devoted to the conduct of the national courts within the post-award phase of the arbitration, even though not exactly in the "*core*" leave to enforce context, but rather in the context of the general obligation of the state

> *[...] to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes concerning the right of property,*

recognized, *inter alia*, in the other controversy, considered by the ECtHR, *Sovtransavto Holding v. Ukraine*[22].

[20] The inclination to advance in the above task could most clearly be followed through in the text of the Judgment in *Regent*, where, at para. 54, the Court explained:

> *Article 6 does not preclude the setting up of arbitration tribunals in order to settle disputes between private entities. Indeed, the word "tribunal" in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country. [...] the Arbitration Tribunal was a "tribunal established by law", acting in accordance with the 1994 International Commercial Arbitration Act and internal procedural rules[...].*

[21] See *Stran*, para. 40(2). Similarly, in *Regent*, the Court clarified that the demand of payment of a debt or the demand to comply with a civil-law obligation to provide compensation for pecuniary and non-pecuniary damage is a "*civil*" right, protected by the ECHR (*Kin-Stib*, para. 55).

[22] No. 48553/99, ECHR 2002-VII, para. 96.

5.10. Following this concise overview, one could note that the ECtHR, even though no "*denial of recognition and enforcement*" cases have yet been submitted thereto, could potentially serve as a forum for the redress of the grievances of investors arising out of the actions of the state courts, resorted to at the post-award phase of the international commercial arbitration (in case the investors are nationals of the ECHR Member State and the action of the judiciaries of another Member State is concerned)[23]. The ECHR, moreover, as will be shown with the progress of the discussion within the present article, might potentially constitute a more accessible forum for the challenge of the "*wrongful*" denials (or grants) of the recognition and enforcement, as compared to the international investment arbitration, *inter alia* because of not having an additional jurisdictional requirement of existence of the investment underlining the dispute (and operating the "*determination of civil rights and obligations*" notion instead).

III. The Issues Related to the Recognition and Enforcement of Foreign Arbitral Awards before Investment Arbitration Tribunals

5.11. The exact matter of denial or, on the other hand, of the grant of recognition and enforcement to foreign arbitral awards has recently arisen in the investment arbitration, arguably expanding the content of the investment-related obligations of the states, in particular those reflected in the Bilateral Investment Treaties (BITs) to a new level. The claims concerned with this specific matter will be outlined below with existing and potential jurisdictional, substantive and enforcement-related concerns being put forth and briefly scrutinized.

III.1. The Four Relevant International Investment Arbitration Claims

5.12. The four investment claims analysed – *Western NIS Enterprise Fund v. Ukraine*[24], *Romak v. Uzbekistan*[25], *Kalinigrad Region v. Lithuania*[26] and *GEA Group Aktiengesellschaft v. Ukraine*[27] (listed chronologically, by the date of initiation) – are aimed at uncovering the specificities of the trend related to the review of the recognition and enforcement decisions,

[23] ECHR, Art. 1.

[24] *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Award of July 30, 2004.

[25] PCA Case No. AA280.

[26] No formal details identifying this ICC Proceeding is available to the author. The claim has been discussed in Luke Eric Peterson, *Lithuania Prevails in Investor – State BIT Claim Brought By Russian Regional Government; ICC Tribunal Rules that Enforcement of Commercial Arbitration Award in Lithuania Cannot be Challenged as Expropriation under the BIT*, 2 (5) INVESTMENT ARBITRATION REPORTER (March 17, 2009).

[27] See *supra* note 17.

even though, as of yet, falling short of clearly establishing its limits and prospects. The claims are outlined in Table 2.

5.13. To make the scrutiny more vivid, it is worth to briefly dwell on the fables of the disputes concerned, to the extent the relevant information is available. The *Western NIS* case has in its roots financial and organizational support, allocated by the U.S. – based *Western NIS Enterprise Fund* ("*WNISEF*") to the JSC "*Sonola*" Sunflower oil Processing plant, located in the Eastern Ukraine (a joint venture created by the same Fund (holding 46% of shares) and its Ukrainian partner, "*System SSB*", in 1996). The credit agreement, regulating cooperation between *Western NIS* and *Sonola* that has given rise to the exact controversy at stake, was signed in February 1997. The agreement contained an arbitration clause, referring the disputes to arise to arbitration according to the rules of American Arbitration Association ("*AAA*"). Shortly after the credit has been provided by *Western NIS*, the relationships between the parties have deteriorated. *Sonola* has put restrictions on the Fund's participation in its supervisory board and failed to repay the credit. Moreover, it has also requested the Ukrainian courts to deem the credit agreement void *ab initio*. *Western NIS*, in its turn, commenced the AAA Arbitration in New York, seeking to recover the debt arising out of the credit agreement from *Sonola*.

5.14. The decision of the local court of Kirovograd, voiding the credit agreement, was rendered in May 2000[28] and later confirmed by the courts of the higher instances[29]. Being aware of the invalidation of the agreement, AAA still rendered its award in January of 2001[30], satisfying the claims of *Western NIS* in full and, in the meantime, condemning the relevant Ukrainian judicial decisions (as well as Ukrainian Judicial System in its entirety) as follows:

> *The decision of the Ukrainian courts in issues of the invalidity of the agreement between the parties can not preclude the tribunal from proceeding with the matter, since the consideration of the case in that courts is far from meeting the standards, as far as Ukrainian judicial system is placed under considerable political influence, suffering from corruption and inefficiency.*

5.15. Subsequently, recognition and enforcement of the AAA award has been denied by the Appellate Court of Kirovograd Region[31]. The denial bore no [direct] reference to the New York Convention, bearing on the *res judicata* effect of the decisions of Ukrainian courts, invalidating the credit agreement, instead. In its turn, the statement of the AAA arbitrator concerning the Ukrainian judicial system has been described as a matter reaching beyond the scope of the arbitration agreement. Finding no more

[28] Decision of the Kirovograd District Court (Ukraine), May 25, 2000.

[29] Decision of the Appellate Court of Kirovograd Region (Ukraine), November 30, 2000; Decision of the Supreme Court of Ukraine, October 5, 2001.

[30] AAA Award, January 30, 2001, as corrected on March 29, 2001.

[31] Decision of the Appellate Court of Kirovograd Region (Ukraine), May 16, 2002, confirmed by the Decision of the Supreme Court of Ukraine, May 14, 2003.

remedy for the situation in Ukraine, *Western NIS* submitted its grievances to ICSID Arbitration on the basis of the U.S. – Ukraine BIT[32] in the early 2004. The case has been settled shortly after the tribunal affirmed its jurisdiction over the merits[33].

5.16. The *Romak* controversy, being less "*lucky*" than *Western NIS* in having to stop at the jurisdictional phase of the arbitration, has been concerned with a sort of a wheat trade-related cooperation between several Uzbek entities, *Uzkhleboproduct*, *Uzdon* and *Odil* and a Swiss cereals trading company, *Romak*. Overall, the transaction has been characterized by the complicated contractual framework, out of which the "*Supply Agreement*", concluded in July of 1996 between *Romak* and *Uzdon* and guaranteed, on *Uzdon*'s side, by *Uzkhleboproduct*, as well as the "*Protocol of Intentions*", signed by *Romak*, *Uzdon* and *Uzkhleboproduct* around the same time and reflecting the intentions to maintain the "*long-term cooperation*" between the two Uzbek entities and *Romak*, are of utmost relevance.

5.17. Performing under the Supply Agreement, *Romak* made a series of deliveries of wheat to Uzbekistan, yet, was never paid for the goods delivered, *inter alia* for the reason of administrative difficulties surrounding the import operation. After multiple attempts to recover the payment for the wheat, in April of 1997 *Romak* commenced GAFTA Arbitration against *Uzdon* in London. Disregarding the allegations of *force majeure* because of the failure of the Uzbek government to allocate the quotas needed for *Romak's* grain purchase, raised by *Uzdon*, the Tribunal, on August 22, 1997, ruled in favor of *Romak*. *Uzdon's* appeal, belatedly submitted to the GAFTA Appellate Board, had not been taken into consideration by the latter[34]. The set aside request, brought by *Uzdon* to the High Court of Justice in London in August 1998, was not satisfied either[35].

5.18. In the meantime, *Romak* sought recognition and enforcement of the award. Its request, lodged with the Commercial Court of the City of Tashkent (Uzbekistan) in August 2000 has been retuned, without prejudice, for the failure to meet the two formal requirements. First, the application has been filed in Russian, while the only state language of Uzbekistan is Uzbek[36], which, consequently, is the language of rendering

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[32] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, and Related Exchange of Letters, done at Washington on March 4, 1994, available at: http://www.state.gov/e/eeb/ifd/43366.htm (accessed on December 20, 2010), in force since 16 November 1996.

[33] *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order on Jurisdiction, dated March 16, 2006. Following the settlement, proceedings were discontinued by the Order in June 2006.

[34] Decision of GAFTA Board of Appeals, July 31, 1998.

[35] Decision of the High Court of Justice, London, January 28, 1999.

[36] Law of the Republic of Uzbekistan *"On Official Language"* (last amended 1995) [Uzbekistan], 3561-XI, 21 October 1989, available at: http://www.unhcr.org/refworld/docid/3ae6b4d328.html (accessed on December 20, 2010).

justice. Secondly, the court also found the request incomplete because of the failure of the applicant to include the confirmation, that its procedural counterpart, *Uzdon*, which, *inter alia*, has not participated in the formation of the GAFTA arbitral tribunal, was notified about the arbitration proceedings. The above decision has been confirmed by the Appellate Court of Tashkent on November 24, 2000. Without making any attempt perfect and resubmit the application in Uzbekistan, or to challenge the return of the application further – before the Supreme Court of the country, *Romak* obtained an exequatur for the award in France[37], however, not being able to secure enforcement there either (for the lack of appropriate debtor's assets), initiated the UNCITRAL arbitration against Uzbekistan in March 2006, relying on the provisions of the BIT concluded between Uzbekistan and Switzerland[38]. By the Award of November 2009 the Tribunal denied its jurisdiction over the dispute due to the inability to characterize the activity of *Romak* as an investment.

5.19. The *Kaliningrad Region (Russian Federation) v. Lithuania* dispute has gained much less publicity. The information thereabout, which leaked into the public domain, allows, at best, making reasonable guesses both about its underlining factual background and legal reasoning. Nevertheless, it is known that, in light of the economic difficulties, faced by the region, the loan agreement for some $30 Million was concluded in November 1997 between the *Dresdner Bank (Germany)* and *Kaliningrad Regional Development Fund*. The text of the agreement was pre-approved by the Kaliningrad Regional Parliament, while the loan itself was issued under the guarantee of the Kaliningrad regional budget. The Central Bank of Russian Federation was notified about the operation and, upon its own analysis thereof, found it legal[39].

5.20. The loan, allegedly aimed at the development of poultry business in the region[40], was supposed to have been paid in tranches. Yet, after the first

[37] The leave to enforce the award has been granted by the *Tribunal de Grande Instance* of Paris on November 7, 2002. The same has been confirmed by the Paris *Cour d'Appel* on October 27, 2005. Nevertheless, the attachment of funds available on the bank accounts of the National Aviation Company of Uzbekistan ("*NAC*") and Ouzaeronavigation in satisfaction of the debt awarded, initially ordered by the *Tribunal de Grande Instance* of Paris in May 2003, was reversed by the Paris *Cour d'Appel* in October of the same year. Ultimately, *Uzdon* could secure only the protective attachment of the same accounts, granted by the *Tribunal de Grande Instance* of Paris in March 2008 and confirmed by the appellate instance in December 2008.

[38] Agreement between the Swiss Confederation and the Republic of Uzbekistan Concerning the Promotion and Reciprocal Protection of Investments of April 16, 1993, in force since November 5, 1993 (*Uzbekistan-Switzerland BIT*).

[39] For more information on the issue see *Dresdner-Bank Loan Investigation Failed*, 21 KALININGRAD THIS WEEK (May 19-25, 2003). Available online at: http://webu2.upmf-grenoble.fr/pepse/IMG/pdf/KTW_2003_21.pdf (accessed on December 20, 2010).

[40] See *Kaliningrad Region to Appeal Loan Payoff Ruling*, RIANOVOSTI (November 8, 2005), available online at: http://en.rian.ru/russia/20051108/42027156.html (accessed on December 20, 2010).

$ 10 Million tranche was paid shortly after the conclusion of the agreement, the arrangement was suspended, with another $20 Million never paid. Even the first $10 Million tranche was never returned by the *Fund* to the *Dresdner Bank* or to *Duke Investment Limited* (Cyprus) – the assignee of the right to the claim under the loan. Thus, following the terms of the loan agreement, *Duke* initiated the LCIA arbitration, in order to recover the principal due, as well as the accrued substantial interest thereon from the *Kaliningrad region* – the guarantor. The LCIA tribunal ruled in *Duke's* favour. Eventually, in trying to avoid the well-known enforcement hurdles in Russian Federation, *Duke* resorted to the *"safe harbour"* and sought leave to enforce the award, "(which, eventually, was granted)" and, subsequently, an arrest and sale of debtor's property – an administrative building in Vilnius belonging to the *Kaliningrad region* – in Lithuania. After less than successful attempts to oppose the sale of the building locally, in 2006 the *Kaliningrad region* resorted to the investment arbitration under the ICC Rules, relying on the Russian Federation-Lithuania BIT of 1999[41] and making allegations of expropriation. The ICC Arbitration Award in the case, rendered in February 2009, denied all of the *Kaliningrad Region's* claims for lack of jurisdiction.

5.21. Finally, the *GEA* controversy seems to be the least transparent of the four in terms of the available background information. The dispute is concerned with in-kind investments, made over the course of several years by *GEA* into the Oriana petrochemical complex, located in Western Ukraine. After the relationships between *GEA* and Oriana deteriorated, the latter was accused of misappropriation of the raw materials, furnished by *GEA* as an in-kind contribution, as well as of some part of the produced goods, which had to be transferred [back] to *GEA*. The parties were able to settle, however, as Oriana never complied with the terms of the settlement, *GEA* initiated the ICC arbitration on the basis of the arbitration clause in the settlement agreement. The ICC Tribunal, by its award rendered in 2002, ordered Oriana to pay *GEA* some $30 Million[42]. After voluntary compliance with the award by Oriana did not follow, *GEA* requested the recognition and enforcement of the award from Ukrainian courts. The request was denied as the courts, *inter alia*, deemed the arbitration agreement invalid for the failure to meet formal requirements. In 2008 *GEA* initiated ICSID international investment arbitration, relying on the Germany-Ukraine BIT of 1993[43]. The arbitration is still pending.

[41] Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of Investments 29 June 1999, in force since 24 May 2004 (*Lithuania – Russian Federation BIT*).

[42] Luke Eric Peterson, *German Firm Sues Ukraine under BIT; Claimant Complains of Failure to Enforce ICC Arbitral Award, and of Malfeasance on Part of State-Owned Petrochemical Complex*, 1 (15) INTERNATIONAL ARBITRATION REPORTER (November 25, 2008).

[43] Agreement between the Federal Republic of Germany and the Ukraine on the Promotion and Reciprocal Protection of Investments, 15 February 1993, in force since 29 June 1996 (*Ukraine - Germany BIT*).

Table 2. ***Investment Claims Dealing with the Recognition and Enforcement of Foreign Arbitral Awards***

Parties	Year of Filing	Forum	Basis	Sector of Economy	Host Country Action Alleged to Violate Treaty or Contract	Amount Claimed (U.S. Dollars)	Most Recent Procedural Position	Result
Western NIS Enterprise Fund (U.S.A.) v. Ukraine	2004	ICSID	BIT	Agriculture	Failure of Ukrainian courts to grant recognition and enforcement to the foreign arbitral (AAA) award.	4 million	Order taking note of disconti-nuance, Jun/2006	The terms of settlement are not public
Romak (Switzerland) v. Uzbekistan	2006	UNCITRAL (PCA-Admi-nistered)	BIT	Agriculture/ Wholesale Trade	Failure of the Uzbek courts to entertain the application for the recognition and enforcement of the foreign arbitral (GAFTA) award and, eventually, to grant recognition and enforcement thereof under the New York Convention.	10.5 million	Award, Nov/2009	Dismissed all claims [No Juris-diction]
Kaliningrad Region (Russian Federation) v. Lithuania	2007	ICC	BIT	Real Estate Development /Leasing	Recognition and enforcement of the foreign arbitral (LCIA) award under the New York Convention, by virtue of seizure of investor's property.	15 million	Award on Jurisdiction, Feb/2009	Dismissed all claims [No Juris-diction]
GEA Group Aktienge-sellschaft (Germany) v.Ukraine	2008	ICSID	BIT	Oil and Petroleum	Failure of Ukrainian courts to grant recognition and enforcement to the foreign arbitral (ICC) award under the New York Convention.	30 million	Post-Hearing Stage, since Jul/2010	Pending

III.2. Underlying Investment: The Jurisdiction of the Tribunals Concerned

5.22. All of the mentioned disputes seemed to be proceeding according to the overall "*classical*" scenario, with the tribunal accessing its jurisdiction before moving further to the merits (the two proceedings (in *Western NIS* and *Kaliningrad Region* cases) were subject to bifurcation, while the other two were/are moving on without such)[44]. Moreover, as explained by the tribunal in *Romak*, this is exactly the jurisdiction of the investment arbitration tribunal over the dispute arising out of the recognition and enforcement of the arbitral award by the host state concerned (grounded, *inter alia*, on the presence of the investment in the relevant understanding) that puts an important limit, preventing the investment arbitration tribunals from becoming a *de facto* another "*appellate*" instance for the parties dissatisfied with the outcome of [any type of] the recognition and enforcement proceedings before the national court[45]. Essentially, it is indeed the presence of the investment (and investor), which draws a dividing line between the availability of the "*civil right*" (as is relevant, for instance, as discussed above, for the ECHR Art. 6(1) jurisprudence) and availability of the right, protectable within the particular investment arbitration context.

5.23. It does not seem that the issue of participation of the investor in the proceedings, along the *ratione personae* line, has been touched upon in any of the controversies analysed, at least to the extent of awareness of the author. As far as the incidence of an investment (e.g. issue of relevance to the jurisdiction *ratione materiae*) is concerned, even without diving into the details of elaboration over the definition of investment in *Romak*, which, by now, has already found multiple reflections (and, at times, critiques)[46], one of the major strategic traits thereof is to be noted: a *holistic* approach to the circumstances, and, in particular, to the situation concerned with the problems pertaining to the recognition and enforcement of foreign

[44] On this issue, see, for instance, the Award in *Romak*, paras. 157-158.

[45] In para 186 of the *Romak* Award, it was, namely, recalled:

> *[the broad definition of investment under the BIT (relying solely on the literal meaning of the terms), as suggested by Romak] would create, de facto, a new instance of review of State court decisions concerning the enforcement of arbitral awards. [...], any award rendered in favor of a national of a Contracting Party (even one rendered in a purely commercial arbitration procedure) would be considered a "claim to money" or, arguably [...] a "right given by decision of the authority" The refusal or failure of the host State's courts to enforce such an award would therefore arguably provide sufficient grounds for a de novo review – under a different international instrument and on grounds different from those that would normally apply – of the State courts' decision not to enforce an award.*

[46] See, *inter alia*, Matthew Weiniger, Promod Nair, *Investment Treaty Arbitration: UNCITRAL Tribunal Applies ICSID Definition of "Investment"*, 5 (1) G.A.R. 36-37 (2010); Barton Legum, Caline Mouawad, *The Meaning of Investment' in the ICSID Convention, in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY, ESSAYS IN HONOUR OF DETLEV VAGTS, Cambridge: Cambridge University Press 326-356 (P. H. F. Bekker, R. Dolzer, M. Waibel eds., 2010).

arbitral award. Being overall consistent with the earlier findings of the investment arbitration tribunals[47], the *Romak* tribunal, in part – in order to justify the rejection of the position taken by *Romak* – noted:

> *any determination as to whether Romak holds and investment under the BIT cannot be made without reference to the entire economic transaction that is the subject of these arbitral proceedings. The GAFTA Award merely constitutes the embodiment of Romak's contractual rights (as determined by the GAFTA Arbitral Tribunal) stemming from the wheat supply transaction entered into by Romak. If the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment*[48].

5.24. Indeed, the above line of reasoning of the *Romak* award does not seem to be deprived of legal sense, especially as seen in light of the overall broad definitions of investment in the modern BITs. For instance, all the BITs relied on in the four cases under the emphasis essentially incorporate quite an over encompassing definition of investment, referring, *inter alia*, to "*claims to money or to any performance having an economic value*" and "*rights given by law, by contract or by decision of the authority in accordance with the law*"[49]- the language, which, if applied in its literal meaning, would allow seeing investment in practically any arbitral award or judicial decision.

5.25. Hence, following *Romak*, at least theoretically, investment not being present within the nature of the transaction out of which the claim later subject to the [commercial] arbitration arose, no further recourse to the international investment arbitration in case of problems in terms of recognition and enforcement of the award would be possible.

5.26. Referring to practical elucidations of the same, while neither *Western NIS* nor *GEA* seem to provide one with a relevant background, both having a clear trace of the investment within, the *Kaliningrad Region* dispute appears to offer an interesting picture, possibly undermining the above concept (at least *prima facie*). Namely, according to the facts of the latter case, the investment, if any, was made by the German party (*Dresdner Bank*) to the

[47] See, for instance, the very first ICSID (and, arguably, very first international investment arbitration) award in *Holiday Inns v. Morocco*, Decision of jurisdiction of 12 May 1974, discussed in Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, *in* BRITISH YEARBOOK OF INTERNATIONAL LAW, Oxford: Oxford University Press 159 (1980) or a very recent (and extremely relevant to the issue) Decision on Jurisdiction in *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Award of March 21, 2007, para. 127.

[48] Award in *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, November 26, 2009, para. 211.

[49] See Arts. 1(1)(c) and 1(1)(e) of the Ukraine – Germany BIT; Arts. I(1)(a)(iii) and I(1)(a)(v) of the Ukraine – U.S. BIT, Arts. 1(2)(c) and 1(2)(e) of the Uzbekistan – Switzerland BIT. In the meantime, the Lithuania – Russian Federation BIT is more specific, emphasizing the connection of the claims concerned to the investment in its Arts. 1(2)(c), yet, in the meantime, providing no such explicit link for the "*other rights*" in Art. 1(2)(e).

Russian Federation, or, in particular, to the Kaliningrad Region[50]. The dispute dealt with by the LCIA award, the recognition of which had been later sought and granted, has arisen exactly out of this relationship. In the meantime, at least according to the information available, the building located in Vilnius, Lithuania, and belonging to the *Kalinigrad Region* was just an administrative representation of the latter, not directly connected to the exercise of any investment activity whatsoever and, importantly, not [directly] linked to the dispute considered by the LCIA. Hence, the investment (and, arguably, the "*investor*") element was missing in the *Kaliningrad Region v. Lithuania* case. Nonetheless, on the basis of the available information, the position, taken by the parties to that dispute and the ICC Tribunal concerned, is unclear. It is not even known, was this particular jurisdictional issue considered in course of the relevant proceedings.

III.3. Host State's Obligations – Investment-Related Instruments versus the New York Convention

5.27. In case of the re-examination of the national judgments arising out of context of recognition and enforcement of foreign arbitral awards "*proper*" by the international arbitral tribunals, the interplay, or, as the case may be, the conflict between the obligations undertaken by the host state concerned under the New York Convention and those assumed under the relevant investment treaty might arise. Three basic instances of such could be outlined:

a. The compliance of the state with its obligations under the New York Convention essentially amounts to the compliance with the undertakings in respect to the treatment of investors;
b. The non-compliance with the obligations under the New York Convention simultaneously brings in a breach of the investor-related (treaty-based) obligations;
c. The compliance of the state with its obligations under the New York Convention is considered as a breach of the investor-related (treaty-based) obligations.

While the situation underlined under "*a*" above appears to be non-problematic overall and the positive recognition and enforcement record strengthens the investment – related image of the host state concerned, certain attention has to be devoted to the "*b*" and "*c*" situations.

5.28. Dwelling on the issue of the obligations of the state (or, in particular, the state judiciaries) under the New York Convention, one should necessarily

[50] This scheme of the relationship *inter alia* supports one of the jurisdictional objections, made by Lithuania in course of the ICC proceedings. Lithuania, namely, alleged, that the dispute at stake *de facto* is the controversy between the two states – Lithuania and Russian Federation, and, thus, has considered by the state v. state dispute resolution mechanism, provided for in the Lithuania – Russian Federation BIT (Art. 11), rather than via the investment arbitration intended for the disputes between state and investor (Art. 10).

note that the term "*non-compliance*" used above is of symbolic significance and is used to indicate a subjective perception (by the commentators, and, at times, by the courts of the different member states of the treaty, which, using the residual discretion they are provided with by virtue of the Art. V of the New York Convention, allow recognition and enforcement of foreign arbitral awards which were not granted recognition and enforcement elsewhere), rather than the objective assessment (made by the competent body). In its proper text, the Convention does not refer to any dispute resolution mechanism able to interpret its provisions or resolve the disputes arising between the states as far as its application is concerned. The "*gap*", nonetheless, is to be filled by reference to the general [state-to-state] dispute resolution framework of the United Nations. Dwelling on the Art. 36 of the Statute of International Court of Justice (ICJ), the principal judicial organ of the United Nations, it could be established, that the disputes referred to above will be subject to the ICJ's jurisdiction[51]. In the knowledge of the author, no dispute related to the interpretation of the New York Convention has yet been brought to the ICJ.

5.29. In the meantime, it should be safe to presume that the drafters of the New York Convention (some more than 50 years ago) were most likely not intending to see the international investment arbitration forum considering the compliance of the states with the provision thereof. Vesting the obligation to recognize and enforce arbitral awards and recognize arbitration agreements into the states[52], they were not necessarily intending to ever create an "*appellate body*" over the relevant actions of the latter. Nevertheless, the issue is could the international dispute settlement arena have changed so dramatically to *de facto* allow the New York Convention – based review proper in course of the investment arbitration?

5.30. Several tribunals concerned with the parties' direct reliance on the breach of the host state's obligations under the New York Convention (positioned among the rules of public international law or the rules of customary international law), have felt no reluctance or discomfort at least in discussing the possibility to consider such claims (*Romak, Kaliningrad Region*). Even more so, in *Saipem v. Bangladesh*, the recent controversy, in which the merits phase was completed, the breach of the New York Convention claims was considered, albeit in a very careful manner, with the tribunal, at least technically, distinguishing its task from the so-called "*New York Convention's appellate instance*". For instance, in the Decision on jurisdiction in *Saipem*, which has been later "*incorporated*" into the final award, the tribunal stated:

> *[...] To avoid any ambiguity, the Tribunal stresses that Saipem's claim does not deal with the courts' regular exercise of their power to rule over annulment or setting aside proceedings of an award*

[51] See, in particular, Arts. 36(2)(a) and 36(2)(c) of the Statute of the International Court of Justice.

[52] See Arts. III and II(1) of the New York Convention, respectively.

rendered within their jurisdiction. It deals with the court's alleged wrongful interference [...].

By accepting jurisdiction, this Tribunal does not institute itself as control body over the ICC Arbitration, nor as enforcement court, nor as supranational appellate body for local court decisions. This Tribunal is a treaty judge. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise[53].

It might be presumed, thus, that in the cases of non-enforcement of foreign arbitral awards (or, as in *Saipem* – "*cancellation*" of the arbitration agreement), the tribunals would be "*exclusively*" looking for the traits of malfeasance in the actions of the domestic courts. In case such traits would be found, the breach of the obligations of the host state under the relevant investment treaty would be established, and, if appropriate, the due compensation – awarded.

5.31. It is interesting to admit, however, that, according to the tribunal's reasoning in *Saipem*, the establishment of the breach of the state's obligations under the New York Convention might also take place "*along the way*", yet, essentially, as a step in establishing wrongfulness of the judicial conduct rather than as a final determination. This approach is quite remarkable in both *de facto* confirming the power of the investment arbitration tribunal to evaluate the compliance of the host state with the Convention (despite the disclaimer of the same made in this regard), yet, to do so "*discretely*", within the part of the general evaluation of the conduct of the state judiciary and positioning the findings of the violations, if any, as only one of the cumulative grounds on which the state's responsibility would be based.

5.32. The same matter, nevertheless, might gain a different context once the relevant BIT expressly deals with the recognition and enforcement obligations of the state and, arguably, modifies the obligations of the Member States under the New York Convention. The issue seems to have been touched upon in the *Kaliningrad Region* case, where, still within the jurisdictional phase, the tribunal had a brief look at the conflict of the two relevant treaties – New York Convention and Lithuania – Russian Federation BIT, concluding, that it does not see the reflection of intent to modify the recognition and enforcement framework of the Convention in the BIT[54].

5.33. Indeed, it is not easy to imagine such a modification as, to be relevant in the exact context of the dispute at stake, it should have had a restrictive effect on the recognition and enforcement regime of the Convention, for instance, by expanding the scope of the circumstances, in which recognition and enforcement of a foreign arbitral award could have been denied. This is a complex (or, even, a barely possible) task taken both – an

[53] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award of June 30, 2009, paras. 155, 158.

[54] It is not completely clear from the available reports as to why the tribunal declined its jurisdiction over the case- because of the [probable] absence of investments (as discussed above) or due to the reluctance to address the New York Convention-related issues (as is seemingly alleged by Peterson, *supra* note 26).

overall "*pro-enforcement bias*" of the Convention and the possibility of the party seeking recognition and enforcement to rely on the instrument of its choice, more favourable in terms of the latter, provided for in the Art. VII(1) of the Convention.

5.34. Nevertheless, representing the "*c*" – type situation[55], the *Kaliningrad Region* case is obviously specific. A more conventional ("*b*"- type)[56] state of affairs that might reasonably be (and, actually, is) brought before the eyes of the international investment arbitration tribunals is the one when recognition and enforcement of the award is, exactly to the contrary, denied. Here, presuming that the language of the BIT would be intended to deal with the issue of recognition and enforcement, and so would also be not only more favourable towards the recognition and enforcement, but also specific enough, the cause of action might arguably exist. For the purposes of such an outcome, however, the relevant provisions of the BIT would have to be relied on by the investor concerned in course of the recognition and enforcement proceedings in the host state, or should the language of the Art. VII(1) of the New York Convention be interpreted as authorizing or, rather, requiring the court concerned to rely on the more pro-enforcement ground *sua sponte*, by the enforcing court.

III.4. Substantive Claims Made (An Overview)

5.35. Besides the core jurisdictional and conflict of treaties issues, however, it is quite exciting to have a brief look at the substantive claims made in the recognition and enforcement related cases. For the sake of clarity, it should be noted that the choice of the claims to be raised out of the similar factual background (that of actions resorted to by the national courts in course of the recognition and enforcement phase of international commercial arbitration) is dependent on the "*portfolio*" of the protected entitlements subject to its dispute settlement mechanism, available in the applicable investment treaty[57], as, eventually, several ways to structure a recourse are potentially possible. The Table 3 below visually presents an overview of such claims, inasmuch as the relevant information is available.

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[55] An exceptional case when the compliance of the state with its obligations under the New York Convention is considered as a breach of the investor-related (treaty-based) obligations.

[56] The situation where non-compliance with the obligations under the New York Convention is seen as simultaneously bringing in a breach of the investor-related (treaty-based) obligations.

[57] For instance, the choice of the remedy by *Saipem* has been explained in the following manner in the para 121 of the respective award (note 53 above):

> *Saipem does consider that the misconduct of the domestic courts did also amount to a denial of justice, at least in the form of a "Prevention from arbitrating", or, "Obstruction of the agreed mechanism for the settlement of the disputes arising from the contract". [...] However, Article 9.1 of the BIT does not confer to your Tribunal jurisdiction over a claim based on denial of justice, and restricts your jurisdiction to a claim for expropriation. This is why we did not bring a claim on the ground of denial of justice before you.*

Table 3. ***Substantive Investment Claims Made in Cases Related to the Recognition and Enforcement of Foreign Arbitral Awards***

Dispute	Expropriation	Denial of Justice	Breach of		
			Other than BIT-based obligations	FET[2]	The other BIT provision(s)
Western NIS v. Ukraine		X			
Romak v. Uzbekistan	X	X	X	X	X
Kaliningrad Region v. Lithuania	X				
GEA Group v. Ukraine		X			

5.36. Up until now, because of the jurisdictional findings in the *Romak* and *Kaliningrad Region* disputes, the settlement reached in *Western NIS* and pendency of the proceedings in *GEA*, no applied feedback on the above issues is available. Nevertheless, even on the level of presumption and judging from some of the information about the positions taken by the parties in the terminated proceedings, a potential for a quite exciting discussions, should the merits be ever reached, is undeniably present.

5.37. The further discussion will concentrate on the claims pertaining to the expropriation and denial of justice due to the most frequent history of reliance of the parties thereon in the controversies concerned.

III.4.1. Expropriation (or Measures Having Similar Effects) through Enforcement or Denial of Enforcement

5.38. In terms of expropriation, which, according to the position of the tribunal in the *Kaliningrad Region* dispute, could potentially take place via the recognition and enforcement of a foreign arbitral award, more guidance could be sought in the Decision on Jurisdiction and Recommendation on Provisional Measures in *Saipem v. Bangladesh*[58] as well as in the final

[58] Dated March 21, 2007. In particular, see Section IV.5.2 of the Decision. The *Saipem v. Bangladesh* controversy itself was not dealt with in more detail in this contribution for the reason of the specific factual background it dwells on, and, in particular, due to the fact that it deals with the local judicial interference with the arbitration and annulment of the arbitral (ICC) award at the seat, rather than with the recognition and enforcement issues. A somewhat similar situation has arisen in another ICSID case, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID

award rendered in the same case. The *Saipem* tribunal has found traits of expropriation in somewhat comparable actions of the national judicial bodies, linked to the arbitration[59].

5.39. Without going deep into the more detailed elaboration over the elements of expropriation to be located and further covered in the tribunal's reasoning, an important for the dividing line between the expropriation and denial of justice substantive element has to be noted. While the exhaustion of the national judicial remedies is of crucial significance for the denial of justice claim[60], the same is not the case for the allegations of expropriation, where, rather, the fact of taking is of crucial value (as confronted with the process).

5.40. Furthermore, addressing the denial (or granting) of the recognition and enforcement to foreign arbitral award, in one jurisdiction or the other, an important matter, arising out of the nature of the powers of such a jurisdiction over the arbitral award should definitely be given due weight. Namely, following the idea of existence of the two types of jurisdictions – *primary*, that of the seat of arbitration (or, potentially, of the country whose procedural law is applied), where the award is subject to annulment and *secondary*, that of the state where the recognition and enforcement of the award is sought[61], the only discretion of which is to grant recognition and enforcement of the award, thus admitting the latter to the national legal system, or to refrain from doing so. Notably, whilst the primary jurisdiction, which essentially and, in the view most widely shared, has a "*life-threatening*" power over the award being able to "*erase*" the latter, thus depriving the secondary jurisdictions (arguably excluding the

Case No. ARB/08/2, Award of February 28, 2008, concerned with the annulment of the award rendered in Jordan by the Jordanian courts and the retrospective extinguishment of the arbitration agreement. The award in the case was rendered in May 2010.

[59] See Award in *Saipem* (note 52 above), para. 129. Nevertheless, the reservation here should be made, noting that the possibility of such a "*potential*" to become reality should be accessed separately in each given case.

[60] See *Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award of June 26, 2003, explaining, that:

> *The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.*

[61] See, for instance, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, Nos. 02-20042 & 03-20602, 2004 WL 541837 (5th Cir. March 23, 2004) at 5. The Court, in particular, stated:

> *The [New York] Convention 'mandates very different regimes for the review of the awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are thought.' Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.*

"special case" of France) from even being able to resort to its competences, the decision in regard to the award, made by the secondary jurisdiction, effectively has no influence neither on the existence of the award, nor on the assessment of the award in the other [secondary] jurisdictions, where it might be brought for the recognition and enforcement. What follows from the above complicated scheme is that the denial of the recognition and enforcement does not have an *"erga omnes"* effect and, even if an instance of the earlier has occurred, the recognition and enforcement could be sought (and granted) by the other jurisdictions. This is exactly on the basis of the situation described that certain authors suggest the improbability of the expropriation situations when the recognition and enforcement scheme is at stake[62].

5.41. Nonetheless, the above conclusion could indeed be subject to criticism, foremost because the scheme described above is vulnerable at the point of *de facto* obligating the investor to initiate alternative recognition and enforcement proceedings, in case of failing the initial attempt to get the award enforced in order to *"exhaust the [internationally] available remedies"*. This way the enforcement forum shopping seems to be encouraged, which is hardly one of the aims pursued by the New York Convention. Moreover, at times, as this, for instance, took place in *Saipem*, the assets in the different jurisdictions are not available, thus, even though theoretically recognition and enforcement of the award could be sought elsewhere, there is no real possibility to resort thereto[63].

III.4.2. A [Sui Generis] Denial of Justice

5.42. No less exciting could be a denial of justice evaluation, which, in the particular context taken, would bear a strong link to the expropriation. The probability of such a link, acknowledged in the Decision on Jurisdiction and Recommendation on Provisional Measures in *Saipem v. Bangladesh*, already referred to above, is also quite logical judging from the relevant case law of the ECtHR, in which the bond between the fair trial provisions of the ECHR Art. 6(1) and Art. 1 of the Protocol 1 to the same Convention, dealing with the enjoyment of property, is consistently maintained.

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62 See Yaraslau Kryvoi, *Can an Arbitration Award Be Expropriated? Introductory note to Kin-Stib and Majkic v. Serbia* 49 INTERNATIONAL LEGAL MATERIALS 1181 (July 24, 2010), stating:

> *[...] because New York Convention awards can be enforced in multiple jurisdictions and require a special recognition they cannot be expropriated.*

63 Award in *Saipem* (note 52 above), para. 130, where the tribunal, namely, stated:
It is true that one could object – Bangladesh did not – that in theory Saipem can still benefit from the ICC Award (or from the ICC arbitration agreement). Yet, Bangladesh itself acknowledges that Petrobangla has "no assets outside Bangladesh" [...]. Hence, the perspective that the ICC Award could possibly be enforced under the New York Convention outside Bangladesh despite having been declared "a nullity" by the Bangladeshi courts has no realistic basis.

5.43. The extent of the gravity of the violation and the issue of exhaustion of the local (judicial) remedies in the denial of justice cases related to the recognition and enforcement proceedings are just some matters from the checklist before the tribunal which would be seized with the claim. In this light, it is indeed a pity that, due to the settlement reached by the parties in the *Western NIS*[64], the renowned specialist in denial of justice in international law (and, *inter alia*, international arbitration) domain, Jan Paulsson[65], appointed as an arbitrator by *Ukraine*, could not have presented his reflections on the issues in the deliberations of the tribunal and, subsequently, in the award.

5.44. Furthermore, as denial of justice is a complex concept and implies a grave malfunctioning of the judicial system, it would be too much to presume that particular judicial decisions, once challenged individually, without more "*far-reaching*" violations raised, could justify a denial of justice claim. A look at the three relevant proceedings in which the allegations of the denial of justice were raised (*Western NIS*, *Romak* and *GEA*), as outlined above, however, shows that at least two of them (with the exception of the *Western NIS* dispute) rather dealt with the specific controversy and its result, falling short of challenging the respective systems overall. As far as *Western NIS* is concerned, here, indeed, the investment arbitration claim seemed to side with the AAA award, which condemned the Ukrainian judiciary for its [alleged] bias. However, at least on the basis of the available information, the latter dispute has fallen short of providing the sufficient proof of the defects of the [entire] system it has been challenging as well.

5.45. It is true that such sensible evidence is difficult to obtain and, moreover, no consensus currently exists as to what would constitute the appropriate evidence. To draw on several examples, the reliance on the newspaper reports, alleging the corrupt nature of the Russian system of justice by the Dutch courts in the *Yukos v. Rosneft*' recognition and enforcement proceedings was severely criticized by Albert Jan van den Berg[66]. Potentially, indeed, the evidence that the system at stake is functioning in an undue manner and the denial of justice is highly likely, might originate from the careful analysis of the text of the decision themselves and, where (and to the extent) applicable – from the relevant laws. However, while at times this venue might furnish satisfactory results, as, for instance, in the *Osorio v. Dole Food Company* case, considered by the Federal

[64] On this issue, see, *inter alia*, Sergei A. Voitovich, *Western NIS Enterprise Fund vs. Ukraine – Certain Issues of Denial of Justice in the Discontinued investment Arbitration*, THE UKRAINIAN JOURNAL OF BUSINESS LAW (August 2006). Available online at: http://www.gp.ua/content/files/artvitovich3.pdf (accessed on December 20, 2010).

[65] See, *inter alia*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, Cambridge: Cambridge University Press (2005).

[66] Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009*, 27 (2) JOURNAL OF INTERNATIONAL ARBITRATION 179 (2010)

District Court of Southern District of Florida[67], such an approach might not be efficient at all times, especially taking into consideration the fact that the decisions rendered by the courts of the CIS member states[68] are very concise and, usually, do not contain extensive reasoning or the presentation of the facts of the case.

5.46. Even though the debates over the nature of the denial of justice (as encompassing only procedural violations, or, alternatively, substantive violations or even both) is still pending, the balance still seems to be struck towards the substantive side, inter alia due to the contribution made thereto by Jan Paulsson. Approaching the four investment arbitration disputes analysed above from this particular perspective, it could be uncovered that in neither of them the claimants are relying on the procedural discrepancies. What is challenged is the reliance of the courts on the certain grounds for the denial of recognition and enforcement (*Western NIS, GEA*), the inadmissibility of the recognition and enforcement request in light of submission of certain documents (*Romak*) and, finally, the legal framework allowing arrest and subsequent sale of certain properties in course of recognition and enforcement of a foreign arbitral award (*Kaliningrad Region*). All claims essentially being substantive, a denial of justice situation, at least in its conventional understanding, might not even arise.

III.5. Enforceability of Investment Arbitration Awards Dealing with the Denial of Recognition and Enforcement of [Potentially] Rendered Foreign Arbitral Awards

5.47. A reasonable and well-placed concern is that of the further, post-arbitration, fate of the investment arbitration awards dealing with the areas of concern in the present article. Predictably, depending on the forum in which such awards were rendered, they would be subject to the two different recognition and enforcement regimes – the so-called

[67] *Osorio v. Dole Food Co.*, 1:07-22693, U.S. District Court, Southern District of Florida (Miami.), the summary of the case prepared by Trey Childress is available at Conflict of Laws Net:
http://conflictoflaws.net/2009/us-court-refuses-to-enforce-nicaraguan-judgment (accessed on December 20, 2010).

[68] CIS is the international organization, or alliance, consisting of the former Soviet Republics: Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, and Uzbekistan. Turkmenistan discontinued permanent membership as of August 26, 2005 and is now an associate member, Georgia, a member of the organization since 1994, announced its withdrawal therefrom on August 18, 2008 (effective from August 17, 2009). Finally, Ukraine, while being one of the founding members of the CIS in 1991 never ratified the CIS Charter, thus, officially, is doubtfully a CIS member state. Yet it *de facto* participates in the CIS activities. For this reason, Ukraine is going to be seen as a member state of the CIS for the purposes of this article. With the mention of the CIS region, thus, the reference is made to the above countries and their legal systems.

"*automatic*" enforcement, characteristic for ICSID awards[69], and the recognition and enforcement regime of the New York Convention (or, much rarely so, to the regime proscribed by another relevant treaty). Whilst for in terms of the ICSID enforcement mechanism the avenues for recourse against the arbitral awards are limited) on both – ICSID *ad hoc* appellate mechanism and the national courts' levels[70], more problems could potentially ensue as far as the recognition and enforcement of the awards rendered outside of the ICSID, in the institutional or *ad hoc* arbitration, is concerned. The eminent risk here might arise out of the possible application of public policy grounds for the denial of recognition and enforcement, based on the allegations of impropriety of submission of the evaluation of the conduct of the state's courts in the recognition and enforcement context for the assessment of the international investment arbitration. Essentially, a situation similar to that of *Western NIS*, where the foreign arbitral award was denied recognition and enforcement *inter alia* [arguably] because of the unfavourable evaluation given to the Ukrainian judicial system by the AAA tribunal, might occur. In addition, again by the similar token as in the *Western NIS*, the enforcement courts might read the arbitration-related provisions restrictively, failing to allow in, say, the denial of justice claims, unless the relevant international investment treaty expressly provides for the respective entitlement.

Concluding Remarks

5.48. Summarizing the findings made in the course of the scrutiny performed, one should note that the possibility of consideration of the disputes arising out of the actions of state judiciaries in the context of recognition and enforcement of foreign arbitral awards should not be overlooked. There is a potential for an increase in the number of claims of the kind being brought for the resolution by the international investment arbitration tribunals. The "*progress*" seems to be irreversible and new challenges to the judicial independence of the host states are probable.

5.49. Nevertheless, the existent case-law clearly demonstrates several important trends that might militate against a "*review boom*" before international investment arbitration tribunals in future. First of all, it is reasonable to expect that the tribunals would continue to carefully perform the "*existence of the underlining investment*" test, this way sorting the disputes arising out of the recognition and enforcement of foreign arbitral awards originating from the transactions having the "*general commercial*" rather than the "*investment*" background out. Consequently,

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[69] Arts. 53-56 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States International Centre for Settlement of Investment Disputes, Done at Washington, D.C., March 18, 1965, T.I.A.S. No. 6090, 575 U.N.T.S. 159; Entered into Force: October 14, 1966.

[70] Edward Baldwin, Mark Kantor and Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 (1) JOURNAL OF INTERNATIONAL ARBITRATION 1–24 (2006).

only the investment-related controversies bear a threat of being subject to the "new" level of the scrutiny before the arbitral tribunals[71]. Secondly, the analysis of the merits, representing an even more serious challenge in respect of the possibility of establishment of expropriation overall (in light of the potential existence of the alternative fora for the recognition and enforcement), exhaustion of the local [judicial] remedies requirements for the purposes of the denial of justice determination, as well as arguably procedural-only character of the latter, might support the conclusion, that the re-examination of the recognition and enforcement decision of the national courts in the investment arbitration should not be perceived as a venue for an easy recourse. Thirdly, as explained in more detail above, the investment arbitration award evaluating the actions of the national court at the recognition and enforcement phase, might become (especially if rendered outside the context of the ICSID) as vulnerable to the enforcement itself, as the award initially subject to the judicial scrutiny in the national post-award phase proceedings, this way subjecting the utility of this additional level of recourse to certain doubt.

5.50. As a matter of a more general trend, which, though, to certain extent, catalyses the reluctance of the investment arbitration tribunals to consider the recognition and enforcement-based claims, one should name their still somewhat under-defined powers in ruling on the compliance by the states with their obligations under the New York Convention. So far only the tribunals in *Saipem* and *ATA Construction* have essentially analysed the compliance of the states with the obligations undertaken under the treaty (both in regard to the enforcement of international arbitration agreements under Art. II of the Convention). The evaluations made were not emphasized in the reasoning and, technically (especially as far as *Saipem* is concerned), identified as a special type of assessment, not amounting to an "*appeal*" over the respective holdings.

5.51. Nevertheless, taken that the current international investment arbitration practice has proven that the re-examination of the decisions made by the state courts in course of the recognition and enforcement phase proceedings might be possible, the host states might indeed consider the pre-emptive step of removing the investment disputes arising out of the recognition and enforcement of foreign awards domain from the scope of their respective consents to the investment arbitration as reflected in the investment treaties, or, at least to access this issue for the purposes of negotiating the new similar instruments.

[71] A more inclusive scope of the controversies, however, might fall within the ECHR jurisdictional pool, as discussed in the relevant subchapter above.

Summaries

DEU [***Internationale Überprüfung von Entescheidungen zur Anerkennung und Vollstreckung ausländisher Schiedssprüche (mit Schwerpunkt auf den Entwicklungen im umfeld Internationaler Investitionen) – eine Bedrohung der Eigenstaatlichkeit oder eine (Bislang) Überschätzte gefahr?***]

Der Artikel untersucht die Möglichkeiten der Überprüfung von Entscheidungen nationaler Gerichte in Sachen Anerkennung und Vollstreckung ausländischer Schiedssprüche durch internationale BIT-Schiedsgerichte – eine relativ neue Entwicklung, von der wohl behauptet werden darf, dass sie die unabhängige Entscheidungsgewalt der Gerichtsbarkeit in Gastländern durch Einführung eines neuen „Berufungsmechanismus" weiter einschränkt, der die „Angemessenheit" ihrer Urteile überprüft. Bei genauerem Hinsehen stellen wir, gestützt auf eine Analyse des vorliegenden Fallrechts, fest, dass – ungeachtet einer gewissen Zurückhaltung bezüglich derartiger schiedsrichterlicher Nachprüfungen innerhalb des Systems für die internationale Streitbeilegung generell – BIT-Schiedstribunale bei Vorliegen der Zuständigkeitsvoraussetzungen prinzipiell ein mögliches Forum für die Revision nationaler Urteile darstellen und gegebenenfalls von Streitparteien unter Verweis auf Enteignung, Verweigerung des Rechtsschutzes und ähnlichen, sich aus dem jeweiligen Kontext ergebenden, Einreden angerufen werden können. Eine Reihe kontroverser Punkte dürfte freilich eine Herausforderung für Investoren darstellen, wenn es darum geht, die Stichhaltigkeit ihres Revisionsanspruchs zu belegen: so etwa die [potenzielle] Existenz alternativer Vollstreckungswege (welche die Behauptung einer Enteignung wohl ausräumen dürfte), oder die Notwendigkeit, zuerst sämtliche auf nationaler Ebene verfügbaren Rechtsmittel auszunutzen (in Fällen, in denen eine Verweigerung des Rechtsschutzes behauptet wird). Unklar sind bis dato außerdem die Erfolgsaussichten einer Vollstreckung internationaler BIT-Schiedssprüche zur Schlichtung von Streitigkeiten nach Ergehen eines ‚erstinstanzlichen' Spruchs und außerhalb des ICSID-Kontexts. Es ist durchaus möglich, dass derartige Entscheidungen das Schicksal der Schiedssprüche teilen werden, deren erfolgreiche bzw. erfolglose Anerkennung und Vollstreckung sie zum Gegenstand haben.

CZE [***Mezinárodní přezkoumávání rozhodnutí týkajících se uznávání a výkonu cizích rozhodčích nálezů (s důrazem na vývoj v rámci prostředí mezinárodního investičního rozhodčího řízení) – hrozba pro suverenitu států, nebo spíše [dosud] přeceňované riziko?***]

Článek se zabývá možnostmi přezkoumání rozhodnutí vnitrostátních soudů ve vztahu k uznání a výkonu cizích rozhodčích nálezů ze strany mezinárodních investičních rozhodčích tribunálů – relativně novým vývojem, který údajně omezuje suverenitu soudních orgánů hostitelských států ještě více tím, že vytváří nový „odvolací" mechanismus, čímž prověřuje „přiměřenost" jejich příslušných verdiktů. Tato kontrola, založená na analýze judikatury, prokazuje, že zatímco všeobecně dotčené mechanismy řešení mezinárodních sporů vykazují určitou neochotu zabývat se přezkoumáním tohoto druhu, mohlo by se v zásadě jednat, pokud jsou splněny předpoklady jurisdikce, o možné místo nového

přezkoumávání příslušných vnitrostátních rozsudků, které by případně mohli vyvolat účastníci vznášející nároky z důvodu vyvlastnění majetku, odepření spravedlnosti apod., vyplývající z příslušné situace. Rozpory však slibují být značnou výzvou pro investory, pokud jde o fázi prokazování skutkové podstaty ve světle [případné] existence alternativních soudů k výkonu (údajně eliminujících nárok spočívající ve vyvlastnění majetku), případně ve světle potřeby vyčerpat všechny dostupné vnitrostátní soudní opravné prostředky (v případech týkajících se odepření spravedlnosti). Navíc jsou dosud nejasné vyhlídky výkonu rozhodčích nálezů v mezinárodních investičních rozhodčích řízeních zabývajících se rozpory v rámci fáze následující po vydání nálezu vydaného mimo Mezinárodní centrum pro urovnávání investičních sporů. Mohl by je totiž stihnout stejný osud jako nálezy s úspěšným nebo neúspěšným uznáním a výkonem, kterých se týkají.

POL [***Międzynarodowy przegląd dezyzji dotyczących uznawania i wykonywania orzeczeń zagranicznych sądów arbitrażowych (ze szczególnym uwzględnieniem zdarzeń zachodzących podczas rozpatrywania przez sądy arbitrażowe spraw związanych z inwestycjami o charakterze międzynarodowym) – zagrożenie dla suwerenności państw, czy też [jak dotąd] wyolbrzymiane ryzyko?***]

Niniejszy artykuł opisuje dostępne środki ponownego rozpatrywania orzeczeń sądów krajowych w zakresie uznawania i wykonywania orzeczeń wydawanych przez zagraniczne sądy arbitrażu inwestycyjnego – względnie nowe zjawisko stanowiące potencjalne ograniczenie suwerenności władz sądowych w państwach przyjmujących inwestycje, mające swoje źródło w utworzeniu nowego mechanizmu kontroli „prawidłowości" stosownych orzeczeń.

FRA [***Contrôle et révision des décisions en matière de reconnaissance et d'exécution des sentences arbitrales rendues à l'étranger – un risque pour la souveraineté des Etats ? (étude des développements dans le cadre de l'arbitrage d'investissement)***]

Cet article décrit les voies et moyens de procéder au contrôle et à la révision des décisions des tribunaux nationaux en matière de reconnaissance et d'exécution des sentences arbitrales rendues à l'étranger. A travers la pratique, en particulier, des tribunaux arbitraux d'investissements, l'article met à jour un phénomène relativement nouveau et qui risque de limiter la souveraineté des Etats hôtes du fait du contrôle exercé sur les décisions émises par leurs autorités judiciaires.

RUS [***Пересмотр судебных решений касающихся признания и исполнения иностранных арбитражных решений международными инвестиционными трибуналами – угроза государственному суверенитету или пока переоцененный риск?***]

В статье рассматриваются возможности пересмотра решений национальных судов, разрешающие признание и исполнение иностранных арбитражных решений либо отказывающие в таковом,

международными инвестиционными арбитражными судами – относительно новое явление, потенциально ограничивающее суверенитет судебной власти государств – реципиентов инвестиций путем создания нового механизм проверки «правильности» соответствующих судебных решений.

ES [***Revisión internacional de resoluciones concernientes al reconocimiento y la ejecución de decisiones judiciales de los tribunales de arbitraje extranjeros (con énfasis en el avance de los acontecimientos vinculados con el arbitraje de las invesrsiones internacionales : ¿una amenaza para la soberanía de los estados o un peligro? Considerado hasta ahora como sobrestimado?***]
El artículo trata sobre la posibilidad de reconsiderar los fallos judiciales nacionales con respecto al reconocimiento y la aplicación de concesiones de arbitraje extranjero mediante tribunales de arbitraje de inversión; un fenómeno relativamente nuevo que limita la soberanía de las autoridades judiciales de los Estados receptores de las inversiones por medio de la creación de un nuevo mecanismo de comprobación de la "certeza" de las decisiones judiciales pertinentes

Oleksiy Kononov

International Investment Law: Is it Time to Change the Traditional BIT System?

Key words:
BIT regime | BITs | BRIC countries | common commercial policy | ICSID | international investment regime | liberalism | MAI | Marxism | mercantilism | North--South confrontation | renegotiation of BITs | TFEU

Abstract | *This paper argues that the current international investment regime predominantly based on bilateral investment treaties (BITs) is exhausting its capacity as an efficient tool for regulating international investment. The increasing number of international investment agreements (IIAs) further perpetuates and accentuates the defragmented international investment regulation. Moreover, the existing regime can hardly accommodate the needs of developed states concerned with increasing investments from former capital-importing economies (e.g., BRIC countries) and sovereign wealth funds.*
Based on historical experience, it remains unlikely that a new multilateral investment treaty initiative will be successful in near future. However, the international community may deepen regional co-operation and foster conclusion of regional investment treaties better designed for current challenges. It might become a provisional measure which would facilitate negotiation of a MAI remaining on the international agenda.

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I. Introduction

6.01. Being deprived of centralized decision-making features and a multilateral treaty covering investment-related issues like, for example, in the GATT/ WTO, UN or EU, the system of international investment law has been predominantly based on numerous BITs and regional free trade agreements (FTA) like NAFTA or MERCOSUR, as well as an extensive case law developed by investment arbitration. It took a while to create this system, to establish its basic principles sacrificing sovereignty of investor-importing states and multiplying the number of existing BITs. The North-South confrontation which froze in the 1970s after a series of compromising UN resolutions on sovereignty of host states seems to re-appear nowadays. Developing capital-importing states are once again concerned about their sovereign rights to deal with foreign investments in their territory, demonstrate frustration in the ICSID arbitration, which they consider one-sided and prejudiced toward host countries[1]. Growing outward investments from former capital-importing states like Brazil, Russia, India or China (so-called BRIC countries), BIT re-negotiation problems in the EU after the Lisbon Treaty, complicate the situation even further. History is cyclic in this case; old problems with the international investment regime are at stake once again. Will the current BIT system survive or will it be converted into a complex of regional multilateral agreements like, for example, between the EU and third countries or other international entities like NAFTA? If BIT arrangements were to shift into regional multilateral treaties, would it be a smooth process? To answer these difficult questions, it appears useful to briefly recall the past (the legal history on this matter).

II. From Military Coercion to Investment Treaties

6.02. Nowadays nobody challenges the postulate that states are entitled to give diplomatic support to their citizens in other (foreign, host) states. At the same time, foreigners, being in a host state, must obey the laws of that state; to put it in other words, foreigners have to accept rights and obligations existing for citizens of the host state, and there is no possibility of the host state exempting foreigners from its jurisdiction[2]. These rather simple diplomatic rules brought about the emergence of a concept, according to which a foreign investor is obliged to obey a host state in

[1] Existing concerns and problems have been briefly described and analyzed in a rather unconventional publication prepared recently by the Investment Working Group of the Seattle to Brussels Network, see RECLAIMING PUBLIC INTEREST IN EUROPE'S INTERNATIONAL INVESTMENT POLICY. EU INVESTMENT AGREEMENTS IN THE LISBON TREATY ERA: A READER, Amsterdam: Seattle to Brussels Network (R. Eventon ed., 2010)

[2] See MALCOLM N. SHAW QC, INTERNATIONAL LAW, Cambridge: Cambridge University Press 722–723 (5th ed. 2003).

exchange for protection of his property against wealth deprivation[3] and permission to exercise business activities in the host state's territory. It took centuries to work out these customary rules, and three political economy theories concerning the relationship between the State and the market: mercantilism, Marxism and liberalism played a decisive part in the process.

6.03. Mercantilism came into existence together with the strengthening of colonialism in the sixteenth – seventeenth centuries. Mercantilism advocated extensive state regulation in pursue of national interests, it equated national wealth and prosperity with the quantity of gold available to the State and sought to restrict imports simultaneously increasing exports in order to increase the supply of gold[4]. Resources (mainly gold), according to mercantilists, were to be procured in colonies; at the same time, colonies were regarded as markets for the State's export. Therefore, all capital placements had to be performed with the purpose of expanding colonial possessions[5]. Mercantilism traditionally regarded trade as a source to earn capital for further investment. There was no necessity to work out legal instruments for protection of traders because the whole idea of protection was based on military power of the empire, bayonets substituted laws and soldiers substituted lawyers.

6.04. Mercantilism managed to live without challenges for a remarkable period of time. In the eighteenth century, liberals (Smith and Ricardo) started to argue that wealth was best measured by the productivity of people rather than by the amount of gold, and that the productivity was best achieved by unregulated market[6]. Liberals opposed the very idea of restricting international trade claiming that market must rule the trade[7]. Liberal theory became the foundation for the international free trade movement in Europe (*laissez faire*) already by mid nineteenth century.

6.05. Despite all these developments in the economic theories scholars of the time were not much concerned with international investment[8].

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[3] Weston in particular stressed that "wealth deprivation" is a term which avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. See Burns H. Weston, *'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation',* 16 VA. J. INT'L L. 103, 112 (1975). Thomas Pollan calls the history of FDI law "the history of expropriation". See THOMAS POLLAN, LEGAL FRAMEWORK FOR THE ADMISSION OF FDI, Ultrecht: Eleven International Publishing 64 (2006).

[4] DOMINICK SALVATORE, INTERNATIONAL ECONOMICS, Englewood Cliffs, N.J.: Prentice-Hall 26–28 (5th ed. 1995); Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 375 (1998).

[5] Kenneth J. Vandevelde, *supra* note 4, at 375.

[6] See Jeffrey A. Frieden & David A. Lake, *International Politics and International Economics, in* INTERNATIONAL POLITICAL ECONOMY, New York: St. Martin's 1, 25 (J. A. Frieden, D. A. Lake eds., 3rd ed. 1996).

[7] *Ibid.;* GEORGE T. CRANE, ABLA AMAWI, THE THEORETICAL EVOLUTION OF INTERNATIONAL POLITICAL ECONOMY, Oxford: Oxford University Press 6 – 7, 55 – 58 (1997).

[8] Kenneth J. Vandevelde, *supra* note 4, at 376.

Communication and travel difficulties prevented foreign direct investment (FDI)[9], though large capital surpluses created during the nineteenth century industrialization became available for the purpose. But the vast majority of those investments, as Cameron notes, was portfolio investment(s)[10]. The situation changed by the end of the nineteenth century when the corporate form of business became widely spread. Following the increase of foreign investment, it became more common for host states to seize the investments, and for capital-exporting states to demand compensation for those seizures. As of that time lawyers received more say in the matter. To illustrate, Brownlie noted that, within 100 years after 1840, some sixty claims commissions had been established to settle disputes arising from injuries to the interests of aliens[11]. However, reference to legal protection tools was an exception rather than a rule in those years. Besides, nobody made any distinction between pure trade, investment, and other forms of economic activity. Protection of own citizens as well as property abroad remained the concern of the government that preferred to rely on the language of military force.

6.06. Consequently, with the booming foreign investments, Marxist theory came onto the stage. Being concerned with the prosperity of the working class and peasants, Marxists contended that the accumulation of large quantities of surplus capital in industrialized countries would lead to an oversupply and thus reduce profits earned by investors[12]. Such situation forced capitalists to invest in non-industrialized states, and this, in its turn then was to help the economic development there, a necessary step on the way to socialism. But, as Marxists stressed, the development was achieved by means of low wages for workers, cheap raw materials and lands which means misery for the working class and the necessity of the proletarian revolution[13]. It is a paradox, but with all their hatred for increased profits and private property Marxists were among the first

[9] Different opinions, do, however, exist. Transnational corporations (TNC) or multinational enterprises (MNE) are regarded as the main carriers of FDI. British East India Company and Dutch East India Company are classical examples of the first such carriers in human history. *Cf.* Karl Moore and David C. Lewis insist that the first "multinationals" were Assyrian traders circa 2000 B.C. See, Karl Moore, David C. Lewis, *The First Multinationals: Assyria circa 2000 B.C.*, 38 (2) Management International Review 95 (1998). Other scholars claim that first MNEs emerged in the late 19th century due to the development of telegraph, steamships and railroads which made it possible to control investments. See The Growth Of Multinationals, International Library Of Critical Writings In Business History, London: Edward Elgar Publishing Ltd. 1 (M. Wilkins ed., 1991).

[10] Rondo Cameron, A Concise Economic History Of The World, Oxford: Oxford University Press 130–62 (3rd ed. 1997).

[11] Ian Brownlie, Principles Of Public International Law, Oxford: Oxford University Press 521 (4th ed. 1990).

[12] Kenneth J. Vandevelde, *supra* note 4, at 380–81.

[13] Vladimir Lenin, Imperialism: The Highest Stage Of Capitalism, New York: International Publishers 63 (1977).

to develop ideas which later became central for direct investment (cheap labour and resources, higher profits, lack of local capital).

6.07. Despite the booming investments, internationally, cases of legal protection of foreign investors and their property were very rare even in the first decade of the twentieth century. In fact, no instruments of legal protection existed. The explanation was easy – *"[n]o elaborate framework for foreign investments was needed at the time because most investment was conducted within Europe, between the U.S. and Europe and within their colonial territories"*[14]. States still relied mostly on the military to protect their citizens and their property abroad. The situation changed marginally after the World War I and the Bolshevik Revolution in Russia, when aggrieved states and private parties started to file claims with different arbitration institutions[15]. While settling disputes the arbitral institutions broadened the old concept of the right of a state to exercise diplomatic protection of its citizens abroad (to seek redress for injuries to its citizens caused by action(s) of foreign powers) by applying it to protect foreign investments[16]. In 1929–31, the International Chamber of Commerce (ICC) and the League of Nations undertook efforts to draft a multilateral agreement on foreign investment but failed[17]. At the same time, the reversed processes were typical during that time (end of the nineteenth century – end of World War II). The United States, for example, reserved the exclusive prerogative to use military force to collect private debts in the Americas (so-called Roosevelt Corollary to the Monroe Doctrine). In fact, it was a response to South American states relying on the Calvo Doctrine rejecting foreigners a right to any kind of preferential treatment, denying the right of home states to exercise diplomatic protection of their nationals abroad[18], and to a newly born ideas of economic nationalism

[14] THOMAS POLLAN, *supra* note 3, at 64.

[15] *Among the most famous cases are: Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (SER. A) No. 13, at 63–64 (September 13); *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1926 P.C.I.J. (SER. A) No. 7, at 81–82 (May 25); *Shufeldt Claim* (U.S. v. Guatemala), 2 REP. INT'L ARB. AWARDS 1080 (1930).

[16] Kenneth J. Vandevelde, *supra* note 4, at 377; IAN BROWNLIE, *supra* note 11.

[17] Arthur S. Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 AM. J. INT'L L. 371, 373 (1959), available in the JSTOR Archive at: http://www.jstor.org/stable/2195809 (accessed on September 20, 2010);
PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, Oxford: Blackwell Publishers Inc. 573 (1999).

[18] The Latin American states claimed that foreign states abused their rights in the exercise of diplomatic protection of their citizens. See DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY, Minnesota: University of Minnesota Press 17–20 (1955), cited from Kenneth J. Vandevelde, *supra* note 4, at 379; Karl P. Sauvant, Victoria Aranda, *The International Legal Framework for Transnational Corporations, in* 20 UNITED NATIONS LIBRARY ON TRANSNATIONAL CORPORATIONS-TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK, London: Routledge 85 (A.A. Fatouros ed., 1994).

which justified the improvement of a State's economic situation at the expense of other states, restrictive trade measures and other protectionist measures, phenomenon that was common all over Europe and America in the late nineteenth and beginning of the twentieth centuries. Moreover, unprecedented expropriation of foreign property by the Bolsheviks after the Russian Revolution and Civil War, European turmoil between the two World Wars, and the economic crisis of the 1930s contributed to the "conservative reaction" of the main economic powers of the time. On the one hand, all these in complex delayed the development of the international protection of FDI for years, on the other hand, the U.S. – Mexico conflict on the nationalization of oil and agrarian property owned by the U.S. nationals which dragged in the 1920s-1930s resulted in a very important principle which exists up to date and is known as the Hull Rule of *"[p]rompt, adequate and effective compensation"*[19].

6.08. A real breakthrough in the development of international investment regime took place only after the end of World War II during the Bretton Woods negotiations, when Keynes inspired the idea of creating an International Trade Organization (ITO)[20]. Draft documents related to the Organization contained very extensive provisions on foreign investment. For example, the Draft Charter for an International Trade Organization (widely known as Havana Charter) in its preamble stressed that the ITO members pledged themselves *"[t]o foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment"*[21]. Though the Charter was not ratified, its significance for the development of the foreign investment law is beyond any doubt because it was the first document to recognize the importance of the issue and the necessity to get rid of economic nationalism in treating foreigners. Creation of the UN in 1945 put an end to the armed protection of property abroad[22]. It was the beginning of liberal era (sustainable liberalism) in international investment regime.

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[19] Thomas Pollan, *supra* note 3, at 64–65; Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt, Adequate and Effective' Standard*, 31 Stan. J. Int'l L. 423, 428 (1995). The Hull Rule became the most attacked customary international law principle by developing nations. In particular, the Hull Rule was ignored by Iran in 1951 during nationalization of British property; by Libya during *Liamco's* concessions expropriation in 1955; by Egypt in the process of Suez Canal nationalization in 1956.

[20] The plan was that ITO would become the third pillar of the international economic system together with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD).

[21] Havana Charter for an International Trade Organization, March 24, 1948, available at: http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed on September 20, 2010).

[22] Art. 2(1) of the UN Charter prohibits *"threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*

6.09. Naturally, liberal investment regime based on the liberal economic theory (which assumes protection of property through an autonomous legal system) needed a body of international investment law[23]. Setting new rules for the international trade also furthered the necessity of some universal approach in dealing with foreign investments. Many attempts to adopt some kind of an international convention on private investment protection had been made in the 1940s and 1950s, but none was successful[24]. The GATT (1947)[25], however, achieved some progress on this topical issue. Despite the fact that GATT did not contain rules similar to those of the Havana Charter, its provisions on the most-favoured nation (MFN) treatment[26], reducing trade tariffs between signatory states[27], national treatment[28], and general elimination of quantitative restrictions[29] also contributed to the development of the international investment regime and legally separated trade and investment once and for all. In relation to this matter it seems important to mention the remarkable role of the 1955 GATT Resolution on International Investment for Economic Development, which, *inter alia*, urged countries to conclude bilateral agreements to provide protection and security for foreign investment. In 1959, the first BIT in the world was concluded (between West Germany and Pakistan), other countries followed suit and already by 1965 the number of BITs increased to 40[30]. At that time, BITs were perceived as a protection of investments after their establishment, a *"[d]eliberate policy response to what the capital-exporting countries perceived as a threat to traditional international standards for the treatment of foreign investors..."*[31]. BITs and other IIAs (*e.g.*, FTAs, DTTs of mostly bilateral nature) were destined to fill in the vacuum in international regulation of FDI and become the primary source of international investment law.

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[23] Kenneth J. Vandevelde, *supra* note 4, at 382.

[24] In 1949, the ICC issued a draft Private Investment Protection Code; in 1957, the ICC again called for adoption of an international convention and initiated an international conference under the auspices of the UN Economic and Social Council (ECOSOC), International Financial Corporation (IFC), and the International Bank of Reconstruction and Development (IBRD); in the same year, the West German Society to Advance the Protection of Foreign Investment (*Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V.*) published a draft called *"International Convention for the Mutual Protection of Private Property Rights in Foreign Countries."* In fact, the West German initiative can be called successful because the mentioned draft became a prototype for future German BITs. For detailed information on the developments in the 1947–1959 see Arthur S. Miller, *supra* note 17, at 371–378.

[25] The General Agreement on Tariffs and Trade (GATT 1947), available at: http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (accessed on September 20, 2010).

[26] *Ibid.*, Art. I.

[27] *Ibid.*, Art. II.

[28] *Ibid.*, Art. III.

[29] *Ibid.*, Art. XI.

[30] Zachary Elkins, Andrew T. Guzman, Beth Simmons, *Competing for Capital: the Diffusion of Bilateral Investment Treaties, 1960–2000*, U. ILL. L. REV. 265, 269 (2008).

[31] THOMAS POLLAN, *supra* note 3, at 72; PETER MUCHLINSKI, *supra* note 17, at 618.

6.10. Conclusion of BITs has been a non-stop trend since the 1960s. According to UNCTAD, as of the end of 2009, there were 2,750 BITs[32]. However, their influence on a country's ability to attract more foreign investment is rather questionable. Some experts claim that BITs help capital-importing states to attract more FDI[33], diminishing their role of "protective instruments" and liberalizing access for investors (positive investment climate). Others insist that empirical evidence thereof is inconclusive, existence of BITs does not by itself increase inward investment flows[34]. Indeed, popularity of BITs contrasts sharply with the collective resistance developing countries have shown toward principles protecting foreign investors and their investments and the failure of the international community to make progress on a multilateral investment agreement[35]. As a matter of fact, many developing states had no other choice and had to accept the conditions on take-it-or-leave-it basis to win the foreign investment attraction competition[36]. Moreover, as will be stressed in the following part of the paper, the process of concluding new BITs and other IIAs further perpetuates and accentuates the patchwork of existing treaties with its inherent complexities, inconsistencies and overlaps, and its uneven consideration for development concerns[37].

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[32] United Nations, Unctad World Investment Report 2010: Investing in a Low-Carbon Economy, New York and Geneva: United Nations Publications 81 (2010).

[33] Thomas Pollan, *supra* note 3, at 73; Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 274–79.

[34] Anne von Aaken, *Perils of Success? The Case of International Investment Protection*, 9 (1) EBOR 9-10 (2008); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 Pac. Mcgeorge Global Bus. & Dev. L. J. 337, 339 (2007).

[35] Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 266. The authors explain this phenomenon as follows: the proliferation of BITs and the liberal property rights regime they embody is propelled in good part by the competition among potential host countries for credible property rights protections required by direct investors.

[36] Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World. Balancing Rights with Responsibilities*, 23 Am. U. Int'l L. Rev. 451, 468 (2008); Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 Duke L.J. 343, 345 (2009); Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 277.

[37] Unctad, World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge, New York and Geneva: United Nations Publications 17 (2008).

III. Failure of Multilateral Agreements and Imperfect BIT Regime

6.11. Establishment of the BIT regime did not stop further international debates about foreign investment. The very composition of the international rules covering foreign investment proved to be the cause of disagreement[38]. The North-South dialogue between developed and developing economies is the most significant example of the events in the 1960s -1970s. In fact, the discussion on national sovereignty, expropriation and compensation, became an ideological battle[39] between the North and the South[40]. In response to these extensive debates and under the pressure of developing countries UN established a rule that every country has a sovereign right to regulate and control foreign investments within its territory, once again it brought about a series of restrictive UN resolutions[41] and domestic laws adopted by developing countries.

6.12. Further efforts to create binding legal instruments under the auspices of World Bank were partially successful. Adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) in 1965 did not settle arguments on substantive law notions so disturbing in the North-South dialogue. Neither did the creation of the Multilateral Investment Guarantee Agency (MIGA) in 1988[42].

6.13. The end of the 1970s – beginning of the 1980s was marked by new "FDI disturbances" which again illustrated the complexity of the international

[38] RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS, USA: West Group Publishing §25.1 (3rd ed.), available in West Law as INTBUSTRAN.

[39] THOMAS POLLAN, *supra* note 3, at 66.

[40] Position of the South can be shortly expressed by citing Nikita Khrushchev (USSR leader in 1953–64) who once said: "*[W]e declare war upon you in the peaceful field of trade*". See Arthur S. Miller, *supra* note 17, at 371. Developing countries (especially new independent nations of Africa in the 1960s) strongly believed that all their misfortunes were due to the economic and political intrigues of the rich developed states. According to this southern point of view, the gap between the North and the South was increasing all the time. They made very unrealistic demands addressed at developed nations, like transfer of progressive technologies at little or no cost, capital investments in companies with the majority local control and ownership. Besides, developing countries instigated by the socialist ideology challenged the standards of treating the investors claiming that in reality customary public international law did not contain rules requiring paying for expropriation.

[41] See, for example, United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (1962); United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States (1974); United Nations General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order (1974); United Nations General Assembly Resolution 3202 (S-VI): Program of Action on the Establishment of a New Economic Order (1974). The effect of these resolutions is unclear. Lawyers still argue whether they can be regarded as a reflection of customary international law. See THOMAS POLLAN, *supra* note 3, at 68.

[42] However, practices of these two bodies, especially in dispute settlement and interpretation of BITs became very important sources of international investment law.

regulation of FDI. The first one occurred in February 1979 – the Islamic Revolution in Iran. After unprecedented expropriation of foreign property (mainly American) and seizure of the U.S. embassy in Tehran, the U.S. responded by freezing all Iranian assets in the U.S. The crisis was partially solved only in 1981, when with the active participation of Algiers the rivals signed the so-called Algiers Declaration[43], which resolved the hostage issues and formed the Iran-United States Claims Tribunal authorized to settle expropriation claims[44]. The following years of the Tribunal's work resulted in a massive contribution to the international practice of settlement expropriation claims and compensation under international law[45].

6.14. In 1982, the U.S. challenged the Canadian Foreign Investment Review Act (FIRA)[46] alleging that Canada's practices under FIRA violated Canada's GATT obligations. This dispute forced to include the issue of applying GATT principles to FDI in the agenda of the Uruguay Round. However, raising the issue of a universal foreign investment regulation within the framework of the GATT/WTO also proved to be unsuccessful. The Agreement on the Trade-Related Investment Measures (TRIMs)[47], as one of the products of the Uruguay Round compromise, is not a complete investment agreement since it contains no rules on screening and establishment issues, repatriation of capital, free movement of personnel, expropriation and, most importantly, adequate compensation[48]. On the other hand, experts note that the TRIMs Agreement clearly placed FDI issues on the WTO agenda[49]. During the Doha Round, provisions of the 2004 Framework Agreement explicitly excluded investment issues from

43 The Algiers Declaration of January 19, 1981, reprinted in 20 ILM 224 (1981), 75 AJIL 418 (1981).

44 See background information on the Iran-United States Claims Tribunal, available at: http://www.iusct.org/background-english.html (accessed on September 22, 2010).

45 The list of awards and decisions available at: http://www.iusct.org/lists-eng.html (accessed on September 22, 2010). For more details, see also George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Am. J. Int'l L. 585 (1994).

46 See Canada-Administration of the Foreign Investment Review Act, (30th Supp.) GATT B.I.S.D. 140 (1984).

47 Agreement on Trade Related-Investment Measures (TRIMS 1994), available at: http://www.wto.org/english/docs_e/legal_e/18-trims.pdf (accessed on September 22, 2010).

48 Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 Am. U. J. Int'l L. & Pol'y 1015, 1038 (1997).

49 OECD Trade Directorate, Investment and the Final Act of the Uruguay Round: A Preliminary Stocktaking (OECD Doc. COM/TD/DAFFE/IME (94) 56/REV 1) 5 (1994); Mark Koulen, *Foreign Investment in the WTO, in* Multilateral Regulation of Investment, The Hague: Kluwer Law International 181–203 (E.C. Nieuwenhuys, M.M.T.A. Brus eds., 2001).

the negotiations agenda[50], however, experts and scholars insist that the GATT/WTO framework might still be used to resolve existing discord between the capital-exporters and developing states[51] where the latter argue that restrictive investment policies are their sovereign right and an element of national economic policy. Developing states consider liberalization of investment policies a danger of abuse by MNEs and a loss of sovereign control over national development[52]. Indeed, despite the traditional separation between the trade and investment, the GATT/WTO roof appears to be a more logical choice, especially if one recalls the futile attempt to negotiate the Multilateral Agreement on Investment (MAI) under the auspices of the OECD. The MAI initiative failed first of all because of the choice of the OECD as a venue (too many developing states were excluded from negotiations); secondly, NGOs resisted the MAI very stubbornly; finally, some OECD member states did not support the initiative[53].

6.15. The current state of affairs in the international investment regime has a tendency for further complication. The spaghetti bowl of BITs and other IIAs[54], many of which are "*grounded in anachronistic assumptions*"[55] and hegemony of capital-exporting states[56], where contracting states are often deprived of an opportunity to interpret IIAs provisions[57], where capital-importing states are afraid to apply regulatory measures for public good and development in order not to invoke costly investment arbitration and measures protecting foreign investors, poses challenges for stability and legal certainty of the regime itself. Besides, as noted by Peterson, "*[w]hile proposed agreements such as the OECD Multilateral Agreement on Investment (MAI) were subjected to rigorous public scrutiny, many hundreds of bilateral agreements have entered into force without public notice or scrutiny. This reality casts some doubt on the oft-repeated claim*

[50] THOMAS POLLAN, *supra* note 3, at 127; Ian F. Ferguson, Charles E. Hanrahan, William H Cooper and Danielle J. Langton. *The Doha Development Agenda: The WTO Framework Agreement.* CRS REP. Order Code RL32645 3 (2005).

[51] For example, Kate M. Supnik notes that there is a possibility to introduce changes to the ICSID by using an analogy with the WTO General Exceptions (art. XX GATT, art. XIV GATS, art. III TRIMS) to reconcile differences in an international investment regime. See Kate M. Supnik, *supra* note 36.

[52] This position was made public by India at the Singapore Ministerial Conference. See Eric M. Burt, *supra* note 48, at 1017.

[53] *Thomas Pollan, supra note 3, at 125.*

[54] As of the end of 2009, UNCTAD reported 5,939 IIAs, see *supra* note 32, at 81.

[55] Kate M. Supnik, *supra* note 36, at 347.

[56] ROBERT CRAWFORD, REGIME THEORY IN THE POST-COLD WAR WORLD: RETHINKING NEOLIBERAL APPROACHES TO INTERNATIONAL RELATIONS, Dartmouth: Darmouth Publishing Group (1996); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD OF POLITICAL ECONOMY, Princeton: Princeton University Press (2005).

[57] For more information on the existing dilemmas of investment treaty interpretation, see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010).

that the defeat of the MAI was somehow a "major victory" for critics of unfettered globalization. For those who take the extreme view that investor protection is an illegitimate international goal, the sober reality is that there have been rather more 'losses' than 'victories' of late, as bilateral treaties have proliferated with surprisingly little public notice"[58]. Eventually, one may conclude that shifting from multilateral efforts to bilateral negotiations is, in fact, not such a good solution but rather a temporary measure.

6.16. According to Salacuse, today's international investment regime faces four major challenges:

- disappointing regime results;
- perceived defective decision-making process and unjustified constraints on national sovereignty;
- divergence of participant expectations;
- the impact of the global economic crisis[59].

6.17. The above listed challenges are not new to the international investment regime. Once again it demonstrates the old unsolved problems that have been at stake for decades. Developing and transition economies are more and more frustrated with the existing "one-sided" rules of the game when private investors can successfully sue them via international arbitration whenever new regulatory measures are introduced[60]. Withdrawal of Ecuador and Bolivia from the ICSID has not been considered a serious threat for the existing international investment regime, or at least not so far. At the same time, omission of the investor-state dispute provision in the 2004 USA – Australia FTA[61], Russia's non-ratification of the ICSID Convention[62] and decision to terminate its provisional application of the Energy Charter Treaty (ECT) as of October 18, 2009[63], Brazil's refusal

[58] Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, 19 Friedrich Ebert Stiftung Dialogue on Globalization Occasional Papers 25 (2005). Tollefson stresses that *"[i]nternational legal sovereignty" is so important in the contemporary global economy that "any adverse impacts on Westphalian sovereignty are more than offset by the benefits that derive from [participation in the international investment] regime."* See Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 Yale J. Int'l L. 141, 144 (2002); Kate M. Supnik, *supra* note 36, at 350.

[59] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harv. Int'l L. J. 427 (2010).

[60] See, *e.g.*, The S2B Investment Working Group, *Introduction: 50 Years of BITs is Enough*, *in* Reclaiming Public Interest in Europe's International Investment Policy. EU Investment Agreements in the Lisbon Treaty Era: A Reader, Amsterdam: Seattle to Brussels Network 9-10 (R. Eventon ed., 2010).

[61] USA – Australia Free Trade Agreement of May 18, 2004, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text accessed on September 22, 2010).

[62] The Russian Federation signed the ICSID Convention on June 16, 1992.

[63] *What is Russia's Status with the Energy Charter?*, available at: http://www.encharter.org/index.php?id=18 (accessed on September 22, 2010).

to participate in BITs and the ICSID Convention[64] are more alarming signs for both investors and the host states. Thus, examples of Ecuador and Bolivia "*resisting the global investment agenda*"[65] may be only the beginning. The most striking feature of the current state of affairs in the international investment regime is the fact that there have been more and more protectionist measures introduced by developed nations;[66] as a matter of fact, capital-exporting states switch roles with capital-importing states in terms of sovereignty concerns and the necessity to protect public security and public policy. In relation to this matter, it is essential to remember that it is not solely the recent world financial crisis that can be blamed for this[67]. Increasing outward investments from the BRIC countries and other developing and transition economies (emerging markets)[68] pose new challenges for the existing BITs and investment arbitration designed to protect investors from the developed nations. It remains a million dollar question how the existing ICSID regime or any other investment arbitration will react in case a developing state challenges regulatory measures introduced by a developed state.

6.18. Recent developments in the EU, namely the Lisbon Treaty coming into force and allocation of FDI to the common commercial policy pursuant to art. 207 TFEU, pose more questions than answers. Common commercial policy does not include portfolio investments which, along with direct

[64] Brazil concluded a few BITs (14 as of 2006), none of them has been ratified.

[65] Antonio Tricarico, Roberto Sensi, *Bolivia Resisting the Global Investment Agenda*, *in* RECLAIMING PUBLIC INTEREST IN EUROPE'S INTERNATIONAL INVESTMENT POLICY. EU INVESTMENT AGREEMENTS IN THE LISBON TREATY ERA: A READER, Amsterdam: Seattle to Brussels Network 35–36 (R. Eventon ed., 2010).

[66] OECD, STATUS REPORT: INVENTORY OF INVESTMENT MEASURES TAKEN BETWEEN 15 NOVEMBER 2008 AND 15 JUNE 2009 (2009); UNITED NATIONS, UNCTAD WORLD INVESTMENT REPORT 2006: FDI FROM DEVELOPING AND TRANSITION ECONOMIES: IMPLICATIONS FOR DEVELOPMENT XVIII–XIX, New York and Geneva: United Nations Publications (2006); Karl P. Sauvant, *Reservoirs of the Future*, *in* WHAT'S NEXT? STRATEGIC VIEWS ON FOREIGN DIRECT INVESTMENT, ISA, UCTAD, WAIPA 91 (S. Passow, M.Runnbeck eds., 2005); Karl P. Sauvant, *We Must Guard Against Growing Protectionism*, SHANGHAI DAILY (August 4, 2009); Karl P. Sauvant, *The Rise of FDI Protectionism*, *in* OCO INSIGHT-A NEW INVESTMENT PARADIGM, OCO GLOBAL 31 (2008/09).

[67] For example, increasing investments by sovereign wealth funds (SWFs) from Russia, China and Gulf States are met by developed states with caution. German Chancellor Merkel noted: "*[W]ith those sovereign funds we now have a new and completely unknown element in circulation.... One cannot simply react as if these are completely normal funds of privately pooled capital.*" See Carter Dougherty, *Europe Looks at Controls on State-owned Investors*, INT'L HERALD TRIB., July 13, 2007.

[68] In 2007, emerging markets accounted for 15% of global outward FDI flows, in 2009, almost 9% of all FDI outflows came from BRIC countries. See UNITED NATIONS, UNCTAD WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, New York and Geneva: United Nations Publications 7 (2010); Karl P. Sauvant, *Is the US Ready for the FDI from Emerging Markets: The Case of China*, *in* FOREIGN DIRECT INVESTMENT FROM EMERGING MARKETS: THE CHALLENGES AHEAD, New York: Palgrave Macmillan (K. P. Sauvant, G. McAllister, W. A. Maschek eds., 2010).

investments, are normally covered by BITs. In terms of the existing BITs between Member States and third countries, the European Commission acknowledged that it would be impossible for the Union to abruptly take over negotiation competencies from Member States[69]. At the same time, the proposed scheme authorizing Member States to negotiate new BITs and/or re-negotiate the existing treaties will hardly solve the problems already at stake. Withdrawal of the authorization from Member States by the Commission are highly unlikely, resistance of individual Member States and absence of a common (model) EU BIT template[70] will take their toll. On the other hand, individual efforts of some Member States have been far from successful, especially when BITs with big players like the US or Canada are involved, here the bargaining power of small Member States is crucial. Memorandum of Understanding Concerning the Applicability and the Preservation of Bilateral Investment Treaties Concluded between the US and the New EU Member States, or Countries – Candidates for Accession signed in September 2003[71] by no means accelerated or facilitated negotiations with the US. Government of the Czech Republic, generally perceiving BITs as a "necessary evil"[72], has been disappointed with its new BIT with Canada which has replaced the 1990 BIT now incompatible with EU law[73]. Renegotiation of the existing BITs might encounter the stubborn position of third countries on such cornerstone issues as, for example, non-discriminatory application of capital transfer restrictions by the EU[74], besides, new issues caused by environmental and

[69] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions towards a comprehensive European international investment policy, COM (2010) 343 final (Brussels, July 7, 2010); Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM (2010) 344 final (Brussels, July 7, 2010).

[70] Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 CML Rev. 383 (2009); Armand de Mestral C. M., *Is A Model EU BIT Possible – or Even Desirable?* 3 (21) Columbia FDI Perspectives (2010).

[71] United Nations Conference on Trade and Development, Recent Developments in International Investment Agreements, (UNCTAD/WEB/ITE/ITT/2005/1), New York and Geneva: United Nations Publications 6 (2005).

[72] Filip Černý, Jaroslav Heyduk, *Report: Czech – Canadian BIT Concluded*, *in* Czech Yearbook of International Law. Second Decade Ahead: Tracing the Global Crisis 340, 342 (A. Bělohlávek, N. Rozehnalová eds., 2010).

[73] *Ibid.*

[74] See the recent ECJ case law: Judgment of 3 March 2009, Case 205/06, *Commission of the European Communities v Republic of Austria* [2009] 2 C.M.L.R. 50; Judgment of 3 March 2009, Case 249/06, *Commission of the European Communities v Kingdom of Sweden* [2009] 2 C.M.L.R. 49; Judgment of 19 November 2009, Case 118/07, *Commission of the European Communities v Republic of Finland* [2009], available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0118:EN:HTML (accessed on September 29, 2009). For critical comments on the ECJ position and on the general EU position toward re-negotiation, see Eileen Denza, *Bilateral Investment*

other public policy concerns might further complicate the process. In any case, this time, third countries will not be that willing to unilaterally accept conditions offered by individual Member States, position of BRIC countries and other emerging markets might be especially strong. Re-negotiation of the existing BITs will give the latter a unique chance to broaden both their rights as host and home states.

6.19. As I have argued at the beginning of this paper, the history is cyclic. The existing BITs-based international investment regime is challenged more and more often. Nowadays, the issue of a multilateral investment treaty is at stake once again. Old North-South issues of state sovereignty and investors' protection are now accompanied by new concerns of both developed and developing economies. Political concerns of the developed nations toward growing outward investments from the emerging markets are counterbalanced by the emerging markets' willingness to secure equal rules of the game where the old stereotypes of the Cold War should not apply. It is very unlikely that this discord can be effectively solved via BITs, it will only further defragment the existing legal and policy framework, let alone sustainable development and good governance. The new MAI initiative is hard to imagine being successful under the present conditions, irrespectively of the prospective venue (UN, WTO, OECD, IMF, World Bank). Gradual modification of the ICSID and closer regional co-operation (*e.g.*, between the EU and ASEAN, NAFTA, MERCOSUR, perhaps even BRIC countries as one entity) seem to be more feasible as provisional measures. International investment regime can and must be re-shaped.

Summaries

DEU [***Internationales Investitionsrecht: Ist die Zeit reif für Änderung des traditionellen Systems bilateraler Investitionsschutzabkommen (BIT)?***]

Der vorliegende Beitrag argumentiert, dass der gegenwärtige internationale Rahmen für Investitionen, der vorrangig auf bilateralen Investitionsschutzabkommen (BITs) beruht, an die Grenzen seiner Kapazität gestossen ist, was den Einsatz als effizientes Instrument zur Regulierung grenzüberschreitender Investitionen anbelangt. Die wachsende Zahl von Investitionsschutzabkommen (IIAs) schreibt ein internationales Investitionsrecht fort, das defragmentiert ist, und unterstreicht dessen Charakter noch. Darüber hinaus ist der vorhandene rechtliche Rahmen kaum in der Lage, die Bedürfnisse der Industrienationen zu befriedigen, die sich mit zunehmenden Investitionen seitens vormals kapitalimportierender Volkswirtschaften (wie z.B. den BRIC-Staaten) und seitens Staatsfonds auseinandersetzen.

Aufgrund der historischen Erfahrung, dass eine neue Alternative für multilaterale Investitionsabkommen in naher Zukunft wahrscheinlich keinen Erfolg

Treaties and EU Rules on Free Transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland, 35 (2) E. L. REV. 263 (2010).

haben dürfte. Es ist doch denkbar, dass die internationale Gemeinschaft die regionale Zusammenarbeit vertieft und den Abschluss regionaler Investitionsschutzabkommen fördert, die den aktuellen Anforderungen besser gewachsen sind. Das kann zu einer Übergangsstuffe werden, mit der Weg für die Aushandlung eines multilateralen Investitionsabkommens (MAI) bereitet wird, das noch immer auf der internationalen Tagesordnung steht.

CZE [***Mezinárodní investiční právo: Je čas změnit tradiční systém bilaterálních investičních dohod?***]
Tato stať polemizuje se skutečností, že současný mezinárodní režim ochrany investic založený převážně na dvoustranných dohodách o podpoře a ochraně investic (BID) vyčerpává svoji kapacitu účinného nástroje pro regulaci mezinárodních investic. Rostoucí počet mezinárodních dohod o investicích (IIA) dále prohlubuje a zvýrazňuje roztříštěnost úpravy mezinárodních investičních předpisů. Stávající režim navíc může jen stěží vyhovět potřebám vyspělých zemí, které řeší narůstající investice z bývalých zemí dovážejících kapitál (např. země BRIC), a suverénních investičních fondů.
Na základě historických zkušeností není v blízké budoucnosti pravděpodobné realisticky očekávat úspěch nové iniciativy k uzavření multilaterální investiční dohody. Mezinárodní komunita však může prohloubit regionální spolupráci a podpořit uzavírání regionálních investičních dohod, jež jsou určeny k tomu, aby lépe reflektovaly aktuální problémy a výzvy. Tímto by mohl být vytvořen dočasný nástroj, který by usnadnil vyjednání vícestranné investiční dohody (MAI), jež stále zůstává na programu mezinárodního jednání.

POL [***Międzynarodowe prawo inwestycyjne: czas na zmiany w tradycyjnym systemie BIT?***]
Niniejszy artykuł stwierdza, że aktualny reżim inwestycji międzynarodowych przeważnie opiera się na dwustronnych umowach o ochronie i wzajemnym popieraniu inwestycji (BIT) i wyczerpuje swoje możliwości efektywnego narzędzia regulacji inwestycji międzynarodowych. Choć wydaje się mało prawdopodobne, aby nowa inicjatywa wielostronnych umów o ochronie i wzajemnym popieraniu inwestycji odniosła sukces, społeczność międzynarodowa może pogłębiać współpracę regionalną i dążyć do zawierania regionalnych umów inwestycyjnych, lepiej dostosowanych do aktualnych wyzwań.

FRA [***Droit des investissements internationaux: le moment est-il venu de modifier le système traditionnel fondé sur les traités bilatéraux d'investissement ?***]
Cet article relate que le régime d'investissement international actuellement en vigueur, basé en premier lieu sur les traités bilatéraux d'investissement (TBI), perd de son efficacité dans le domaine de la régulation des placements internationaux. Bien qu'il soit peu probable que la mise en œuvre d'un nouveau projet de traité multilatéral soit couronnée de succès, il est possible que la communauté internationale élargisse la coopération régionale et favorise la conclusion de traités régionaux d'investissement mieux adaptés aux défis actuels.

RUS [***Закон о зарубежных инвестициях: не пора ли менять традиционную систему двусторонних инвестиционных соглашений?***]
В настоящей статье приводятся доводы в пользу того, что нынешний режим международных инвестиций, главным образом основанный на двусторонних инвестиционных соглашениях (BIT), уже исчерпывает себя в качестве эффективного инструмента регулирования зарубежных инвестиций. Хотя маловероятно, что новая инициатива о заключении многосторонних инвестиционных соглашений возымеет успех, международное сообщество может укрепить сотрудничество на региональном уровне и активнее заключать региональные инвестиционные соглашения, которые в большей мере отвечают современным требованиям.

ES [***Ley de inversión internacional: ¿Es hora de cambiar el sistema de TBI tradicional?***]
El artículo argumenta que el régimen de inversión internacional actual, basado principalmente en tratados bilaterales de inversión (TBI), está agotando su capacidad como herramienta eficaz para regular la inversión internacional. Aunque el éxito de una iniciativa de tratado de inversión multilateral nueva es improbable, la comunidad internacional puede ahondar en la cooperación regional y fomentar la conclusión de tratados de inversión regional mejor diseñados para los desafíos actuales.

Pierre Lalive | Laura Halonen

On the Availability of Counterclaims in Investment Treaty Arbitration

Key words:
Investment Treaty Arbitration | Counterclaims | ICSID Convention | Article 46 | UNCITRAL Rules | Jurisdiction | Consent |Dispute Resolution Clause | Applicable law | Admissibility | Main claims

Abstract | *This article explores the obstacles that may exist for states to bring counterclaims before an investment treaty tribunal and analyses the reasoning of the tribunals that have have refused to hear such counterclaims. In relation to the key question of jurisdiction, the ICSID Convention and the UNCITRAL Rules both provide in principle for counterclaims. The question thus often becomes one of consent and whether an investor-state dispute resolution provision in a BIT encompasses counterclaims – an issue that always requires careful consideration of the treaty language. The investor's consent is also discussed as well as the law applicable to such counterclaims. In order for counterclaims to be admissible they must be connected to the primary claims, but the nature of such a connection is not self-evident. The article concludes that the test established in the May 2004 decision in Saluka Investments BV v. Czech Republic was too strict, and leads to it being near-impossible for states to succeed in having their counterclaims heard, which is regrettable.*

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7.01. Investment treaty arbitration is often seen as a form of internationalised administrative law[1] whereby the respondent state is brought to task for treating a foreign investor in a manner that violates its treaty obligations. However, on closer look there is nothing that fundamentally prevents the mechanism from being used also to adjudicate the state's grievances against the investor.

It is undoubtedly the case that

> *... the investor may at all times choose to consent to the admissibility of the host State's counterclaim; which it may be advised to do, considering the time and money that can be saved by consolidating the parties' claims in one set of proceedings*[2].

7.02. As laudable as such strive for efficiency is, it is unlikely to occur in practice. From the point of view of the investor there is nuisance value in forcing the state to initiate its claims before a separate forum[3] – a concern that often plays a role in arbitration and litigation strategy – with a potential deterrent effect that will lead to such claims never being heard. There is also the more "presentable" concern of turning the eye of the tribunal away from the state's actions and focusing more on the behaviour of the investor, with the risk of detrimental effect on the tribunal's perception of the main claims as well. For these and a multitude of other possible reasons, litigants have, as a practical matter, throughout time sought to challenge jurisdiction of an arbitral tribunal to hear the claims of their adversaries once a dispute has arisen. As a result, trying to get investors to agree to hear all disputes before the same tribunal for the sake of efficiency seems in most cases unrealistic[4].

7.03. This article will explore what are the obstacles that may exist for states to bring counterclaims before an investment treaty tribunal and whether tribunals when they have refused to hear such counterclaims have been correct to do so or not[5].

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[1] Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 (1) EJIL 121 (2006); Rudolph Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 INTERNATIONAL LAW AND POLITICS 953, 970 (2005).

[2] Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 1 (2007).

[3] Whether before domestic courts or a separate arbitral forum, depending on the nature of the counterclaims and other circumstances.

[4] Investors are much more willing to agree to consolidation and other efficiency devices when the question is one of hearing more of *their* claims, or claims of their fellow shareholders or other related parties, in a single set of proceedings: see, eg. the *Aguas and Vivendi v. Argentina* case, where the tribunal issued a single decision on jurisdiction, even though the proceedings brought by the three individual shareholders were not only brought under different BITs, but even governed by different arbitration rules: *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of August 3, 2006, paras. 7 and 19.

[5] Only one publicly available investment treaty award considers counterclaims on their merits, but summarily dismisses them without any detailed (or useful) analysis: *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award of June 25, 2001,

7.04. We will consider first below the question of jurisdiction and conclude that both the ICSID Convention[6] and UNCITRAL Rules[7] in principle provide for counterclaims. We will next look at the parties' consent and what kind of language is necessary for an investor-state dispute resolution provision in a Bilateral Investment Treaty (BIT) to encompass counterclaims. We will also discuss the investor's consent and what must the law applicable to the dispute be for counterclaims to be possible. We will then turn to the connection that must exist between the main claims and counterclaims, focusing in particular on the May 2004 Decision on Jurisdiction over the Counterclaims in *Saluka Investments BV v. Czech Republic*[8]. In our view the test established in that case was probably too strict, and leads to it being near-impossible for states to succeed in having their counterclaims heard by investment treaty tribunals.

I. Determining Jurisdiction under the ICSID Convention and UNCITRAL Rules

7.05. In order for counterclaims to be successful, the first step is naturally to ensure that the tribunal has jurisdiction to hear them. The ICSID Convention and the UNCITRAL Rules in principle provide for counterclaims, so the starting point should be to ascertain whether in the right factual circumstances a tribunal has jurisdiction to hear them.

I.1. ICSID Rules

7.06. Article 46 of the ICSID Convention provides as follows:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or ***counter-claims arising directly out of the subject-matter of the dispute*** *provided that they are within the scope of the* ***consent*** *of the parties and are otherwise within the* ***jurisdiction*** *of the Centre.* (Emphasis added.)[9]

7.07. First it should be noted that the ICSID Convention thus specifically provides for counterclaims. This is of course standard in contractual disputes, of which ICSID hears some every year, but nothing in the text of Article 46 suggests that it is limited to contractual disputes and excludes investment treaty arbitrations.

paras. 376-8. The tribunal did not discuss its jurisdiction over the counterclaims, or whether they were admissible, presumably because the issue was not raised by the parties.

[6] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (*ICSID Convention*).

[7] The Arbitration Rules of the United Nations Commission on International Trade Law, adopted on 28 April 1976, amended in June 2010 (*UNCITRAL Rules*).

[8] *Saluka Investments BV v. Czech Republic*, UNCITRAL arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004 (*Saluka v. Czech Republic*).

[9] See also Rule 40 (1) of the ICSID Rules of Procedure for Arbitration Proceedings (*ICSID Arbitration Rules*).

7.08. Secondly, the conditions for counterclaims being within the scope of the ICSID Convention are identity of subject-matter with the main dispute, parties' consent for the counterclaims to be arbitrated before ICSID and jurisdiction of an ICSID tribunal to hear them. There is nothing controversial about these conditions, and it is easy to see that states' counterclaims could fulfil them, as a matter of principle. The issue of jurisdiction is considered first below, before turning to "subject-matter". Consent will be discussed separately in section 2.

7.09. ICSID has *jurisdiction* over disputes that fall under Article 25 of the Convention, which provides in relevant part that it extends to "*any legal dispute arising directly out of an investment* ...". The intentional lack of definition[10] of the word "investment" has precipitated a wealth of case-law and commentary, but for present purposes it suffices to note that as long as the main claims arise out of an investment that passes the test in Article 25 (whatever that test may be), counterclaims that arise out of the same investment should come within ICSID jurisdiction[11].

7.10. The requirement in Article 46 of the ICSID Convention that the counterclaims "*aris[e] directly out of the subject-matter of the dispute*" is *additional* to the jurisdictional requirements in Article 25 and thus pertains to the admissibility of such counterclaims[12].

7.11. It is not immediately clear whether the "*subject-matter*" of the dispute in Article 46 is something different than the "*investment*" in Article 25. Moreover, is "subject-matter" a *legal* or *factual* concept?

7.12. The same subject-matter is probably something different – and *narrower* – than the same investment as that term is used in Article 25 of the ICSID Convention (a "dispute arising directly out of an investment"). If it were not, there would have been no reason to add the word "*subject-matter*" to Article 46, since the question of "*jurisdiction*" would in any event have covered the issue. But in the authors' opinion there is no reason to imply a requirement of a *legal* connection into the term "*subject-matter*". If this had been the intention, it could have been clearly stated, like it is in Article 25, which refers to a "*legal dispute*". It should be enough that the claims and counterclaims arise directly out of the same subject-matter as a matter of *fact*, as indicated in the official "Notes" that accompanied the first version of the ICSID Arbitration Rules:

> *[T]o be admissible such claims must arise "directly" out of the "subject-matter of the dispute" (French version:* "l'objet du différend"*; Spanish*

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[10] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 27.

[11] Assuming that they fulfil the other jurisdictional requirements relating to nationality and timing.

[12] Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: a commentary on the Convention on the settlement of investment disputes between States and nationals of other States, Cambridge: Cambridge University Press 732-3, 751 (2nd ed. 2009).

version: "la diferencia"*). The test to satisfy this condition is whether the* ***factual*** *connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute ....*[13]

7.13. Although it is not enough that the counterclaim relates to the same "*investment*" as the main claim, it should be enough that there is a factual nexus with the claims themselves – for example when the state's actions of which the investor complains in the main claim were driven by the acts that constitute the heart of the counterclaim.

I.2. UNCITRAL Rules

7.14. The UNCITRAL Rules used to be ostensibly in a sense more problematic in this respect, as they limited counterclaims to those "*arising out of the same contract*" as the primary claim (former Article 19(3)). In another sense, the test in the UNCITRAL Rules is more straight-forward than the ICSID Convention, and thus *less* problematic. Be that as it may, the language in former Article 19(3) of the UNCITRAL Rules merely mirrors the language of former Article 1(1), referring to "*disputes in relation to [a] contract*". If the language in Article 1(1) is broad enough to permit disputes under a BIT, presumably Article 19(3) permits counterclaims if the usual conditions (mainly jurisdiction and consent) are met. The only UNCITRAL BIT arbitration that considered counterclaims in detail (*Saluka v. Czech Republic*) appears to have believed this was the case, since Article 19(3) was not even discussed by the tribunal in any meaningful way.

7.15. If the concern was ever anything other than academic, it should no longer be so in the future. The revised version of the UNCITRAL Rules that applies to arbitrations brought under BITs concluded after 15 August 2010 removes the reference to "*the same contract*" and provides for counterclaims as long as the tribunal has jurisdiction to hear them (new Article 21(3)). This is not a coincidence. The report that was commissioned by UNCITRAL to kick off the revision process already noted that "*[t]he limitation to contracts [in Article 19(3)] is simply inappropriate to arbitrations arising under international treaties*"[14].

7.16. However, since the new UNCITRAL Rules only apply to disputes under BITs that have been concluded *after* their entry into force in August 2010 (unless the BIT specifies that arbitrations are to be conducted under the

[13] Notes to the ICSID Arbitration Rules (1968), Note B (a) to Rule 40, reprinted in 1 ICSID REPORTS 63, 100 (emphasis added). As discussed below, the requirement of a *legal* connection imposed in the UNCITRAL arbitration of *Saluka v. Czech Republic* was in the authors' opinion also misplaced.

[14] Jan Paulsson, Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, para. 174 (2006). Available at: http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (accessed on September 27, 2010).

UNCITRAL Rules *"as then in force"*[15]), the old UNCITRAL Rules will still govern investment disputes for years to come. But as seen above, this should not be a hindrance to a state introducing counterclaims in such proceedings: if investment claims arise out of a *"contract"*, counterclaims arise presumably out of *"the same contract"*[16].

7.17. Accordingly both the ICSID Convention and the UNCITRAL Rules provide for the possibility of respondent state counterclaims, as long as the parties have consented to have them arbitrated.

II. Consent

7.18. Consent being the cornerstone of arbitration, it is paramount that the parties have agreed to have the state's counterclaims arbitrated. In a normal contractual relationship this is hardly problematic, with the arbitration agreement being intended to cover both parties' grievances as a matter of course. In the case of investment treaty arbitration the terms of the consent given in the BIT must be carefully scrutinised to determine whether they are *intended* to cover counterclaims as well[17]. If this is the case, the investor's consent must be interpreted to also extend to such counterclaims.

7.19. However, a further hurdle, also covered by the dispute resolution clause in the BIT, is the *law applicable to the dispute*. As the BIT itself imposes no obligations on investors in the vast majority of cases, the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction.

II.1. Dispute Resolution Clauses in BITs

7.20. The terms of dispute resolution clauses in BITs differ, and such differences should be given effect. This means that when the clause refers to claims "arising from investments", and in particular when the clause appears to make it possible for the state to initiate the arbitration as well, a tribunal has no reason not to give effect to the text and purpose of such a clause and find that the state has consented to have such counterclaims arbitrated.

[15] E.g. Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the Republic of Finland for the Promotion and Protection of Investments (adopted 6 November 1990, entered into force 23 October 1991), Art. 8(1)(b).

[16] Zachary Douglas has argued that the relevant consideration for the purpose of using the (old) UNCITRAL Rules to bring a claim and potentially a counterclaim under an investment treaty should not be the legal source but rather the *object of the primary claim*, namely the investment: ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge: Cambridge University Press 257 (2009).

[17] A further pertinent issue in the context of counterclaims is the issue of *identity* of the parties to the dispute: Parties can only consent to adjudicate disputes to which they are *parties*, and the tribunal must thus evaluate carefully whether the counterclaim is based on an obligation owed by the *investor* to the *state*.

7.21. Article 8 of the Czech Republic – Netherlands BIT[18] – which provided the jurisdictional basis for the *Saluka v. Czech Republic* case – is a good example of a dispute resolution clause that is broad enough to encompass counterclaims:

1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.

2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.

7.22. *Saluka v. Czech Republic* provides the most comprehensive treatment to date of jurisdiction over respondent state's counterclaims of publicly available investment treaty decisions. The case arose out of the forced administration of Investiční a poštovní banka a.s., a bank in which Saluka owned shares. During the arbitral proceedings, the Czech Republic raised several counterclaims alleging violations of Czech banking, competition and tax laws as well as the Share Purchase Agreement by which Saluka's parent (and predecessor-in-interest) Nomura Europe plc had obtained the shares that constituted the "investment". The tribunal issued a decision in May 2004 holding that it had no jurisdiction to hear the counterclaims.

7.23. However, on the issue of consent pursuant to Article 8 of the Czech Republic – Netherlands BIT, the *Saluka v. Czech Republic* tribunal stated that the language of the provision was:

... wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. [The wording of Article 8] carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims[19].

This is a correct reading of the dispute resolution provision the tribunal was interpreting, as it refers to "*[a]ll disputes ... concerning an investment*". By contrast, a clause that limits jurisdiction to claims brought under the BIT itself would in all likelihood not suffice for counterclaims to be introduced, as BITs generally impose no obligations on investors, only on states[20].

[18] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (adopted 29 April 1991, entered into force 1 October 1992).

[19] *Saluka v. Czech Republic*, para. 39.

[20] The tribunal in *Sempra v. Argentina* commented on Argentina's complaints about the investor's alleged lack of diligence and good faith, excessive earnings, failure to resort to local courts or to respect contractual commitments and the regulatory framework as follows:

The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and could have resulted in breaches of the Treaty, the Respondent would be entitled to raise counterclaims.

Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award of September 18, 2007, para. 289. It is unclear, however, what provisions in the United States – Argentina BIT (1994) could have provided the foundation for such counterclaims.

Examples of more restrictive consent provisions that will make jurisdiction over counterclaims doubtful, or only available in limited specific circumstances, can be found in the Czech Republic – United Kingdom BIT[21], and the Czech Republic – Canada BIT[22]. Article 8(1) of the former states:

Disputes between an investor of one Contracting Party and the other Contracting ***Party concerning an obligation of the latter under Articles*** *2(3), 4, 5 and 6* ***of this Agreement*** *in relation to an investment of the former which have not been amicably settled ....* (Emphasis added.)

The latter (Czech Republic – Canada BIT) provides in Article X.1:

Any dispute between one Contracting Party and an investor of the other Contracting Party ***relating to the effects of a measure or series of measures taken by the former Contracting Party on the management, use, enjoyment or disposal of an investment*** *made by the investor, and in particular, but not exclusively, relating to expropriation referred to in Article VI (Expropriation) of this Agreement or to the transfer of funds referred to in Article VII (Transfer of Funds) of this Agreement, shall, to the extent possible, be settled amicably between them.* (Emphasis added.)

7.24. The recently released award in *Hamester v. Ghana* discussed briefly the respondent state's counterclaims, although those had not been developed beyond a request for relief in the Counter-Memorial[23]. The tribunal noted the test under ICSID Convention Article 46 and mentioned the relevant passages in the applicable BIT, but concluded simply that:

...in the absence of any submissions on the nature of the Respondent's counterclaim under the BIT, the Tribunal is unable to analyse whether it [i.e. the counterclaim] is capable, in accordance with Article 46 of the Convention, of falling within the parties' scope of consent[24].

7.25. The language in the applicable BIT gave the Contracting Parties' consent to disputes "*concerning* ***an obligation of [one Contracting Party] under this Treaty*** *in relation to an investment of [a national or company of the other Contracting Party]*"[25], but the tribunal noted that under the BIT a state could also be an aggrieved party, and refer a dispute to arbitration[26].

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[21] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Republic for the Promotion and Protection of Investments with Protocol (adopted 10 July 1990, entered into force 26 October 1992).

[22] Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments (adopted 6 May 2009, not yet in force).

[23] *Gustav F. W. Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award of June 18, 2010, paras. 351-2 (*Hamester v. Ghana*).

[24] *Ibid.*, para. 355.

[25] Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments (adopted 24 February 1995, entered into force 23 November 1998), Art. 12 (1) (emphasis added). Translation from *Hamester v. Ghana*, para. 353.

[26] *Hamester v. Ghana*, para. 354.

Faced with such ambiguous treaty text, it is understandable that the tribunal decided that it was not going to interpret it in the absence of any substantive pleading from the parties. Had the respondent been serious about its counterclaim, it would undoubtedly have argued in detail (a) why the tribunal had jurisdiction to hear the counterclaim; (b) why the counterclaim was admissible; (c) what the legal norm that the claimant had allegedly violated was; and (d) what acts constituted such a violation. Throwing in such "off the cuff" allegations without seriously developing them unnecessarily undermines counterclaims as a genuine and legitimate tool in investment treaty arbitration.

7.26. Nevertheless, the award demonstrates that the host state's consent depends on the text of the applicable investment treaty, which should be carefully interpreted. There is no room for general sweeping statements about whether counterclaims are within the consent to arbitrate investor claims.

7.27. Even when faced with a restrictive clause, the state could possibly bring a counterclaim for abuse of process, which arises directly from the investor's act of commencing arbitration. This could be a viable option when the investment arbitration is brought, for example, with the aim of interfering in domestic criminal or other court proceedings, leading to delay, nuisance and monetary losses to the respondent state. Although BITs do not in principle create obligations on investors as such, invoking the arbitration clause arguably binds the investor to act in good faith, an obligation which would be breached by an abuse of process.

II.2. Investor's Consent

7.28. The terms of the BIT are of course only half of the issue when considering consent. An investor most commonly provides *its* consent to arbitrate by initiating the proceedings. In such circumstances, the request for arbitration rarely expressly states that the investor consents to the state's counterclaims to be arbitrated. More commonly the language will either:

(a) "*invoke*" the arbitration clause in the BIT;[27]

(b) "*consent to arbitration in accordance with*" the applicable treaty;[28] or

(c) "*accept the Respondent's offer to arbitrate and consent to the jurisdiction ... over [the investor's] claims*"[29].

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[27] For example, the Notice of Arbitration dated 25 March 1999 in *Pope & Talbot, Inc. v. Canada 1*, available at: http://www.naftaclaims.com/Disputes/Canada/Pope/PopeNoticeOfArbitration.pdf (accessed on September 27, 2010).

[28] For example, the Request for Institution of Arbitration Proceedings dated 21 October 2003 in *Corn Products International, Inc v. Mexico*, para. 17, available at: http://naftaclaims.com/Disputes/Mexico/CPI/CPI%20-%20Claim.pdf (accessed on September 27, 2010).

[29] For example, the Request for Arbitration dated 19 February 2010 in *FTR Holding and others v. Uruguay*, para. 56, available at:

7.29. The first two of the above examples arguably simply mirror the consent in the BIT's arbitration clause, and can thus be said to amount to consent in relation to counterclaims, as long as such counterclaims come within the consent of the host state as expressed in the BIT.

7.30. But how about the third example? On the face of it, it would appear to only give the investor's consent to have its own claims heard, rather than those of the host state. In our opinion this is an overly narrow reading of such language. The investor cannot pick and choose from the dispute resolution provision of a BIT, just like it cannot pick and choose from other provisions of the investment agreement. A BIT is not an *à la carte* selection of provisions among which the investor can choose – deciding, for example, to arbitrate its own expropriation claim but not the state's "essential security interests" defence. The offer to arbitrate in a BIT's dispute resolution provision can only be accepted according to its own terms. If those terms provide an opportunity for the state to introduce counterclaims, then an investor cannot exclude this possibility by wording its acceptance of the offer narrowly[30].

II.3. Applicable Law

7.31. In general BITs do not provide for obligations on investors, only on the contracting states. This does not mean that an arbitration initiated under a BIT could not espouse counterclaims that are governed by a national law, most often the law of the host state. The offers to arbitrate contained in BITs' dispute resolution provisions are not by necessity limited to claims that arise under the BIT in question, although such claims form the vast majority of cases initiated under them. Where the BIT does not specify any applicable law, the default rule is that the *lex specialis* is the BIT itself[31], and counterclaims are likely to fall outside a tribunal's jurisdiction[32].

7.32. By contrast, where the BIT specifies applicable law to include domestic

http://www.arbitration.fr/resources/ICSID-ARB-10-7-Notice-of-arbitration.pdf (accessed on September 27, 2010).

[30] *Cf.* Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 17-8 (2007). Professor Schreuer's Commentary on the ICSID Convention provides slightly confusingly in this regard that

> *[i]f the investor accepts the offer [to arbitrate contained in a BIT] only in respect of its specific claim, consent will be restricted by the terms of the acceptance. If the investor accepts the offer of jurisdiction by instituting proceedings, consent exists only to the extent necessary to deal with the investor's request. But if a counterclaim of the State is closely connected to the investor's complaint, it is arguable that it will be covered by the mutual consent of the parties.*

Christoph Schreuer et al., *supra* note 12, at 756.

[31] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31. The ICSID Convention (Article 42) provides that the applicable law is the one agreed by the parties. In the absence of such agreement, the laws of the host state together with applicable rules of international law would govern, but in the case of BIT arbitration, the BIT constitutes the agreement on applicable law.

[32] Except for claims for abuse of process, discussed above.

law, there should be no problem for states to bring counterclaims *which have their basis in that law*, but which arise out of the same "investment" or "subject-matter". An example of such a clause can be found also in the Czech Republic – Netherlands BIT, Article 8(6) of which provides as follows:[33]

The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- *the law in force of the Contracting Party concerned;*
- *the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;*
- *the provisions of special agreements relating to the investment;*
- *the general principles of international law.*

7.33. The respondent state should face fewer problems bringing counterclaims that arise out of breaches of domestic law when the BIT includes such a broad applicable law clause, but the situation in relation to contract breaches is more problematic. The *ad hoc* annulment committee in *Vivendi v. Argentina* famously ruled that contract claims are separate from treaty claims[34]. The same act (by the state) could constitute a violation of *both* a contract and a BIT, but only the latter may be brought before the BIT tribunal, whereas the former must usually be litigated in accordance with the dispute resolution mechanism provided in the contract. The committee made this finding despite the fact that the applicable law clause in the BIT was broad and specifically included host state law[35]. The committee did not appear to consider the question of applicable law under Article 8(4) of the BIT, but simply assumed that it was international law[36].

7.34. A lot has been said about the *Vivendi* decision[37], and not much need be added here. In the context of counterclaims by the respondent state, the

[33] The *Saluka v. Czech Republic* tribunal did not discuss the law applicable to the counterclaims, as it held that it had no jurisdiction on other grounds, as discussed below.

[34] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 98.

[35] Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Encouragement and Reciprocal Protection of Investments (adopted 3 July 1991, entered into force 3 March 1993), Art. 8(4): "*L'organe d'arbitrage statuera, sur la base des dispositions du présent Accord,* ***du droit de la Partie contractante partie au différend*** *– y compris les règles relatives aux conflits de lois –, des termes des accords particuliers éventuels qui auraient été conclus au sujet de l'investissement ainsi que des principes de droit international en la matière.*" (Emphasis added.).

[36] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 102: "*the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law.*"

[37] See, e.g. Bernardo M. Cremades, *Litigating Annulment Proceedings The Vivendi Matter: Contract and Treaty Claims*, *in* ANNULMENT OF ICSID AWARDS 87 (E. Gaillard & Y. Banifatemi eds., 2004); Christoph Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA,

Saluka v. Czech Republic tribunal agreed expressly with the reasoning of the *Vivendi* committee in rejecting jurisdiction to hear the counterclaims arising from the Share Purchase Agreement – in particular because there was a mandatory dispute resolution clause in that agreement[38]. However, again the tribunal did not consider the question from the viewpoint of applicable law, which it arguably should have done.

7.35. Nevertheless, to the extent that investors are prohibited from bringing contractual claims before an investment treaty tribunal, it appears fair that the state should also litigate such claims before the contractual forum. A more difficult situation arises when such claims are brought not directly as contractual claims but under an "umbrella clause" found in the applicable BIT. In such circumstances fairness would tend to dictate that contractual counterclaims are heard by the same forum, but if *Vivendi* is followed to the letter, this will not be possible: the counterclaims remain contractual claims, whereas the investor's claims are international law claims brought for violation of the "umbrella clause" itself. This would tend to suggest that the "*Vivendi* doctrine" might deserve to be refined to achieve fairness and efficiency.

III. The Required Connection between the Main Claims and the Counterclaims

7.36. The tribunal in *Saluka v. Czech Republic* decided that in addition to fulfilling the jurisdictional requirements set out in the applicable instruments, a counterclaim must have a "*connexion*" with the main claim that is closer than that required by Article 46 of the ICSID Convention, or what is found in the UNCITRAL Rules. It is unclear why this should be the case. The rules are presumably sufficiently set out in the ICSID Convention (or UNCITRAL Rules) and the applicable BIT.

III.1. *Saluka v. Czech Republic*

7.37. The tribunal in *Saluka v. Czech Republic* began its analysis of its jurisdiction over the domestic law counterclaims by stating that "*a legitimate counterclaim must have a close connexion with the primary claim to which it is a response*"[39], and then went on to note that "*[t]he nature and extent of the necessary close connexion may be variously expressed*"[40].

7.38. It had been considered in the early ICSID case of *Klöckner v. Cameroon* that the tribunal had jurisdiction to hear the respondent's counterclaims because, although not based on the same contract, they were "indivisible"

BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 281 (T. Weiler ed., 2005).

[38] *Saluka v. Czech Republic*, paras. 55-7. The tribunal also noted problems with identity of parties, which probably would have been sufficient to defeat its jurisdiction to hear the contractual claims: *Ibid.*, paras. 49-51.

[39] *Ibid.*, para. 61.

[40] *Ibid.*, para. 63.

and "interdependent" with the primary claim[41]. This reasoning was quoted with approval in *Saluka v. Czech Republic*. The *Saluka* tribunal stated that the counterclaims:

> *... cannot be regarded as constituting "an indivisible whole" with the primary claim ... or as invoking obligations which share with the primary claim "a common origin, identical sources, and an operational unity" or which were assumed for "the accomplishment of a single goal, [so as to be] interdependent." The legal basis on which the Respondent has itself relied ... is to be found in the application of Czech law, and involves rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction*[42].

This was the main basis on which the *Saluka* tribunal refused to hear the respondent's counterclaims arising under Czech domestic law.

III.2. Why such a Strict Test?

7.39. In the authors' opinion *Saluka*'s reliance on *Klöckner* was incorrect, as the latter was a contractual arbitration, and different considerations thus applied. The language in the *Klöckner* decision referring to claims and counterclaims that are aimed at the "*accomplishment of a single goal*" is simply misplaced and inappropriate in an investment treaty context where the parties to the arbitration have rarely been engaged in a joint enterprise in the way that contractual parties often have. In an UNCITRAL arbitration the text of the earlier version of the Rules (referring to the "*same contract*") is in general unhelpful when the primary claims do not arise out of a contract. Thus the tribunal should instead have focused on the terms of the BIT, which refer to claims "*concerning an investment*"[43]. Nothing suggests that a stricter test of "*interdependence*" with the primary claims is required. The *Saluka v. Czech Republic* tribunal's contention that there are various ways of expressing the required connection might be true as a matter of principle, but it should have had no place in the tribunal's analysis. The tribunal was not called upon to rule on the question of jurisdiction over (or admissibility of) counterclaims as a matter of general principles of law, but under a very specific instrument, the Czech Republic – Netherlands BIT. The way of expressing the required connection in that instrument was the only one with which tribunal needed to concern itself: the fact that the counterclaims arose out of the same investment should have been sufficient.

[41] *Klöckner Industrie-Anlagen GmbH et al v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment of May 3, 1985, paras. 17 and 65.

[42] *Saluka v. Czech Republic*, para. 79. The tribunal also analysed the connection that had been required by the Iran-United States Claims Tribunal and in *Amco v Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in the Resubmitted case of May 10, 1998: *Saluka v. Czech Republic*, paras. 68-75.

[43] The term "contract" in the old UNCITRAL Rules could also be read to refer to the object of the claim, i.e. the investment: see *supra* note 16.

7.40. Similarly, the *Saluka* tribunal appeared to suggest that the required connection had to be *legal* when it made particular reference to the "*legal basis*" of the counterclaims as being "*found in the application of Czech law*"[44], whereas the primary claims arose under the BIT. From a practical viewpoint this is again rather unhelpful, and makes the apparent availability of counterclaims a mirage. Whereas the investor might well have committed unlawful acts that are closely connected to the measures taken by the state that allegedly violate the BIT, it is hard to see a scenario where they may arise under the same legal order, namely international law. As an investor cannot in general violate a BIT, the complaints of the state are going to arise from (alleged) violations of its own laws (such as environmental or banking regulation) or a contract between the investor and the state.

7.41. Other commentators have also criticised the connection required in *Klöckner* and *Saluka* as being too demanding[45], suggesting that a close factual nexus should be enough or that the fact that the counterclaim arises from the same "investment" as the claim suffices. We join in these criticisms. The "connection" that is required should be deducted from the ICSID Convention/UNCITRAL Rules and the applicable BIT (such as "subject-matter" or "investment"), nothing suggests that a stricter test than that for jurisdiction or admissibility should be devised (like the *Saluka* tribunal did). This might be the direction in which investment tribunals are going: the recent *Hamester* tribunal did not require overcoming such an additional hurdle of "connection", but restricted itself to considering whether the counterclaim came within Article 46 of the ICSID Convention and the parties' consent[46].

IV. Conclusion

7.42. The introduction of counterclaims into investment arbitration requires careful study of the applicable instruments, in order to establish that such counterclaims are within the tribunal's (and institution's) jurisdiction.
However, such analysis is the bread and butter of investment arbitration lawyers. The fact that states have so rarely brought counterclaims into investment treaty proceedings may be the result of their counsels' failure to advise them on the matter. Good counsel should see if there is something in the investor's behaviour that is more than just a defence to the claim, but can in fact form the basis of a counterclaim (such as breaches of local environmental regulatory norms or abuse of process), and consider whether efficiency or a tactical advantage could be gained by introducing those counterclaims into the same proceedings. States would probably have more faith in the process of investment treaty arbitration

[44] *Ibid.*, para. 79, quoted above.

[45] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge: Cambridge University Press 260-3 (2009); Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 43-6 (2007).

[46] *Hamester v. Ghana*, paras. 351-6.

if they saw that it could also provide quality adjudication of their own grievances in appropriate circumstances.

| | |

Summaries

DEU [***Über die Möglichkeit von Gegenklagen in Schiedsverfahren für Investitionsabkommen***]

Dieser Beitrag untersucht die Hindernisse, denen Staaten begegnen können, wenn sie ihre Gegenansprüche vor einem Schiedstribunal für die Schlichtung von Streitigkeiten aus Investitionsabkommen vorbringen und analysiert die Argumente von Schiedstribunalen bei der Weigerung, solche Gegenansprüche zu verhandeln. Was die Schlüsselfrage der Gerichtsbarkeit anbelangt, so sehen sowohl das ICSID-Abkommen als auch die UNCITRAL-Regeln prinzipiell die Möglichkeit von Gegenklagen vor. Damit stellt sich die Frage oft erneut als eine Frage nach der Einwilligung in die Schiedsgerichtsbarkeit und, ob die fragliche Schlichtungsbestimmung in einem BIT, die Beilegung von Streitigkeiten zwischen Investor und Staat auch Gegenansprüche einbezieht – ein Thema, welches stets eine gründliche Betrachtung des Wortlauts des Abkommens notwendig macht. Außerdem wird auch die Einwilligung des Investors diskutiert sowie das auf besagte Gegenklagen anzuwendende Recht. Gegenklagen müssen mit der Hauptforderung in Verbindung stehen, um zulässig zu sein, aber die Art solcher Verbindung ist allerdings nicht offensichtlich. Der Beitrag kommt zu dem Schluss, dass der mit der Entscheidung in Sachen Saluka Investments BV vs. Tschechische Republik im Mai 2004 geschaffene Test zu streng war, und dazu führt, dass es für Staaten fast unmöglich ist, Gehör für ihre Gegenklagen zu erlangen, was zu bedauern ist.

CZE [***O přípustnosti protinároků v investičním rozhodčím řízení***]

Tento článek analyzuje překážky, které se mohou objevovat při vznášení protinároků hostitelských států před tribunály rozhodujícími spory z investic, a zkoumá argumentaci těch tribunálů, které tyto protinároky odmítly projednat. S ohledem na klíčovou otázku soudní pravomoci poskytují v zásadě prostor pro protinároky hostitelských států v investičním rozhodčím řízení jak Washingtonská úmluva (Úmluva o řešení sporů z investic mezi státy a občany druhých států), tak Rozhodčí pravidla UNCITRAL. Tato otázka se tak často stává otázkou souhlasu podrobit se investičnímu rozhodčímu řízení a toho, zda ustanovení o řešení sporů mezi investorem a státem v dvoustranných dohodách o podpoře a ochraně investic zahrnují taktéž protinároky – otázkou, kterou je vždy třeba pečlivě posuzovat s ohledem na textaci příslušné dohody. Článek se dále zabývá otázkou souhlasu investora, jakož i práva použitelného pro vznášené protinároky. Aby mohl být protinárok hostitelského státu vůči investorovi přípustný, musí souviset s původním nárokem investora, ovšem povaha této souvislosti není samozřejmá. Autoři uzavírají svůj příspěvek konstatováním, že test, který aplikoval rozhodčí tribunál v květnu 2004 v případu Saluka Investments BV v. Česká republika byl příliš přísný, a vede ke stavu, kdy je pro státy prakticky nemožné uspět při vznášení svých protinároků vůči investorům, což je nežádoucí.

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POL [***Dostępnośc roszczeń wzajemnych w arbitrażu w oparciu o umowy inwestycyjne***]
Niniejszy artykuł omawia dostępnośc roszczeń wzajemnych w postępowaniu arbitrażowym inwestor-państwo. Jest to zasadniczo kwestia właściwości sądu w rozumieniu stosownych instrumentów. Kluczowy problem stanowi zgoda, która wymaga dokładnej analizy warunków stosownej umowy inwestycyjnej. Dopuszczalnośc roszczeń wzajemnych uzależniona jest również od związku z roszczeniem pierwotnym, choć jest to wymóg, którego wykładnia nie powinna być nazbyt surowa.

FRA [***Sur la disponibilité des demandes reconventionnelles dans les arbitrages relatifs aux traités d'investissement***]
Cet article explore la possibilité d'utiliser les demandes reconventionnelles dans les arbitrages investisseurs-Etat. Il s'agit en premier lieu d'une question de compétence, qui dépend des outils applicables. La question de l'aval, qui exige une analyse prudente des dispositions du traité d'investissement en vigueur, constitue un aspect essentiel de cette problématique. La recevabilité des demandes reconventionnelles dépend également du rapport entre les requêtes fondamentales, soit une exigence qu'il convient de ne pas interpréter de façon trop stricte.

RUS [***О наличии встречных исков в арбитраже с рассмотрением инвестиционных соглашений***]
В настоящей статье изучается явление встречных исков в арбитраже между государством и инвестором. Вопрос прежде всего состоит в юрисдикции согласно соответствующему инструментарию. Ключевым моментом, требующим тщательного анализа условий применимого инвестиционного соглашения, является согласие. Допустимость встречных исков также зависит от связи с первичными претензиями, и такое требование не должно интерпретироваться очень строго.

ES [***Sobre la disponibilidad de las contrademandas en el Arbitraje de tratados de inversión***]
Este artículo examina la disponibilidad de las contrademandas en el arbitraje inversor-estado. Una de las preguntas principales es la de la jurisdicción de los instrumentos relevantes. Un elemento clave es el consentimiento, que requiere un análisis cuidadoso de los términos del tratado de inversión aplicable. La admisibilidad de las contrademandas también depende de la conexión con las demandas principales, un requisito que no debería interpretarse demasiado estrictamente.

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Budgetary Legal Consequences of Breaching the Terms of Investment Incentives

Key words:
investment incentives | European Union | investment protection | subsidies, contract | budget | investments | investor

***Abstract** | After 1989, Czechoslovakia began to realize the importance of building a market economy, which was linked to the need for involvement of foreign investors. A major role in attracting foreign capital was played by contract that guaranteed aid for and protection of investments. These contracts are on the one hand a shield against devaluation of investments due to action or non-action of state institutions, but also have a marked impact on the state budget – whether directly or indirectly, which is often forgotten when formulating specific arrangements. Institute of investment incentives is not possible to understand unilaterally, but must take into account not only the positive but also negative effects on state finances. The factor of national debt in the case of investment incentives has clearly been overlooked. Two opinions stand side by side – to support foreign investors to the maximum with all impacts or not to do so. At a time when the Czech Republic finds itself at the beginning of the introduction of necessary economic reforms, one needs to ask this question and reflect on the profitability of foreign investment and its contribution to the state economy and state budget.*

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I. Introduction

8.01. The system of investment incentives has become one of the paths the EU has taken in an effort to draw foreign as well as domestic investors into the process. At the same time, individual states must respect the rules relating to public aid to investors, which also apply to the Czech Republic as a member of the EU. The system of incentives and subsidies in the Czech Republic has therefore been structured in such a way that it is in compliance with European Union rules, specifically the 1998 EC Guidelines on national regional aid.

8.02. Related to public aid are systems for various incentives to subjects for their business activities not only to create new employment opportunities for people, but also to contribute to GDP growth and the development of society as a whole.

8.03. With the Lisbon Treaty, effective as of 1 December 2009, the European Union acquired a new, exclusive authority to regulate the area of direct foreign investment, which in principle is incompatible with the parallel existence of international instruments of Member States concerned with the subject at hand. Generally, bilateral investment treaties are traditional tools for protecting foreign investments. Currently between the EU Member States there are nearly two hundred valid bilateral investment treaties[1]. The number of intra-union investment treaties, however, is negligible compared with the hundreds of bilateral treaties on investment protection, which were entered into in the past between individual Member States and third countries. The question is how to make these instruments compatible with the new, exclusive union authority[2]. The new, exclusive authority of the European Union to regulate direct foreign investment in itself has raised questions of the following type – what consequences will this authority have for existing bilateral investment treaties, which the Member States entered into between each other and with third countries; are these treaties still applicable; what will the impact be at the level of protection of foreign investments in the territory of the European Union and in the territory of third countries; and a number of other questions[3].

[1] Historically, these instruments were not utilised in the old EU "fifteen," with two exceptions. The current relatively high number of these treaties in effect in Member States has expanded by two recent waves during the nineties, as many countries of the European fifteen entered into the aforementioned instruments for investment protection with the relevant states of Central and Eastern Europe for reasons entirely apparent.

[2] Prior to the entry of the Lisbon Treaty into effect, the Member States undertook several steps with the aim of adapting their international obligations to the new situation. Some Member States began negotiating also in relation to their investment treaties entered into with third countries, particularly with the intention of inserting into the text new clauses that would enable them not to apply certain contractual provisions if required by their obligations within the context of the European Union.

[3] Magdaléna Ličková, *O nové pravomoci Evropské unie v oblasti přímých zahraničních investic a rozpacích, které vyvolává (On the New Exclusive Authority of the European*

The situation could change if a European-wide treaty could be successfully reached to eliminate all incentives and apply only naturally comparative advantages. All hitherto attempts to limit investment incentives to a broader degree from the side of the OECD or WTO, however, have been unsuccessful, and therefore not even the Czech Republic can circumvent incentives in the international competition for direct investment.

II. Investment Aid and International Treaties

8.04. After 1989, the former Czechoslovakia began to realise the importance of building a market economy, which, due to a lack of equity, was linked to the need to involve foreign investors. It sought the best way to implement this approach. To this end, in 1992, an agency was established to support (foreign) investment, CzechInvest, or the Czech Agency for Foreign Investment[4]. The establishment of this agency greatly assisted in the fight against unemployment. Realization of investment projects brokered by the CzechInvest agency since 1993 in the Czech Republic has facilitated the creation of more than 200 thousand jobs[5]. Treaties that guarantee investment aid and protection have played a great role in attracting foreign investors[6].

8.05. Czech law governing investment incentives is derived from Commission Regulation No 1628/2006 of 24 October 2006, on the use of Articles 87 and 88 of the Treaty to national regional investment aid. The former Article 87 TEC, today Article 107[7], discusses any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. When

Union in the Field of Direct Foreign Investments and on the Constraints it Produces), available in Czech at: http://jinepravo.blogspot.com (accessed on October 13, 2010).

[4] Pavel Franc, Jiří Nezhyba, Zahraniční investice a CzechInvest jako faktory destabilizující demokratický právní stát (*Foreign Investment and CzechInvest as Factors Destabilising to a Legal Democratic State*), Brno: Ekologický právní servis 8 (2007).

[5] Source available in Czech at: http://www.czechinvest.org/vliv-pzi/ (accessed on October 13, 2010).

[6] Historically, the first treaty on investment protection was signed on 25 November 1959 between the Federal Republic of Germany and Pakistan and today, the number of valid bilateral investment treaties is estimated at approximately 2600. In addition to material-legal guarantees, the attractiveness of investment treaties rests especially in the existence of a special mechanism for resolving disputes, which has typically been international arbitration. This system enables investors to avoid the national legal system of the host state, which without the existence of an investment treaty, would otherwise be called upon to resolve the dispute.

[7] Consolidated version of the Treaty on the European Union and the Treaty on the Establishment of the European Community, no. 6655/08 dated 15 April 2008, Title VII, Chapter 1, Section 1, pp. 120–122.

establishing subsidies, it is critical to take this provision into account. Only such aid of a social character, aid to make good the damage caused by natural disasters or exceptional occurrences, and aid granted to the economy of certain areas of the Federal Republic of Germany are *ipso jure* denoted by the regulation as compatible with the internal market. Other categories include aid that could be considered as compatible in the case of fulfilment of established conditions. Related in content, the former Article 88 SES, today Article 108[8], establishes the authority of the Commission to keep under constant review all systems of aid existing in Member States. In the most extreme case, primarily if the aid is misused, it may be altered or even abolished. Exceptionally, in cases when a state has failed to comply with the measures within the prescribed deadline, the Commission has the right to appeal to the Court of Justice of the European Union. In case of the existence of extraordinary circumstances, the Council has the right to decide on the compatibility of aid with the internal market. For this decision, however, the unanimity of all of its members is required.

8.06. The promise of "fair and equal treatment of all subjects" has become the standard for all treaties and the main motive. Currently, the Czech Republic has signed treaties with 80 countries. Practically each of the treaties defines the concept of investment. The most frequent formulation is the following: "Every asset value used for business purposes in accordance with the economic activities of the investor of one party on the territory of the other contractual state according to the regulations of the other contractual party, whereas the treaty continues to contain a demonstrative specification of individual types of investments." In the definition (specification) of investment, it is very important to monitor whether the contents of the treaty also relate to indirect investment. In practice, this aspect is enormously important for protecting investments. This involves a typical example, in particular by reason of tax optimization, when an investment is implemented via third parties registered in another country, controlled overall by the original investor. Whether this intermediary will be considered the actual investor or not usually depends on the place of the proceedings in the case of a dispute regarding the investment.

8.07. The definition of the company's seat is highly significant in this issue, i.e. whether the domicile of the investor is the country of its incorporation or whether its seat is considered according to the principle of control or actual management. The domicile of the investment (more precisely the domicile of the investor), is absolutely essential for determining whether and which treaty was used and what procedural method for investment protection would be applied. In this way, we also come across the general characteristic of the aforementioned treaties – they have the same or a similar format, but each treaty differs in content. When choosing

[8] *Ibid.*

jurisdiction (as the country of the investment source), it is always necessary to proceed individually and to thoroughly study the specific treaty[9].

8.08. If a treaty for investment aid and support exists, matters will always proceed in accordance therewith. Guaranteeing investments from countries with which the Czech Republic has not entered into any such treaty shall be addressed by the Commercial Code. As a rule, the treaty contains stronger protective means (the presence of international components markedly strengthen the positions authorised for enforcement of its rights). One must also not forget that an investment from the resources of a foreign investor is and will always be protected more strongly than in cases of a Czech investor on Czech territory[10]. One of the components of the protection of an investment made by a foreign investor is protection from expropriation[11]. Although expropriation is a serious incursion into constitutionally guaranteed rights for the protection of ownership; during this process it is important to remember Art. 11 (4) of the Czech Charter of Fundamental Rights and Basic Freedoms[12], which in case of expropriation or restriction of ownership rights, establishes the requirement of a fulfilment of three conditions, being the existence of public interest, legal provisions and the provision of compensation[13].

III. Subsidies and the State Budget

8.09. *Investment subsidies have both positive and negative impacts on the state* budget. From the standpoint of budget revenues, which could be obtained from investment incentives, they are quite limited in number. The creation of new jobs means for the budget revenues from employees' tax payments (on income from dependent activities) and their contribution to social and health insurance and the sum of payments for social and health insurance

[9] Multi-national concerns always analyse in advance the contractual relations of the state in which they have decided to invest. According to the results of analysis, they then decide on the most beneficial territory for placing an investment source in case of possible future disputes. It is also recommended to monitor international practice and to structure situations still prior to the actual investment in a way that would bring the greatest probable resolution of any arbitration dispute (who would decide in the matter can be determined in the relevant Treaty).

[10] For more details, for example, see *Smlouvy o ochraně investic* (*Investment Protection Treaties)* 13(3) AKONTINFO (5 September 2009), available in Czech at: http://www.akont.cz (accessed on October 13, 2010).

[11] Direct modification is established primarily in the text of the Investment Promotion and Protection Treaties, a subsidiary of which is applied by Sec. 25 of the Czech Commercial Code (Act no. 513/1991 Coll.) and also by Sec. 128 (2) of the Civil Code (Act no. 40/1964 Coll., as amended) and Secs. 108-116 of Act no. 50/1976 Coll., the Building Act.

[12] Act no. 2/1993 Coll., On the Declaration of the Czech Charter of Fundamental Rights and Basic Freedoms, as amended by subsequent regulations.

[13] Source available at:
http://www.epravo.cz/top/clanky/majetek-cizincu-v-ceske-republice-a-jeho-ochrana-pred-vyvlastnenim-21885.html (accessed on October 13, 2010).

for these employees, which are paid by the employer. This phenomenon may have a domino effect on other spheres in the given area and thus to the acquisition of other resources for the budget (subcontractors, purchase of products and services and related contribution of direct and indirect taxes etc.). Together with these revenue sources, it is necessary to note that this leads to savings in expenditures related to payment of unemployment benefit, payments by the state for insured parties who are not engaged in gainful employment and for expanding the knowledge and skills of those workers who are undergoing requalification and who could take advantage of these new experiences in their future work or personal life[14].

8.10. Counter to these positive sides are the levels of expenditure from the state budget, which take the form of subsidies or grants or other forms of allowance. Their scope must be lower than the amount of revenues collected by investment incentives. In the area of budgeted expenditures, however, it is possible to find more items that have a direct or indirect impact on the overall budgetary management.

8.11. Although incentives are of diverse character, they are linked by the fact that they have an impact on the state budget – either directly or indirectly. The most well known incentives are related to the 'tax holiday', which is an expression for incentives that take the form of an income tax concession (for a period of ten years – for newly established subjects, or a partial income tax concession for a period of five years – for already existing subjects). Other options for business aid consist of subsidies for creating job opportunities, training and requalification. It is also possible to consider the provision of industrial land at a preferential price and the transfer of land owned by the state to a business subject at a preferential price as a financial benefit with an impact on the state budget. Aid for investing in land as an investment incentive is available under the precondition that suitable land is available. This is provided through the relevant local governmental bodies – not directly to investors. The community or region receives a grant for the development of infrastructure on the land where production is to be located and then it may sell to investors a fully developed building parcel at a favourable price. Support for the development of industrial zones[15] or support for the strategic services sector and a subsidy for technological centres

[14] Of the 30 billion crowns provided by incentives, since 1998 only CZK 6.4 billion were remitted from the state budget to the accounts of investors as aid for the creation of new jobs, requalification of employees or as capital subsidy for investment. "The remaining 21 billion crowns are created by income tax concessions and another 2.6 billion crowns a price reduction for preferential land in industrial zones," pointed out Rudysarova (Deputy General Director of CzechInvest), but according to her, these two items are not a state expenditure.

[15] This has manifested itself since 1999, when more than CZK 723 million of state resources were used for the development of more than 50 parcels, which could be prepared for potential investors within a minimum amount of time and to which local

mean in fact other forms of grants for business activity depending on the level of unemployment in the region for investment or a grant for training and requalification. When investing at a local and regional level, communities and regions enter into contracts with foreign investors[16]. Aid is also possible in relation to projects for customer service centres, shared service centres, centres for the development of software, both expert and resolution, centres and high-tech technological centres at which expectations exist that the results of research and development activities in the technological centre will be followed by production. To these specific programmes for investment incentives, the Czech government has also prepared other advantages outside the framework of the official package. Grants for the creation of jobs are also bound to budgetary resources. This involves investment incentive packages that contain incentives relating to employment, although grants for creating jobs and grants for requalification cover roughly one third of the costs for obtaining qualification for one employee.

8.12. A subsidy may also be in the form of the provision of a certain amount of financial resources, most often from the state budget or from a regional budget. This may be, but need not be, established for a specific purpose. In addition to subsidies, resources are provided to support business in the form of grants. Precisely defined borders between both forms of provided resources and differences thereof have not been defined by law. Often, both terms are taken as synonymous, the difference between which is perhaps more precisely the purpose and specifics of a grant as opposed to a subsidy[17]. A subsidy is often understood as public aid[18].

offices now offer land to production investment companies at significantly reduced prices.

[16] An interesting element of these relationships is the clash of the independent performance of state administration with the contractual obligations of autonomous regional units toward foreign investors. Contracts have been entered into by autonomous regional units within the context of the execution of their independent competency. An important point of these contracts, either already involving the most diverse named contracts (on cooperation, future purchase contracts, stipulations and memoranda of understanding or contracts for the sale of parcels in industrial zones) has often been the principle obligation of autonomous regions to provide investors with participation and cooperation during the preparation and realisation of investment in order to complete this as quickly and easily as possible. The above was most frequently performed by means of the obligation of participation when acquiring the necessary permits and decisions whereas allowing investment is the typical result transferred by community action and performance of the state administration. Pavel Franc, Jiří Nezhyba, *supra* note 4, at 26.

[17] Generally, a programme is called a subsidy if it co-finances a share of 80 or more percent of the investment costs of a project. Such voluntary transfer in favour of the private sector or private individuals is called a subsidy.

[18] The methodology of government financial statistics for a subsidy is considered voluntarily common or capital investment between governmental units, between multi-national organisations and the government. Government financial statistics and the System of National Accounts in the manuals of the Ministry of Finance of the Czech

8.13. The greatest risk for state budget expenditures from the standpoint of support and protection for investment is seen, for example, by the Supreme Audit Office in the fact that *"various amendments have been entered into on the basis of government decrees to the "Declaration of Common Intentions" (Declaration), according to which investment incentives were provided to commercial companies prior to the Investment Incentives Act becoming effective and which enable companies to acquire higher future targeted subsidies than had been originally negotiated. These higher expenditures from the state budget, however, are not compensated by expanded obligations of the companies,"* noted the president of the Supreme Audit Office, František Dohnal, as early as 2006. According to the amendments, the limit fell and the only criteria is, therefore, the permitted intensity of public aid. State expenditures will therefore be higher than originally anticipated and cannot be precisely estimated. *"In conclusion, it is possible to state that amendments to the Declaration bring profit to companies, but increased expenditure to the state with a risk of further increases in the future. Deficiencies when drawing on the resources of the state budget determined for individual companies will be resolved in a standard way by the Supreme Audit Office by notifying the relevant financial office,"* stated president Dohnal in conclusion[19].

IV. Promotion and Protection of Investment During the Breach of a Contract

8.14. As a rule, clever and well-prepared foreign investors were at the root of the problems in the Czech Republic with regard to investment aid and protection in the territory of the Czech Republic, and their weapons were contracts which left perceptible dents in the budget of the Czech Republic. On one hand, these are a shield against the devaluation of investments as a result of action or non-action on the part of state institutions, but they also have a marked impact on the budgetary expenditures of the state, which is often forgotten when formulating specific stipulations.

Republic provide a narrower definition of the word subsidy as an untitled transfer, which the government provides to selected businesses and the size of which is determined on the basis of the level of production or activities or on the basis of the amount and value of produced goods and services. In a broader sense, this demonstrates that any payment or provided tax exemption recognized by individuals in connection with their personal situation may be considered an subsidy, which is provided under the conditions established by law or decree (e.g. for the unemployed or disabled) – source available at: http://www.mfcr.cz (accessed on October 13, 2010).

[19] Radka Burketová, *Tisková zpráva o ukončení kontrolní akce č. 05/33: Výdaje státu budou vyšší než původní předpoklady* (*Press release on completion of the Audit proceeding no. 05/33: Expenditures of the state will be higher than originally anticipated*), Supreme Audit Office (19 September 2006) available in Czech at: http://www.nku.cz (accessed on October 13, 2010).

8.15. Budgetary-legal norms do not address in more detail the consequences surrounding the departure of foreign investors after having exhausted various concessions. For example, land that had been invested in for the purpose of realising certain business activities may be difficult to return to their original state and their use may not be determined – there is then a question as to whether there has been a return on such invested state funds. A still more complex situation may occur in cases when an investor terminates its business activity sooner than anticipated. It is true that the Investment Incentive Act makes reference to some sanctions related to the breach of a specific contract (compensatory damages etc.), but it does not address impacts on budgets. From the standpoint of the budgetary outlook or approved budget for a given year, problems and expenditures related thereto that had not been anticipated (growth in unemployment in a given location and thereby also costs for support and other related state expenditures) could arise. The departure of a business itself after completion of the period for which a contract had been entered into is not a breach in and of itself and therefore the consequences for the state assumes a domestic character – generally with the need for public resources for their resolution.

8.16. International Treaties address the protection of a foreign subject who has taken advantage of the possibility to invest in the Czech Republic whilst using financial incentives which are provided from public budgets, however it is only obliged to adhere to that which has been agreed contractually. And it is precisely at this stage that future problems are often established. Breach of contract is often related to the fact that deadlines or price stipulations are unrealistically established and become the subject of dispute at the moment when an investor finds itself in a situation when it can no longer continue or develop its business due to reasons resting in, for example, the economic conditions of the host country. If an agreement on the applicable law for dispute resolution, which is not advantageous to the host state, is added to such arrangements, one can expect an increase in the financial costs not only for handling the dispute, but often also for resolving the consequences of the decision. If the decision in the dispute is such that it is decided that the state receiving the investment is designated as a subject that was unable to protect it (in such disputes, in principle, subsidies are no longer discussed), it is necessary to find resources in the state budget for compensation of established financial amounts.

8.17. The factor of national indebtedness in the case of investment incentives has clearly been overlooked. Nonetheless, if we take into consideration the broader economic picture, this factor rises to the forefront. The Czech Republic stands on the edge of critical economic reforms which need to be introduced (pension reform, budgetary and tax reform, healthcare reform). Currently, the state needs to deal with the fact that there is extensive immobility in the state budget – a large part of budgetary expenditure items are of a mandatory nature and without changes in the law, it may be difficult to deal with them. Investment incentives granted

to large economic subjects – tax breaks, investments in infrastructure, in essence could create still larger deficits to an already stretched state budget. The somewhat „black and white" vision of politicians that foreign investors operate in the Czech economy only with a great deal of benevolence (employment, innovation, dynamics, cultivation of the environment, etc.) and therefore require the most advantages, is somewhat out of balance from this standpoint.

8.18. Two opinions stand side by side – to support foreign investors to the maximum with all impacts or not to do so. Maximization of support may manifest itself also in the fact that investment incentives will be doubled – directly or indirectly – on the one hand tax breaks will be provided, but an identical situation with the same apparatus is also addressed by grants for employment support, or investment incentives that the state provides but at the same time this could be implemented by local autonomous administrations. The second option is to hold to the principle of not involving the state where the market governs and to leave it up to investors as to whether they will decide according to individual market conditions as to whether or not to enter the market. Both opinions may be supported or refuted.

8.19. With regard to the area of financial theory or also from the perspective of tax law theory, the issue is the nature of income tax exemption – this may be understood as a budgetary expenditure or this opinion may be rejected in that such a link does not exist. In order for an investment incentive in the form of tax compensation to be granted, the investor must adhere to formal procedures established by the Investment Incentive Act and this is a precondition for applying a tax concession[20]. If a taxpayer duly initiates business activity and has been registered as a taxpayer, he/she obtains the right to apply for a tax concession. To calculate the amount of the income tax concession, criteria are set for natural or legal entities in such a way that their specific structure is respected[21].

8.20. Another question is whether to include additional aid in state expenditures, such as reduced land prices provided by communities selling to investors or to build infrastructure on parcels that are made available to investors.

8.21. Although opinions could be diverse as to the above concessions – their impact is clear – they reduce budget revenues. And so if the elimination of these various concessions and preferences are discussed in the new

[20] This procedure rests on submitting an application for the promise of investment incentives to the Ministry or designated organisation within a period of 3 months from the delivery of tenders for providing investment incentives. On the basis of this application, the Ministry will issue a decision on the promise of investment incentives within 30 days from delivery. This decision is the document for fulfilment both of general requirements of the Investment Incentive Act as well as special requirements of the Income Tax Act.

[21] Source available in Czech at: http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/inv_pob_vyvoj.html (accessed on October 13, 2010).

income tax act, it will also be necessary to resolve these changes in connection with the existence of international treaties on investment protection and the budgetary consequences of premature termination of business activities by foreign investors.

8.22. At the same time, one should be aware that in private international law, the subject of which is adaptation of private law relations with an international element, the application of financial law regulations may also come into consideration, which may have consequences for the rights and responsibilities of parties in private-law relations. Parties may not avoid these effects even if foreign law is selected as the applicable law. Therefore, the one who decides on specific private-law relations with international elements[22], must take into consideration the fact that except for the use of norms of private international law and arbitration law, the regulations of Czech financial law must also be taken into consideration, the effects of which may not be circumvented in any case.

V. Model Example of Italy and Budgetary Expenditures

8.23. For a comprehensive perspective and thoughts on the questions of tax exemptions and the budgetary consequences of investment incentives, it is useful to look into legal arrangements abroad, which enables us to draw information from foreign experience and to take advantage of it in our deliberations on this issue. We can observe a very interesting development in the area of budgets in Italian law. The economy of Italy is the seventh largest economy in the world, and its central feature is the existence of primarily small and medium-sized companies. Italy is a very open country for investing. It offers investment in many diverse branches, and it therefore has something to offer to investors. Although there are many investment opportunities in Italy[23], dynamic conditions on international markets, fluctuating currency exchange rates, changes in the legal framework and, most importantly, the ever present crisis of the cooling global economy, have led Italy also to take steps to support investment. The government offers modest incentives for support of private sector investment directed primarily at the economically weaker areas of southern Italy. Tax breaks play a significant role in the field of investment incentives. Two years ago, during the preparation of the

[22] For details on the application necessary to use the standards in arbitration proceedings, compare KVĚTOSLAV RŮŽIČKA, ROZHODČÍ ŘÍZENÍ PŘED ROZHODČÍM SOUDEM PRI HOSPODÁŘSKÉ KOMOŘE ČESKÉ REPUBLIKY A AGRÁRNÍ KOMOŘE ČESKÉ REPUBLIKY (*Arbitration Proceedings before the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic)*, Plzeň: Vydavatelství a nakladatesltví Aleš Čeněk s.r.o. 130 (2nd extended ed. 2005).

[23] See for example: http://www.lifeinitaly.com/real-estate/investing.asp (accessed on October 13, 2010).

state budget for 2008, Italy proceeded to reform the tax system (Act no. 344/2003). The reason for this step was a reaction in part to Europe-wide competition for investment, primarily due to the entry of new Member States in 2007, which are attractive destinations for investors due to low production costs, as well as reduced income taxes in neighbouring Germany.

8.24. After implementing income tax concessions[24], however, Italy recorded significantly reduced finance flowing into the public revenue stream; therefore the Italian government was forced to introduce compensatory measures, such as an adjustment to limits for the deductibility of interest or elimination of accelerated depreciation. Other steps led to the tightening of tax laws with the objective of increasing the enforceability of tax collection. The trigger for of this fundamental change to their approach, leading Italy to palpable reforms in the field of budgetary savings, was a growth in national debt in relation to GDP, which rose high above the reference value established in the Treaty. These reasons motivated the government to take steps directed at limiting support for investment in the form of tax breaks for investors[25]. In 2008, Italy proceeded to resolve its high debt levels when it approved, effective as of 2009, the so-called Framework Act on Reform of the Budgetary Process[26]. The benefit was the introduction of a three-year budgetary overview of legal regulations and the overall simplification of the state budget structure.

8.25. If we consider the issue of tax concessions and their budgetary consequences[27], the steps taken by Italy provide evidence that from a formal standpoint, tax concessions are not a budgetary expenditure, but from a material standpoint they undoubtedly are. Taxation is an obligatory, repetitive payment by which the taxpayer periodically contributes to the state budget. At the moment when the state reduces the tax obligation for a foreign investor, for example in the form of a tax concession, this difference between the standard rate of tax and the amount of taxation reduced in the form of a tax break for a foreign investor is a budget expenditure and, in comparison with situations where this does not involve a foreign investor, but a standard taxpayer, this amount is deducted this from the amount that would otherwise form part of the state budget. This difference is a budgetary expenditure in the material sense.

[24] For more, see: Vincenzo Caló, Pronuntario dell'Imposta di Bollo e dei Tributi Minori, Contabiltá e Fisco, Milano: Edizioni Fag Milano (2009).

[25] Ina Dimireva, *Italy Investment Climate*, available at: http://www.eubusiness.com/europe/italy/invest (accessed on October 13, 2010).

[26] Council Opinion on the updated stability programme of Italy, 2009-2012 (2010C 142/03), [2010] O.J. C 142/13-18.

[27] For more, see Paolo Bosi, Corso di Scienza delle Finanze, Bologna: Il Mulino 231 (2010).

VI. Conclusion

8.26. In private international law, whose purpose is to regulate private relations with an international element, the application of financial law rules may enter into consideration which may have implications for the rights and obligations of the private relationships. Participants cannot avoid these effects by choosing a foreign law as the governing law, and therefore the one who decides on a particular private relationship with an international element must bear in mind that, except for the application of rules of private international law and the governing law, the rules of the Czech Financial law, whose effects it is impossible anyway to avoid and which must be adhered to, must be taken into account.

Summaries

DEU [***Haushaltsrechtliche Rechtsfolgen bei Verletzung der Bedingungen von Investitionsanreizen***]
Nach dem Jahre 1989 wurde sich die damalige Tschechoslowakei der Bedeutung bewusst, die Marktwirtschaft aufzubauen, was im Zusammenhang mit dem Bedarf von Einschaltung ausländischen Investoren stand. Eine große Rolle bei der Beschaffung von Auslandskapitals spielten Verträge, die Unterstützung und den Schutz von Investitionen garantierten. Diese Abkommen stellen eine Schutzhülle gegen die Enteignung der Investitionen aufgrund der Handlung oder Nicht-Handlung der Staatsbehörden, haver aber auch starke... Auswirkung auf den Staatshaushalt – ob direkt oder indirekt, was bei Abfassung konkreter Abkommen oft vergessen wird. Es ist nicht möglich, die Institution der Investitionsanreize einseitig zu begreifen, stattdessen dürfen nicht nur die positiven, sondern es man muss auch die negativen Auswirkungen auf den Fiskus in Betracht gezogen werden. Der Verschuldungsfaktor des Landes ist im Fall der Investitionsanreize eindeutig unterschätzt worden. Nebeneinander stehen zwei Ansichten, nämlich ob man ausländische Investoren mit allen solchen Auswirkungen unterstützen soll oder nicht. Zur der Zeit, als die Tschechische Republik am Anfang der Einleitung von notwendigen Wirtschaftsreformen stand, war es kaum für jemanden notwendig, sich solche Fragen zu stellen und über die Effizienz von Auslandsinvestitionen und deren Beitrag zur Staatswirtschaft und zum Staatshaushalt nachzudenken.

CZE [***Rozpočtově-právní důsledky porušení podmínek investičních pobídek***]
Po roce 1989 si tehdejší Československo začalo uvědomovat důležitost budování tržní ekonomiky, což bylo spojeno s potřebou zapojení zahraničních investorů. Velkou roli v lákání zahraničního kapitálu sehrály smlouvy, které zaručovaly podporu a ochranu investic. Tyto smlouvy jsou na jedné straně štítem před znehodnocením investic v důsledku jednání či nejednání ze strany státních institucí, ale mají i značný dopad do rozpočtových výdajů státu – ať již přímo nebo nepřímo, na což se při formulaci konkrétních ujednání často zapomíná. Institut investičních pobídek tedy není možno chápat jednostranně, nýbrž je třeba vzít v úvahu nejen jeho positivní, nýbrž i negativní účinky na hospodaření státu. Faktor zadlužování země je v případě investičních pobídek

jednoznačně přehlížen. Vedle sebe stojí dva názory – podporovat maximálně zahraniční investory se všemi dopady či nikoliv. V době, kdy se Česká republika ocitá na počátku zavedení nutných ekonomických reforem, je potřeba si tuto otázku položit a zamyslet se nad rentabilností zahraničních investic a jejich přínosem pro hospodaření státu a státní rozpočet.

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POL [***Konsekwencje prawno budgetowe naruszenia warunków bodyców inwestycyjnych***]
Pod tym względem zawarte umowy o ochronie i wspieraniu inwestycji miały i mają znaczący wpływ na stan wydatków budżetowych państwa. Faktor zadłużania kraju jest w przypadku bodźców inwestycyjnych często niedoceniany. Stoją obok siebie dwa skrajne poglądy: wspierać maksymalnie inwestorów z zagranicy z wszystkimi z tym związanymi konsekwencjami lub z tego zrezygnować. Autorzy tego artykułu starają się odpowiedzieć na to pytanie i wywodzić z tego uzasadnione wskazania.

FRA [***Conséquences juridiques budgétaires d'une rupture des termes des contrats d'incitation à l'investissement***]
Les contrats de soutien et de protection des investissements conclus avec des investisseurs étrangers représentent également une dépense conséquente dans le budget des Etats. En cas d'appels de capitaux, le facteur qui grève les États est purement et simplement occulté. Deux points de vue s'opposent à cet égard : soutenir, ou non les investisseurs étrangers par tous les moyens disponibles. Les auteurs de cet article tentent d'apporter une réponse à cette interrogation et d'adopter une position éclairée en la matière.

RUS [***Бюджетно-правовые последствия нарушения условий инвестиционных поощрений***]
Однако договоры об охране и поддержке капиталовложений, заключенные с зарубежными инвесторами, оказывают неблагоприятное влияние на бюджетные расходы государства. Фактор задолженности страны в случае инвестиционных поощрений не учитывается. В этом отношении имеются два взгляда. Поддерживать в максимальной мере зарубежных инвесторов со всеми из этого вытекающими последствиями, либо нет. Авторы настоящего доклада стремятся к поиску ответа на данный вопрос и обоснованной точки зрения на данную проблематику.

ES [***Consecuencias legales en los presupuestos derivadas de la infracción de los términos de los incentivos de inversión***]
Los contratos sobre apoyo y protección de las inversiones con inversores extranjeros tambien tienen una implicación considerable en los gastos presupuestarios del estado. En el caso de invitaciones de capital, el factor que obstaculiza a un estado está claramente desatendido. Coexisten dos puntos de vista: apoyar a los inversores extranjeros con todas las implicaciones o no hacerlo. Los autores de este artículo intentan hallar la respuesta a esta cuestión y adoptan una postura razonada acerca de este tema.

Pavel Mates | Michal Barton

Public versus Private Interest – Can the Boundaries Be Legally Defined?

Key words:
public interest | democracy | majority interest | majority decision-making | protection of minorities | protection of the public interest | liberal and welfare state | fundamental rights and freedoms | public good | proportionality | judicial activism | collective interest | generally accepted values | private and public law

Abstract | *The issue of how to define public interest is being approached time and again from the various perspectives of the most diverse scholarly disciplines, which is merely the natural outcome of the fact that the understanding of the term "public interest" has far-reaching implications for the functioning of society as a whole, and indicates whether and to what degree such a society is a democratic society. In determining the public interest, the case law plays a key role; it must interpret public interest within the context of having to protect a great variety of legal relations, and especially in the event of a clash between diverging rights (whether from the area of private law or public law). In determining the public interest, the political and ideological bent of the person who seeks to identify public interest (or decrees its meaning top-down) plays a crucial role. No matter whether one approaches public interest from a liberal, conservative, or even a leftist position: such preconceptions will not only determine the scope of permissible regulatory interferences by the state, but also* inter alia *the size of the government apparatus – which, after all, is in charge of enforcing public interest. Traditionally, public interest is considered one of the criteria for differentiating between the sphere of private law and that of public law. However, modern society has advanced to a point at which public interest fulfills precisely the opposite purpose, i.e., it ultimately blurs the differences between the two spheres – a development that has been actively fostered by the European Union as a lawmaker, and by the decision-making practice of its authorities. Voices critical of what are known as 'activist judges' have made themselves heard, but it appears that in a state under the rule of law, the decisive role in determining public interest and its importance for a viable society and its system of law has fallen to the courts, and will continue to be exercised by the courts.*

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I. General Starting Point – Society as a Sum of Individuals with Individual Interests versus the Protection of "Higher Values"

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9.01. The definition of "public interest", or of those areas the protection of which can be regarded as in the public interest, is a frequently discussed and controversial issue not only in law, but also in political science, economics, sociology and other social sciences. Regardless of whether we use the phrase "public interest", "general welfare", "common good" or "l'intérêt général", in all cases we are referring to certain collective values, compliance with which and protection of which should be a key policy objective or goal of the activities carried out by the central government and its bodies[1].

9.02. Key questions that need to be asked when interpreting the term "public interest"[2] can be defined as follows: Is the public interest merely a sum of individual interests? Is the public interest, then, that what is sought by the majority? Should the perspective used in defining the public interest be purely numerical? Can the term "public interest" include the protection of certain "higher" objective values? Can those values then be protected even against the will of the majority? If so, who should define and protect the public interest in a democratic form of government? In a democracy, policy decisions are formed based on the principle of majority, i.e. by voting procedure. A majority decision (e.g. a law or constitutional law) is a sum of individual interests, or the result of compromises reconciling individual interests; the main mediators of these interests are political parties. Is a majority interest also a public interest?

[1] We do not share the scepticism of Andrew Heywood, who considers that the public interest is good only as a cover for politicians to give their actions the appearance of respectability, ANDREW HEYWOOD, POLITICAL THEORY, cited according to the Czech edition, published as ANDREW HEYWOOD, POLITICKÁ TEORIE, Praha: Eurolex 207 (2005).

[2] For the sake of comparison, for example, Theodore M. Benditt defines the following six questions that need to be considered and distinguished in any attempt to define the term "public interest". These questions are: "(a) How is the phrase 'the public interest' to be defined? (b) What acts and policies are in the public interest? (c) How is it to be determined what particular acts and policies are in the public interest? (d) What is the best thing to do, the best policy to adopt? (e) How is it to be authoritatively determined what is the best thing to do? (f) Who is to decide authoritatively what is in the public interest and/or what is the best thing to do?", *cf.* Theodore M. Benditt, *The Public Interest*, 2 (3) PHILOSOPHY AND PUBLIC AFFAIRS 291, 292 (1973).

9.03. T.M. Benditt discusses two traditions in the perception of the term "public interest", which he links with the works of J. Bentham and J. J. Rousseau[3]. Bentham views an interest of society as the sum of the interests of those who form society. Rousseau makes a link between the public interest and the concept of "volonté générale" (general will). Concepts trying to model the public interest in purely mathematical methods (quantitative concepts of the aggregation of individual interests)[4] build on Bentham's utilitarian approach. In contrast, there are approaches that regard the public interest as something more than a sum of private interests, as a specific separate entity also defined by certain values. As stated, in the context of American political science, by Frank J. Sorauf, *"[t]he phrase 'public interest', or some variation on its theme, has run through the American political vocabulary since the early years of the Republic"*[5]. He then identifies four possible concepts of public interest, defining it as a "commonly-held value", "the wise or superior interest", "moral imperative", and "a balance of interests"[6].

9.04. A democratic form of government based on the principle of majority decision-making, however, must always be accompanied by the principle of the protection of minorities[7]. The basis for the protection of the public interest can be found here. Not every decision (political) which is a majority decision is also a democratic decision. In addition to the formal aspect, i.e. the procedures (the principle of majority), democratic decision-making always involves a material aspect, i.e. the content of decisions (the protection of minorities). The protection of minority opinion (in the broadest political sense of the protection of the opposition) is a significant public interest on which the modern constitutional state rises and falls.

II. Plurality of Views on the Public Interest in Judicial Practice

9.05. In terms of the legal regulation of the economy, the concept of "public interest" is generally mentioned in discussions on the extent of legitimate state interference in economic processes, the free market and property rights. The issue of defining the public interest in judicial practice began to emerge at the time of the first efforts by the modern state to regulate certain aspects of business, economics and property. As stated back in 1876 by the US Supreme Court in Mann v. Illinois[8], *"[p]roperty does*

[3] Theodore M. Benditt, *supra* note 2, at 291–295.

[4] *Cf.* James W. Deskins, *On the Nature of the Public Interest*, 40 (1) THE ACCOUNTING REVIEW 76-81 (1965).

[5] Frank J. Sorauf, *The Public Interest Reconsidered*, 19 (4) THE JOURNAL OF POLITICS 616, 616 (1957).

[6] *Ibid.*, 624-631.

[7] *Cf.* Article 6 of the Constitution of the Czech Republic: *"Political decisions shall proceed from the will of the majority, expressed by free vote. Majority decisions shall respect protection of minorities"*

[8] *Munn v Illinois*, 94 U.S. 113 (1876).

become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created"[9].

9.06. In this respect, the notion of public interest appears in practice in antitrust law, in the regulation of prices, in production quotas[10], in the regulation of the pursuit of certain professions (professional chambers with compulsory membership), in the regulation of product or service quality, etc. The aspect of public interest is also present in discussions on the extent of the necessary control of labour relations, or the level of protection necessary for employees[11], on quality standards in health and education, and on the economic availability of health care or education (tuition, fees in the health sector), and in discussions on compulsory health insurance[12], environmental protection[13] or cultural heritage.

9.07. The Constitutional Court of the Czech Republic also applies the concept of public interest in assessing violations of the principle of equality. Unequal treatment is not a violation of the principle of equality where it is in the public interest. For example, the constitutionality of the unequal approach to the calculation of the service pension for professional soldiers who served the totalitarian regime was justified by the Constitutional Court as follows: "the promotion of the principles of democracy and human rights is undoubtedly in the public interest. Likewise and conversely, it is clearly not in the public interest to confer any benefits for activities which (directly or indirectly) constituted a repression of human rights and the democratic system and served for the consolidation of the totalitarian political system"[14].

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[9] *Munn v Illinois*, 94 U.S. 113, 126 (1876). *Cf.* Wanton H. Hamilton, *Affectation with Public Interest*, 39 (8) THE YALE LAW JOURNAL 1089, 1097 (1930).

[10] *Cf.* Finding of the Constitutional Court of the Czech Republic Pl. US 5/01 of October 16, 2001, published under No. 410/2001 Coll. (the system of milk production quotas as a form of controlling the use of assets, which monitors the public interest in stabilizing the market in this commodity).

[11] *Cf.* Finding of the Constitutional Court of the Czech Republic Pl. US 83/06 of March 12, 2008, published under No. 116/2008 Coll.

[12] The differences in the territorial perception of the public interest are evident here. In Europe, compulsory health insurance associated with the constitutional subjective right to affordable health care for every insured person is perceived as a human rights standard, while in the US the introduction of compulsory health insurance is the subject of fierce debate.

[13] The conflict of property rights and hunting rights was assessed by the Constitutional Court of the Czech Republic in Finding Pl. US 34/03 of December 13, 2006, published under No. 49/2007 Coll. The right to hunt was found to be a public interest allowing for interference with property rights.

[14] Finding of the Constitutional Court of the Czech Republic Pl. US 9/95 of February 28, 1996, published under No. 107/1996 Coll.

9.08. The public-interest argument is very widespread and diverse. The European Court of Human Rights (ECHR) has also labelled as a public interest, for example, the sovereignty and unity of a state (Germany) in a dispute over the restitution of art confiscated during the Second World War[15], an interest in the cessation of civil war in relation to the detention of a Turkish aircraft in Ireland[16], and the legal regulation of religious communities[17].

9.09. Public interest is also frequently mentioned in connection with media activities, both in terms of the regulation of the content of freedom of expression and from the perspective of institutional safeguards ensuring the existence of a particular type of media (the standard existence of public service broadcasters in Europe). In disputes between the media and persons affected by the content of published information or opinions, the courts often consider whether the disclosure of such information is in the public interest ("information and ideas on matters of public interest")[18]. Public interest is also used to justify the right of journalists to the confidentiality of their sources of information[19]. In this regard, the criterion of public interest is often a key determinant of whether, in a particular dispute, the court will give priority to freedom of speech or to the protection of conflicting values (the right to privacy, honour or reputation).

9.10. Therefore, the term "public interest", on account of the multiplicity of its meanings and the different contexts in which it is used, is polyvalent; its meaning is constantly being fleshed out and modified for the various fields of legal practice.

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[15] *Prince Hans-Adam II of Liechtenstein v Germany*, Application No. 42527/98, 12 July 2001, Section 69 ("[...] *Court considers that the applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany*").

[16] *Bosphorus Hava Yollari Turizm in Ticaret Anonim Şirketi v Ireland*, Application No 45036/98, 30 June 2005, Section 48 ("*While there had been a severe interference with the applicant company's interest in the lease, it was difficult to identify a stronger type of public interest than that of stopping a devastating civil war*").

[17] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria*, Applications Nos. 412/03 and 35677/04, 22 January 2009, Section 122.

[18] *Cf.* e.g. *Barfod v Denmark*, Application No. 11508/85, 22 February 1989, Section 31; *Observer and Guardian v the United Kingdom*, Application No. 13585/88, 26 November 1991, Section 59; *Von Hannover v Germany*, Application No. 59320/00, 24 June 2004; *Bladet Tromsø and Stensaas v Norway*, Application No. 21980/93, 20 May 1999, Section 59; *Editions Plon v France*, Application No. 58148/00, 18 May 2004, Section 53.

[19] *Cf.* e.g. *Goodwin v the United Kingdom*, Application No. 17488/90, 27 March 1996, Section 39; *Roemen and Schmit v Luxembourg*, Application No. 51772/99, 25 May 2003, Section 46; *Voskuil v the Netherlands*, Application No. 64752/01, 22 November 2007 Section 65.

III. The Political Dimension of the Definition of Public Interest

9.11. The identification of a particular interest as a private or public interest is not a purely objective evaluation process; it depends, to some extent, on the ideas and philosophical orientation of the person interpreting it. According to the liberal view, the issue of industrial relations may be a purely private interest between the employee and the employer and a matter of their mutual individual freedom of contract, which need not be controlled by any power. A more patriotic approach would take account of the inequality between the employee and employer and consider the need for certain regulation of labour relations, institutional employment safeguards and the provision of social support in the event of job loss, etc., to be a public interest. To a certain extent, this oscillation is a result of the reciprocity of the liberal and welfare state.

9.12. Accordingly, the question of the distinction between a private and public interest is not purely a legal question, but also largely a political and economic question. A clear line between the private and the public interest cannot be drawn with mathematical precision and certainty because it is a line which is inherently vague and variable over time. An example of this is a situation where, at a time of severe economic recession, job creation and the implementation of an economic interventionist policy by the state is a public interest, whereas, at a different stage of the economic cycle, the same policy could result in very negative consequences and could hardly be defended as a "public interest". The nature of public interest is therefore contextual. It is, as discussed below, a broader issue which can be summarized in one sentence: who formulates the public interest? In a democratic rule of law, it is possible to debate this and single out the status of democratically legitimized politicians or judges. The situation is different in totalitarian regimes, where the political party, its leadership, or a single "infallible" leader decides what a public interest is. Although, of course, there is always room to argue whether we are genuinely faced by a public interest, there is a real and often legal (albeit not legitimate) possibility of advocating such an interest here. This is a situation where, in the words of Andrew Heywood, those who pursue their own interest form the presumption that it is to the benefit of the greatest possible number of people, and society is then necessarily frustrated and unhappy.

9.13. We can also talk of a cyclical repetition of certain historical waves or phases (much like the cycles of economic growth and decline), where an institutional and legal framework is preferred or promoted that reflects either the public interest or the private interest more[20]. These are traditional disputes between right and left, manifested not only in matters

[20] *Cf.* ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION, Princeton: Princeton University Press 3-8 (2002).

of economic regulation, but also in discussions on the national budget deficit, i.e. the necessary degree of mandatory government spending, the necessary scope of the constitutional guarantee of social rights, etc. This institutional framework has always been consistent with the political power structure of society, whether in the form of early-19th-century liberal economies with no guarantee of social rights, or in the form of the post-war concept of the welfare state with the constitutional guarantee of social rights[21]. Then there are the extreme forms, to be simplistic, of totalitarian regimes, where the "public interest" encompasses almost everything from any economic activity to the privacy of the individual. As noted by the Constitutional Court of the Czech Republic in reference to the practices pursued by totalitarian states in labour issues, "*under the pretext of alleged public interest, accompanied by the rhetoric of historical necessity and the needs of the nation and general welfare, people's minds were manipulated, resulting in the enactment of labour duties, labour camps for the maladjusted, the punishment of 'parasitism', etc.*"[22].

9.14. The power aspects behind the advocacy of the public interest are then reflected in the structure of the state apparatus, because, to promote the public interest, it is necessary to establish specific government institutions. An idea of what is perceived in a particular society and a particular historical phase as a public interest can then be traced only by viewing the structure of the state apparatus (e.g. the names of ministries). From this perspective, education, health, culture, national security, public policy, protection from crime, transport services, environmental protection, the safeguarding of minimum social standards and working conditions, arrangements for currency stability, etc., can then be typically regarded as the public interest.

IV. The Human Rights Dimension of the Problem

9.15. From the aspect of human rights, public interest can be viewed as a two-tier concept. The first tier is the notion of the public interest as one of the legitimate reasons for limiting certain fundamental rights and freedoms. The second tier involves the protection of fundamental rights and freedoms by the state as a public interest in itself.

9.16. Generally, fundamental rights can be restricted in order to protect another fundamental right (a clash of two individual private interests) or to protect a public good of a constitutional quality. In the terminology of

[21] E.g. Germany's Constitution (Basic Law – Grundgesetz) defines the German State, in Article 20, as a "democratic and social federal state" ("*ein demokratischer und sozialer Bundesstaat*"). Available at: http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg_02.html (accessed on November 10, 2010).

[22] Finding of the Constitutional Court of the Czech Republic Pl. US 83/06 of March 12, 2008, published under No. 116/2008 Coll.

human rights, a public interest appears in the form of a "public good", i.e. as a legitimate aim for the potential restriction of a fundamental right.

9.17. In Europe, it is important to note the Convention for the Protection of Human Rights and Fundamental Freedoms[23] (the "Convention"), which in numerous provisions sets out conditions for the restriction of guaranteed rights; the ECHR traditionally uses a three-step test to assess the legitimacy of the restriction of a particular right: an interference with the the right or freedom is only legitimate if: 1) it is prescribed (provided) by law; 2) it pursues a legitimate aim and 3) it is 'necessary in a democratic society'[24].

9.18. The second step in this test, besides protecting other conflicting rights, very often protects the public interest, even though the Convention does not directly use the term "public interest". Nevertheless, the "interests of national security, public safety or the economic well-being of the country", "the prevention of disorder or crime", and the "protection of health or morals", referred to in the Convention, clearly are a public interest.

9.19. The term "public interest" has appeared to be in two Additional Protocols to the Convention. In connection with the protection of property, a public interest is mentioned in Article 1 of the Additional Protocol (No. 1):[25] "*No one shall be deprived of his possessions* ***except in the public interest*** *and subject to the conditions provided for by law and by the general principles of international law*" [*emphasized by authors*]. In addition to the term "public interest", Article 1 also uses the formulation "general interest"[26]. There is evidently no semantic difference between them. Furthermore, the term "public interest" appears in Additional Protocol No. 4 in connection with restrictions on freedom of movement: "*restrictions imposed in accordance with law and* ***justified by the public interest*** *in a democratic society*"[27] [*emphasized by authors*].

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[23] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force 3 September 1953) 213 U.N.T.S. 221.

[24] As to the "three-step test", *cf.* e.g. THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Antwerpen – Oxford: Intersentia 334 – 342 (P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak eds., 4th ed. 2006).

[25] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol no. 11, 20 March 1952. Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/09.htm (accessed on November 12, 2010).

[26] "*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property* ***in accordance with the general interest*** *or to secure the payment of taxes or other contributions or penalties*" (emphasized by authors), *cf. ibid.* Article 1, second paragraph.

[27] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm (accessed on November 12, 2010).

9.20. By assessing the third step in the above-mentioned test (the necessity of a restriction), the ECHR essentially balances the protection of the private interest of the individual, in the form of a constitutional subjective right, on the one hand, and the public interest, in the form of a legitimate aim, on the other. Here, the proportionality of the means used (the necessary extent to which a right is restricted) is considered in relation to the desired legitimate aim (the necessary extent to which the public interest is protected), i.e. this is the principle of proportionality.

9.21. As indicated above, the actual protection of fundamental rights, or the existence of specific procedural safeguards for the protection of these rights, is a public interest. One of the purposes of protecting fundamental rights is to protect minorities (in the broader sense of the word) from the will of the current political majority. Thus, for example, the constitutional protection of an individual's private property from a majority decision of the legislative body has two dimensions. From the individual's perspective, it is a purely private interest (the protection of his own property), while from the perspective of society it is also a public interest (the potential protection of all persons from the despotism of the current majority).

9.22. In the context of ECHR case law, we might refer to „Jahn and Others v Germany" where the ECHR stressed the need to consider political, economic and social aspects when considering the concept of public interest, as well as the general "margin of appreciation" granted to Member States. As the ECHR notes, "the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation"[28]. Here, then, the ECHR gives Member States a relatively large degree of freedom; it is sufficient for legislation to pass the test of "reasonable foundation".

V. Who Should Be the Final Arbiter of Public Interest?

9.23. It can be inferred that all the different concepts of "public interest" can be simplified into two general categories, or two general views. The first emphasizes the purely numerical or quantitative aspect. Here, the public interest can be ascertained by the simple sum of individual interests. This view is based on a concept of democracy in the procedural sense, i.e. only as a process of forming political will. In this concept, a crucial role is played by the legislature: democratic decisions are those taken by a majority of the freely elected representatives of the people. In cases of controversial regulations, where a law is found to be unconstitutional by

[28] *Jahn and Others v Germany*, Applications Nos. 46720/99, 72203/01 and 72552/01, 30 June 2005, Section 91.

the judiciary, the same material may be passed again by parliament in the form of a constitutional law. Such a law is formally not subject to review by the judiciary, and the legislature is therefore placed in the role of final arbiter.

9.24. However, elected representatives themselves may be bound by something beyond the simple sum of individual interests (whether embodied in a law or a constitutional law) which can be regarded as a system of values named, for example, a "public interest". Frank J. Sourauf observes that "*willingness or unwillingness to accept a theory of the public interest will shape the scholar's understanding of the role of the elected representative in a legislature*"[29]. This brings us to another concept, where we view the public interest as "higher objective values" which are protected for the benefit of society (the public), even though this benefit may currently be different from the mere sum of the individual interests of the members of society. This is a concept that makes it possible to modify the view of the democratically elected majority in the interest of "higher goals". Yet these "higher goals" do not correspond with the current sum of goals of individuals; they must be distinguished and defended by an authority independent of the momentary sum of individual interests, an authority of long-standing stability with consistent staffing. In this respect, the numerical aspect urgently needs to be complemented by a value aspect. The legitimacy of the competence to adjudicate on the protection of objective values from subjective interests (even where such interests are those of the current majority) must be supported by a criterion of legitimacy other than a purely procedural criterion, i.e. by a reason beyond the democratic rule of majority decision-making. Normally, this entails a reference to the natural law conception of human rights or a meta-right source of knowledge. A key role in the protection of this concept of "public interest" will therefore be played by the judiciary, particularly in the protection of fundamental rights[30]; a necessary condition for this role is the principle of judicial independence and the non-removability of judges by other branches of state power.

9.25. However, excessive judicial activism in the defence of "higher values", usually in the name of constitutionality, is subject to criticism in from the perspective of the concept of representative democracy and the rule of law[31]. The matter of who should be the final arbiter of "higher values" is the subject not only of theoretical debates, but also of practical litigation, i.e. whether this role should be played by elected representatives of the people in the approval of the constitution or constitutional amendments (constitutional acts), or by the courts (constitutional courts in the

[29] Frank J. Sorauf, *supra* note 5, at 616, 617.

[30] *Cf.* Larry Yackle, Regulatory Rights: Supreme Court Activism, The Public Interest and the Making of Constitutional Law, Chicago-London: University of Chicago Press 68 *et seq.* (2007).

[31] *Cf.* Rory Leishman, *Judicial Activism versus the Rule of Law*, *in* Against Judicial Activism: The Decline of Freedom and Democracy in Canada, Montreal: McGill-Queen's University Press 19-46 (2006).

European context), which, in the interest of "higher values", could examine (and in a European context also repeal) constitutional acts[32]. For example, in the Czech Republic, the Constitutional Court has already assumed this role of "final arbiter" and repealed a constitutional act[33]. However, this ruling was met by a large wave of criticism, especially from politicians.

9.26. For the concept of public interest to be relevant, it should be based on the second concept outlined, i.e. there should be a distinction between individual interests and the sum thereof, on the one hand, and the public interest as a qualitatively different type of interest, on the other. While the sum of individual interests can be assessed in purely numerical terms (e.g. the majority of the population of particular location demands the expropriation of the land of one of their neighbours to build a hypermarket), the public interest must be defined by value (for example, the building of the hypermarket need not be in the general interest of the area concerned). If the public interest were completely identical to the sum of individual interests, it would not be necessary to formulate and discuss it as a specific category or specific concept.

9.27. Similarly, Benditt distinguishes between the distributive and collective concept of public interest. The distributive concept is close to the numerical aspect we have defined (the concept of public interest as a mere sum of individual interests). In contrast, the collective concept exists in cases of the interest "of the public"[34]. Benditt is inclined towards the concept of the collective public interest, and observes that stating that *"[a]n act or policy is in the public interest not because it is in the overall interest of each member of the public, but because it promotes an interest of the public, i.e., an interest of anyone"*[35].

9.28. The Constitutional Court of the Czech Republic, in connection with expropriation, has noted that "[...] not every collective interest can be described as a public interest [...], the term 'public interest' should be understood to mean an interest that could be regarded as a general or generally beneficial interest"[36]. Again, the Constitutional Court rejects the mechanical numerical aspect (collective, in the sense of the majority) and requires a certain general "benefit". In this respect, decisions on the public interest will not be taken only by considering the actual number

[32] *Cf.* KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY, Bursa: Ekin Press (2008).

[33] The Constitutional Court repealed "Constitutional Act No. 195/2009 on the shortening of the fifth term of office of the Chamber of Deputies" as it contradicted the material essence of the Constitution ("the essential requirements for a democratic state governed by the rule of law"), *cf.* Decision of the Constitutional Court of the Czech Republic Pl. ÚS 27/09 of December 10, 2009; *cf.* Article 9(2) of the Constitution of the Czech Republic: *"Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible."*

[34] Theodore M. Benditt, *supra* note 2, at 306-311.

[35] *Ibid.*, 311.

[36] Finding of the Constitutional Court of the Czech Republic Pl. ÚS 198/95 of March 28, 1996.

and strength of individual interests that may create a collective interest, but also values which need not correspond with the strength or the number of individual interests.

9.29. In judicial decision-making practices, then, there are efforts to strike a balance between protecting individual interests (and individual freedoms) and "common values", "public goods" or "public purposes". Nevertheless, there is something of a circle to this definition, as the above concepts emphasizing "higher" values, objectives and benefits do not necessarily require further interpretation in a particular case and cannot be "mathematically" modelled in advance.

VI. Private and Public Law

9.30. Public interest is traditionally one of the criteria used to divide the law into private and public. According to the famous definition by Ulpian, the difference between them lies in the fact that "*Publicum ius est quod ad statum rei Romanae spectat, privatum, quad ad singulorum utilitatem pertinet*". Although other theories are now more widespread, this definition has not been abandoned entirely. For example, the leading French civil law experts A. Weill and F. Terré believe that the difference between private and public law is that public law protects the common interests of society, its government and public needs; private law primarily defends individual interests[37]. A reference to private and public interest as a criterion dividing the two areas of law can also be found indirectly in many definitions of public administration, which is a branch controlled by administrative (hence public) law and which is characterized by the fact that it is exercised in the public interest[38].

9.31. The dominance of public interest, under this conception, makes criminal, constitutional, and administrative law public law, and conversely, the protection of individual interests' places civil, commercial, family and other law under private law.

9.32. However, the public interest may act not only as a criterion demarcating the boundary between private and public law, but also the opposite, as a phenomenon that blurs the differences between them. It has been mentioned that the public interest also appears in areas that are

[37] ALEX WEILL, FRANÇOIS TERRÉ, DROIT CIVIL. INTRODUCTION GÉNÉRALE, Paris: Dalloz 70 (1979); similarly, André Demichel and Pierre Lalumière identify a difference between the two in that public law protects the general interest, the other private interests: ANDRÉ DEMICHEL, PIERRE LALUMIÈRE, LE DROIT PUBLIC, Paris: PUF 13 (1974).

[38] DUŠAN HENDRYCH ET AL., SPRÁVNÍ PRÁVO. OBECNÁ ČÁST *(Administrative Law, General Part)*, Praha: C. H. Beck 5 (2009); JEAN-MICHEL DE FORGES, DROIT ADMINISTRATIF, Paris : PUF 7 (2002); John Bell, *La comparaison en droit public, in* MÉLANGES EN L'HONNEUR DE DENIS TALLON. D'ICI, D'AILLEURS: HARMONISATION ET DYNAMIQUE DU DROIT, Paris : Société de législation comparée 33-44 (D. Tallon ed., 1999).

traditionally classified under the sphere of private law or that stand on the boundary thereof (typically labour law). An example in this respect is the protection of privacy rights, which fundamentally belong to civil law. The (Czech) Supreme Court has used the category of public interest to tackle the relationship between the right to information and criticism on the one hand and the protection of privacy on the other. Here, it came to the conclusion that criticism, in the given case inadmissible (because it was imprecise, vague, and unfair), does not override the right to privacy since, in the case at hand, it found that there was no public interest in having to endure such criticism[39].

9.33. One important area where the public interest is advocated is the protection of the "weaker" party in contractual relations. The concept of private law is conventionally based on the principle of the equality of contracting and any interference with this relationship, in terms of the protection of or preference for one party is viewed as contrary to its most innate defining features. At least since the middle of the last century[40], this strict concept has been abandoned, allowing for the possibility of interference in favour of the "weaker party", as dictated by the need to protect the public interest to ensure genuine equality in certain relations. Public interest can also be identified in the foundations of the regulation of certain private-law relations of a specific nature (e.g. trade in goods which could be dangerous to human life and health).

9.34. The concept of the weaker contracting party is not lawful in the sense of being defined or explained in any law, but it is applied nonetheless. The requirement to ensure equality is viewed in a material sense here, i.e. as genuine, real equality, which is assessed in the light of what actual impact a particular situation has on the individual's position, and not only with regard to equality before the law. It is thus not only in legislation but also in practice that the specific circumstances of parties to a legal relationship are considered[41]. Although there are no universally accepted criteria, reasons for which one party might be described as weaker include the economic circumstances of the contracting parties, their professional skills, and the fact that one party has no choice but to enter into the contract; naturally, other reasons could be found, depending on movements in trends and unique circumstances[42] .

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[39] Judgment of the Supreme Court No 30 Cdo 2573/2004 of July 15, 2005. This judgment also indicates that, in relation to other parties to the public interest (typically politicians), the situation could be the exact opposite, and they must suffer sharper criticism, specifically with regard to the public interest.

[40] This is a trend termed the "publicization" of private law (e.g. VLADIMÍR HRDLIČKA, VEREJNOPRÁVNÍ OTÁZKY V PRÁVU SOUKROMÉM *(Public-Law Issues in the Private Law)*, Praha: Knihovna Sborníku věd právních a státních 21 (1946).

[41] Similarly, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHT, Oxford: Oxford University Press 276 et seq. (2002).

[42] František Zoulík, *Soukromoprávní ochrana slabší smluvní strany (Private Law Protection of the Inferior Party)*, 10 (3) PRÁVNÍ ROZHLEDY 109 (2002).

9.35. In a situation where a large corporation stands opposite an individual who is forced to use its services, there must be guarantees that the individual will not be completely at the mercy of the stronger party. Here, we have in mind relationships that typically arise in the provision of services by banks, insurance companies and providers of telecommunication services. While it is conceivable that an individual may not have a bank account, use public transportation or make telephone calls, in the reality of the 21st century, especially in large urban agglomerations, this is a notion probably from the realm of speculation. Therefore, in modern states measures are taken to compensate for this de facto inequality. This procedure has also been backed by the Constitutional Court, which affirmed that private law and public law are not currently hermetically separated by a "Chinese Wall"; on the contrary, in practice, public and private elements (even in the same piece of legislation) are increasingly intersecting. In private law, the principle of equality predominates; in this case, one of the other parties cannot unilaterally foist anything on the other party. However, in the court's opinion, this does not preclude action by the state[43]. Although these arguments were raised to protect not the weaker party, but the more powerful party (it was a transport company recovering a penalty from a passenger who had not paid his fare), this conclusion applies universally.

9.36. The provisions on consumer contracts in Sections 51a to 65 of the Czech Civil Code cannot be interpreted other than with regard to the public interest. Here, there is interference in the relationship between the contracting parties in favour of the buyer. In its case law, the Constitutional Court responded to the practices of a major international company, which offered goods to still-inexperienced customers in the Czech Republic and misled them by stating the prices in DEM, i.e. in a currency ostensibly substantially lower in value than CZK, failed to specify clearly the conditions of the contractual penalty, created misconceptions about the suitability of the contract, etc. Here, the Constitutional Court pointed out that, in the case of consumer contracts, for various reasons consumers find themselves in an unequal position with the seller and this inequality needs to be offset by mandatory provisions, including a certain restriction on the autonomy of will, which are otherwise not typical for private relations[44]. The possibility of such a process can be considered in circumstances where it is needed to protect the public interest.

9.37. One of the arguments put forward by the Constitutional Court was Council Directive 93/13/EEC on unfair terms in consumer contracts, which rules

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[43] Finding of the Constitutional Court Pl US No 33/2000 of January 10, 2001. A similar argument is put forward by 3 Klaus Stern, Das Staatsrecht Der Bundesrepublik Deutschland: Allgemeine Lehren Der Grundrechte II, München: C. H. Beck 792 (1994).

[44] Finding of the Constitutional Court II. US 3/06 of November 6, 2007. Moreover, in this case the Constitutional Court built on its previous case law (Finding IV. US 182/01 of November 30, 2001), where the same company featured as an intervener and where the court declared its practices to be distinctive.

out similar conduct. Incidentally, Community law is contributing heavily to the aforementioned process making private law more "public"[45], albeit sometimes with a delay and on the basis of previous long-term negative experience of inappropriate practices by stronger parties, as was the case with time-sharing[46].

9.38. Highly intensive regulation of contractual relations can also be identified in areas such as business on the capital market (Czech Act No. 256/2004 Coll. on the capital market, as amended), where entities doing business in this field are set wide-ranging obligations designed to protect clients' rights. The whole system is also subject to oversight by a regulator, the Czech National Bank. Although this is an area where relations between entities operate mainly on a contractual basis, this entire sphere is subject to extensive regulation, as dictated by the public interest in relation to investments in the capital market, where there are high risks, the consequences of which could lead to a considerable adverse ramifications for the stability of society as a whole. Therefore, in this act we can find concepts such as the protection of customer assets, imposing a range of restrictions on the management of assets under management, as well as obligations prophylactic in nature and obligations aimed at ensuring the transparency of the entire system (e.g. Sections 12 to 12 (e) of the Act). Compliance with the whole system is guaranteed by recourse to public, administrative sanctions. Again, we repeat that much of this legislation is the result of the implementation of directives of the European Communities and the European Union.

9.39. The provisions of the Czech Act No. 189/2004 Coll. on collective investment schemes, as amended, can be characterized in a similar light; to quote the explanatory memorandum, this constitutes a "business risky for investors since the value of assets in which they invest the funds they have amassed can change dramatically." Here, again, regulatory measures and special safeguards for consumers are established in the public interest.

[45] See, for example, Council Directive 85/577/EEC of 20 December 1985 to protect consumers in respect of contracts negotiated away from business premises [1985] L 372; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] L 280; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] L 144; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] L 178; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] L 271. In the light of these directives, similar provisions may be applied *mutatis mutandis* in other EU Member States.

[46] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] L 280.

9.40. Interventions are also made, in the public interest, in relationships that arise in the field of tourism, in the use of electronic communications[47] and other areas typical for the functioning of modern society, where there is a bias in favour of those who manage the goods provided.

9.41. Regulatory elements in the legal relations of a private nature are accepted for other reasons too. An example here would be a purchase agreement as a typical private concept based on the freedom of the will of the parties. Interventions are made in the public interest to protect certain generally accepted values, such as an interest in the healthy and normal development of the young population, which is the reason for prohibiting the sale of certain categories of products (cigarettes, alcohol, fireworks) to young people and for restricting certain services for them (use of slot machines). Public policy and security as important values of public interest are the reason for restrictions in relation to the fight against money laundering, where it is directly forbidden to provide certain financial services if the customer fails to produce identification (see Article 15 of Act No. 253/2008 on certain measures against money laundering and terrorist financing, as amended).

9.42. If we apply the public interest as a criterion for dividing law into private and public (knowing that this is one of the possible doctrinal approaches), we arrive at the conclusion that previous inferences on the blurring of the differences between the two spheres of law are true[48]. This appears to be an enduring trend, which, although primarily attributable for Member States of the European Union to their membership of this community, is undoubtedly a general tendency in all modern states.

VII. Conclusion

9.43. The term "public interest" in the pursuit of exact research or analysis in the social sciences is perceived as rather indistinct and vague. As Sorauf observes, the concept of public interest as an exact criterion has become unusable because of its vagueness, reflected in the large number of conflicting definitions. As he states, "*one cannot justify the public interest as either commonly-held value, moral imperative, superior wisdom, or compromise and yet maintain its status as a genuine 'interest,' as a political goal of the great 'public' attached to it in the struggle to influence policy*"[49]. His conclusion is sceptical but fitting: "*Its [public interest's] willingness to serve all parties makes it useful to none*"[50].

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[47] Recall, for example, the intervention of the European Union's institutions authoritatively establishing maximum prices for Short Message Service (SMS) from abroad.

[48] Out of interest, we note that the same conclusion was reached by Russian authors, who, for various reasons, have not been heard of much in the Czech Republic in recent years (e.g. Alexij P. Alekhin, Anatolij A. Karmolitskij, Jurij M. Kozlov, Administrativnoye pravo rossiyskoy federatsii, Moscow: Zercalo 41 (1997).

[49] Frank J. Sorauf, *supra* note 5, at 638.

[50] *Ibid.*

9.44. When considering the issue of public interest, there will also be a subconscious tussle between egoism and altruism, between individualism and collectivism, and on a political level between a liberal and social (or patriotic) approach, between rightist and leftist values, and between a conservative and liberal approach to human rights. Assessments of the content of the concept of "public interest" are thus inextricably bound up with the assessor's inner preferences.

9.45. The presence of the legal aspect (public interest as a legal concept) makes the subject of this debate a subject of legal disputes too. Here, the dispute is transformed into a debate about the degree of legitimate activism by the judiciary, the degree of restraint in deciding on political issues and the extent of permissible "legislative activity" by judges[51]. The first plane outlined above (the influence of the assessor's inner preferences) will not disappear if it is "judicialized". It can only be more or less hidden behind legal terminology and legal procedures of interpretation.

9.46. An exact definition of "public interest", reached purely by formal legal procedures, is evidently impossible. Efforts to arrive at a clear solution are reminiscent (for the sake of simplification) of an endless chess game that has been going on for several hundred years. Although there is not, and probably cannot be, a sustained, valid outcome, it makes sense to play on and to justify and discuss every move.

Summaries

FRA [***Intérêts publics contre intérêts privés : peut-on en définir les limites d'un point de vue juridique ?***]

La question de la définition de l'intérêt public fait partie de celles étudiées sous l'angle des disciplines scientifiques les plus variées, ce qui est une conséquence naturelle du rôle important que joue cette compréhension du terme « intérêt public » dans le fonctionnement de la société en tant que « tout ». Elle apporte également des indications sur le niveau de démocratie de cette société. La jurisprudence, joue un rôle primordial dans la définition de l'intérêt public qu'elle doit interpréter en relation avec la protection de toutes sortes de relations juridiques, principalement au moment où différents les droits (qu'ils relèvent du droit privé ou du droit public). L'orientation politique et idéologique de celui qui cherche à déterminer ou qui définit l'intérêt public joue un rôle considérable dans sa détermination. L'approche adoptée, qu'elle soit libérale, conservatrice ou plutôt de gauche, détermine non seulement l'étendue de l'interventionnisme en matière de régulation, mais aussi par exemple la taille de l'organe d'État qui garantit en fin de compte le respect de l'intérêt public. L'intérêt public est généralement classé parmi les critères de différentiation des sphères de droit privé et de droit public. Cependant, la société moderne en est arrivé à un stade

[51] *Cf.* RICHARD A. POSNER, HOW JUDGES THINK, Harvard: Harvard University Press 78-92 (2008).

de développement où l'intérêt public remplit une fonction totalement opposée conduisant à l'effacement des différences entres ces deux sphères, ce à quoi la production normative de l'Union européenne et les pratiques d'application de ses organes contribuent. Bien que des voix se font entendre pour critiquer ce que l'on appelle l'activisme judiciaire, il apparaît que ce sont et que ce seront les tribunaux qui jouent et continueront à jouer un rôle décisif dans les États de droit pour ce qui est de la détermination de l'intérêt général et de son rôle dans le fonctionnement de la société et de son droit.

CZE [***Veřejný versus soukromý zájem – je možné mezi nimi právně definovat hranice?***]
Otázka vymezení veřejného zájmu patří k těm, které jsou zkoumány optikou nejrůznějších vědních disciplín, což je přirozeným důsledkem skutečnosti, že jeho pojímání dalekosáhle ovlivňuje fungování celé společnosti a také vypovídá o tom zda a nakolik je demokratickou. Klíčovou roli při určení veřejného zájmu hraje judikatura, které musí interpretovat veřejný zájem v souvislosti s ochranou nejrůznějších vztahů, především v okamžiku, kdy dochází ke kolizím různých práv ať již z oboru práva soukromého či veřejného. Značný význam při stanovení veřejného zájmu sehrává politická a ideová orientace toho, kdo jej hledá, resp. určuje. To, zda je k němu přistupováno z pozic liberálních a konzervativních nebo spíše levicových, určuje nejen rozsah regulativních zásahů ze strany států, ale také např. velikost státního aparátu, který konec konců prosazování veřejného zájmu zajišťuje. Veřejný zájem je tradičně řazen mezi kritéria pro rozlišení sféry soukromého a veřejného práva. Vývoj moderní společnosti však dospěl do stádia, kdy plní funkci právě opačnou, tedy vede ke stírání rozdílů obou sfér, k čemuž aktivně přispívá normotvorba Evropské unie a aplikační praxe jeho orgánů. Třebaže se ozývají hlasy kritizující tzv. soudcovský aktivismus, ukazuje se, že v právním státě to jsou a budou soudy, které hrají rozhodující roli při určování veřejného zájmu a jeho role ve fungování společnosti a jejího práva.

POL [***Interes publiczny a interes prywatny – czy granice między nimi można prawnie określić?***]
Interes publiczny to jedna z kluczowych kwestii jeżeli chodzi o funkcjonowanie społeczeństwa i gwarancje demokracji. Dlatego właśnie kładzie się tak wielki nacisk na jego zdefiniowanie, co w praktyce jest problemem politycznym i orzecznictwa, niemniej jednak jawi się również jako zagadnienie prawne tam, gdzie według rządzących państwo powinno regulować ważne stosunki. Interes publiczny odgrywa również dużą rolę w zapewnieniu podstawowych praw i wolności. Interes publiczny jest często tradycyjnym kryterium rozróżniającym prawo prywatne i publiczne, choć w nowoczesnym społeczeństwie pozwala raczej pokonywać bariery między nimi. W rzeczywistości państwa prawa to sądy odgrywać będą decydującą rolę w jego zdefiniowaniu.

DEU [***Öffentliches versus privates Interesse – lässt sich eine rechtliche Grenze ziehen?***]

Das öffentliche Interesse gehört zu den Schlüsselelementen einer funktionierenden Gesellschaft und ist ein Garant der Demokratie. Deshalb wird so viel Wert auf seine Definition gelegt, was aber in der Praxis eher eine politische Frage bzw. eine Frage der Rechtsprechung ist, obschon das öffentliche Interesse dort, wo der Staat das Bedürfnis verspürt, wichtige Beziehungen einer Regelung zu unterwerfen, auch als Rechtskonzept auftauchen mag. Eine bedeutende Rolle spielt das öffentliche Interesse auch im Zusammenhang mit der Gewährleistung von Grundrechten und -freiheiten. Traditionell dient das öffentliche Interesse zum Kriterium der Unterscheidung von privatem und öffentlichem Recht, trägt aber in der modernen Gesellschaft eher zur Überwindung von Barrieren zwischen diesen Bereichen bei. In der Realität eines demokratischen Staats spielen Gerichte spielen Gericht bei der der Suche nach seiner Definition entscheidende Rolle.

RUS [***Общественный интерес в сравнении с частным – можно ли провести границу между ними с юридической точки зрения?***]

Общественный интерес относится к ключевым вопросам функционирования общества и обеспечения демократии. Именно поэтому его определению уделяется такое большое внимание, что на практике является скорее вопросом политическим, а также вопросом прецедентного права, тем не менее он встречается и как правовое понятие там, где государство считает необходимым регулировать отношения, имеющие важное значение. Общественный интерес также играет важную роль в связи с обеспечением основных прав и свобод. Общественный интерес служит традиционным критерием для различения частного и публичного права, хотя в современном обществе он способствует скорее преодолению барьеров между ними. В условиях правового государства решающую роль в его определении будут играть суды.

ES [***Interés público frente al privado: ¿se pueden definir legalmente los límites?***]

El interés público atañe las cuestiones clave del funcionamiento de la sociedad y las garantías de la domocracia. Por esto se hace tanto hincapié en su definición, lo que en la práctica es más bien una cuestión política y también de jurisdicción, no obstante, aparece también como noción legal, allí donde el Estado percibe la necesidad de reglamentar las relaciones importantes. El interés público desempeña un rol importante en relación con la garantía de los derechos y libertades fundamentales. El interés público suele ser el criterio tradicional para distinguir el derecho privado y el público, aunque en la sociedad moderna, más bien ayuda a superar las barreras entre los mismos. En la realidad del Estado de derecho serán los tribunales los que desempeñen el rol decisivo en su definición.

Miloš Olík | David Fyrbach

The Competence of Investment Arbitration Tribunals to Seek Preliminary Rulings from European Courts

Key words:
EU law | Intra-EU BITs | ECJ | Investment Arbitration | Commercial Arbitration | Preliminary Ruling | National Courts

***Abstract** | In the wake of the accession of new EU Member States in 2004 and in 2007, the portfolio of bilateral investment treaties (BIT) between Member States has become significantly larger. The fact that these BITs overlap with EU law creates friction when BITs are applied by investment tribunals which are constituted thereunder. In the spirit of the requirement that EU law be applied uniformly, these tribunals should have the authority to refer matters to the ECJ for preliminary rulings.*
Given the peculiarities of commercial and investment arbitration tribunals, it will not do to point to the previous case law of the ECJ on the admissibility of requests for a preliminary ruling by international commercial tribunals (i.e., in particular, Nordsee, Danfoss). In assessing the options of investment arbitration tribunals for referring matters for a preliminary ruling, one must put the focus on the basis of their jurisdiction, which derives from the provisions of the given legal system, i.e., the international treaty.

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10.01. In recent times, academic literature[1] and investment dispute tribunals[2] have both begun to address the question of how investment arbitration tribunals should deal with aspects of EU law; an issue which is closely connected to that of their jurisdiction to decide disputes. This issue has arisen as a result of the two waves of EU enlargement in 2004 and 2007 which resulted in an increase in the number of bilateral investment treaties (BITs) existing between current Member States from 2 to *circa* 190. Subsequent to these events, we have seen the development of disputes arising under intra-EU BITs. Arbitration tribunals must now therefore, deal with the influence of EU law on their jurisdiction or as the law applicable to the proceedings.

10.02. One of the questions relating to the application of EU law in investment disputes is whether arbitration tribunals may request a preliminary ruling from the ECJ[3] or whether they may do so through a national court. While this question could be answered by reference to the well known decision in *Nordsee*, the recent emergence of investor-state disputes involving issues of EU law suggests, however, that this is still an issue that merits discussion, particularly with respect to the distinction between commercial arbitration tribunals and investments dispute tribunals.

10.03. This paper examines these issues and contains an analysis addressing the issue of whether investment arbitration tribunals dealing with EU law should or could be allowed to seek preliminary rulings from the ECJ in order to guarantee the uniform interpretation and application of EU law and/or whether they can do so by asking the national courts to request a preliminary ruling on their behalf.

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[1] E.g. Christer Soderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 (5) JOURNAL OF INTERNATIONAL ARBITRATION 455-468 (2007); Markus Burgstaller, *European Law and Investment Treaties*, 26 (2) JOURNAL OF INTERNATIONAL ARBITRATION 181-216 (2009); Michele Potesta, *Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ*, 8 (2) THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 225-245 (2009); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 (2) COMMON MARKET LAW REVIEW 383-429 (2009); Miloš Olík, David Fyrbach, *Are intra-EU investment disputes at their end?*, *in* THE EUROPEAN AND MIDDLE EASTERN ARBITRATION REVIEW 3,6 (C.Campbell ed., 2010) also as Milos Olík, David Fyrbach, *BITs EU*, (Article, publication date unknown) available at: http://www.globalarbitrationreview.com/reviews/30/sections/107/chapters/1162/bits-eu/ (accessed on November 15, 2010).

[2] E.g. *AES Summit Generation Limited AES-Tisza Erömü KFT v. the Republic of Hungary*, ICSID Case No. ARB/07/22, Award of September 23, 2010.

[3] The abbreviation ECJ is in this article used as equivalent to the Court of Justice of the European Union (CJEU).

I. Bilateral Investment Treaties Concluded by Member States

10.04. The issue of agreements on the protection of investments, to which at least one party is a Member State, may be analysed from two points of view. First, there are the so-called extra-EU BITs – bilateral investment treaties made between a Member State and a third state. As of the day on which the Lisbon Treaty came into force, 1 December 2009, over 1,000 such treaties were in existence. Then, there are the so-called intra-EU BITs – bilateral investment treaties on the protection of investments existing between two Member States. Between the current 27 Member States, there are currently *circa* 190 intra-EU BITs in existence, having been concluded as extra-EU BITs prior to both parties becoming Member States.

10.05. The issue of the relationship between intra-EU BITs and the *acquis communitaire* is closely linked with the accession of the twelve European states to the EU in 2004 and 2007. The enlargement of the EU by these new countries resulted, *inter alia*, in their international treaties with both Member States and non-Member States coming to the attention of the competent authorities of the EU[4]. Leaving the undisputed importance and impact of other types of treaties to one side, this paper focuses solely on intra-EU BITs.

II. Concerns Regarding Intra-EU BITs and EU Law

10.06. Since the accession of the new Member States to the EU, the debate regarding intra-EU BITs has grown in its intensity. The issue of intra-EU BITs certainly raises a number of theoretical questions which appear to have considerable practical implications. The crucial issue generally arises from questions of whether or not the intra-EU BITs continue to be effective and whether or not their provisions are still applicable[5]. In this respect, it is necessary to examine whether or not intra-EU BITs are compatible with the mandatory provisions of EU law and the judicial system of the EU.

10.07. Undoubtedly, there is at least a partial overlap between the provisions of the intra-EU BITs and the EU provisions on the internal market[6]. The overlap of the provisions of the extra-EU BITs with the provisions on the internal market was recently addressed by the ECJ in three judgements[7] whereby it

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[4] Resulting in e.g. Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (Understanding, 22 September 2003), available at: http://www.state.gov/s/l/2003/44366.htm (accessed on November 15, 2010). A brief commentary to this issue in Markus Burgstaller, *supra* note 1, at 181.

[5] Generally to the debate on termination or inapplicability of intra-EU BITs after the accession see the articles cited *supra* note 1.

[6] Thomas Eilmansberger, *supra* note 1.

[7] ECJ Judgement of 3 March 2009, C-205/06, *Commission of the European Communities v. Republic of Austria* [2009] ECR I-1301; ECJ Judgement of 3 March 2009, C-205/06,

was decided that three Member States had violated their obligations under EU law. Although these cases relate to extra-EU BITs, the reasoning of the rulings may also be applied to cases involving intra-EU BITs.

10.08. A typical intra-EU BIT aims at promoting investments by guaranteeing investors a specific level of treatment and protection; e.g. most favoured nation clauses, national treatment clauses, fair and equitable treatment clauses, full security and protection clauses, umbrella clauses, prohibition of expropriation clauses and arbitration clauses for investment dispute settlement. These remedies are, however, also reflected in EU law, e.g. in the provisions on the freedom of establishment, the free movement of capital or the prohibition of discrimination[8]. Bearing in mind the fundamental characteristics of EU law, i.e. its supremacy and direct applicability; one must ask what the relationship between EU law and intra-EU BITs is, and how it should be addressed.

10.09. The next concern is the manner in which disputes under intra-EU BITs are resolved, as these agreements enable investors to address their claims to arbitration tribunals, which are not court institutions of the EU. In the judicial system of the EU, only EU courts and national courts of Member States are authorized to interpret and apply EU law[9].

10.10. Were this to be applied to investment tribunals, Member States would not comply with their obligation to ensure the observance of EU law and the uniform application of EU law as parties to such proceedings; therefore such arbitral tribunals should not have jurisdiction to hear these investor-state disputes. This results from the principle of direct effect and the direct applicability of EU law. This conclusion was confirmed by the Commission[10] which recommended the application of the ECJ's conclusions in the *MOX Plant* decision of 30 May 2006[11] (this related to inter-state disputes). The *MOX Plant* decision confirms that Member States shall not be able to resolve any dispute other than before the EU courts, as provided by Article 344 of the TFEU[12].

Commission of the European Communities v. Republic of Austria [2009] ECR I-1301; ECJ Judgment of 3 March 2009, C-249/06, *Commission of the European Communities v. Kingdom of Sweden* [2009] ECR I-1335; ECJ Judgment of 19 November 2009, C-118/07, *Commission of the European Communities v. Republic of Finland* [2009] ECR I-10889.

[8] Further see Miloš Olík, David Fyrbach, *supra* note 1.

[9] Allan Rosas, *International Dispute Settlement: EU Practises and Procedures*, 46 German Yearbook Of Internationa Law, Berlin: Duncker & Humblot GmbH 284, 288 (J. Delbrück, R. Hofmann, A. Zimmermann eds., 2003).

[10] Luke Eric Peterson, *Intra-EU BIT cannot be relied upon by EU national for purposes of suing another EU state, says European Commission to arbitral tribunal,* 3 (11) Investment Arbitration Reporter (5. August 2010), available at: http://www.iareporter.com/articles/20100818_10/ (accessed on November 15, 2010).

[11] ECJ Judgment of 30 May 2006, C-459/03, *Commission of the European Communities v. Ireland* [2006] ECR I-4635.

[12] And its contemporary predecessor, Article 292 of the EC Treaty. The issues of the concurrence of the provisions of intra-EU BITs and of EU law have been so far addressed by arbitration tribunals constituted under intra-EU BITs in such cases

10.11. This, so called "intra-EU BIT issue", was identified by the EU institutions as early as in 2006 as being an issue in urgent need of being resolved[13]. However, due to the apparent inaction of the Member States, the resolution of this issue has yet to be achieved, to the dissatisfaction of the EU institutions[14]. Recently, the Commission[15] put pressure on the Member States to resolve this issue by means of mutual negotiations and the termination of the intra-EU BITs.

10.12. However, even were this to be put into effect, not all of the problems are capable of being resolved. Disputes arising under intra-EU BITs may nonetheless withstand if we consider the intertemporal provisions of the individual intra-EU BITs, which further constitute the risk of a non-uniform interpretation of EU law and the consequent unenforceability of arbitration awards.

10.13. While leaving aside the debate on the termination and applicability of intra-EU BITs, the jurisdiction of tribunals constituted under intra-EU BITs are capable of being disputed. Where the provisions of intra-EU BITs are replaced by EU law, a tribunal constituted under an intra-EU BIT would effectively be deciding on a breach of EU law without there being any recourse to a preliminary ruling by the ECJ to clarify potentially unclear issues regarding EU law; actions for which it is not competent.

10.14. In this situation, and until the creation of a suitable platform for the resolution of disputes relating to the protection of investments within the EU, other than that of the national court systems of Member States; the issue is generally capable of being resolved in two ways: (i) by enabling the arbitration tribunals hearing such disputes to submit their preliminary questions to the ECJ; and, where this is not possible, (ii) by giving priority

where the conclusions are publicly accessible: *Eastern Sugar v. Czech Republic*, *AES v. Hungary* and *Eureko v. Slovak Republic*. It shall be noted that the individual tribunals made relatively diverse conclusions. (*Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award of March 27, 2007; *AES Summit Generation Limited AES-Tisza Erömü KFT v. the Republic of Hungary*, ICSID Case No. ARB/07/22, Award of September 23, 2010). For *Eureko v. Slovak Republic* see Luke Eric Peterson, *ANALYSIS: Tribunal rejects objections of European Commission and Slovak Republic in arbitration; Vienna Convention arguments examined in detail*, 3 (17) INVESTMENT ARBITRATION REPORTER (4 November 2010), available at: http://www.iareporter.com/articles/20101105_2/ (accessed on November 15, 2010).

[13] Council of European Union, 2006 Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, (Report, 4 January 2007), available at: http://register.consilium.europa.eu/pdf/en/07/st05/st05044.en07.pdf (accessed on November 15, 2010).

[14] Council of European Union, 2007 Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, (Report, 8 January 2008), available at: http://register.consilium.europa.eu/pdf/en/08/st05/st05123.en08.pdf (accessed on November 15, 2010).

[15] Luke Eric Peterson, *EC asks member-states to signal by year's end whether they will terminate their intra-EU investment treaties; spectre of legal action looms*, 3 (16) INVESTMENT ARBITRATION REPORTER (20 October 2010), available at: http://www.iareporter.com/articles/20101023_10/ (accessed on November 15, 2010).

to the application of EU law over intra-EU BITs, which entails the lack of jurisdiction of arbitral tribunals in cases where the interpretation of EU law and its application are in dispute. In this study, we shall be dealing with solutions which entail the submission of preliminary questions to the ECJ[16].

III. The Admissibility of a Request for a Preliminary Ruling by Investment Arbitration Tribunals

10.15. A preliminary ruling is capable of being sought by all the courts and tribunals of Member States. Among them, the courts and tribunals against whose decision there is no judicial remedy under national law are obliged to bring the matter before the ECJ[17]. The reason for this, and this is something that cannot be stressed enough, is to ensure the uniform application of EU law in all Member States, as EU law would otherwise become inoperable.

10.16. The term "court or tribunal of a Member State" is, however, rather vague. In the mid-1960s, the ECJ had already formulated the criteria by an autonomous interpretation of the term "courts and tribunals" in *Vaassen*[18], and since that time the ECJ case law has been further developed and debated.

10.17. In *Vaassen*, the ECJ indicated that in order to be considered a court or tribunal of a Member State, such a body must (i) be constituted under the laws of the Member State; (ii) be a permanent body; (iii) decide adversarial procedures similar to those decided in the ordinary courts of law; (iv) apply rules of law; and (v) with compulsory jurisdiction conferred by the Member State.

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[16] As to a lack of jurisdiction see e.g. Miloš Olík, David Fyrbach, *supra* note 1.

[17] Article 267 of the Treaty on the Functioning of the European Union, consolidated version published in Official Journal C 83 of 30 March 2010:

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with minimum of delay.

[18] ECJ Judgment of 30 June 1966, Case 61/65, G. *Vaassen-Göbbels (a widow) v. Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261.

10.18. Apart from courts of law, the ECJ has found several types of bodies to have satisfied these criteria, e.g. a disciplinary body of a professional organization in *Broekmeulen*[19] or an independently acting immigration officer in *El-Yassini*[20]. However, bodies acting as administrative authorities are prevented from raising a request for a preliminary ruling, e.g. *HSB-Wohnbau*[21] (Commercial Register), *Salzmann*[22] (Land Register) as well as bodies forming part of the legislature or executive, e.g. *Victoria Film*[23], *Corbiau*[24] as they do not exercise judicial functions.

10.19. With regard to commercial arbitration tribunals, the ECJ ruled in *Nordsee*[25] that, as arbitration tribunals do not comply with the criteria set by the ECJ in defining a court or tribunal of a Member State under Article 177 of the EC Treaty[26], they are not entitled to request preliminary rulings. When rejecting the request for a preliminary ruling in *Nordsee*, the ECJ pointed out that the jurisdiction of the arbitration tribunal was not compulsory and that the individuals were not responsible for the performance of the obligations arising under EC law to the Member State.

10.20. Later, in *Danfoss*[27] the ECJ accepted a request for a preliminary ruling from an industrial arbitration board, after finding that the body issued final decisions and its jurisdiction did not depend upon the agreement of parties: "An industrial arbitration board then hears the dispute at last instance. Either party may bring a case before the board irrespective of the objections of the other. The board's jurisdiction thus does not depend upon the parties' agreement."

10.21. The definition of the terms "courts and tribunals of a Member State" was subject to criticism in *De Coster*[28], where the opinion of Advocate General Colomer criticised[29] the insufficient consistency and overwhelming

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[19] ECJ Judgment of 6 October 1981, Case 246/80, *C. Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311.

[20] ECJ Judgment of 2 March 1999, C-416/96, *Nour Eddline El-Yassini v. Secretary of State for Home Department* [1999] ECR I-1209.

[21] ECJ Order of 10 July 2001, C-86/00, *HSB-Wohnbau* [2001] ECR I-5353.

[22] ECJ Judgment of 14 June 2001, C-178/99, *Doris Salzmann* [2001] ECR I-4421.

[23] ECJ Judgment of 12 November 1998, C-134/97, *Victoria Film A/S* [1998] ECR I-7023.

[24] ECJ Judgment of 30 March 1993, C-24/92, *Pierre Corbiau v Administration des Contributions* [1993] ECR I-1277.

[25] ECJ Judgment of 23 March 1982, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095.

[26] Contemporary counterpart of Article 267 of the Treaty on European Union and the Treaty on the Functioning of the European Union.

[27] ECJ Judgment of 17 October 1989, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199.

[28] ECJ Judgment of 29 November 2001, C-17/00, *François De Coster and Collège des bourgmestre et echevins de Watermael-Boitsfort* [2001] ECR I-9445.

[29] Opinion of Advocate General Ruiz-Jarabo Colomer delivered 28 June 2001. This opinion contains a thorough analysis of ECJ case law defining the term court or tribunal

flexibility of the definition given by the ECJ, which excessively broadened the scope of the institutions entitled to request a preliminary ruling. These complaints were not addressed however.

III.1. Should the ECJ Distinguish Investment Tribunals from the *Nordsee* Arbitral Tribunal?

10.22. When deciding *Nordsee*, the ECJ could scarcely foresee the necessity of entitling investment arbitration tribunals to request preliminary rulings. Firstly, there was no foreseeable need for investment arbitration tribunals to address EC law in an arbitration involving a Member State; at that time (the early 1980's) investors from the EU invested outside the EU, with EU countries being capital exporting countries, and in the event of a dispute, the law of the capital importing country, i.e. a non-Member State, would usually apply. Secondly, there was only one BIT in force between Member States; that of Germany and Greece, the latter of which having joined the EU just one year prior to *Nordsee* being decided.

10.23. However, the portfolio of intra-EU BITs became significantly enlarged by the accession of new Member States in 2004 and 2007. As a result, the number of investment arbitrations in which tribunals encounter questions of EU law has increased. Questions of EU law were raised recently in *AES v. Hungary*[30], where the European Commission attempted to intervene on its own initiative as *amicus curiae*, and in *Eureko v. Slovak Republic*[31].

10.24. From publicly accessible sources, however, it is not known, as of the date of submission of this paper, as to whether or not tribunals have submitted a preliminary question to the ECJ in any of the disputes arising under intra-EU BITs. It may be assumed that such tribunals have not exercised this option so far, specifically in the context of the explicit nature of the decision of the ECJ in the *Nordsee* case.

10.25. But can we conclude from *Nordsee* that an investment arbitration tribunal is not entitled to request a preliminary ruling? After all, *Nordsee* deals with

of a Member State, while Advocate General concludes: "*[...] the Court's approach to this matter is not only excessively casuistic, [...] but also lacks the clear and precise features for the definition of a Community concept. Far from providing a reliable frame of reference, the case-law offers a confused an inconsistent panorama, which causes general uncertainty. [...] The principal victim of the situation has been the Court of Justice itself, which has been hesitant with respect to the judicial nature of many bodies which have made preliminary references, and has sometimes failed to give its reasons for going in one direction or the other.*" See also Koen Lenaerts, *The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited, in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE, Baden-Baden: NOMOS Verlag 211 (I. Pernice, J. Kokott, Ch. Sunders eds., 2006), available at: http://www.ecln.net/elements/conferences/book_berlin/lenaerts.pdf (accessed on November 15, 2010).

[30] *AES Summit Generation Limited AES-Tisza Erömü KFT v. the Republic of Hungary*, ICSID Case No. ARB/07/22, Award of September 23, 2010.

[31] Luke Eric Peterson, *supra* note 12.

a preliminary ruling raised within commercial arbitration proceedings. Indeed, both types of proceedings, i.e. commercial arbitration and investment arbitration share some features, but they also contain considerable distinctions.

a) Commercial Arbitration

Under both jurisdictional and contractual theories[32], commercial arbitration is based on an agreement of private law between two parties concluded within the limits of national law. The relationship of the parties to a commercial arbitration is governed by the national law chosen by the parties. The relationship between such parties may be described as horizontal in that neither of the parties can act as a sovereign entity, i.e. impose duties, on the other party.

The main purpose of commercial arbitration is to resolve disputes between two private entities arising from their relationship governed by private law. The parties intentionally exclude the application of rules other than those contained in their private contract. These parties are also not subject to the obligations arising from EU law, such as the uniform application of EU law or the obligation to resolve their disputes only through the EU courts and national courts. Only exceptionally have they to sustain the application of rules other than those to which they have agreed. This may occur in the event that their agreement would breach mandatory rules which are not capable of being contractually avoided, such as competition law.

The arbitration clause is usually agreed for a specific relationship or for a group of specific relationships between two contractual parties.

b) Investment Arbitration

First and foremost, investment arbitration disputes are commenced, unlike commercial arbitrations, on the basis of international treaties of public law, be they bilateral or multilateral.

These treaties are hybrids which intend to replace, on the one hand, the diplomatic protection which the investor's state would otherwise claim in favour of its national whose rights were allegedly deprived by the host state, and litigation in the domestic courts of the host state, on the other, with a single mechanism through which the harmed investor could itself raise its claims[33].

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[32] See further NADĚŽDA ROZEHNALOVÁ, ROZHODČÍ ŘÍZENÍ V MEZINÁRODNÍM A VNITROSTÁTNÍM OBCHODNÍM STYKU (*Arbitration in International and Domestic Business Relations*), Praha: ASPI, Wolters Kluwer 52-58 (2nd ed. 2008).

[33] *Christoph Schreuer, The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, available at: http://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf (accessed on November 15, 2010).

Secondly, investment arbitration always involves a state party[34]. Its relationship to the other party to the dispute is rather exceptional. Some authors, such as Rozehnalová[35], speak of the diagonal relationship between the investor and the state to describe the fact that the state is acting as a sovereign entity towards the investor in such a dispute, with the dispute usually arising from a sovereign act of state which the investor perceives to be hostile. Its position as a party to the dispute does not deprive the state of its duties arising either from international or EU law.

10.26. From the above mentioned, it is unlikely that an investment tribunal constituted under an intra-EU BIT would fall within the scope of the *Vaassen* criteria, particularly with regard to the lack of compulsory jurisdiction, in that the investor is always free to bring his/her matter to the national courts of the relevant state. However, the different nature of investment arbitration, from that of commercial arbitration, justifies a second glance at the possibility of investment tribunals requesting a preliminary ruling.

10.27. If we analyse the basic reasons for the rejection of a preliminary ruling by the ECJ in the *Nordsee* case, we will discover that the ECJ considerations in this decision are not fully applicable to investment tribunals. In the *Nordsee* case, the ECJ took particular regard to the following circumstances of the case:

a) The jurisdiction of the arbitrator was established by the agreement of private entities (para. 7).
b) In making the agreement, the parties to the dispute had a choice as to whether they would let the courts have general jurisdiction or let the arbitrator decide the issue (para. 11).
c) It is evident from the circumstances that the parties were, either as a matter of law or as a matter of fact, not obliged to submit the dispute to an arbitration tribunal (para. 11).
d) A (German) public authority did not participate in the parties' decision to choose arbitration to resolve their disputes and is not *ex officio* automatically called on to intervene in the dispute (para. 12).
e) It is the state's responsibility to fulfil its obligations under EU law; in other words, the state does not vest or confer responsibility on private entities to fulfil these obligations (para. 12).

10.28. These considerations are only, to a limited extent, capable of being applied to investment arbitration tribunals arising under intra-EU BITs:

- Usually, the jurisdiction of these tribunals is established by a treaty under international public law and not by a contract under private law and under private entities.

[34] The state may be also a party to disputes based on a contract concluded by the state acting as merchant and a merchant based in another state. Such contracts are usually governed by national law of the relevant state.

[35] See further NADĚZDA ROZEHNALOVÁ, *supra* note 32, at 74.

- The state has no choice as to whether it submits an investor-state dispute to its national courts or arbitration.
- Although the investor is not obliged to submit the dispute to a tribunal, the state is obliged to participate in the dispute, with there being no other way in which investment disputes are resolved.
- Finally, in contrast to the parties to a commercial arbitration, the state does have the duty to provide for the fulfilment of the obligations under EU law.

It follows, therefore, that in the *Nordsee* case, the conclusions of the ECJ cannot be, by implication, applied to arbitration tribunals hearing investment disputes.

10.29. It is a question of whether the conclusions of the ECJ that were reached in *Danfoss* could be analogically applied to the status of investment tribunals. In *Danfoss*, the ECJ ruled that the arbitration tribunal was entitled to submit a preliminary question, since in this case, it was not at the discretion of the parties to the dispute to submit the dispute to an arbitration tribunal or a court; the jurisdiction of the arbitration tribunal was derived from the collective agreements concluded between the employer's union and the employee's union. Basically, the situation was that the law fixed the exclusive jurisdiction of the arbitrators in the event the parties to the contract agreed on an arbitration clause. It may be assumed that the conclusions of the ECJ in this award could also be partially applied to arbitration tribunals hearing investment disputes. Their jurisdiction is likewise derived from a law, embodied in an international treaty (not a private contract). However, the tribunal's jurisdiction is not exclusive, but is at the claimant's discretion. It is debatable as to whether this difference suffices for the ECJ to reject its jurisdiction to rule on a preliminary question.

10.30. We believe that it is not. In our opinion, it is not decisive as to whether the jurisdiction of the respective body is obligatory or not, but rather, what the legal grounds for its jurisdiction are, i.e. whether its jurisdiction is derived from an agreement of private entities under private or public law, i.e., a treaty. It shall be further taken into account that in such circumstances the state is a party to the dispute in its sovereign function and that the jurisdiction of the tribunal is derived from its consent and authority to hear disputes that were not specified in advance.

10.31. In the *Nordsee* case, the ECJ concluded that it is the state and not individuals who are responsible for the fulfilment of the obligations which arise under EU law. The obligations of the state specifically include its correct observance and uniform application of EU law and simultaneously its duty to follow Article 344 of the TFEU[36] which states: *"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those*

[36] Article 344 of the Treaty on the Functioning of the European Union, consolidated version published in Official Journal C 83 of 30 March 2010.

provided for therein." The attainment of a preliminary ruling under Article 267 of the TFEU is a method to which Article 344 refers[37].

10.32. We believe that the consent of the state to the submission of disputes to arbitration tribunals should be construed in conformity with EU law so that EU law is not violated by its execution. Its consent should be therefore interpreted in such a way that it entails the entitlement and authorisation of the arbitration tribunal to submit a preliminary question to the ECJ. An interpretation to the contrary could lead to a violation of the state's obligation to provide for the correct observance and a uniform application of EU law. Such a breach should be remedied by the application of the principles of direct effect and direct applicability of EU law so that the arbitration clause cannot be applied. This conclusion is made with the caveat that it is not possible for an arbitration tribunal to request a preliminary ruling through a national court (see below).

IV. Possibility to Request National Courts to Submit Preliminary Rulings

10.33. Were the ECJ, in proceedings on a preliminary question raised by an investment tribunal, to disregard the above mentioned arguments and to insist on its ruling in the *Nordsee* case; the arbitration tribunal would have, apart from a ruling as to its lack of jurisdiction, one (theoretical) way of retaining jurisdiction and simultaneously ensuring a uniform application of EU law; i.e. to request the submission of a preliminary question to the ECJ by the national supervising court. The ECJ, in paragraph 14 of the *Nordsee* decision, held that commercial arbitration tribunals are to be referred to national courts and tribunals. In other words, the ECJ recommended the commercial arbitration tribunals to request a preliminary ruling through the national courts and tribunals within the performance of their auxiliary and/or supervisory functions. This solution, as suggested by the ECJ calls, for review. It is not entirely clear whether such an interpretation would be in line with Article 267 of the TFEU.

10.34. As it follows from *Roda Golf*[38], a national court may refer a question to the ECJ if it shall "give judgment in proceedings intended to lead to a decision of a judicial nature". As the ECJ further explains, such is not the case when a court does not decide a legal dispute, but rather merely issues an administrative decision. That is also the case of a court requested to advance a preliminary ruling a question raised by an arbitration tribunal. Such a request for a preliminary ruling further does not fulfil the requirements as stipulated by said article, as the court does not need

[37] *Ibid.*, Article 267.

[38] ECJ Judgment of 25 June 2009, C-14/08, *Roda Golf & Beach Resort SL* [2009] ECR I-5439.

that ruling for its own judgment[39]. The ECJ may thus reject such a request where a national court does not make a decision as to the merits. In other words, the question of the interpretation and applicability of EU law could actually arise before a commercial arbitration tribunal, not before the court or tribunal under Article 267 of the TFEU. Thus, the national court or tribunal would be merely "transferring the baton".

10.35. We think that the reasoning of the *Roda Golf* decision applies also to this situation and that the ECJ would not accept the request for a preliminary ruling made through a domestic court. The main reason for this conclusion is that the court, in this scenario, does not decide a case between the parties.

10.36. Further, it is not entirely clear whether all national laws of Member States permit such a procedure. For example, in the case of German law, some authors expressed the opinion that § 1050 of the German Code of Civil Procedure allows for such a recourse to the ECJ[40]. Bearing in mind that the authors of Article 267 of the TFEU (and, of course, its contemporary predecessors) sought the uniform interpretation and application of EU law by this provision, a conclusion based on beliefs and opinions, even coming from distinguished practitioners and scholars, cannot be comforting. Therefore, the ECJ's proposal to commercial arbitration tribunals is attractive, but most probably will not succeed.

V. Conclusion

10.37. Although the ECJ in *Nordsee* would seem to prevent all arbitration tribunals from requesting preliminary rulings, there is reason as to why this case should not be followed in the context of investment arbitration tribunals when they address issues of EU law. The differences that exist between investment arbitrations and commercial arbitrations justify this approach. More specifically, the dual role of the Member States in such investment arbitrations, as both parties to the dispute and, more importantly, as guarantors of the uniform application of EU law, calls for the acceptance of preliminary rulings to be raised by investment tribunals. The right of investment tribunals to request preliminary rulings would guarantee that investment arbitration would not become a path by which EU Law could be potentially violated.

[39] I.e. a preliminary ruling question is not "necessary to enable it to give judgment".

[40] Klaus Sachs and Torsten Lörcher, *§ 1050 – Court Assistance in Taking Evidence and other Judicial Acts*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE, Alphen aan den Rijn: Kluwer Law International 341 (K.-H. Böckstiegel, S. M. Kröll, P. Nacimiento eds., 2007).

Summaries

FRA [***Compétence des tribunaux d'arbitrage d'investissement dans la recherche de recours préjudiciels auprès des cours européennes de justice***]

Le portfolio des accords d'investissement bilatéraux (AIB) entre les différents États membres de l'UE s'est considérablement élargi par suite de l'adhésion de nouveaux États membres à l'UE en 2004 et 2007. Le fait que ces AIB couvrent les mêmes questions que le droit de l'UE pose des problèmes dans l'application des AIB aux tribunaux désignés sur la base de ces AIB. Ces tribunaux devraient être autorisés à présenter un recours préjudiciel auprès de la CEJ, conformément aux exigences d'une application du droit unifiée de l'UE.

Au vu des particularités des tribunaux internationaux de commerce et d'investissement, on ne peut pas renvoyer devant la jurisprudence actuelle de la Cour européenne de justice (CEJ) la recevabilité à présenter un recours préjudiciel par les tribunaux internationaux de commerce (principalement Nordsee, Danfoss*). En évaluant les possibilités des tribunaux d'arbitrage de présenter un recours préjudiciel, il faut accroître leur jurisprudence découlant du code juridique institué, à savoir le traité international.*

CZE [***Kompetence tribunálů pro investiční rozhodčí řízení domáhat se u evropských soudů předběžných rozhodnutí***]

V důsledku přistoupení nových členských států k EU v roce 2004 a 2007 se významně rozšířilo portfolio bilaterálních investičních smluv (BIT) mezi členskými státy. Skutečnost, že tyto BIT pokrývají tytéž otázky jako právo EU, způsobuje tribunálům ustanoveným na základě takových BIT problémy při aplikaci BIT. V souladu s požadavkem jednotné aplikace práva EU, by tyto tribunály měly být oprávněny předložit předběžnou otázku k ESD.

Vzhledem k odlišnosti obchodních a investičních rozhodčích tribunálů nelze odkázat na dosavadní judikaturu ESD ve vztahu k přípustnosti mezinárodních obchodních tribunálů předložit předběžnou otázku (zejména Nordsee, Danfoss). Při posouzení možnosti investičních rozhodčích tribunálů předložit předběžnou otázku je třeba akcentovat základ jejich jurisdikce odvozený z ustanovení právního řádu, tj. mezinárodní smlouvy.

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POL [***Kompetencje trybunałów arbitrażu inwestycyjnego w zakresie wnioskowania o orzeczenia wstępne do sądów europejskich***]

W wyniku przystąpienia nowych państw członkowskich do UE w 2004 i 2007, znacznie wzrosła liczba dwustronnych umów o ochronie i wzajemnym popieraniu inwestycji (BIT) między państwami członkowskimi. Ponieważ wspomniane BIT w wielu miejscach pokrywają się z prawem UE, powoduje to pewne tarcia w sytuacji, kiedy trybunały inwestycyjne stosują BIT, na mocy której zostały ukonstytuowane. Aby zapewnić jednolite stosowanie prawa UE, trybunały te powinny posiadać kompetencje do występowania o orzeczenia wstępne do ETS.

DEU [***Die Zuständigkeit von Schiedsgerichten in Investitionssachen für Gesuche nach Vorabentscheidungen durch die europäischen Gerichte***]
Das Portfolio bilateraler Investititionsschutzabkommen (BIT) hat infolge des EU-Beitritts neuer Mitgliedstaaten in 2004 und 2007 erheblich zugenommen. Die Anwendung der intra-europäischen BIT von den Schiedsgerichten ruft regelmäßig die Auslegungsschwierigkeiten hervor, die durch überlappenden Inhalt von der EU und BIT Normen verursacht werden. Die Schiedsrichter stehen vor der Frage, wie und im welchen Umfang die BITs und EU Recht anzuwenden. Um die einheitliche Anwendung von EU-Recht zu gewährleisten, sollte solchen Schiedsgerichten die Berechtigung eingeräumt werden, Vorabentscheidungen beim EGH einzuholen.

RUS [***Компетенция арбитражных (третейских) судов по инвестиционным спорам в поиске предварительных решений в европейских судах***]
В результате принятия в ЕС новых государств-членов в 2004 и 2007 годах значительно увеличился портфель двусторонних инвестиционных соглашений (BIT) между государствами-членами. Тот факт, что такие соглашения частично повторяют право ЕС, создает трения при применении соглашений соответственно учрежденными судами по инвестиционным спорам. Для обеспечения одинакового подхода к применению права ЕС таким судам необходимо иметь компетенцию в поиске предварительных решений в Суде Европейского Союза.

ES [***La competencia de los tribunales de arbitraje de inversión para buscar normativas preliminares en los tribunales europeos***]
Como resultado de la entrada de los nuevos Estados miembros en la EU en 2004 y 2007, la cartera de tratados bilaterales de inversión (TBI) entre éstos aumentó significativamente. El hecho de que estos TBI se superpongan a la ley de la UE crea conflictos cuando estos TBI son aplicados por los tribunales constituidos en virtud de ellos. Para asegurar una aplicación uniforme de la ley de la UE, estos tribunales deberían tener competencia para buscar normativas preliminares de los tribunales de justicia europeos.

Andreas von Staden

Towards Greater Doctrinal Clarity in Investor-State Arbitration: The *CMS*, *Enron*, and *Sempra* Annulment Decisions

Key words:
Argentina | necessity | non-precluded measures provision | CMS | Enron | Sempra | annulment | manifest excess of powers | failure to apply the proper law | lex specialis

***Abstract** | Several arbitral awards rendered against Argentina under bilateral investment treaties and related to the country's devastating economic crisis in 2001–2002 restrictively interpreted Argentina's ability to rely on either the exception clause in the US-Argentina investment treaty or the necessity defence under customary international law. In three cases (CMS, Sempra, and Enron), the tribunals, by simply equating the requirements under the treaty exception with those of the customary necessity defence, all but ignored established canons of treaty interpretation and engaged in doctrinally muddled analyses of the relationship between treaty law and customary law. All three awards have since been subject to annulment decisions by ICSID ad hoc committees. While the decisions disagree on what constitutes an appropriate reason for annulment under the manifest excess of powers ground, they offer doctrinally much improved approaches to the interpretation and application of both treaty exceptions and the necessity defence. Identifying the proper dividing line between permissible annulment review and impermissible appellate review in such contexts has been, and will remain, contentious, but the Sempra and Enron committees offer reasonable assessments of when an error of law becomes so grave as to result in actual failure to apply the proper law.*

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I. Introduction

11.01. The spate of investor-state arbitrations against Argentina following the country's devastating economic crisis of 2001–2002 has prominently foregrounded the tension in international investment law between the legitimate safeguarding of fundamental public interests by a state's government and the protection of the interests of foreign investors[1]. In a series of disputes arbitrated under the U. S.-Argentina bilateral investment treaty (BIT)[2] in particular, Argentina has sought to defend the measures adopted in response to the crisis by invoking both the treaty's own non-precluded measures (NPM) clause[3] as well as the necessity defence under customary international law. The legal response of the tribunals charged with arbitrating these disputes, constituted primarily under the institutional umbrella of the International Convention (and Centre) for the Settlement of Investment Disputes (ICSID)[4], has been uneven and partly contradictory, a fact that has elicited its own share of scholarly comment[5]. In a system without binding precedents, at least *de jure*[6], and without a superordinate appellate instance that might provide

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1 With 51 known investment treaty claims as of the end of 2009, Argentina is the country with the highest number of investor-state arbitrations to date, most of which were initiated after and in relation to the 2001-2002 economic crisis. See UNCTAD, LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTE SETTLEMENT, 1 IIA ISSUES NOTE 13 (2010), available at: http://www.unctad.org/en/docs//webdiaeia20103_en.pdf (accessed on November 11, 2010); International Centre for the Settlement of Investment Disputes, Pending and Concluded Cases, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (accessed on November 11, 2010). For background information on the crisis and how it affected various industries, see R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims: First Lessons from Argentina*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, London: Cameron May, Ltd. 425, 425-446 (T. Weiler ed., 2005); see also PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA, New York: PublicAffairs (2005).

2 Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103–2 (1993) (*U.S.-Argentina BIT*).

3 On NPM clauses in BITs generally, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2008).

4 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (*ICSID Convention*).

5 See, e.g., August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS and LG&E*, 8 J. WORLD INVESTMENT & TRADE 191 (2007); Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. 265 (2007); Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT'L L. 637 (2007).

6 See generally Christoph Schreuer & Matthew Weininger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford: Oxford University Press 1188 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008).

for a more homogeneous jurisprudence[7], some ICSID tribunals rejected Argentina's pleas under both treaty and customary law and found the country responsible for the damages incurred by the investors[8], while others sided with the Argentine government and recognized exceptional circumstances that absolved Argentina from having to compensate foreign investors for damages suffered as a result of the crisis and the Argentine government's rescue package[9].

11.02. Doctrinally, the principal issues arising with respect to the availability and operation of the defences invoked by Argentina concerned, on the one hand, the general relationship between the treaty-based exception clause of Article XI[10] and the necessity defence under customary law in

[7] See ICSID Convention Article 53 (1): "The award ... shall not be subject to any appeal or to any other remedy except those provided for in this Convention." The strongest remedy provided for is the annulment of an award (Article 53), which will be discussed below. Annulment proceedings, however, are circumscribed by an exhaustive and restrictive list of permissible reasons for annulment and as such "not designed to bring about consistency in the interpretation and application of international investment law." *MCI Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Annulment Decision of October 19, 2009, para. 24 (*MCI Annulment Decision*).

[8] *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005 (*CMS Award*); *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007 (*Enron Award*); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of Sept. 28, 2007 (*Sempra Award*). In investor-state arbitrations under BITs that do not include non-precluded measures provisions of their own, the rejection has solely been on the basis of the applicability of the customary necessity defence; see *BG Group plc v. The Argentine Republic*, UNCITRAL Arbitration, Award of December 24, 2007, paras. 407-412 (*BG Group Award*); *National Grid plc v. The Argentine Republic*, UNCITRAL Arbitration, Award of November 3, 2008, paras. 250-262 (*National Grid Award*); *Suez, Sociedad General de Aguas de Barcelona, S.A., & InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of July 30, 2010, paras. 235-243 (*Suez & InterAgua Decision on Liability*); *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Liability of July 30, 2010, paras. 257-265 (*Suez, Vivendi & AWG Decision on Liability*).

[9] *Continental Casualty Co. v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of September 5, 2008 (*Continental Casualty Award*); *LG&E Energy Corp. et. al v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of September 26, 2006 (*LG&E Decision on Liability*) and Award of July 25, 2007 (*LG&E Award*). In a further case, the tribunal was "convinced of the severity of the crisis suffered by Argentina in late 2001 and early 2002," but refused to decide whether the necessity defence could be legitimately invoked because it found that the claimant had not suffered any adverse consequences to begin with; see *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award of June 6, 2008 (in Spanish), paras. 208-213.

[10] Article XI provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or

the cases arbitrated under the U.S.-Argentina BIT, and, on the other, the interpretation and application of the individual elements of either Article XI, the necessity defence, or both, to the facts of the cases. The positions taken on these issues are obviously of central importance because they may be outcome-determinative and critically affect the general balance between the regulatory freedoms on the part of a host state's government in times of national emergencies and the protections afforded to the investments of foreign investors. Especially in cases where the BITs at issue explicitly contain non-precluded measures provisions, one cannot maintain that the *sole* object and purpose of a BIT is *exclusively* investor protection, and that all interpretations of treaty terms have to be guided by that objective. Rather, the inclusion of non-precluded measures provisions clearly signals that the parties to the treaty sought to preserve for themselves some regulatory freedom of action, under the conditions specified in the NPM clause, even if such action might be in contravention of otherwise applicable substantive investment protections. In these cases, the presence of non-precluded measures clauses must also inform the object and purpose of a treaty and such clauses need to be given appropriate consideration and effect[11]. Where a treaty does not contain such a clause, the defence of necessity under customary law would still be available. Although its existence does not as such affect the object and purpose of a treaty (which accordingly swings more in the direction of investor protection), it also provides for exoneration of otherwise unlawful state conduct, albeit under restrictively defined conditions.

11.03. At a minimum, then, state respondents in investor-state arbitrations can expect tribunals to apply the applicable treaty and customary law in line with the recognized rules of treaty interpretation and the doctrinal principles relating to the relationship between sources in international law. However, it is precisely with respect to doctrinal clarity and correctness that several of the awards rendered against Argentina have fallen surprisingly short. One of the most troubling aspects of the first set of awards that found against Argentina in the context of the U.S.-Argentina BIT in particular has been the fact that the tribunals simply equated the standards applicable under the treaty's exception clause with those of the necessity defence available under customary international law, commonly accepted[12] as being reflected in Article 25 of the International

security, or the protection of its own essential security interests." *U.S.-Argentina BIT*, Article XI.

[11] For the argument that this should entail, *inter alia*, reasonably deferential standards of review when it comes to the adjudication of public law issues, see William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283 (2010).

[12] *But see* Matthew Parish, *On Necessity*, 11 J. World Investment & Trade 169, 173 (2010) (qualifying, *inter alia*, Article 25, not as a "statement [] of the law" but as the ILC's opinion "about what the law should be").

Law Commission's Draft Articles on State Responsibility[13]. Equally disconcerting, the tribunals did so without any discernible reliance on the rules of treaty interpretation as codified in Arts. 31-33 of the Vienna Convention on the Law of Treaties (VCLT). Finally, the interpretation of the elements of the necessity defence by these tribunals, as well as by others that have arbitrated cases under BITs that lack non-precluded measures provisions of their own, has generally been devoid of a properly systematic approach and has frequently been undertaken in so cursorily and superficial a manner that if a law student had done so in a final exam, he or she might well have failed.

11.04. It is not surprising, then, that several of the awards at issue here have come under close scrutiny as part of ICSID annulment proceedings, with three of them – in the *CMS*, *Sempra*, and *Enron* cases[14] – having been concluded so far. While these three decisions reproduce at the annulment level the phenomenon of different outcomes on similar fact patterns observable at the award stage – with the *CMS ad hoc* committee, while severely criticizing the relevant tribunal's interpretive approach, finding no ground for annulment, and the *Sempra* and *Enron* committees annulling the tribunals' awards, albeit for different reasons – I argue that they represent a great improvement in terms of doctrinal clarity as well as for the potential uses of the annulment procedure in the future. While they will likely reopen the "finality vs. correctness" debate, both the *Sempra* and *Enron* decisions have appropriately applied the sharp sword of setting aside binding awards on the basis of errors of law that are so egregious that they amount effectively to a non-application of the proper law and thus constitute a legitimate ground for annulment under the manifest excess of powers criterion.

11.05. This contribution proceeds as follows. The next section summarizes the principal findings of the arbitral awards rendered against Argentina so far. In section 3, I recapitulate the elements of annulment as a special

[13] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10 (2001), Article 25 (*ILC Draft Articles*). Draft Article 25 reads: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."

[14] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision of Sept. 25, 2007 (*CMS Annulment Decision*); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision of June 29, 2010 (*Sempra Annulment Decision*); *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Decision of June 30, 2010 (*Enron Annulment Decision*).

remedy under the ICSID Convention and summarize the arguments in the three annulment decisions of concern here with respect to the failure to apply the proper law under the manifest excess of power annulment ground. Section 4 assesses these decisions with respect to legal doctrine applicable in investor-state arbitrations under BITs and the scope of annulment review. Section 5 concludes.

II. The NPM Clause and Necessity in the Argentina Awards to Date

11.06. The awards rendered against Argentina relating to claims arising out of the 2001-2002 economic crisis have been abundantly discussed in a large and still growing number of publications[15]. Here, they shall only be reviewed summarily to provide a point of reference.

11.07. Jürgen Kurtz has provided a useful categorization of the five awards rendered under the U.S.-Argentina BIT according to the dominant interpretive methodology they employ[16]. The awards in *CMS*, *Sempra*, and *Enron* utilize what he calls the "confluence" methodology in that they simply conflate Article XI and the necessity defence by importing the requirements of the latter into the former. In its examination of the treaty clause, the first tribunal in the *CMS* case did so without offering any cogent justification for that approach. Instead, it several times simply invokes the ILC Draft Articles[17] and merely asserts that as part of its review, it "must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions [...]"[18]. Perhaps most curiously, in considering Article XI, the tribunal asks whether the object and purpose of the BIT might exclude the necessity defence, in line with Article 25 (2) (a) of the ILC Draft Articles[19], notwithstanding the fact even if one were to accept that Article XI was simply mirroring the necessity defence, that article was after all *explicitly* included in the treaty to authorize reliance on that

[15] See in addition to literature cited elsewhere in this paper, e. g., Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford: Oxford University Press 1188 (P. Muchlinski, F. Ortino & C. Schreuer eds. 2008); Nicholas Song, *Between Scylla and Charydbis: Can a Plea of Necessity Offer Safe Passage to States in responding to an Economic Crisis Without Incurring Liability to Foreign Investors?*, 19 AM. REV. INT'L ARB. 235 (2008); Tarcisio Gazzini, *Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina*, 26 J. ENERGY NAT. RESOURCES 450 (2008); José Rosell, *The CMS Case: A Lesson for the Future?*, 25 J. INT'L ARB. 493 (2008); *Panel Discussion: Is There a Need for the Necessity Defense for Investment Law?*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW, New York: Juris Net LLC 189 (T. J. Grierson Weiler ed., 2008).

[16] See Jurgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L & COMP. L. Q. 325, 341-370 (2010).

[17] *CMS Award*, paras. 353, 357 & 379.

[18] *Ibid.*, para. 374.

[19] See *ILC Draft Articles*, art. 25 (2) (a).

defence. The mere consideration that the object and purpose of a treaty might *exclude* reliance on a provision that is *included* in the treaty is indeed quite remarkable.

11.08. In *Enron* and *Sempra*, the tribunals did address the relationship between treaty law and customary law somewhat more explicitly. While accepting in principle the *lex specialis* function of treaty law, they denied its applicability in the present cases on the ground that Article XI did not explicitly define the terms it employs. Specifically, the tribunals found that because the treaty itself does not define what was meant by "essential security interests," this made it "necessary to rely on the requirement of state of necessity under customary international law"[20]. Similarly, they argued that because the treaty does "not deal with the legal elements necessary for the legitimate invocation of a state of necessity"[21], it "becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned"[22]. One looks in vain for any substantiation of these conclusions through reliance on the standard rules of treaty interpretation. Instead, the *Enron* and *Sempra* tribunal jump from the need to interpret Article XI straight to the conclusion that "this Article does not set out conditions different from customary law [...]"[23].

11.09. Not all tribunals have followed the line of reasoning advanced by these tribunals (which, incidentally, all shared the same president)[24]. Following Kurtz's second methodology of treating the treaty exception as *lex specialis* vis-à-vis the necessity defence, with the latter being understood as operating at the primary rule level – the *LG&E* tribunal's award, although not without its own problems in terms of the lucidity and stringency of its arguments, applied Article XI without equating it with the necessity defence and only in a second step asked whether the necessity requirements under customary law might have also been satisfied[25]. In contrast to the awards above, the *LG&E* tribunal interpreted the required nexus that measures taken under Article XI have to be "necessary" for the protection of the stated permissible objectives to mean, not that that the adopted measures had to have been the "only means" available, but rather that the respondent state must have had "no choice but to act" and that the adopted measures were necessary in the sense of being appropriate and effective in responding to the problems they were meant to solve, even if other alternatives in principle existed[26]. Based on a review of the severe turmoil Argentina was undergoing at the material

[20] *Enron Award*, para. 333; see also *Sempra Award*, para. 375.

[21] *Ibid.*, para. 378; see also *Enron Award*, para. 334.

[22] *Ibid.*, para. 334; see also *Sempra Award*, para. 376.

[23] *Enron Award*, para. 339; *Sempra Award*, para. 388.

[24] Francisco Orrego Vicuna, a Chilean jurist and professor of international law at the University of Chile. The *CMS* and *Sempra* tribunals also shared the Canadian Marc Lalonde as arbitrator.

[25] *LG&E Decision on Liability*, para. 206.

[26] *Ibid.*, para. 239.

time, the tribunal concluded that at least between December 2001 and April 2003, the protections afforded by Article XI[27] applied, as did, incidentally, the necessity defence[28].

11.10. The third methodological approach treats the treaty exception as a primary rule and the necessity defence as a secondary rule which only kicks into effect once the application of the primary rules has yielded a violation of the treaty. This is the approach followed by the *Continental Casualty* tribunal. The tribunal notes that, as a primary rule, "Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met," with the consequence that if it is legitimately triggered, no violation of the BIT ensues[29]. By contrast, the necessity defence, as a secondary rule, only applies when a treaty provision has been violated to begin with. As a result, the tribunal concludes that "invocation of Art. XI under this BIT, as a specific provision limiting the general investment protection obligations (of a "primary" nature) bilaterally agreed by the Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law"[30]. Following a detailed examination of the measures adopted by Argentina as well as of potential alternatives, the *Continental Casualty* tribunal eventually concluded that the criteria for the invocation of Art. XI had by and large been met and that Argentina was thus, with one exception, not in breach of the BIT[31].

11.11. At least five further awards have been rendered against Argentina under BITs that do not contain NPM clauses and in which Argentina thus had to rely exclusively on the customary necessity defence. In all of these cases the defence failed. In the three most recent awards, issued in July 2010, identically composed tribunals concluded that Argentina could not invoke the necessity defence because the measures it had adopted were not the "only means" available and because Argentina itself had contributed to the crisis[32]. In the earlier *National Grid* arbitration, conducted under UNCITRAL rules, the tribunal likewise found a substantial contribution by Argentina and, noting that the necessity requirements needed to be satisfied

[27] This finding is particularly notable given that two of the three arbitrators (i.e., a majority) on the *LG&E* tribunal, Francisco Rezek and Albert van den Berg, also sat on tribunals (in the *CMS* and *Enron* cases, respectively) that had *unanimously denied* that Argentina could benefit from either Article XI or the customary necessity defence. This sheds a curious light on how decision-making works within ICSID tribunals, given that no individual opinions or dissents were attached to any of the awards, as would have been permissible under Art. 48 (4) ICSID Convention.

[28] *LG&E Decision on Liability*, paras. 245-259.

[29] *Continental Casualty Award*, para. 164.

[30] *Ibid.*, para. 167.

[31] *Ibid.*, para. 233. The exception concerns the restructuring of Argentina's Treasury Bills; see *ibid.*, paras. 220-222.

[32] See *Suez & InterAgua Decision on Liability*, para. 243, and *Suez, Vivendi & AWG Decision on Liability*, para. 265 (the latter decision relates to two formally separate proceedings, one under ICSID, the other under UNCITRAL rules).

cumulatively, ended its examination there[33]. Finally, in the *BG Group* case, also conducted under UNCITRAL rules, the tribunal remained undecided whether the necessity defence could be relied on at all, but concluded that *even if it were applicable, it would fail*[34]. *Unfortunately, while invoking the* "very restrictive conditions" entailed by the necessity defence, it did not interpret or apply any of them and instead rejected Argentina's plea on the basis of a potpourri of reasons which, on their face, have nothing to do with the elements of the necessity defence whatsoever[35].

11.12. It should be noted in closing that both the *Continental Casualty* and the *LG&E* awards are currently subject to annulment proceedings, initiated in both cases on the application of each of the parties[36]. Motions to have the *BG Group* and *National Grid* awards set aside in a US court have recently failed[37].

III. The *CMS*, *Enron*, and *Sempra* Annulment

III.1. Decisions Annulment as a Special Remedy under the ICSID Convention

11.13. Unlike UNCITRAL or International Chamber of Commerce (ICC) arbitration rules, the ICSID Convention provides for a "self-contained regime of review"[38] that precludes review proceedings in national or other international fora and limits the available remedies to those included in the Convention itself[39]. The two principal remedies provided for there are revision (Article 51) and annulment (Article 52)[40]. While revision allows for altering an award on the basis of newly discovered facts that were unknown to the tribunal and the applicant at the time of the original award, without the applicant being at fault for that ignorance, annulment provides for the more drastic remedy of the setting aside of an otherwise binding award, either in part or in full, by a newly appointed

[33] See *National Grid Award*, para. 262.

[34] See *BG Group Award*, paras. 407 & 412.

[35] *Ibid.*, para. 411.

[36] See International Centre for the Settlement of Investment Disputes, List of Pending Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (accessed on November 15, 2010).

[37] See *The Argentine Republic v. National Grid*, U.S. District Court for the District of Columbia, Civil Action No. 09-248 (RBW), Memorandum Opinion of June 7, 2010 (confirming the award); *Republic of Argentina v. BG Group plc*, U.S. District Court for the District of Columbia, Civil Action No. 08-485 (RBW), Memorandum Opinion of June 7, 2010 (denying Argentina's petition to vacate or modify the award).

[38] Christoph Schreuer et al., The ICSID Convention: A Commentary, Cambridge: Cambridge University Press 1102 (2nd ed. 2009).

[39] See *ICSID Convention*, Article 53 (1).

[40] In addition, Article 49 (2) ICSID Convention provides for parties' right to ask a tribunal to supplement its award with answers to "any question which it had omitted to decide in the award," and Article 50 permits requests for interpretation of an award.

ad hoc committee of three members. Indeed, partially or fully invalidating an award is the only possible outcome, other than letting the award stand: In distinction to appeals proceedings, annulment committees cannot modify the content of an award, they can merely decide whether any of the grounds for annulment apply to the award in question.

11.14. The five possible grounds for annulment are exhaustively[41] listed in Article 52 (1) ICSID Convention: a) improper constitution of an arbitration tribunal; b) manifest excess of powers; c) corruption on the part of a tribunal member; d) serious departure from a fundamental rule of procedure; and e) failure to state the reasons on which an award is based. While the first ground has rarely, and the third ground apparently never, figured in any annulment proceedings to date[42], the other three are frequently invoked. Of particular interest for the issue of the relationship of treaty law exceptions and the customary law defence of necessity, as well as the interpretation and application of each, is the second ground for annulment: manifest excess of powers. The two principal categories that may result in a finding that a tribunal exceeded its power are jurisdictional error and failure to apply the proper law[43]. In either case the excess of power must be "manifest," a term that has variously been interpreted to refer either to an obvious and easily perceivable excess of powers, a threshold degree of severity and egregiousness, or a combination of the two[44].

11.15. In applying the "failure to apply the proper law" standard, *ad hoc* committees have repeatedly reiterated that this criterion is distinct from the merely erroneous or inappropriate application of law[45]. Because

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[41] Confirmed by Rule 50 (1) (c) (iii) of the ICSID Rules of Arbitration for Arbitration Proceedings, available online at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap07.htm#r50 (accessed on November 28, 2010).

[42] See SCHREUER ET AL., *supra* note 38, at 907 (para. 28), 935 (para. 120) & 979 (para. 276). For an invocation and discussion of the annulment ground of an improper constitution of the tribunal, see *Azurix Corp. v. The Argentine Republic* (*Azurix I*), ICSID Case No. ARB/01/12, Annulment Decision of September 1, 2009, paras. 40, 274-284 & 286-292; *Sempra Annulment Decision*, paras. 2 & 43; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision of August 10, 2010, paras. 18-23 & 200-242. The last case initially appears to also have included the request for annulment due to the alleged corruption of a tribunal member under Article 52 (1) (c) ICSID Convention, but Argentina's Memorial on Annulment later apparently dropped this item and requested annulment only on account of the remaining four grounds; see *ibid.*, paras. 2 & 17.

[43] See SCHREUER ET AL., *supra* note 38, at 938 (para. 133).

[44] *Ibid.*, 938-943 (paras. 133-154).

[45] *See, e.g., Klöckner Industrie-Anlagen GmbH & Others v. United Republic of Cameroon & Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Annulment Decision of May 3, 1985, 1 ICSID REV.—FILJ 90, 110 (para. 61) (1986) (*Klöckner I Annulment Decision*); *Amco Asia Corporation & Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Decision of May 16, 1986, 25 INT'L LEGAL MATERIALS 1441, 1446 (para. 23) (1986) (*Amco I Annulment Decision*); *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Decision of December 22, 1989, 5 ICSID REV.—FILJ 95, 104 (para. 5.04) (1990); *Repsol*

ad hoc committees do not have general appellate jurisdiction, they have no authority to correct what they consider merely a wrong or inappropriate interpretation among several *prima facie* tenable ones[46]. To this extent, then, "annulment is only concerned with the legitimacy of the process of decision; it is not concerned with its substantive correctness"[47]. At the same time, several annulment committees have acknowledged that, exceptionally, an error of law may "be so gross or egregious as substantially to amount to failure to apply the proper law"[48]. As the *MCI* Annulment committee noted in this respect, "the freedom which [a] tribunal enjoys in the application of the law is not unlimited [...]"[49], citing as an example of "[a]n egregious violation of the law ... a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations"[50]. By contrast, "[s]hould more than one interpretation of a legal norm or rule be possible, no serious violation can ensue where one of these interpretations has been chosen"[51].

11.16. The relevance of this ground for annulment in light of the issue of the interpretation and application of Art. XI and of the necessity defence is evident. If conflating Art. XI with the customary necessity defence can be qualified as such a gross error of law as a result of which Art. XI is left with no independent meaning of its own, then the condition of the non-application of the proper law would be met and an excess of power would result, which, if manifest, could result in annulment.

III.2. The *CMS* Annulment Decision

11.17. The first annulment decision that addressed the issue of state defences under international investment law in light of the manifest excess of power criterion was the *ad hoc* committee in the *CMS* case. As part of its discussion, the committee put forward a doctrinally much improved view of the relationship between Article XI and the necessity defence under customary law, but eventually declined to annul the *CMS* award on this account.

11.18. Regarding the issue of substantive law, the committee acknowledged that "Article XI and Article 25 [of the ILC Draft Articles as a codification of the customary law of necessity] are substantively different" and set out different

YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/01/10, Annulment Decision of January 8, 2007, para. 38.

[46] See, e.g., *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Annulment Decision of September 5, 2007, para. 112.

[47] SCHREUER ET AL., *supra* note 38, at 901 (para. 11).

[48] *Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Annulment Decision of June 5, 2007, para. 86 (*Soufraki Annulment Decision*); see also *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Annulment Decision of March 21, 2007, para. 47.

[49] *MCI Annulment Decision*, para. 43.

[50] *Ibid.*, para. 51.

[51] *Ibid.*

requirements for their successful operation[52]. Simply equating one with the other thus represented a "manifest error of law"[53]. Furthermore, the committee clarified that the application of Article XI, as part of treaty law, had priority over the application of the customary defence of necessity. This was the case regardless of whether one characterized the customary circumstances precluding wrongfulness as primary or secondary rules. If they were taken to form part of the primary rules – that is, regulating and determining whether there was wrongfulness to begin with – then Article XI would have to be applied as the more specific provision under the *lex specialis* rule[54]. But if they were taken to be part of the secondary rules of state responsibility that could be invoked to excuse otherwise wrongful acts, then Article XI, unquestionably part of the primary rules of the U.S.-Argentina BIT, would necessarily have to have been applied first to determine whether there had been a violation of the BIT to begin with. Only if this had been the case, could necessity as a circumstance precluding wrongfulness come into play: "Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations"[55].

11.19. Despite these two serious errors and their potentially "decisive impact on the operative part of the Award," and although noting that "[i]f the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground"[56], it eventually declined to annul the award on this basis. Highlighting the limited jurisdiction of annulment committees which prevent them from substituting their own views on the correct application of the law for those of the tribunal, the committee concluded that "[n]otwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers"[57].

11.20. That such a strongly worded critique of the erroneous interpretation and application of the relevant law by the *CMS* tribunal[58] did not suffice to

[52] *CMS Annulment Decision*, para. 130.

[53] *Ibid.*, para. 130.

[54] *Ibid.*, para. 133.

[55] *Ibid.*, para. 129.

[56] *Ibid.*, para. 135.

[57] *Ibid.*, para. 136. The committee did annul, however, the tribunal's finding that Argentina had violated the BIT's umbrella clause of Article II(2)(c) on account of the tribunal's failure to state reasons for that finding; see *ibid.*, para. 97. For discussion, see Jean-Christophe Honlet & Guillaume Borg, *The Decision of the ICSID* Ad Hoc *Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited*, 7 Law and Practice of International Courts and Tribunals 1-32 (2008).

[58] See also *CMS Annulment Decision*, para. 158 (reiterating that "[t]hroughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions").

establish the existence of an annullable error may be seen as irritating. In light of the statements by the *Soufraki* and *MCI ad hoc* committees cited above, the question arises, however, whether the errors of law in the *CMS* case may not be qualified as so grave that they in fact do amount to an effective non-application of Article XI. After all, when treaty parties specifically include a non-precluded measures exception in the BIT they negotiate which is then simply equated by a tribunal with the necessity defence under customary law, no independent effect is given to that treaty provision. Such an approach violates the principle of effectiveness in treaty interpretation according to which each provision in a treaty should be given effect (also known as *effet utile* or the principle of *ut res magis valeat quam pereat*)[59]. If Argentina and the U.S. had merely wanted to make their undertakings subject to the necessity defence, they could have either remained silent on the issue in the treaty text because the necessity defence would have applied anyway, or they could have explicitly affirmed the applicability of the necessity exception as part of customary law. The fact that they chose a differently worded text that did not refer at all to the necessity defence under customary law rather suggests that they did not merely want to restate customary law, but had intended to provide for a different standard under which emergency measures were to be assessed[60]. Still, while the *CMS ad hoc* committee affirmed the essential difference between Article XI and the customary necessity defence, it was not prepared to conclude that conflating the two effectively resulted in the non-application of Article XI.

III.3. The *Sempra* Annulment Decision

11.21. The *ad hoc* committee in the *Sempra* case did not have such reservations and annulled the award in full on the ground of the tribunal's manifest excess of powers due to its failure to apply Article XI of the U.S.-Argentina BIT[61]. Notably, the committee, while acknowledging that grossly erroneous application of the law might effectively be tantamount to non-application[62], concluded that the *Sempra* tribunal had "failed *altogether* to apply the applicable law" and thus refrained from entering into a discussion of where the dividing line between annullable and non-annullable grave errors of law should be drawn[63].

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[59] See, e.g., William Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, *in* The Backlash against Investment Arbitration: Perceptions and Reality, The Hague: Wolters Kluwer 407, 420 (M. Waibel et al. eds., 2010).

[60] But see Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, Oxford: Oxford University Press 167 (2008) (asserting, without any proof or further justification, that "US treaty practice has been ... essentially restating the existing customary law instead of revising or modifying the customary rules").

[61] *Sempra Annulment Decision*, para. 159.

[62] *Ibid.*, para. 164.

[63] *Ibid.*, para. 165 (emphasis added).

11.22. In terms of its doctrinal arguments, the *Sempra* committee proceeded in line with the principal positions adopted by the *CMS* committee: First, the committee affirmed that, as a general rule, treaty law takes precedence over customary law[64], except where it conflicts with a norm of *jus cogens.* Because the necessity defence does not constitute a peremptory norm, however, states were free to negotiate treaty exceptions that deviate from its requirements under customary law, and the legitimate invocation of such treaty provisions does not in turn have to be legitimated in any way by the customary necessity defence[65]. Second, Article XI and the necessity defence have different purposes, the former delimiting instances under the treaty in which state action would not give rise to wrongfulness, the latter applying only when a wrongful infringement had been committed in the first place[66]. Third, the textual content of Article XI and of the necessity defence as codified in Article 25 of the ILC's Draft Articles differ "in material respects" to begin with, so that the latter could not be regarded as an interpretive guide for the former[67].

11.23. Although the *CMS* and the *Sempra* annulment committees identified essentially the same errors of law, they came to a different conclusion as to whether the tribunal awards were to be annulled as a result. The principal difference apparently resides in the fact that the *Sempra* tribunal, unlike the one in *CMS,* had explicitly stated that "there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard"[68]. The *Sempra* committee took this statement as evidence that the tribunal had "adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law"[69]. The failure to apply Article XI, evident from the tribunal's own statements, constituted a manifest excess of powers that had to result in the annulment of the award as a whole[70].

11.24. To the extent that the different outcomes indeed resulted from the textual detail of the *Sempra* tribunal's statement that there was no need to undertake a separate (because identical) review under Article XI, the

[64] *Ibid.*, para. 176.

[65] *Ibid.*, paras. 201-202 (noting, *inter alia*, that "[j]*us cogens* does not require parties to a bilateral investment treaty to forego the possibility of invoking a defence of necessity in whatever terms they may agree. The terms on which they agree may be thought to be politically or economically unwise, but this does not render them unlawful"); see also *ibid.*, para. 197 (noting that customary law did not provide for "a peremptory 'definition of necessity and the conditions for its operation' in the context of the interpretation of the treaty-based exception clause of Article XI).

[66] *Ibid.*, para. 200; see also *ibid.*, paras. 187 & 203.

[67] *Ibid.*, paras. 198-199.

[68] *Sempra Award*, para. 388.

[69] *Sempra Annulment Decision*, para. 208.

[70] *Ibid.*, para. 209 (finding an excess of powers), paras. 211-219 (addressing the question of the manifest nature of the excess of powers) & para. 223 (stating the committee's conclusion).

different conclusions as to the consequences for annulment are noteworthy. In the *CMS* case, the *ad hoc* committee had concluded that the tribunal had applied Article XI, even if it had erroneously equated it substantively with the necessity defence under customary international law, with the consequence that no ground for annulment existed. By contrast, in the *Sempra* context, the tribunal had refrained from applying Article XI because it erroneously believed it to be identical to the necessity defence and thus to yield no different outcome, with the result that a ground for annulment obtained. In terms of substance, of course, the consequences of both approaches are equivalent: the application of the stringent standards under the customary necessity defence notwithstanding the fact that Article XI was arguably intended to lay down a different standard to be applied. It would have been quite interesting to see what the *Sempra* annulment committee had concluded if the tribunal in that case had gone through the motions of re-examining Argentina's conduct, if only nominally, under Article XI. In that case, the committee's current argumentation would not have been available and the outcome of the annulment proceedings would have hinged on the question of whether the error of law committed by equating Article XI and the necessity defence was of such gravity as to result in annullable manifest excess of powers.

III.4. The *Enron* Annulment Decision

11.25. The *Enron ad hoc* committee took yet a third approach. It avoided the issue of determining the appropriate relationship of sources by holding that "the substantive operation and content of Article XI and the customary international law principles of necessity, and the interrelationship of the two, are issues that fall for decision by the tribunal"[71] and were thus beyond consideration by the committee. At the same time, the committee did find a ground for annulment in the *Enron* tribunal's handling of several of the elements of the customary necessity defence and, because the tribunal had imported these elements into the treaty's non-precluded measures clause, of Article XI as well[72].

11.26. In particular, the committee concluded that both with respect to the requirement that a measure adopted by a state must be the "only means" available to ward off an imminent peril to an essential interest and that it must not have contributed to the situation of necessity to be able to avail itself of the defence, the tribunal had failed to apply the proper law. Instead of carefully interpreting and applying these requirements to the facts of the case, the committee faulted the tribunal for jumping to conclusions on the basis of a superficial reading of the requirements and a report by one of the claimant's expert witnesses, an economist. While the committee reiterated that it was not for itself to impose an interpretation

71 *Enron Annulment Decision*, para. 405.

72 *Ibid.*

of the terms stipulated in the ILC's codification of the necessity defence, it was the tribunal's duty to show that it had done so as part of its obligation to apply the applicable law[73]. With respect to the "only means" test, the committee thus noted:

The Tribunal was required to determine whether, on the proper construction of Article 25(1)(a) of the ILC Articles, the "only way" requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis. The Committee concludes that in determining that the measures adopted were not the "only way", the Tribunal did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue[74].

11.27. In the view of the committee, the tribunal followed the same approach with respect to the requirement that a state must not itself have contributed to the situation for which it subsequently claims the necessity defence[75]. The committee considered that in both cases the tribunal had failed to apply the proper law or, alternatively, if indeed it had applied the proper law *sub silentio*, that it had failed to state the reasons for its decision[76], either of which sufficed as a ground for annulment.

IV. Assessment

IV.1. The Scope of Annulment Review

11.28. The two annulment decisions in the *Sempra* and *Enron* cases in particular will without a doubt rekindle debates about the proper scope of substantive review by annulment committees; indeed they have already begun to do so among investment arbitration practitioners[77]. After the strong

[73] *Ibid.*, paras. 373 & 376.

[74] *Ibid.*, para. 377.

[75] *Ibid.*, paras. 379-393.

[76] *Ibid.*, para. 378. The committee did not explicitly adduce a failure to state reasons as an alternative ground for annulment with respect to the assessment of Argentina's contribution to the state of necessity, but given its identical analysis and reasoning regarding the tribunal's approach with respect to that issue, it would have to conclude that the tribunal also failed to state the reasons for its finding in that context. See also *ibid.*, para. 378 where the committee concludes that to the extent that the *Enron* tribunal had based its decision also on Argentina's non-compliance with the requirement that the act(s) of state for which the defence of necessity is being claimed must not "seriously impair an essential interest" of other states or the international community, its decision in that respect was tainted by the same annullable error of having failed to give reasons.

[77] See Steven Smith & Kevin Rubino, *Investors Beware: Enron and Sempra Annulment Decisions Bolster the State of Necessity Defense While Sowing New Uncertainty regarding the Finality of ICSID Arbitral Awards*, O'MELVENY & MYERS LLP NEWS ALERT available at: http://www.omm.com/investors-beware--enron-sempra-annulment-decisions-bolster-state-necessity-defense-while-sowing-new-uncertainty-regarding-finality-of-icsid-arbitral-awards-08-09-2010/ (accessed on November 28, 2010).

reactions in response to the perceived activism of the *Klöckner I*[78] and *Amco I*[79] annulment decisions which were criticized for having crossed the line into appellate review[80], subsequent ICSID *ad hoc* committees appeared to have sufficiently internalized a posture of judicial restraint in approaching their task under Article 52 of the ICSID Convention. By the time of the 2002 *Wena*[81] and *Vivendi*[82] decisions, Christoph Schreuer thus concluded that "the ICSID annulment process [had] found its proper balance"[83], a balance that was said to entail "emergency relief in rare cases of fundamental importance but to uphold the finality of awards in the face of alleged relatively minor substantive and procedural flaws"[84]. *Sempra* and *Enron* clearly fall into the category of serious and important cases and their decisions to annul the underlying awards were taken for non-trivial reasons, but the manner in which they arrived at those decisions is bound to raise the charge that in doing so they engaged in appellate review, and that in light of their extensive analysis, the excess of powers identified could not be considered "manifest."

11.29. Such charges must, however, be dismissed, if the annulment sub-ground of the non-application of the applicable law is to have any meaning beyond the most blatant failures to take even cognisance of the proper law. Specifically, this criterion has to be understood not merely in purely formal terms in the sense of not referring to the applicable legal provisions at all, but must be given a substantive meaning. When litigants decide on the applicable law, either as part of a *compromis* or by default by way of Article 42 (1) of the ICSID Convention, they do so not because they merely want to see a given textual "shell" relied upon, but because of the content and meaning for which that text stands, given reasonable assumptions as to its interpretation. Applying the proper law is not exhausted by paying lip service to the text in which it is clothed, but rather requires that its content is observed.

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[78] See *Klöckner I Annulment Decision.*

[79] See *Amco I Annulment Decision.*

[80] See Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME, in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, London: Cameron May Ltd. 471, 499-500 and the literature cited in footnotes 103-104 (T. Weiler ed. 2005).

[81] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Annulment Decision of February 5, 2002, 41 I.L.M. 933 (2002).

[82] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. The Argentine Republic,* ICSID Case No. ARB/97/3, Annulment Decision of July 3, 2002, 41 I.L.M. 1135 (2002).

[83] Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings, in* ANNULMENT OF ICSID AWARDS, New York: Juris Publishing, Inc. 17, 18 (E. Gaillard & Y. Banifatemi eds. 2004).

[84] Christoph Schreuer, *ICSID Annulment Revisited,* 30 LEGAL ISSUES OF ECONOMIC INTEGRATION 103, 122 (2003).

11.30. Against this background, I submit that the *Sempra* committee was correct in undertaking a substantive examination as to the separate meanings of Article XI and Draft Article 25 and to then conclude that conflating the former with the latter is simply untenable under prevailing rules of treaty interpretation, which thus effectively resulted in the non-application of the treaty-based exception. Had the tribunal gone through the motions of first looking for the "ordinary meaning to be given to the terms" of Article XI "in their context and in the light of its object and purpose" (Article 31 (1) VCLT), then it might have been quite difficult, although maybe not impossible, to conclude that all interpretive weight had to be attached to the meaning of the necessity defence, imported into Article XI through reliance on the systemic interpretation norm of Article 31 (3) lit. (c) VCLT[85]. But the burden of proof lies clearly with the tribunals who have to show that the terms of Article XI have no "ordinary meaning" separate and apart from the necessity defence – a position that would be daunting to justify, given the observable range of alternative interpretations that exist with respect to key terms used in Article XI, such as "necessary," "public order," and "essential security interest"[86]. And even if one takes the existence of alternative interpretations as evidence that there is no single ordinary meaning, then, by the same token, such ordinary meaning cannot simply be found in the necessity defence either.

11.31. A similar logic applies to and justifies the *Enron* committee's investigation into the interpretation and application of the elements of the necessity defence, which, as a customary law rule, it is not as such subject to the VCLT interpretation regime. The meaning of none of the elements codified in Article 25 of the ILC Draft Articles is so obvious as to obviate the need for interpretation. Without such interpretation and the determination of content and potential thresholds, however, the application of these elements becomes impossible. The requirement, for example, that a state must not have contributed to the situation of necessity, though on its face phrased in absolute language, immediately raises questions as to what constitutes such contribution, including what magnitude or severity it must have[87]. Without answering these questions, the requirement has no content that could be applied. In addition, any such processes of interpretation and application of the proper law must not only be done, they must be seen to be done[88]. This is not only a superficial formal

[85] Article 31 (3) (c) VCLT stipulates that together with the context, "any relevant rules of international law applicable in the relations between the parties" may be taken into account in the interpretation of a given treaty provision.

[86] See Burke-White & von Staden, *supra* note 3, at 337-368.

[87] See only *ILC Draft Articles*, art. 25 (para. 20); Alberto Alvarez-Jiménez, *Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law*, 27 J. Int'l Arb. 141 (2010).

[88] Paraphrasing the insight that "justice should not only be done, but should manifestly and undoubtedly be seen to be done;" *Regina v. Sussex Justices, ex parte McCarthy*, November 9, 1923, [1924] 1 KB 256, [1923] All ER 233. The case is usually cited as

requirement, but one with substantive weight of its own which assures, *inter alia*, that the arbitrator has recognized, understood, and applied established principles and rules of law in a comprehensible and justifiable manner.

IV.2. Treaty Law, Customary Law, and Doctrinal Clarity

11.32. Even commentators that disagree with the conclusions reached by the *Sempra* and *Enron* committees concerning the presence of annullable failures to apply the proper law will have to concede that the principal observations put forward by these two committees, as well as the one in the *CMS* case, on the basic doctrinal parameters regarding the relationship between treaty law and customary law, and the interpretation and application of each, are great improvements over much of what can be found in the underlying tribunal awards. While space constraints do not permit me to substantiate this claim in full here, three areas of improvement in terms of doctrinal clarity may be briefly mentioned. First, the fact that the application of the provisions of a treaty has, and should have, precedence over customary law with respect to the same or similar issues under the *lex specialis* principle[89] – except where recognized norms of *jus cogens* are concerned – is much more in line with widely accepted legal practice and also appears to be the dominant position among recent commentators on the Argentine cases[90]. Second, by employing the distinction between, on the one hand, primary rules that govern the scope and content of an obligation and, on the other, secondary rules which concern the consequences resulting from a violation of those rules, the committees brought their jurisprudence in line with the approach adopted by the ILC in formulating the Draft Articles[91] and provided a useful analytic lens through which the relationship between treaty exceptions and customary defences can be approached. Third and finally, all three committees appropriately emphasized the necessity of carefully interpreting treaty law as well as customary law on the basis of the recognized rules of interpretation applicable to each. They correctly

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authority for the proposition that a mere appearance of bias may suffice for overturning a judicial decision.

[89] As Roberto Ago had noted, "being *lex specialis*, a treaty provision in force between two parties has inherent priority over such rules of a general nature as may also be applicable between them." *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Adv. Op.), [1980] I.C.J. Rep. 73, 162 (Sep. Op. Ago); see also ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, para. 5 (2006).

[90] See, e.g., Kurtz, *supra* note 16, at 356 *et seq.*; Campbell McLachlan, *Investment Treaties and General International Law*, 57 Int'l & Comp. L. Q. 361 (2008); Gazzini, *supra* note 15, at 461.

[91] See Eric David, *Primary and Secondary Rules*, *in* The Law of International Responsibility, Oxford: Oxford University Press 27 (J. Crawford, A. Pellet & S. Olleson eds. 2010).

called attention to the fact that the mere identity of select words between different sources of law does not suffice to establish that these words, and much less the provisions as whole of which they are part, must have the same meaning. Any reliance on customary law in this context for the purpose of interpreting treaty provisions must occur by way of Art. 31 (3) lit. (c) VCLT and in conformity with the other applicable rules of treaty interpretation.

V. Conclusion

11.33. As a matter of law, ICSID annulment decisions, just like arbitral awards, have no binding force for other tribunals or *ad hoc* committees. In the absence of a formal rule of *stare decisis*, precedent has to influence subsequent decision-makers through its persuasive authority based on the more cogent and convincing argument. According to the view advanced in this contribution, the three annulment decisions considered here, while remaining somewhat divided in their assessment of what it means to fail to apply the proper law under the manifest excess of powers annulment ground, have presented much more compelling and legally consistent arguments as to the proper interpretation and application of both treaty-based non-precluded measures provisions and the necessity defence under customary law than did most of the tribunal awards rendered against Argentina so far. In addition, while the establishment of an appeals facility remains highly unlikely[92], the application of the manifest excess of powers annulment ground to cases of effective non-applications of the proper law, as done by the *Sempra* and *Enron* committees, will allow *ad hoc* committees to counterbalance the system's bias in favour of finality with the pursuit of legal correctness in at least the most egregious cases of error of law. Of course, when deciding whether an error of law is still only an error, albeit possibly a serious one, or whether it is so grave as to deprive the applicable law effectively of its intended meaning and purpose, committees must draw a line which is certainly difficult. But if that line leaves just a little bit more room for doctrinal correctness and legal integrity on fundamental aspects of international law, then the legitimacy of the ICSID system as a whole will benefit as well.

[92] See Jason Clapham, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?*, 26 J. Int'l Arb. 437 (2009); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 Berkeley J. Int'l L. 444 (2006).

Summaries

DEU [***Hin zu größerer doktrinärer Klarheit in Schiedsstreitigkeiten zwischen Investoren und Staaten: Die Aufhebungsentscheide in Sachen CMS, Enron, und Sempra***]

Mehrere gegen Argentinien unter bilateralen Investitionsschutzabkommen ergangene Schiedssprüche, die im Zusammenhang mit der tiefen Wirtschaftskrise des Landes in den Jahren 2001-2002 standen, legten Argentiniens Möglichkeiten, auf die Ausnahmeklausel im Investitionsabkommen zwischen den USA und Argentinien abzustellen oder sich auf Staatsnotstand nach Völkergewohnheitsrecht zu berufen, restriktiv aus. In drei Fällen (CMS, Sempra und Enron) ließen die Schiedsgerichte den herkömmlichen Kanon zur Auslegung von völkerrechtlichen Verträgen praktisch außer Acht, als sie einfach die Anforderungen gemäß BIT-Ausnahmeklausel mit denen der gewohnheitsrechtlichen Berufung auf Staatsnotstand gleichsetzten, und betrieben eine unter doktrinären Gesichtspunkten konfuse Analyse der Beziehung zwischen Völkervertragsrecht und Gewohnheitsrecht. Alle drei Schiedssprüche sind seither durch Entscheidung von Ad-hoc-Komitees des ICSID zumindest in Teilen aufgehoben worden. Die Aufhebungsbeschlüsse sind sich zwar darüber uneinig, was einen angemessenen Aufhebungsgrund auf Basis der offensichtlichen Ermächtigungsüberschreitung ausmacht; sie bieten aber unter dem Gesichtspunkt der Lehre erheblich bessere Interpretations- und Anwendungsansätze sowohl hinsichtlich von Ausnahmeregelungen in Investitionsschutzabkommen als auch bezüglich des Notstandsarguments. Die Festlegung der richtigen Trennung zwischen der noch zulässigen Prüfung der Aufhebung und einer unzulässigen Berufungsrevision war in solchen Fällen schon immer strittig und wird auch strittig bleiben, aber die Komitees in den Fällen Sempra und Enron legten grundsätzlich vernünftige Beurteilungen zur Frage vor, wann ein Rechtsfehler so schwerwiegend wird, dass er tatsächlich dazu geführt hat, dass das richtige Recht nicht angewendet wurde.

CZE [***Snaha o větší doktrinální průhlednost v investičním rozhodčím řízení: Zrušení rozhodčích nálezů v případech CMS, Enron a Sempra***]

Několik rozhodčích nálezů vydaných proti Argentině dle dvoustranných dohod o ochraně a podpoře investic, jež souvisely s ničivou ekonomickou krizí, která zachvátila tuto zemi v letech 2001 až 2002, vykládalo restriktivně jak možnost Argentiny účinně využít vylučovací doložku v dvoustranné dohodě o ochraně a podpoře investic uzavřené mezi USA a Argentinou, tak i obranu skrze argument krajní nouze dle obyčejových norem mezinárodního práva. Ve třech případech (CMS, Sempra a Enron) pak senáty přímočarým porovnáním požadavků pro uplatnění výjimky z mezinárodní úmluvy s požadavky na uplatnění procesní obrany vycházející z obyčejového pojetí krajní nouze, zcela ignorovaly principy výkladu mezinárodních smluv a zapojily se do dosud doktrinálně nevyjasněných a zmatených analýz vztahů mezi smluvním a obyčejovým právem. Všechny tyto nálezy byla následně předmětem řízení o zrušení rozhodčího nálezu před ad hoc komisemi ICSID. Zatímco se rozhodnutí ad hoc komisí neshodují v tom, co zakládá vhodný důvod pro zrušení rozhodčího nálezu pro zřejmé překročení

pravomocí rozhodčího senátu, přinášejí však doktrinálně mnohem kvalitnější výklad a použití jak výjimek z aplikace mezinárodních úmluv, tak procesní obrany krajní nouzí. Stanovení jasné hranice přípustného přezkumu zrušením rozhodčího nálezu a nepřípustného odvolání proti rozhodčímu nálezu v těchto souvislostech byla a nadále zůstává nejasnou, ovšem rozhodnutí komisí ve věci Sempra a Enron nabízí rozumnou kvalifikaci situace, kdy se právní omyl stává natolik závažným, že vede k faktické nemožnosti aplikovat právo rozhodné.

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POL [***W stronę większej przejrzystości doktrynalnej w arbitrażu inwestorpaństwo: orzeczenia uchylające w sprawie CMS, Enron i Sempra***]

Kilka orzeczeń arbitrażowych wydanych przeciwko Argentynie ujawniło podstawowe problemy jeżeli chodzi o wykładnię i zastosowanie przepisów wynikających z umowy i zapisów dotyczących dozwolonych wyjątków oraz prawa zwyczajowego do obrony koniecznej. Decyzje uchylające ICSID w sprawach CMS, Sempra i Enron dostarczyły tak potrzebnej klarowności doktrynalnej w tej dziedzinie, dwie z nich słusznie uchyliły orzeczenia w sprawie niezastosowania prawa właściwego.

FRA [***Vers une plus grande clarté de la doctrine dans les arbitrages investisseurs/État : les sentences d'annulation CMS, Enron et Sempra***]

Plusieurs sentences arbitrales rendues à l'encontre de l'Argentine ont révélé des problèmes fondamentaux au niveau de l'interprétation et de l'application des dispositions du traité relatives aux mesures de non-discrimination et de défense en état de nécessité dans le droit coutumier. Les décisions d'annulation de la CIRDI dans les affaires CMS, Sempra, et Enron ont apporté une clarification doctrinale éminemment nécessaire dans ce domaine, dont deux en particulier qui ont annulé à juste titre les jugements au motif de non-application du droit propre.

RUS [***На пути к большей ясности в доктринах при арбитраже с рассмотрением споров между инвесторами и государствами: аннулирование решений по CMS, Enron и Sempra***]

Несколько арбитражных решений, принятых в отношении Аргентины, позволили выявить существенные проблемы в истолковании и применении основанных на соглашениях и неустранимых мер и при необходимой защите в рамках обычного права. Решения об аннулировании, принятые Международным центром по урегулированию инвестиционных споров в делах о CMS, Sempra и Enron позволили получить чрезвычайно крайне важное в этом отношении разъяснение, а два из них справедливо аннулировали решения по причине невозможности применения соответствующего права.

ES [***Hacia una mayor claridad doctrinal en el Arbitraje entre inversores y estado: Concesiones de anulación de CMS, Enron y Sempra***]
Muchas adjudicaciones de arbitraje otorgadas a Argentina han revelado problemas fundamentales en la interpretación y aplicación de provisiones sobre medidas no excluidas basadas en los tratados y en la habitual defensa legal de la necesidad. Las decisiones de anulación del ICSID en los casos de CMS, Sempra y Enron han proporcionado mucha aclaración doctrinal necesaria a este respecto y dos de ellos han anulado de forma justificable las adjudicaciones por incumplimiento de la ley pertinente.

Insur Zabirovich Farkhutdinov

Foreign Investor and Host State: Need for Balance Interests

Key words:
globalization | international law | State sovereignty | foreign investments | host state | liberalization | TNC | Calvo clause | ICSID | Most Favoured Nation | National Treatment

Abstract | *Nowadays the problems of state sovereignty have become very important. Massive transnational capital flows influence economic sovereignty of developing transition countries. By using their super mobility TNCs are able to accumulate massive financial resources very quickly in separate branches of the national economy in order to snatch surplus profit and swiftly remove one's investment from the recipient country. One party of an investment transaction is usually a sovereign state whose interests, rights and obligations significantly differ from those of private stakeholders. The host state must also take into consideration political, social, cultural and other factors that are not peculiar to the private investor. Nowadays many countries have started to regulate foreign investments in order to achieve domestic policy objectives. Every sovereign state must pursue its own investment policy that is intended to give strong incentives to foreign investors. The state sovereignty is the base for foreign investment regulation, and this has been recognized by norms of international and domestic law. The effective implementation of international law and its functions in foreign investments requires the harmonization of interaction in regulation on a two-tiered basis (international and national).*

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I. Foreign Investments: Two Antagonisms

12.01. Foreign direct investments (FDI) are important in respect of prosperity and development of different countries, especially the less developed countries. The current conditions in the global market in general and national economies in particular indicate a certain interest of developing countries and countries with transitional economies in larger amounts of foreign investments. The issue is especially important for Russia and other CIS[1] nations, on account of their active participation in world economic activities and membership in leading international economic organizations. This is especially important for developing countries that possess the necessary human and natural resources but lack capital and technological know-how possessed by developed states.

12.02. The growth of interstate investment cooperation is one of the most remarkable trends in the international community, a major trend in the modern system of global international economic relations, and also within the framework of the CIS. This tremendous expansion within the scope of international business may be explained by the rapid growth in international transportation and communication. International investment flows have also become more important in the process of economic globalization than in international trade in goods and services[2]. Furthermore, sustainable development is impossible without effective involvement in the world economic processes and active use of advantages offered by direct foreign investment. Transactions between the recipient states and foreign private investors have the potential to assist the developing countries in utilization of their resources in a more efficient and rational way, to the benefit of both parties.

12.03. The problems of state sovereignty have become a hot issue at the stage of globalization, where the flows of foreign investments prevail over the stream of international goods and services. Within two decades of quite ambiguous support for investment liberalization, many countries have started to review these policies, and some have introduced adjustments, thereby exercising their right to regulate foreign investment to pursue domestic policy objectives. One of the main areas where a more restrictive approach in respect of foreign investment has become obvious relates to national security as well as to the protection of strategic industries and critical infrastructure. Security concerns have particularly been invoked in relation to planned investments in so-called strategic industries and critical infrastructure. Thus, the issue has consequences that go far beyond the defence-related activities for which the national security exception was initially designed.

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[1] Commonwealth of Independent States.

[2] See: ALEKSANDR G. BOGATYREV, INVESTMENT LAW, Moscow, 5-12 (1992); Марк Моисеевич Богуславский (*Mark M. Boguslavskij*), Иностранные инвестиции: правовые проблемы (*Foreign Investments: Legal Regulation*), Moscow (1996).

12.04. This work focuses on two contrasting trends – the antagonism between free capital circulation and so called "regulated regimes". The first policy pursued by capital-exporting developed countries is oriented towards progressive national control liberalization on questions of admitting foreign investments into the host country, settlement and future operations in respect of foreign direct investments. A different attitude to foreign investments prevails in the domestic economic activity of most countries, which supposes that investments in contrast to trade are a more powerful tool for intruding into a state's sovereignty.

12.05. The sovereign state's problems are intensified when investments are made to extract the natural resources of the developing country. Natural mineral resources arouse a great deal of national sentiment, above and beyond their economic value in the marketplace. It is necessary to point out that some Russian mass media skilfully used these aspects of national sentiment against the largest international investment project "*Sakhalin-2*". These resources are considered by the host state to be the natural property of the whole nation. It is difficult for the host state on occasion to accept that a foreign party has control over these resources and that such a party shares the profits made from their extraction[3].

12.06. We can see that foreign investments involve not only favourable opportunities but also certain risks. Massive transnational capital flows influence the economic sovereignty of developed countries. That is why it is necessary to define the correlation between the interests of state and those of foreign investors by improving the regulation on international and domestic levels. Usually, investment agreements stipulate that the foreign investor establishes an industrial, agricultural or commercial project in the host state in an undeveloped area that will be important for the country's economic and social development. The investor is guaranteed to exercise the right for profits that are gained from the project and other various economic benefits as well (i.e., tax benefits, government guarantees etc.). Notwithstanding the mutual benefits for both parties, there are certain economic risks and hazards that emerge due to the specific nature of the parties to an investment agreement: a sovereign state and a transnational corporation[4].

12.07. One of the features of investments into economic development is that one party to a transaction is usually a sovereign state, the interests, rights and obligations of which significantly differ from those of private actors in the international economy. A state that enters into an investment agreement with a foreign investor is interested not only in economic profit. It

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[3] Moshe Hirsh, The Arbitration Mechanism of The International Centre for the Settlement of Investment Disputes, London: Kluwer Law International 6 (1993).

[4] Фархутдинов Инсур Забирович (*Insur Zabirovich Farkhutdinov*), Иностранные инвестиции в России и международное право (*Foreign Investments in Russia and International Law*), Уфа (*Ufa*): Издание Башкирского государственного университета (*The Issue of Bashkir State University*) (2001)

must also take into consideration the political factors (either internal or external), as well as social, cultural and other aspects that are not peculiar to the private investor.

12.08. The government is also interested in guarantees that profits from such a project will be reinvested in the state where they were generated, and will not be transferred to third countries. Export of profit may create an impression that the investor is exploiting the nation's resources without providing appropriate consideration. At times, the government will attempt to pressure the investor to transfer the technological and administrative know-how required for implementing the investment project in the local population. The foreign corporation *de facto* has other aims, so the conflict between these competing interests may cause serious disagreements between the parties.

II. The Sovereign State and Its Foreign Investment Policy

12.09. Every sovereign state is interested in pursuing its own investment policy that is aimed at attracting foreign capital. The issue of state legal regulation of foreign investments is important for Russia too. The Russian strategy for the attraction of foreign investments includes the following: realizing Russia's scientific and technical potential, particularly at enterprises in the military-industrial complex; promotion of Russian goods and technology to foreign markets; diversification of Russian exports and the development of products that substitute imported goods and services in particular sectors; increase in capital flow to the regions with surplus labour resources as well as with rich natural resources in order to speed up their development; job creation; development of the production infrastructure.

12.10. It is necessary to point out the formal (legal) and practical aspects of this specific category – the sovereign state. The first aspect shall be considered as the capacity of the distinctive political-legal form of state sovereignty in appearance and, second, in material substance[5]. Such comprehension of the above-mentioned definition prevails in the Russian doctrine and thus in scientific literature:

"Sovereignty is inherent in state primacy within its territory and independent in international relations. It is from this definition, primarily, that sovereignty is characterized by the state's matter and advancement of state sovereignty and, second, it is inherent in state sovereignty displaying two inseparably connected properties – in state primacy within its territory and in its independence in international

[5] Марченко Михаил Николаевич (*M. N. Marchenko*), *Государственный суверенитет:проблемы определения понятия и сущности* (*State Sovereignty: the Problems of Determination of Definition and Matter*), (1) Санкт Петербург (*Pravovedenje*) 186 (2003).

relations. And finally, third, the definition 'sovereignty' describes a feature of the state and the use of this word to imply any other meaning is inadmissible"[6].

12.11. Being one of the fundamental principles of International Law, economic sovereignty forms a part of sovereign equality of states. It means state autonomy in the implementation of sovereign prerogatives of economic importance in mutual relations with other countries[7].

12.12. There is a view in western literature that globalization is a process during and as a result of which the state and its institutions are diluted to make way for the international financial organizations. I believe that diluting the integral functions of a state is something that simply cannot be allowed. The task of preservation and intensification of the state's legal capacity and its social efficiency is quite important today.

12.13. The British scientist D. Lloyd, upholding the idea of the stability of state sovereignty in international relations, asserts that interaction between international legal norms is not involved in the dissolution of state sovereignty. The restrictions, in his opinion, are imposed only on actions in the international arena, not the domestic one[8].

12.14. The reasons for underestimating the state public functions in Russia were predominant in the 1990s when there was a tendency for massive privatization of state property and a serious misunderstanding of that situation in respect of the public power's role. With a general appreciation of the positive aspects, it is necessary to point out that with administrative governmental methods of economy, especially when the state totally controls the behaviour of its participants, one should not rule out possible unfavourable consequences of the state withdrawing too far from performance of its functions in the economy. The forced liberalization and excessive state's withdrawal from functions of economic administration in the conditions of transition to the market economy led to the state involuntarily narrowing down its obligations to act as the voice of the people and a protector of public interests.

12.15. It is generally known that in the 1990s Russia seriously needed the mass attraction of foreign investments without which it was not possible to ensure the overall development of the oil-and-gas sector. The realization of the Production Sharing Agreement (PSA) – "*Sakhalin – 2*" project was one of those measures. In the 1990s when Russia moved to a market economy it had to provide unilateral guarantees to foreign investors. The revival of the Russian real economy system could be achieved only by balanced attraction of national and international investments, as well as

[6] Николай Александрович Ушаков (*Nikolai A. Ushakov*), Государство в системе международно-правового регулирования (*The State in the System of International Legal Regulation*) Moscow 11 (1997).

[7] Блищенко Игорь Павлович, Дория Джозеф (*I. P. Bliczenko, J. Dorya*), *Понятие об экономическом суверенитете* (*The Definition of Economical Sovereignty*) (1) Санкт Петербург:Правоведение (*Pravovedenye*) 215 (2003).

[8] Dennis Lloyd, The Idea of Law, Moscow: Egon 211-219 (2002).

by reasonable correlation between inconstant public and private interests.

12.16. The actions of transnational corporations in attracting huge financial flows caused by ineffective state regulation could inflict irreparable damage to the national security of the country, and could affect the basis of its economic sovereignty. For example, the realization of the biggest internal investment project "*Sakhalin – 2*", concluded in order to please foreign investors, could seriously damage Russia's economic interests.

12.17. Globalization does not lead to the disappearance of the institution of law and it sets higher requirements than are connected with interaction and conflict of national interests of other states. The states are involved in more complex international relations, and time itself requires an amplification of a state's liability for its internal affairs on the international arena.

12.18. Even in many developed countries the prevailing trends favoured national controls over FDI. Yet Western European countries sometimes pursue a policy that is directed at determined limitation of foreign investments into the national economy. For example, in Great Britain, an open-market economy, there are no special legal tools of control over foreign investments; in exceptional instances other legal means are used. The question concerns matters when the admission of a foreign investor is controlled so as to protect national interests using rules of law.

12.19. The state must independently determine its internal investment policy in accordance with the principle of the sovereign equality of states. The restoration of the real economy sector could be reached by virtue of attracting domestic and international investments, and reasonable correlation between public and private interests; this shall be considered as a purposeful state investment policy. The issue is to take over the control of capital flows where investments are necessary for the public interest.

12.20. This leads to the issue of the role of international investment agreements (IIAs) in connection with the investment restrictions based on national security provisions. An international investment agreement is an agreement between two or more states that sets forth standards in respect of the treatment of foreign investment. The issues usually covered in such treaties are admission of foreign investors and investments into the country; governments grant the essential rights to reliable investors and investments, the procedural processes for settling disputes arising from the treaty, and the scope of potential exceptions from treatment.

12.21. By imposing obligations on contracting parties that concern the treatment of foreign investors, IIAs also impose certain limits on the sovereign right of each country to regulate foreign investment on its territory, including regulation in the field of national security. On the one hand there is, therefore, a potential conflict between the objective of investment protection, and addressing the contracting parties' security concerns on the other. However, numerous IIAs expressly exempt contracting parties fully or partially from their contractual obligations in cases where an investment poses a threat to national security. Thus, the challenge for

governments is to find an appropriate balance – to ensure a sufficient level of protection for its national security interests, whilst at the same time ensuring that investment protection will be still strong enough to keep the country attractive for foreign investors.

12.22. Only a minority of IIAs contain some kind of national security exceptions, and such cases frequent in agreements on the entry of foreign investment more than in treaties limited to the post-establishment phase. This can be explained by the fact that national security primarily concerns foreign investment with regard to the admission issue.

12.23. State sovereignty is fundamental in the regulation of foreign investments and in the formation of international system in the sphere. It has been recognized by norms of international and national law. In practice sovereign states rely on their own doctrine as regards sovereignty when admitting foreign investments into their national territory.

12.24. The sovereign state must protect foreign investors and their property rights. According to principles of international law, the host country, the recipient of an investment, must guarantee foreigners and their property a certain minimum of protection. The minimum standard means that expropriation can take place in the general interest, should not be done in a discriminatory way, must be coupled only with effective, prompt, and appropriate compensation, and must take place according to lawful expropriation procedures, which guarantee the expropriated person sufficient legal protection. The Law on Foreign Investments of 1999 states that foreign investment in Russia will enjoy full and unconditional legal protection provided by Russian legislation and international treaties. The legal status of foreign investment and foreign investors' activities should not be less favourable than the one provided for the property, property rights, and investment activities of nationals, with the exception of the cases stipulated by the Russian Law on Foreign Investment.

12.25. The Russian Constitution declares that guarantees will be provided for the integrity of economic space, free transfer of goods, services, and financial resources, support for competition, and freedom of economic activity. In the Russian Federation, recognition and equal protection are given to private, state, municipal, and other forms of ownership. The right to hold private property is protected by law. Article 35 of the Constitution provides that everyone has the right to have property and possess, use, and dispose of it, both personally and jointly with other people. No one may be deprived of property other than by a court decision. Forced confiscation of property for state needs may be carried out only with compensation. The right of inheritance is guaranteed. The principle of the inviolability of private property is stated and regulated in the Russian Civil Code in force.

III. Harmonization of National and International Investment Laws

12.26. The legal regime of foreign direct investments includes national and international legal regulation. Foreign investments need special legal regulation because of the particular juridical nature of international investment relations. In principle legal regulation of foreign investments is determined by national legislation. The latter is formed by laws of the state on the territory of which foreign investments are carried out. But instability of transition countries' legislation and corresponding risks lead foreign investors to search for ways to get around the host state law and seek international legal protection. It accounts for an increasing amount of international bilateral and multilateral treaties. Generally speaking, having an essentially private-law nature, foreign investments have a simultaneous need for international legal regulation pursuant to international and intergovernmental treaties, including those that involve Russia's participation, for example.

12.27. At present unified standards of governmental regulation of investment processes contribute to international capital flow. These generally accepted international investment standards operate in accordance with multilateral agreements under the auspices of international economic organizations, e.g, the World Trade Organization (WTO). Yet it would be an exaggeration to apply unified legal principles and norms to the process of drawing up global investment law. Clearly, economic integration has quickened the pace of cross-border investment. In this sphere countries are also showing their keenness to accept international standards. The fact that countries, especially developing countries, are trying hard to offer foreign investors favourable terms as an incentive has drastically reduced and in the some cases even removed the losses of nationalization which was most troublesome to foreign investors.

12.28. The legal framework for foreign direct investments, as it exists today, consists of a wide variety of national and international principles and rules, of diverse origins and forms, differing extensively in their strength and specificity. They operate at several levels, with extensive gaps in their coverage of issues and countries. National law remains of paramount importance. It establishes the relevant legal concepts and categories, creates a broader legal environment for the operation of TNCs and reflects in its diversity the prevailing currents and trends on the topic.

12.29. The international legal framework for FDI, however, is still uncertain and incomplete. There is no comprehensive global agreement on the subject. Existing multilateral instruments are partial and fragmentary.

12.30. The Russian Federation is a party to various international agreements related to foreign investment. Provisions in the international agreements take precedence over conflicting domestic legislation. In principle, the guarantees granted to a foreign investor in accordance with national legislation and international treaties can be divided into three groups, as

follows: guarantees providing inviolability of property, which is a foreign investment in the territory of a host country; guarantees providing a right of a foreign investor to use results of his activity carried out in the territory of a host country; and guarantees connected with the settlement of investment disputes.

12.31. A typical investment treaty might offer investors various substantive rights, separately or in combination. First, host states guarantee investors will receive adequate compensation in the event an investment is expropriated. Second, host states promise not to enact currency controls in order to promote the free flow of capital. Third, host states promise to not discriminate on the basis of nationality. This often means states promise to not treat investors worse than their own citizens (the right to "National Treatment") or other foreigners (the right to "Most Favoured Nation" or MFN treatment). Fourth, host states promise to provide investments with fair and equitable treatment. Fifth, host states promise to provide full protection and security for investments. Sixth, host states guarantee that investments will not be treated less favourably than the minimum standard of treatment required by customary international law. Finally, in what is sometimes referred to as the "Umbrella Clause", states promise to honour commitments made as regards investment.

12.32. The interaction of two legal systems – national and international – is a major factor in legal development. It sets special problems, as national law and international law are two independent but closely cooperating legal systems. Their solution is suggested in the Russian Constitution (part 4 of Article 15).

12.33. International rules and concepts operate in constant reference to national ones. Whilst the number and importance of international norms continue to increase, their interplay with national rules remains at the heart of the matter. International agreements of various types are of increasing importance as elements of the legal framework for FDI. The strength of the international legal system is based on the consensus of states, the world community and not on the state itself. International law is composed of basic principles of implementing state sovereignty in specific investment treaty relations.

12.34. Pursuant to the Law on Foreign Investments of 1999, direct foreign investments in the Russian Federation may be made into any assets or sector of the economy, as long as it is not prohibited by law. Russia has retained the right to make exemptions from the application of the national regime to such spheres as banking, production of fissionable materials and related products, ownership rights on agricultural products, the use of natural resources, etc. Russia imposes restrictions on direct foreign investments in strategic sectors of the economy (such as foreign trade of defence industry products). In certain fields, such as banking and insurance, there are restrictive provisions, which limit direct foreign investments to specific levels regarding their proportion to the amount of Russian entities operating in the particular sector. Investors shall be

subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

12.35. One of the principles of the Russian concept of international law is the principle of reciprocity between states. Therefore, it is reasonable to assume that, if an investment is badly affected, any actions by foreign states in connection with the protection of private investment made by their nationals in Russia can be considered as appropriate from the point of view of the Russian law if Russia can take such measures in similar cases.

12.36. The principal causes against which investors seek protection are expropriation, nationalization and other cases of deprivation of property and infringement of investors' rights. Developed countries have insisted that, for such actions to be lawful within international law, they have to meet certain requirements: measures have to be taken in public interest, they should not be discriminatory, and they should be accompanied by full compensation. Developing countries have asserted that the conditions for property takings within the country's territory are to be determined by the host country, in the exercise of its exclusive jurisdiction, although they have allowed that compensation should normally be paid. In practice, the requirement of compensation and the methods for its assessment and payment have been at the centre of the debate.

12.37. The raising of the question about gradual elimination of differences between national law and international law – these two autonomous legal systems – and mutual absorption of each other is incorrect from the methodological point of view. Each of these legal systems has its juridical nature, subject, forms and methods of regulation that are confirmed in particular by studying the problems of legal regulation [of foreign investment] in the context of part 4 Article 15 of the Russian Constitution.

12.38. The purpose of the investment contract is to define the legal framework for interaction between the investor and the host country. Investment contracts precisely determine the prerequisites and legal consequences of expropriation, and make it possible to coordinate contractual risk distribution within national and international investment insurance systems[9].

12.39. There is obviously closer interaction between international and national law based on the fact of their future mutual penetration and mutual enrichment, including in foreign investments. The deepening of the mutual influence of these two legal systems is an objective process which

[9] (Published in English) Rainer Hausmann, *Investment Contracts with Foreign Investors, in* Legal Aspects of Investment Contracts. Materials of the Conference held in Baku on 20-23 November 2008 within the project "Foreign Investment Law in Azerbaijan, Kazakhstan and Russia: Balance of Interests in Transition Countries" 5 (A.Trunk, A.Aliyev eds., 2009).

reflects a more general phenomenon – the integration of individual countries into the international community and primarily in active interstate investment cooperation.

12.40. To my mind, the question is not about primacy of international investment norms over national norms. The effective implementation of international legal norms in the field of foreign investments requires their harmonized interaction on the basis of two-level (international and national) regulation of investment relations.

12.41. On the whole national law for the purpose of interaction was called to define the status of all kinds of property in the sphere of foreign capital, their common and special legal regimes, state guarantees and ways to protect foreign investments, forms and methods of international investment dispute resolution.

12.42. At the same time the actions of non-governmental participants of international economic relations, such as national and transnational structures, TNC, NGO etc., lack coordination and often contradict state sovereignty. It is also remarkable that universal public purpose and other host state interests have often been held back by the corporate interests of international organizations.

12.43. One of several international legal norms concerning foreign investments fully agreed on is the right of a state to exercise complete control over the entry of foreign investments. Therefore states attempt to block the admission of foreign investments into the priority branches of the economy. Such legal practice also exists in Western countries, yet they do not permit the reckless opening of their national economic spaces. It confirms the idea that every country that wishes to receive the maximum profit from foreign investment projects must follow a rational domestic economic strategy. Trade and financial turnover should be liberated in the country's national interests in compliance with multilateral and bilateral agreements; among the latter are treaties on encouragement and protection of investments.

12.44. In principle each country is preoccupied with implementing the policy of demarcation between national and international investments. States are primarily interested in their own national investments, directed to the social sectors of the economy and they are of a more long-term nature. Foreign investors often strive to achieve a foothold in the most lucrative sectors of the economy.

12.45. Why do the recipient states sometimes unwillingly provide equality on a par with local business facilities? The reasons for this are concealed in a number of factors. For example, the governments of some countries foresee massive attraction of foreign capital in those fields of the economy that are important for national security or which constitute the key sectors of the economy. In some cases governments persist in a protectionist policy at the request of national entrepreneurs because they wish to defend from competition with foreign investors. Therefore many countries set forth restrictions or special conditions for the admission of

foreign investments to certain sectors of a country's industry. The rights of an investor from one country on the strength of such circumstances to realize the investments on the territory of another country are not directly determined.

12.46. Despite corresponding norms in Public International Law concerning the establishment of favourable conditions for economic activity of a foreign investor (a common requirement of the host state in relation to foreign investments), in the light of recent developments, the host state may wish to pay more attention to the possible coverage of strategic industries. They have to ask themselves whether they need a broad and undefined security exception that gives them maximum discretion, or they prefer a more limited clause in the interests of better legal security and predictability.

12.47. In the latter case, the states as the contracting parties have various options to clarify the scope and the conditions under which a national security exception is applied. Additional preconditions for invoking the exception shall be taken into consideration, such as explicit good faith requirement concerning the use of the clause and a periodic review of the continuous need for upholding the security-related investment restriction. All these options help to prevent the subject of national security exceptions in IIAs from becoming a "black and white" matter and allow more differentiated solutions to be adopted, permitting a fair balance between the interests of the contracting parties and the foreign investors.

12.48. Exporting countries conventionally strive for the protection of their citizens and companies from unfavourable and even discriminatory consequences and try to secure a regime that governs the granting of permission that is not (!!!) less favourable than a regime which is presented to the business entities of the state receiving the investment or an investor for a third country. In this case the host state, when deciding the question concerning admission of a foreign investment project, must assume an unambiguous attitude in order to interact with the partner country under the investment contract in the same way as it treats the investors from another countries. The sovereign state has the full right to coerce that institution and terminate the foreign investment relations on its territory with due regard to legal prescription and regulations.

12.49. If the issue involves the institution and liquidation of their citizens' investments in the territory of another country, international law establishes restrictions for the sovereign state in applying coercion. In these cases the state can only impose restrictions relatively on operations which are conducted in violation of its legislation or internal regulations. However it is not in its authority to remove the consequences of actions that contradict its national law since they are implemented in the host country.

12.50. In accordance with the World Bank Guidelines on the Treatment of Foreign Direct Investment (II. Admission, point 4):

"A State may, as an exception, refuse admission to a proposed investment:

(i) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or

(ii) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest."

It is said further in this recommendatory multilateral document that "restrictions applicable to national investment on account of public policy (ordre public), public health and the protection of the environment will equally apply to foreign investment" (point 5). As provided by this international legal document, the state applying the system of admission must simplify the making of investments by private persons of other states as well as avoid creation of unwarranted complicated legal procedures, the fulfilment of which is necessary to obtain such admission. Each country preserves this right to regulate the admission of foreign private investments.

12.51. It is obvious that the state carrying out its internal policy must respect the basic international law principles and legal norms in the absence of some kind of multilateral investment conventions. Incidentally, these principles and legal norms have more of a prohibitive than authorizing character. In connection to this one can confirm that in principle the state's ability to issue orders is not unlimited because it is based on the power resulting from the territorial principle or the power resulting from the citizenship principle. Consequently, the sovereign state can alter legal norms regulating activities of natural persons or legal entities that operate on its territory if these natural persons have the citizenship of this state and these legal entities are established in accordance with the laws of this state. Moreover the sovereign state cannot exercise its right to use coercion with the purpose of implementing its legal norms on the territory of another sovereign state.

12.52. A sovereign state has the right to establish legal norms regulating institution and liquidation of foreign investments on its territory; it has the right to establish legal norms that determine institution and liquidation of foreign investments realized by its citizens on a foreign state's territory. The granting of a regime of protection and guarantees by the recipient state is ultimately directed toward the legal basis for the security of capital. The definition of legal treatment and protection of investments and definition of state guarantees are interrelated and interconnected. The legal regime signifies a complex of national and international principles and norms which determine the legal status of foreign investments from the moment of their placing until the moment of liquidation. The methods of protection include complex norms of national law and international law aimed at preventing state bodies from interfering with normal investment activities.

12.53. In conclusion, I would like to mention the International Centre for Settlement of Investment Disputes (ICSID) that was created to facilitate international investment through settlement of investment disputes between host states and nationals of other signatories.

12.54. The right to direct investor-state arbitration is currently one of the most important examples of ICSID mechanisms. It is explained by the fact that one of the parties to a dispute is a sovereign state, and one of the basic powers of a sovereign state is to determine what law shall apply on its territory. Some countries decline to settle their disputes with foreign investors by means of international arbitration. This policy has found expression in the countries of Latin America, in the Calvo Clause, according to which every conflict between the state and foreign investor will be settled exclusively by the courts of the host state in accordance with its national law. Russia has signed, but not yet ratified, the Washington Convention on the International Centre for Settlement of Investment Disputes of 1965. Incidentally, this is corroborated by the content of 32 arbitration cases (in accordance with bilateral investment agreements) that have been received by ICSID in 2009 that investors keep using international arbitration as a means of resolving disputes with their host countries.

12.55. In reality the legal nature of the term "sovereign state", the fundamental concept of international law, is far more complex and multi-faceted. The involvement of states into transnational financial structures and their institutions is increasing and not restricted to the competence of developing counties and transition economies and opportunities to support their interests by international legal means. The basis of contemporary understanding of the state sovereignty is composed of not only the independence and mutual dependence.

Summaries

DEU [***Auslandsinvestor und Gastland: Notwendigkeit des Interessenausgleichs***]
Der Problemkreis Staatssouveränität hat in jüngerer Zeit Brisanz erlangt. Massive länderübergreifende Kapitalflüsse beeinflussen die wirtschaftliche Souveränität von Entwicklungs- und Schwellenländern. Dank ihrer überlegenen Mobilität sind multinationale Unternehmen (TNV) in der Lage, sehr rasch massive Finanzmittel in verschiedensten Branchen einer Volkswirtschaft zu akkumulieren, um riesige Profite zu erzielen und rasch Auslandsinvestitionen vom staatlichen Empfänger abzuschöpfen. Für gewöhnlich ist eine der an solchen Investitionsmaßnahmen beteiligten Parteien ein autonomer Staat, dessen Interessen, Rechte und Pflichten wesentlich von denen eines privatrechtlichen Subjekts abweichen. Das Gastland muss außerdem politische, soziale, kulturelle und andere Faktoren in Betracht ziehen, die den privaten Investor nicht berühren. Viele Länder haben heutzutage damit begonnen, Auslandsinvestitionen zu regulieren, um innerstaatliche politische Ziele umzusetzen. Dabei muss jedes souveräne Staatswesen seinen eigenen Weg in Sachen Investitionspolitik gehen,

der auf die Bereitstellung starker Anreize für Auslandsinvestoren ausgerichtet ist. Staatssouveränität ist die Grundlage für die Regulierung von Auslandsinvestitionen. Sie wird von den Normen internationalen und nationalen Rechts anerkannt. Die wirksame Umsetzung des Völkerrechts und seiner Funktionen im Bereich Auslandsinvestitionen erfordert die Harmonisierung der Interaktion auf der Basis einer Regulierung auf zwei Ebenen (international und national).

CZE [***Zahraniční investor a hostitelský stát: potřeba vyvážení zájmů***]
V dnešní době se jako velice významná ukazuje problematika státní suverenity. Masivní přeshraniční kapitálové toky ovlivňují ekonomickou suverenitu rozvíjejících se zemí v procesu transformace. Nadnárodní společnosti jsou díky své supermobilitě schopny nakumulovat velice rychle obrovské finanční zdroje v samostatných odvětvích národní ekonomiky, díky čemuž jsou schopny dosáhnout nesmírného zisku a rychle vyvézt prostředky z daného státu formou zahraničních investic. Jednou stranou investiční transakce je obvykle suverénní stát, jehož zájmy, práva a povinnosti se významně liší od zájmů, práv a povinností soukromých účastníků transakcí. Hostitelský stát musí brát v úvahu také politické, sociální, kulturní a jiné faktory, které pro soukromého investora nejsou podstatné. V dnešní době již mnohé země započaly s regulací zahraničních investic, aby zajistily dosažení cílů vnitrostátní strategie. Každý suverénní stát musí realizovat svoji vlastní investiční politiku, kterou poskytne významné pobídky zahraničním investorům. Suverenita státu je základem pro regulaci zahraničních investic. Tento předpoklad byl uznán normami mezinárodního i vnitrostátního práva. Efektivní implementace mezinárodního práva a jeho funkcí v oblasti zahraničních investic vyžaduje harmonizaci interakce na základě dvoupilířové regulace (mezinárodní a vnitrostátní).

POL [***Inwestor zagraniczny a państwo przyjmujące: konieczność wyważenia interesów***]
Suwerenność państwowa stanowi podstawę regulacji stosunków w ramach inwestycji zagranicznych. Niosą one bowiem ze sobą nie tylko korzyści i szanse, ale również pewne ryzyko. Państwo powinno starać się znaleźć równowagę pomiędzy interesem własnym a interesami inwestorów zagranicznych, ulepszając regulacje prawne na poziomie narodowym i krajowym.

FRA [***Investisseur Étranger et état hôte : un équilibre nécessaire des intérëts***]
La souveraineté des États constitue le principe de base de la régulation des relations dans le domaine des investissements étrangers lesquels, tout en créant des opportunités, comportent certains risques. Les États doivent parvenir à un équilibre entre leurs intérêts propres et ceux des investisseurs étrangers en améliorant la régulation tant à l'échelle internationale que nationale.

RUS [***Зарубежный инвестор и государство-инициатор: потребность во взвешенных интересах***]

Суверенитет государства является основой регулирования иностранных инвестиций. Последние несут не только положительные результаты, но и риски. Принимающее инвестиции государство не заинтересовано, как частный инвестор, только в экономической выгоде. Оно должно исходить из текущих и перспективных национальных интересов. Это требует оптимизации интересов государства-реципиента и инвестора путем двухуровневого регулирования иностранных инвестиций, то есть сочетания международных и национально-правовых форм и методов.

ES [***Inversor extranjero y estado anfitrión: necesidad de intereses en equilibrio***]

La soberanía del estado conforma la base de la regulación de las relaciones de las inversiones extranjeras. Además de brindar oportunidades favorables, conllevan ciertos riesgos. El estado debe buscar un equilibrio entre sus intereses y los de los inversores extranjeros mediante la mejora de la regulación de los niveles nacionales e internacionales.

Case Law

Bohuslav Halfar
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The Penalty of Deportation in Recent Case–Law of the Supreme Court of the Czech Republic in Relation to International Commitments and, in Particular, the Protection of Human Rights; The Influence of EU Law and the European Convention on Human Rights When Considering Conditions for the Penalty of Deportation

In 2010, the *Supreme Court of the Czech Republic* addressed the penalty of *deportation*, conditions for the imposition thereof, and circumstances precluding the imposition of this penalty in several decisions. In some of them, the court also dealt with issues related to State obligations under international law and EU law. Two of these decisions are summarized below[1].

I. Conditions for the Penalty of Deportation and Circumstances Precluding the Imposition of Such a Punishment, and Investigation Thereof by a Court Ex Officio. Respect for Fundamental Rights in the Imposition of the Penalty of Deportation in Accordance With the Decision–Making Practices of the Constitutional Court [CZE] and the European Court of Human Rights.

Order of the Supreme Court [CZE][2] No 4 Tdo 531/2010-I of 22 June 2010:[3]

[1] The Supreme Court of the Czech Republic also addressed this issue (the penalty of *deportation*), for example, in Order No 4 Tz 88/2009 of 23 February 2010 and in Order No 4 Tz 57/2010 of 23 September 2010.

[2] Previous rulings in the case:
Court of first instance: Judgment of the District Court in Chomutov [CZE] No 6 T 110/2006.
Court of second instance (court of appeal): Judgment of the Regional Court in Ústí nad Labem [CZE] No 6 To 3/2008 of 21 March 2008.

[3] Decision available in Czech on the website of the Supreme Court at: http://www.nsoud.cz (accessed on December 18, 2010).

Key words:
appellate review | European Convention for the Protection of Human Rights and Fundamental Freedoms | illegal migration | unauthorized entry | appeal | offender | long-term residence | personal situation | long-term residence permit | human rights | admissibility of deportation | immigration | family reunification | criminal organization | European Union | penalty of deportation | refugee | family relationship | general interest | ex officio | introduction of serious diseases

States and Groups of States Involved:
[**CZE**] – [Czech Republic];
[**PRC**] – [People's Republic of China];
[**EU**] – [European Union].

Regulations Used:[4]

- Act [CZE] No 140/1961 Coll., as amended, **the Criminal Code** ("**CC 1961 [CZE]**"):[5] **Section 23, Section 57, Section 163a**[6], **Section 171a**[7].

13.01. • **CC 1961 [CZE]** – **Section 23** – **Purpose of a penalty** – **(1)** The purpose of a penalty is to protect society from criminals, to prevent offenders from committing further crime and guiding them to lead an orderly life, and thus have an educational effect on other members of society. **(2)** Human dignity shall not be prejudiced by a penalty.

13.02. • **CC 2009 [CZE]** – **Section 37** – **General provisions for the imposition of criminal sanctions.** **(1)** Criminal penalties may be imposed only on the basis of the Criminal Code. **(2)** Cruel and unfair criminal sanctions shall not be imposed on offenders. Human dignity shall not be prejudiced by a criminal sanction.

13.03. • **CC 1961 [CZE]** – **Section 57** – **Deportation:** **(1)** The court may impose the penalty of deportation from the territory of the Czech Republic on an

[4] Important proviso: Any citations of legislation referred to throughout this publication [CYIL] are non-binding. The only binding text is the text published in the Collection of Laws of the Czech Republic or, in the case of international treaties, in the Collection of International Treaties of the Czech Republic. The same applies to translations of Czech regulations. These are valid and binding only in their original form (see previous sentence) in Czech; any translations are therefore solely indicative and cannot be relied upon in any proceedings or in any legal relations.

[5] This Act was superseded, effective from 1 January 2010, with an entirely new Criminal Code, i.e. Act No 40/2009, as amended ("CC 2009 [CZE]"). However, CC 1961 [CZE] was applied to the case at hand. For clarity, the author of the summary intentionally provides citations of individual provisions under both CC 1961 [CZE] and, for comparison, under CC 2009 [CZE]. Please note that CC 1961 [CZE], as an originally *Czechoslovak law* and therefore valid also for the *Slovak Republic*, was replaced earlier in the Slovak Republic by a new Criminal Code, specifically by Act No 300/2005 [SVK].

[6] This is the substantive regulation of the crime of *Participation in a criminal organization*. In view of the purpose and scope of this summary, the provisions concerned have not been cited.

[7] This is the substantive regulation of the crime of *Organization and facilitation or unauthorized entry*. In view of the purpose and scope of this summary, the provisions concerned have not been cited.

offender who is not a citizen of the Czech Republic or is not a person who was been granted refugee status either as a separate penalty or in addition to another penalty where required for the safety of persons or property, or where required by another general interest. **(2)** With regard to the degree of the social danger of a crime, the possibility of reform and the circumstances of the offender, and to the degree of danger to the safety of persons, property or other general interest, the court may impose the penalty of deportation for one to ten years or indefinitely. **(3)** The court shall not impose the penalty of deportation if **a)** the nationality of the offender cannot be determined, **b)** the offender has been granted asylum, **c)** the offender has been granted long-term residence in the Czech Republic and has a working and social background here, and the imposition of the penalty of deportation would be contrary to the interest of family reunification, **d)** there is a risk that the offender, in the State to which he is to be deported, will be persecuted on grounds of race, nationality, membership of a particular social group, or political or religious beliefs, or if deportation would expose the offender to torture or inhuman or degrading treatment or punishment, **e)** the offender is a citizen of the European Union or a family member of a citizen of the European Union, irrespective of nationality, and has been granted permanent residence in the Czech Republic, or is a foreign national granted the legal status of long-term resident of the Czech Republic under special legislation, unless it finds that there is a serious threat to national security or public policy, or **f)** the offender is a citizen of the European Union and in the last 10 years has continuously resided in the Czech Republic, unless it finds that there is a serious threat to national security. **(4)** An offender who has been sentenced to deportation for a term from one year to ten years shall be deemed not to have been convicted once the sentence has been served.

13.04. • **CC 2009 [CZE]** (here only for comparison, as this new Criminal Code has not yet been applied in this case): **Section 80 – Deportation** – **(1)** The court may impose on an offender who is not a citizen of the Czech Republic the penalty of deportation from the Czech Republic as a separate penalty or in addition to another penalty where required for the safety of persons or property, or where required by another general interest; the penalty of deportation may be imposed as a separate penalty if, in view of the nature and seriousness of the crime committed and the person and circumstances of the offender, the imposition of another penalty is not necessary. **(2)** With regard to the nature and seriousness of the crime committed, the possibility of reform and the circumstances of the offender, and to the degree of danger to the safety of persons, property or other general interest, the court may impose the penalty of deportation for one to ten years or indefinitely. **(3)** The court shall not impose the penalty of deportation if **a)** the nationality of the offender cannot be determined, **b)** the offender has been granted asylum or subsidiary protection under other legislation, **c)** the offender has been granted long-term residence in the Czech Republic and has a working and social background here,

and the imposition of the penalty of deportation would be contrary to the interest of family reunification, **d)** there is a risk that the offender, in the State to which he is to be deported, will be persecuted on grounds of race, ethnicity, nationality, membership of a particular social group, or political or religious beliefs, or if deportation would expose the offender to torture or other inhuman or degrading treatment or punishment, **e)** the offender is a citizen of the European Union or a family member of a citizen of the European Union, irrespective of nationality, and has been granted permanent residence in the Czech Republic, or is a foreign national granted the legal status of long-term resident of the Czech Republic under other legislation, unless it finds that there is a serious threat to national security or public policy, **f)** the offender is a citizen of the European Union and in the last 10 years has continuously resided in the Czech Republic, unless it finds that there is a serious threat to national security, or **g)** the offender is a child who is a citizen of the European Union, unless deportation would be in its best interests.

- Act [CZE] No 141/1961 Coll. on criminal proceedings (Rules of Criminal Procedure), as amended ("**RCP [CZE]**"): **Section 265b(1), Section 350b.**

13.05. • RCP [CZE] Section 265b – Grounds of appellate review – (1) An appellate review may be sought only if any of the following reasons exists: **a)** a decision has been taken in the case by a court without territorial jurisdiction or by a court improperly presided over, unless, in place of a single judge, the case is heard by a chamber or adjudicated by a court of higher instance, **b)** a decision has been taken in the case by an excluded body; this reason cannot be invoked if such fact was known to the person seeking the appellate review in the original proceedings and no objection was raised by that person prior to the decision of the body of second instance, **c)** the accused had no defence counsel in the proceedings, but by law should have, **d)** provisions on the presence of the accused at the trial or a public hearing have been infringed, **e)** criminal proceedings were brought against the accused despite being inadmissible under the law, **f)** a decision has been taken to refer the case to another body, to discontinue the criminal proceedings, to stay the criminal proceedings, or to approve a settlement without the conditions for such a decision being met, **g)** the decision rests on a factual error of law or other substantive error of law, **h)** a type of penalty is imposed on the accused which is inadmissible under the law or a penalty is imposed on the accused which is outside the scale of penalties prescribed by the Criminal Code for the crime of which the accused is convicted, **i)** a decision has been taken to refrain from punitive measures or to hand down a discharge with supervision, even though the conditions laid down by law for such a procedure have not been met, **j)** a decision has been taken to impose a detention order, even though the conditions laid down by law for the imposition thereof have not been met, **k)** an operative part is missing or incomplete in the decision,

l) a decision has been taken to refuse or reject an appeal against a ruling or order referred to in Section 265a (2)(a) to (g), even though the procedural requirements laid down by law for such a decision have not been met or a reason for an appellate review as referred to in subparagraphs (a) to (k) arose in proceedings preceding that decision. **(2)** An appellate review may also be sought if a sentence to life imprisonment has been handed down.

13.06. • **RCP [CZE] – Implementation of the penalty of deportation – Section 350b – (1)** When a judgment imposing the penalty of deportation becomes final, the presiding judge shall send an order to implement the penalty to the Police Force of the Czech Republic and shall call on the convicted person to leave the Czech Republic without undue delay. **(2)** Where there is no concern that a convicted person who is at liberty will hide or otherwise obstruct the implementation of the penalty of deportation, the presiding judge may grant that person a reasonable time to put his/her affairs in order. This period shall not be longer than one month from the date on which the judgment becomes final. **(3)** The period referred to in paragraph 2 may be repeatedly extended by the presiding judge at the convicted person's request up to a maximum of 180 days from the date on which the judgment becomes final, provided that the convicted person proves that he has taken all actions necessary to procure travel documents and other requirements needed to travel, but still cannot leave the Czech Republic. **(4)** Should a person sentenced to deportation seek international protection under special legislation, unless the application is manifestly unfounded, the presiding judge, at the request of the convicted person or without such request, shall suspend the penalty of deportation. The presiding judge shall notify the authority competent in proceedings on international protection under special legislation of the suspension of the penalty of deportation for the above reason [...] and shall request that authority for notification of the decision on the request without undue delay on completion of the proceedings. **(5)** If a person sentenced to deportation is granted subsidiary protection under special legislation [...], the presiding judge shall suspend the penalty of deportation for the period for which subsidiary protection is granted. The presiding judge shall notify the authority competent in proceedings on subsidiary protection under special legislation of the suspension of the penalty of deportation for the above reason and shall request that authority for notification, without undue delay, if such subsidiary protection granted to the convicted person lapses or is revoked. **(6)** A complaint may be lodged against a decision under paragraph (4).

- Act No 326/1999 Coll. **on the residence of foreign nationals in [CZE]** and amending certain laws, as amended by Act No 217/2002 Coll. and Act [CZE] No 161/2006 Coll.: **Section 15a, Section 83.**

13.07. • **Section 15a – (1)** For the purposes of the present Act, "family member of a citizen of the European Union" [under the Treaty establishing the European Community] shall mean a **a)** spouse, **b)** parent, if such citizen

of the European Union is under 21 years old and is provided for by and lives in the same household as the parent, **c**) a child under 21 years of age or such a child of the spouse of a citizen of the European Union, and **d**) a dependent direct relative in the ascending or descending line, or such a relative of the spouse of a citizen of the European Union. **(2)** If the purpose of the stay of a citizen of the European Union is to study, "family member" shall mean only a spouse and dependent child. **(3)** A "dependent person" pursuant to paragraph (1)(d) shall mean a foreign national provided for by a citizen of the European Union or a spouse who **a**) is systematically training for a future profession, **b**) cannot systematically train for a future procession or engage in any gainful activity due to illness or injury, or **c**) is unable to engage in systematic gainful activity due to long-term poor health. **(4)** The provisions of this Act relating to a family member of a citizen of the European Union shall apply *mutatis mutandis* to a foreign national who proves, in a credible manner, that **a**) he/she is a relative of a citizen of the European Union not referred to in paragraph (1), if **1.** he/she lived in the same household as a citizen of the European Union in the State of which he/she is a citizen or in the State in which he/she had been granted permanent or long-term residence, **2.** he/she is provided for by a citizen of the European Union, or **3.** he/she is unable to care for him/herself without the personal care of a citizen of the European Union due to long-term poor health, or **b**) he/she is in a permanent relationship with a citizen of the European Union analogous to a family relationship and lives in the same household as that citizen of the European Union. **(5)** The provisions of this Act relating to a family member of a citizen of the European Union shall also apply to a foreign national who is a family member of a citizen of the Czech Republic.

13.08. • **Section 83** – [...] – **(1)** The Ministry [NB: here the Ministry of the Interior of the Czech Republic], in its decision on permanent residence, shall grant a foreign national the legal status of long-term residence of the European Community [*cf. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*] (hereinafter referred to as "resident") if the foreign national **a**) meets the requirement of five years' continuous residence in the territory (Section 68), **b**) has not seriously disrupted public policy or endangered the national security of the State or another Member State of the European Union, and **c**) has demonstrated the availability of funds for permanent residence in the territory pursuant to Section 71. **(2)** The Ministry shall also grant the legal status of resident to a foreign national with permanent residence in the territory, to whom such legal status has not been granted simultaneously with the issuance of a permanent residence permit, if the foreign national so requests in writing and meets the conditions referred to in paragraph (1). (3) A foreign national whose legal status of resident has been revoked (Section 85(1)) shall be entitled to request the re-assignment of such legal status if, as of the date of the final decision on the revocation of the legal status of resident, at least

five years have passed and the foreign national proves the availability of funds for permanent residence in the territory pursuant to Section 71. The Ministry shall grant a foreign national the legal status of resident if the foreign national has resided in the territory for the prescribed period continuously (Section 68), there are no longer grounds for the revocation of such legal status, and there is no reasonable risk that the foreign national could seriously disrupt public policy or endanger the national *security of the State or another Member State of the European Union.*

- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents[8].
- European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"): **Article 8**[9].

13.09. **(1)** **Deportation** from the Czech Republic is a general type of penalty which may be imposed for all criminal offences defined in the Special Section of the Criminal Code. Conceptually, therefore, we cannot speak of the "inadmissibility of the penalty", which may be one of the conditions for applying to the Supreme Court [CZE] for an appellate review, as it is generally admissible regardless of the crime committed. Nevertheless, the application of this penalty is not totally unrestricted and cannot be used against all offenders. It may be imposed only on an offender who is not a citizen of the Czech Republic and not a person granted refugee status. Furthermore, it cannot be imposed in cases where the circumstances set out in Section 57(3)(a) to (f) of the CC [CZE][10] exist.

[8] Published in: 47 (L16) Official Journal 44-53 (23.1.2004), CELEX: 32003L0109. *Cf.*, for example, Marion Schmid-Drüner, *The ordre-public clause in EC migration law*, *in* Las fronteras de la ciudadanía en España y en la Unión Europea: Actas del II y III Encuentro de jovenes invstigadores en derecho de inmigracion y asilo, Girona: Edicions A Petició – DU 73-78 (M. A. Wihelmi, M. I. Dausa, D. M. Malapeira, S. R. Ranz eds., 2009).

[9] According to Article 8(1) of the ECHR, everyone has the right to respect for his private and family life, his home and his correspondence. According to Article 8(2) of the ECHR, there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The full original text (in English) is available at: http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (accessed on December 18, 2010). The Czech Republic is bound by the ECHR. Czechoslovakia (as the legal predecessor of the Czech Republic) signed the ECHR on 21 February 1991, as amended by Protocols Nos 3, 5 and 8 and acceded to Protocol Nos 2 (of 20 March 1952), 4 (of 16 September 1963), 6 (of 28 April 1983) and 7 (of 22 November 1984), but with reservations on Articles 5 and 6 concerning the disciplinary punishment of soldiers and with a further declaration. The ECHR was published in this version as an annex to Notice of the Federal Ministry of Foreign Affairs (of Czechoslovakia) No 209/1992. Furthermore, [CZE] acceded to Protocol No 11 (see Notice of the Ministry of Foreign Affairs [CZE] No 243/1998) also replacing, for the Czech Republic, Protocol No 9, and to Protocol No 13 (see Notice of the Ministry of Foreign Affairs [CZE] No 114/2004).

[10] Regulation quoted in the introduction to this summary of the decision in the list of regulations used.

13.10. (2) It is not up to the accused to prove a personal situation precluding the imposition of the penalty of deportation in proceedings before the court[11].

13.11. (3) The court imposing the penalty of deportation must, as part of an inquiry and ex officio, address the question of whether the conditions for the imposition of such a penalty have been met or whether, on the contrary, there are circumstances that preclude the imposition of the penalty of deportation[12]. Only on the basis of factual findings, including those relating to all the negative conditions of the admissibility of deportation, may a conclusion be drawn as to whether or not the imposition of this penalty is admissible. These facts and the legal conclusions drawn from them must clearly follow from the statement of grounds of the judgment imposing the penalty of deportation.

13.12. (4) **Circumstances precluding the imposition of the penalty of deportation**, i.e. a permit for long-term residence in the Czech Republic, a local working and social background and inconsistency between deportation and the interest in family reunification, ***must be met concurrently***. These circumstances ***must exist at the time when the decision on deportation is taken***[13].

13.13. (5) When deciding whether the requirements for the admissibility of indefinite deportation have been met, it is also necessary to consider the existence or absence of family life. This is an issue of fact depending on the genuine, practical existence of close personal relationships. In this respect, the State is required, *inter alia*, to not prevent fathers from establishing a relationship with their children where such efforts are made[14].

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[11] The prosecutor argued the opposite (as the plaintiff in this case) and the Supreme Court [CZE] did not agree.

[12] In this case, a deportation order was only issued by the court of second instance further to an appeal by the prosecutor. By contrast, the court of first instance, after its inquiry, concluded that the circumstances did not permit the imposition of such a penalty. However, the court of first instance addressed these circumstances to a lesser extent and in other contexts. If, then, the court of appeal (the court of second instance) issued a deportation order, the court should first have examined all conditions and included them as part of the rationale of its judgment.

[13] Section 57(3)(c) of the Criminal Code [CZE]. Here, the Supreme Court referred to earlier case-law of the Supreme Court [CZE], specifically Decision No 11 Tdo 575/2004.

[14] Here, the court also referred to the case-law of the European Court of Human Rights, specifically the judgment in *Paula Marckx* (acting on her own behalf and on behalf of her daughter Alexandra) *v. Belgium*, Complaint No 6833/74 of 13 June 1979, published in: ECHR Collection of Judgments A 031/1979. In the case concerned, this was a judgment referred to the ECHR by the European Commission of Human Rights. The applicants complained of the Civil Code [BEL] provisions on the manner of establishing the maternal affiliation of an "illegitimate" child and on the effects of establishing such affiliation as regards both the extent of the child's family relationships and the patrimonial rights of the child and of his mother. The applicants also put in issue the necessity for the mother to adopt the child if she wishes to increase his rights. Judgment available through HUDOC: http://echr.coe.int/echr/en/hudoc (accessed on December 18, 2010). In this matter, see, for example, Mr Justice Munby, *Human rights and social welfare law: The impact of article*, SOCIAL CARE INSTITUTE FOR EXCELLENCE, electronic version available at:

13.14. (6) The criminal offence of **participation in a criminal organization** under Section 163a (1) of the CC [CZE], in conjunction with the crime of **unauthorized entry** under Section 171a (1), (2) (b) and (c) of the CC [CZE], in the version effective until 11 July 2007, comprises *conduct which, not only in a particular criminal case, but generally always threatens the general interest of society in combating illegal migration and immigration, because related criminal activity, often of an economic nature, regularly exists in this context, and illegal migration from countries with different hygienic standards also brings with it the risk of the introduction of serious diseases* previously eliminated in the Czech Republic (e.g. TB). *In relation to these offences, the general conditions for imposing the penalty of deportation are met*, i.e. an interest in the safety of persons or property, or other general interest, exists.

13.15. (7) A penalty of *indefinite deportation cannot be imposed* on the accused unless *all the statutory requirements* for the imposition thereof *are met*, especially *in terms of* the accused's *personal and family situation*.

[Subject-Matter of this Summary of Case-Law]

13.16. The subject of the summary of the ruling concerned is a situation where the court of first instance, in proceedings against a citizen of the People's Republic of China [PRC], did not impose the penalty of deportation with reference to the existence of circumstances which preclude the *imposition of that penalty, namely* **(i)** *the accused's long-term residence* permit, **(ii)** the accused's social ties in the Czech Republic. Conversely, the court of appeal (the court of second instance, here the regional court), in appellate proceedings brought by the prosecutor, imposed the penalty of deportation of indefinite (de facto *permanent*) duration[15]. The accused sought an appellate review from the Supreme Court [CZE], limited to that part of the sentence imposing the penalty of deportation pursuant to Section 57(1) and (2) of the CC [CZE]. According to the accused, this contested part of the ruling rested on an error of law.

http://www.scie.org.uk/news/events/humanrights06/mrjusticemunby.pdf (accessed on December 18, 2010). *Cf.* also, for example, S.E .Mumford *The Judicial Resolution of Disputes Involving Children and Religion*, 47 (1) INT'L & COMP. L.Q. 117-148 (1998), and Rhona Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law*, 44 (4) INT'L & COMP. L.Q. 771-802 (1995); Caroline J. Forder, *Legal Protection under Article 8 ECHR: Marckx and Beyond*, 37 (2) NETHERLANDS INTERNATIONAL LAW REVIEW 162-181 (1990); DIRK EHLERS, EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS, Berlin: De Gruyter Recht 33 (2007); JAN M. SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPEAUM AS A MIXED LEGAL SYSTEM, Antwerp: Intersentia 23 (2002), ALLAN ROSAS; JAN E. HELGESEN; DIANE GOODMAN, THE STRENGTH OF DIVERSITY: HUMAN RIGHTS AND PLURALIST DEMOCRACY, Dordrecht: Kluwer Academic Publishers 142 (1992).

[15] In addition, the court of first instance imposed, *inter alia*, a three-year prison sentence; the court of appeal increased this penalty to four years.

[Factual and Legal Status and Circumstances Concerning the Accused]

13.17. The accused, in his application to the Supreme Court [CZE] for an appellate review, claimed to have travelled to [CZE] from China legally and to have lived here (in [CZE]) continuously since 1994. He was initially granted long-term residence for business purposes, and in 1997 he was granted *permanent residence.* This situation still persists. Since February 1995, he has lived in the same household as his partner, convicted in the same criminal case (i.e. the co-accused)[16], with whom he jointly does business and who also has permanent residence in the Czech Republic. On 17 September 1999, their daughter was born in the Czech Republic and also has permanent residence. Between 1994 and 2004, he and his partner were engaged in business by running a Czech company specializing in commerce. As of 2005, the accused's partner has owned another company – a Czech legal entity ("Company II"). The father of the accused's partner died in 1993 [PRC] and therefore her mother left [PRC] to live with her daughter, the accused and their daughter in the same household in [CZE]; the partner's mother was also granted permanent residence in [CZE]. They all live together in [CZE] in a flat which they own. The accused claimed that, over a period of 14 years, he had forged strong personal, work, family and social ties with [CZE] which would be seriously disrupted by deportation. He had never previously been subject to any penalties or investigations and is not a refugee; other conditions of deportation, where this penalty is required for the safety of persons or property, or in another general interest, have not been met. According to the accused, there is also no justification to impose deportation with a view to meeting the purpose of the penalty as defined in Section 23(1) of the CC [CZE][17].

13.18. A prosecutor from the Supreme Public Prosecutor's Office commented on the accused's request for an appellate review[18]. In the prosecutor's opinion, the court of appeal duly addressed the fulfilment of the above conditions when imposing the penalty of deportation. The court of second instance (the court of appeal) held that the business activities of the accused's partner (his common-law wife), and by extension of her common-law husband (in this case, the accused and the party seeking

[16] Under a separate order of the Supreme Court [CZE] of 21 June 2010, the criminal case of the *co-accused partner* was *excluded* to be heard separately. She failed to attend the hearing ordered in the *accused's* case (as set forth in the summary of the decision published here) and it was found that, in the meantime, she had probably left for [PRC]. The measure regarding the exclusion of the case to be heard separately was therefore justified in terms of the efficiency of the proceedings. The decision to exclude the case of the co-accused partner is also available in the database of the Supreme Court [CZE] on the aforementioned website.

[17] Regulation quoted in the introduction to this summary of the decision in the list of regulations used.

[18] The Prosecutor's Office in [CZE] plays the role, *inter alia*, of supervisor of investigations and brings State actions in criminal court proceedings.

an appellate review), served solely as a front to conceal criminal activity. The child they have had together is a foreign national and, in a situation where both the mother and father of the child are sentenced to a virtually identical penalty, the argument of family reunification cannot be upheld. The accused's claims about the existence of a social background in the Czech Republic are an empty proclamation not underpinned by any facts or substantiated in any way by the accused. General security interests do not allow foreign nationals who have committed crimes here as part of an international criminal organization, the negative consequences of which affect a large number of European countries, to remain in [CZE].

13.19. The accused was held in custody while the Supreme Court considered the appellate review. In contrast, his co-accused partner was held in custody only briefly during the criminal investigation, and was subsequently released while her case was examined. In this context it was found, *inter alia*, that while the accused would probably complete his prison sentence very soon once his time spent on remand had been taken into account and that he should then be deported to [PRC], at the same time his co-accused partner would evidently only just be commencing her prison sentence. The daughter of the accused persons would apparently remain in the [CZE] so that she could remain in contact with her mother while she was serving her prison sentence. In contrast, for the father, this contact was *de facto* denied. Furthermore, this fact was important during the consideration of the appellate review by the Supreme Court [CZE], which concluded that the court handing down the penalty of deportation had failed, in particular, to examine either at all or sufficiently the personal and social circumstances of the accused upon whom this punishment was imposed.

13.20. In this case, the Supreme Court annulled the previous ruling and referred the case back to the court. One of the main reasons was the inadequacy of the investigation into the accused's personal situation in relation to the conditions for imposing the penalty of deportation, and, in particular, circumstances precluding the imposition of this penalty. The court must examine these conditions and circumstances ex officio (as a matter of course) and it is not up to the defendant to prove that conditions for the imposition of the penalty do not exist here, or that there are circumstances precluding the imposition of the penalty *(deportation)*. In this regard, the Supreme Court did not agree with the opinion of the prosecutor.

[**From the Conclusions of the Supreme Court**]

13.21. According to Section 265b(1)(h) of the RCP [CZE][19], there are grounds for an appellate review if a type of penalty is imposed on the accused which is inadmissible under the law or a penalty is imposed on the accused which is outside the scale of penalties prescribed by the Criminal Code for the crime of which the accused is convicted. Therefore, if any of the

[19] Regulation quoted in the introduction to this summary of the decision in the list of regulations used.

persons entitled to seek an appellate review has objections to the type and scope of penalty imposed, provided that a sentence of life imprisonment has not been handed down, may lodge such objections only on special legal grounds for an appellate review, not on any other grounds referred to in Section 265b(1) of the RCP [CZE][20]. In order for the grounds to be valid, the text of the application for an appellate review must argue the existence of one of the two relevant conditions, i.e. the imposition of an inadmissible type of penalty, or the imposition of a type of penalty which, while admissible, is outside the scale of prescribed penalties. These and other grounds for an appellate review under Section 265b(1) of the RCP [CZE][21] cannot form the basis to claim other errors by the court consisting of the incorrect type or scope of penalty. Deportation may be ordered in relation to essentially any type of criminal activity and in this respect there are no grounds for an appellate review. Nevertheless, the court is required, of its own motion and ex officio, to address the question of whether the conditions for the imposition of such a penalty have been met or whether, on the contrary, there are circumstances that preclude the imposition of this penalty.

13.22. Besides the above-mentioned grounds for an appellate review (related to the type and scope of penalty), the party seeking such a review may argue that there has been a substantive error of law in respect of certain "special circumstances" in the imposition of the penalty, i.e. that the court erred in imposing a summary penalty, aggregate penalty and joint penalty for the continuation of a crime, with reference to the legal grounds for an appellate review under Section 265b(1)(g) of the RCP [CZE][22].

13.23. The appellate objections raised by the accused to the penalty of deportation challenge the admissibility of the imposition of such a penalty. The accused claims that such a penalty is precluded by the interest of family reunification expressed in Section 57(3)(c) of the CC [CZE][23] as his daughter, born in the Czech Republic in 1999, resides here permanently, and the accused, having lived in this country since 1994, has forged a strong personal, professional, social and family background, which would be seriously disrupted by deportation. Furthermore, the accused claimed that other conditions for imposing the penalty of deportation had not been satisfied, particularly those where deportation is required for the safety of persons or property or for another general interest, and that therefore there was no justification in imposing deportation with a view to meeting the purpose of the penalty as defined in Section 23(1) of the CC [CZE][24].

13.24. The objections raised by the accused to deportation are therefore, according to the Supreme Court [CZE], generally valid in terms of

[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

constituting grounds for an appellate review under Section 265b(1)(h) of the RCP [CZE][25]. From this perspective, the Supreme Court [CZE] deemed it essential to consider whether or not such claims are justified. The Court also found that the accused's daughter was born in [CZE], was familiar with the Czech environment, and, like the accused, was legally resident in [CZE][26]; the accused, together with his partner, the co-accused and the mother of his daughter, was engaged in business in [CZE] from 1994 to 2004. He also lives here with his partner's mother, who has also been granted permanent residence; they all live in a flat which they own.

13.25. The Supreme Court expressly referred to the wording of Section 57 of the CC [CZE] on the nature of the penalty of deportation, the conditions for the imposition thereof, and circumstances precluding the imposition of such a penalty[27]. Furthermore, it referred to Article 8 of the ECHR.

13.26. According to the findings of fact made by the court of first instance, the accused is raising his minor daughter in [CZE]; she was born here and is the daughter of the co-accused partner of the accused. This fact prompted the court of first instance *not to order* the deportation of the accused. As a result of this circumstance, the court of first instance decided that the deportation of the accused was precluded *without carrying out any further inquiry into whether the accused, besides his family, had any working or social background in [CZE].* The same factual basis, with the exception that the accused's partner was also sentenced to imprisonment and indefinite deportation by the court of appeal (the court of second instance), was used by the court of appeal (the court of second instance) in its ruling on the accused when it also ordered his indefinite deportation and the forfeiture of assets. If the court of appeal concluded that the court of first instance had found that the accused (along with his partner), under the front of "Company II", had engaged in the illegal activities of which he was convicted, **in a situation where it intended to order the deportation of the accused, the court of appeal should have ascertained the following facts:** (●) whether "Company II" carried on legal operations alongside the illegal activities, (●) whether the accused has a legal source of income and employment and entrepreneurial opportunities in (●) (bearing in mind that, by the time the court of appeal heard the case, the accused had been detained for approximately three years), and (●) what sort of social background he had in [CZE] (●) in addition to his working and family

[25] *Ibid.*

[26] Regarding the acquisition of citizenship [CZE] by birth, Act [CZE] No 40/1993 Coll., on the acquisition of citizenship, as amended, provides for the following: Section 3 Birth – *A child shall acquires citizenship of the Czech Republic upon birth* a) *if at least one parent is a citizen of the Czech Republic or* b) *where the parents are stateless persons (hereinafter referred to as "homeless persons"), if at least one of them has permanent residence in the Czech Republic and the baby is born in the Czech Republic.*

[27] As stated in the opening *head notes* to the summary of this decision of the Supreme Court [CZE], circumstances precluding the imposition of the penalty of *deportation* must be satisfied cumulatively, i.e. concurrently.

relationships. It was also necessary to examine (●) whether the accused was actually the father of the co-accused partner's child, (●) and whether the child was a citizen of the Czech Republic, in light of the fact that, under Section 9(3) of Act No 40/1993 Coll., on the acquisition and loss of citizenship of [CZE], citizenship may be granted to a child separately at the request of the legal guardian. The court of appeal justified the absence of an interest in family reunification by reference to the fact that the person seeking the appellate review and his partner were sentenced to the same penalty, and therefore there were no grounds for family reunification. However, by arriving at this conclusion, the court of appeal (the court of second instance) failed to take account of the fact that the accused, at the time this decision was being made, had spent approximately three years in detention and that, following the subsequent crediting of such custody, he would already have served most of the prison sentence. By contrast, the accused CW would only just be commencing her prison sentence, and in comparison with the length of the sentence imposed on her by the court of appeal, she had been held in pre-trial detention for a relatively short period of time. On completion of his prison sentence, the accused WH was to be deported in accordance with the procedure under Section 350b of the RCP [CZE][28]. In this regard, the accused was to leave the Czech Republic and leave his minor daughter, born in the Czech Republic, in the care of a third party here in a situation where the child's mother would be in prison, or take this minor with him to an environment in which she had never lived, and render it impossible for her to have personal contact with her mother (albeit significantly limited by her imprisonment) and grandmother, who was alleged to have been residing legally with them in the Czech Republic[29]. This, according to the Supreme Court (depending on the as-yet unascertained actual circumstances of the accused), could undermine commitments to protect human rights in relation to family reunification (see also Article 8 of the ECHR)[30]. The purpose of these provisions is to ensure a balance between the interests of the individual and the interests of society. It is therefore necessary to examine whether the *deportation* of a particular person meets the conditions of paragraph (2), i.e. whether *deportation* has been ordered in accordance with the law, was necessary in a democratic society to achieve a legitimate objective, and, ultimately, whether it is proportionate to admissible objective pursued. It should also be noted that, no matter how much deportation is justified

[28] Regulation quoted in the introduction to this summary of the decision in the list of regulations used.

[29] With respect to the interpretation of the term *"family"*, in the rationale of its decision the Supreme Court [CZE] referred to an order of the Constitutional Court [CZE] published in: 13 COLLECTION OF FINDINGS AND ORDERS OF THE CONSTITUTIONAL COURT (1999).

[30] The Supreme Court specifically referred to a decision of the Constitutional Court [CZE] published in: 57 COLLECTION OF FINDINGS AND ORDERS OF THE CONSTITUTIONAL COURT (1999).

for purposes of crime prevention, i.e. as an admissible objective essential in any democratic society, the requirement of proportionality cannot be regarded as met in cases where the maximum penalty is imposed, i.e. the penalty of deportation for an indefinite period, without time limit (in other words, forever), without an examination of the offender's potential for reform, as prescribed by Section 57(2) of the CC [CZE][31]. In the opinion of the Constitutional Court (according to an interpretation by the Supreme Court [CZE]), the maximum penalty of deportation (i.e. forever) is conceptually linked to an offender whose reform is impossible. Beyond the scope of proceedings on the appellate review, it should be noted that *the potential for the reform of the accused was not examined in detail.* Nevertheless, the Supreme Court [CZE] did not agree with the accused's objection regarding the absence of any need to protect society.

13.27. The Supreme Court [CZE] concluded that there had been a violation of the legal provision on the admissibility of deportation and that the court of appeal had by imposing this penalty on the accused. The Supreme Court ordered the court of second instance to reconsider the matter to the extent necessary and to issue a new ruling. The court of second instance is therefore required to examine and determine whether conditions are currently (at the time the decision on the penalty is taken) in place that permit and justify the deportation of the accused based on his working, social and family background in the Czech Republic. At the time this summary was prepared, in light of the fact that this is a relatively current/new decision of the Supreme Court [CZE], it was impossible to determine the further course of proceedings in this case. At any rate, the Supreme Court [CZE] made important findings regarding the procedure for imposing the penalty of *deportation*, including in relation to international commitments [CZE] in the protection of human rights.

[31] *Regulation quoted in the introduction to this summary of the decision in the list of* regulations used.

II. The Relevance of European Union Citizenship to the Penalty of Deportation— Assessments of Threats to the Safety of Persons or Property as a Condition for the Imposition of Deportation.

Order of the Supreme Court [CZE][32] No 8 Tdo 482/2010 of 19 May 2010:[33]

Key words:
appellate review | Maastricht Treaty | EU citizenship | appeal | long-term residence | obstacles to deportation | /treaty on European Union | penalty of deportation | custody | deportation | penalty

States and Groups of States Involved:
[**CZE**] – [Czech Republic];
[**ROM**] – [Romania];
[**EU**] – [European Union].

Regulations Used:[34]

- Act [CZE] No 140/1961, as amended, **the Criminal Code ("CC 1961 [CZE]"):[35] Section 23[36], Section 57[37], Section 241(1)[38], Section 247(1)(d)[39]**.

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[32] Previous rulings in the case:
Court of first instance: Judgment of the District Court in Kladno [CZE] No 1T 43/2009 of 18 August 2009.
Court of second instance (court of appeal): Judgment of the Regional Court in Prague [CZE] No 11 To 455/2009 of 12 November 2009.

[33] Decision available in Czech on the website of the Supreme Court [CZE] at: http://www.nsoud.cz (accessed on December 18, 2010).

[34] Important proviso: Any citations of legislation referred to throughout this publication [CYIL] are non-binding. The only binding text is the text published in the Collection of Laws of the Czech Republic or, in the case of international treaties, in the Collection of International Treaties of the Czech Republic. The same applies to translations of Czech regulations. These are valid and binding only in their original form (see previous sentence) in Czech; any translations are therefore solely indicative and cannot be relied upon in any proceedings or in any legal relations.

[35] This Act was superseded, effective from 1 January 2010, with an entirely new Criminal Code, i.e. Act No 40/2009 Coll., as amended ("CC 2009 [CZE]"). However, CC 1961 [CZE] was applied to the case at hand. For clarity, the author of the summary intentionally provides citations of individual provisions under both CC 1961 [CZE] and, for comparison, under CC 2009 [CZE]. Please note that CC 1961 [CZE], as an originally *Czechoslovak law* and therefore valid also for the *Slovak Republic*, was replaced earlier in the Slovak Republic by a new Criminal Code, specifically by Act No 300/2005 Coll. [SVK].

[36] Text of the regulation cited under the preceding summary for Judgment of the Supreme Court [CZE] No 4 Tdo 531/2010.

[37] *Ibid.*

[38] This is the substantive regulation of the crime of *Rape*. In view of the purpose and scope of this summary, the provisions concerned have not been cited.

[39] This is the substantive regulation of the crime of *Theft*. In view of the purpose and scope of this summary, the provisions concerned have not been cited.

- Act [CZE] No 141/1961 on criminal proceedings (Rules of Criminal Procedure), as amended ("**RCP [CZE]**"): **Section 265b(1)[40], Section 350b[41].**
- Act No 326/1999 **on the residence of foreign nationals** in [CZE] and amending certain laws, as amended by Act No 217/2002 Coll. and Act [CZE] No 161/2006 Coll.: **Section 83[42].**
- Treaty on European Union (*Maastricht Treaty*)[43].

13.28. **(1)** Where, in Section 57(3) of the CC [CZE][44], the law provides an exhaustive list of circumstances precluding the penalty of deportation in any of its forms, *such circumstances must actually exist at the time of the court's decision on the penalty.* These are negative conditions which must not exist in order for deportation to be ordered.

13.29. **(2)** Obstacles to deportation are alternatively prescribed in Section 57(3) of the CC [CZE][45]. A *deportation* order is precluded by any one of them.

13.30. **(3)** Citizenship of the European Union complements rather than replaces nationality of a Member State. EU citizenship establishes, *inter alia, the right to move and reside freely within the territory of EU Member States, and therefore the Criminal Code precludes the possibility of ordering the deportation of an EU citizen or a family member thereof* in the case of Section 57(3)(e) of the CC [CZE][46] if an offender has been *granted permanent residence in [CZE] and there are no serious grounds constituting a threat to national security or public policy*, or in the case of subparagraph (f) of the same provision if an offender has continuously resided in [CZE] *for the past ten years and there are no serious grounds constituting a threat to national security.*

13.31. **(4)** If the offender meets the precluding conditions of citizenship and permanent residence or is a resident, deportation may be ordered only if the court, in imposing this penalty, finds serious grounds constituting a threat to national security or public policy.

13.32. **(5)** *Concerns that the safety* of persons or property are endangered, constituting grounds for a *deportation* order, *are based on the nature, extent, consequences and severity of the criminal activity for which deportation is ordered.*

13.33. **(6)** The status of "EU citizen" (EU citizenship) does not rule out the possibility of deportation. This status must be associated with at least

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[40] Text of the regulation cited under the preceding summary for Judgment of the Supreme Court [CZE] No 4 Tdo 531/2010.

[41] *Ibid.*

[42] *Ibid.*

[43] Now in the wording of the *Treaty on the Functioning of the European Union (the Lisbon Treaty).*

[44] See *supra* note 42.

[45] *Ibid.*

[46] Text of the regulation cited under the preceding summary for Judgment of the Supreme Court [CZE] No 4 Tdo 531/2010.

permanent residence or with cases where the accused has been granted the status of resident.

[Factual and Legal Status and Circumstances Concerning the Accused]

13.34. Under the judgment handed down by the court of first instance, the accused (a Romanian national) was convicted of the crimes of theft and rape. He was sentenced to imprisonment for two and a half years. The Regional Court in Prague, as the court of appeal, also imposed the penalty of deportation for a period of five years.

13.35. The *accused sought an appellate review, arguing* that the court was silent on whether the accused's continued stay in [CZE] constituted a danger to persons or property, and failed to specify any alleged danger. He also argued that, apart from the present offence, he had not committed any other crime in [CZE], had duly worked on the basis of an employment contract throughout his time in the country, had accommodation and, until his arrest, had fostered personal ties. The accused also pointed out that the crime he had committed was an exceptional occurrence preceded by an otherwise conviction-free life.

13.36. The *prosecutor referred* to the fact that the court of first instance had found that the conditions for imposing the penalty of deportation in accordance with Section 57(1) and (2) of the CC [CZE][47] had been met, in that deportation was required to protect society as the accused had committed a serious crime and had shown no signs of remorse during the proceedings; the prosecutor stated that there were no reasons to preclude the imposition of this penalty, including within the meaning of Section 57(3)(e) of the CC [CZE][48]. The prosecutor pointed to the considerable degree of brutality in the offence with the aid of an accomplice, noting that these are circumstances increasing the social dangerousness of his action to the extent that the imposition of this penalty was required for public safety. To fulfil the purpose of the penalty under Section 23(1) of the CC [CZE][49], it was necessary, besides imprisonment and the forfeiture of assets, to order the deportation of the accused because, prior to the act, the accused had been living in the Czech Republic for under two years, had not been employed until 1 September 2008, and had not forged any relations here, the collapse of which would be disproportionate to the penalty. Therefore, the prosecutor, not finding the penalty imposed to be unlawful, petitioned the Supreme Court to refused an appellate review as manifestly unfounded.

[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*

[From the Conclusions of the Supreme Court]

13.37. The last two conditions stipulated in Section 57(3)(e) and (f) of the CC [CZE][50] were amended by Act No 326/1999 Coll., on the residence of foreign nationals in the Czech Republic and amending certain laws, as amended by Act No 217/2002 Coll., and Act No 161/2006 Coll., which entered into effect on 27 April 2006. This new legislation is based on the principle that EU citizenship is a concept established by the Treaty on European Union (the Maastricht Treaty), which entered into force on 1 November 1993.

13.38. A citizen of the European Union is any person who is a national of any of the Member States of the European Union; specifically in the present case, the accused, as a national of [ROM], is such a citizen.

13.39. As to whether, in the present case of the accused, circumstances existed at the time of adjudication by the court of appeal which precluded a deportation order within the meaning of Section 57(3) of the CC [CZE][51], only the condition specified in Section 57(3)(e) of the CC [CZE][52] would come into consideration as the other conditions mentioned above are irrelevant to the present case.

13.40. With regard to the person of the accused and circumstances which might preclude a *deportation* order, the *Supreme Court* [CZE] made the following findings: The accused himself stated, in particular, that the accused was a national of [ROM], was single, and had come to [CZE] in 2007 to find work. In the two months prior to the crime he had been employed (as of 1 September 2008) by two companies based in [CZE]. The courts established no specific information about the whereabouts of the accused, as he was unable to provide the address where he had been staying. After the incident on 26 November 2008, he was arrested and taken into custody, where he remained until he was transferred to prison to serve his sentence. As stated by the accused, and as (according to the findings of the Supreme Court [CZE]) corresponded to the contents of the file, the accused had not been granted permanent residence and had not been granted the status of long-term resident in [CZE]. It was discovered from a report by the Police Presidium [CZE], as the Interpol National Central Bureau, that the accused had been convicted of theft in the country of which he was a national, for which he had served a one-year prison sentence, and had also been fined for theft (in 2004 and 2007).

13.41. The Supreme Court [CZE] therefore concluded that the court of second instance (the court of appeal) had not erred when it ordered the deportation of the accused because it had acted in accordance with Section 57(1) of the CC [CZE][53], since the accused was neither a citizen [CZE] nor a person who granted refugee status, and the imposition of this

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

penalty was required for the safety of persons and property. This latter aspect, the prime issue challenged by the accused in his application for an appellate review, is valid in the present case because concerns of the risk to the safety of persons or property are rooted in the nature, extent, consequences and severity of the criminal activity for which deportation has been ordered. The Supreme Court [CZE] invoked the rationale of the judgment delivered by the court of second instance, in which it was emphasized that the accused had committed two crimes, namely, the particularly serious crime of rape, in the perpetration of which he had used a gas pistol and had behaved in a brutal fashion towards the victim, with an accomplice to hold the victim down, and, together with that offence, the crime of theft, as he had robbed the victim prior to raping her. It is thus evident, not just in relation to the present crime, but also with regard to the criminal past of the accused reported in his homeland, that this is a person posing the risk, were he permitted to remain in the Czech Republic, that he would behave just as violently in the future or would endanger people's property. There is therefore no doubt that the conditions set out in Section 57(1) of the CC [CZE][54] existed in relation to the accused. The appeal was dismissed.

[***Bohuslav Halfar***]

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[54] *Ibid.*

Alexander J. Bělohlávek

Interpretation of International Agreements on Social Security from the Perspective of "Relocation", "Temporary Residence" and "Permanent Residence"

Judgment of the Supreme Administrative Court of the Czech Republic (*Nejvyšší správní soud České republiky*) [NSS], File No. 6 Ads 56/2009-52 of 20 May 2010 (*A.A.S.*, Citizen of Russian Federation Residing on a Long-term Basis in the Czech Republic (claimant) v. *Czech Social Security Administration (Česká správa sociálního zabezpečení)* (respondent)):[1]

Key words:
long-term residence | permanent residence | alien | domicile | retirement pension | European Social Charter | habitual residence | pension insurance | relocation | international agreement | purpose of stay | dynamic interpretation | historical interpretation | usual meaning | social security

Abbreviations:
CZE - Czech Republic
EEC - European Economic Community
MZV - Ministry of Foreign Affairs of the Czech Republic
NS - Supreme Court of the Czech Republic
NSS - Supreme Administrative Court of the Czech Republic
Coll. - Collection of Laws of the Czech Republic
Coll. of Int. Treaties - Collection of International Treaties of the Czech Republic

States Involved:
[**CZE**] - [Czech Republic];
[**RF**] - [Russian Federation].

[1] The electronic version of the decision is available at: http://www.nssoud.cz (accessed on September 25, 2010). The court adjudicated on a cassation complaint lodged by the respondent, the Czech Social Security Administration in Prague (*Česká správa sociálního zabezpečení v Praze*), against the judgment of the Regional Court in Ústí nad Labem (*Krajský soud v Ústí nad Labem*), File No. 15 CAd 25/2008-24 of 26 February 2009.

Laws and Regulations Applied:[2]

- **Agreement on Social Security between Czechoslovak Republic and Union of Soviet Socialist Republics of 2 December 1959**:[3] Article 2, Article 6, Article 7(1) and (3), Article II of Protocol to Agreement.
- Agreement on Social Security between Czechoslovak Republic and German Democratic Republic of 1956[4].
- Agreement on Social Security between Czechoslovak Republic and Bulgaria of 1957[5].
- Agreement on Social Security between Czechoslovak Republic and Romania of 1957[6].
- European Social Charter (Original)[7] and European Social Charter (Revised).
- **Charter of Fundamental Rights and Freedoms: Article 5, Article 14(4) and Article 30(1).**
- Regulation of European Parliament and of Council (EC) No. 883/04: Article 1(j) and (k)[8].
- Council Regulation (EEC) No. 1408/71 on Application of Social Security Schemes to Persons Moving within Community: Article 1(h) and (i)[9].
- Council Regulation (EC) No. 1346/2000 on insolvency proceedings[10].
- Resolution (72)1 Adopted by Committee of Ministers on 18 January 1972[11].

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[2] The laws indicated in bold letters were directly considered in the judgment. The other laws mentioned in this annotation were mainly used for comparison in the reasons of the NSS judgment.

[3] The Agreement was promulgated under No. 116/1960 Coll. The Agreement was denounced by the Czech Republic and ceased to apply on 31 December 2008 – see Announcement of the MZV promulgated under No. 87/2008 Coll. of Int. Treaties. The Agreement replaced the preceding regulation of international origin applicable in relations between the two states (Convention No. 48 of the International Labour Organization of 1935).

[4] Only for comparison; this law itself was not applied in the annotated NSS decision.

[5] *Ibid.*

[6] *Ibid.*

[7] Ratified by the Czech Republic. See Announcement No. 14/2000 Coll. of Int. Treaties of the Ministry of Foreign Affairs (*Ministerstvo zahraničních věcí*) regarding the European Social Charter adopted on the platform of the Council of Europe in Turin on 18 October 1961. The European Social Charter entered into force on 26 February 1965; for the Czech Republic, it entered into force on 3 December 1999.

[8] Only for comparison; this law itself was not applied in the annotated NSS decision.

[9] *Ibid.*

[10] Only cited in the author's notes in the final part of the annotation for comparison; this law itself was not applied in the annotated NSS decision.

[11] Resolution (72)1 adopted by the Committee of Ministers, recommendation for the standardisation of the legal concepts of [...] "Wohnsitz" (*domicile*) and "Aufenthalt" (*residence*) (Strasbourg 1972), was adopted in English (i.e. the original

- Agreement between Czechoslovak Republic and Union of Soviet Socialist Republics on Transcarpathian Ukraine of 29 June 1945, Promulgated under No. 186/1946 Coll.[12]
- Agreement between Czechoslovak Republic and Union of Soviet Socialist Republics Regulating Right of Option and Mutual Relocation of Czech and Slovak Nationals Living in Former Volhynia Province in USSR of 12 April 1946[13].
- Agreement between Czechoslovak Republic and France on Social Security, Promulgated under No. 215/1949 Coll.: Section 2[14].
- Agreement between Czech Republic and Luxembourg, Promulgated under No. 18/2002 Coll. of Int. Treaties: Article 14, Article 15[15].
- Agreement between Czech Republic and Republic of Macedonia on Social Security, Promulgated under No. 2/2007 Coll. of Int. Treaties: Article 1(1), para. (5)[16].
- Convention of International Labour Organization No. 48 of 1935[17].
- Council of Europe Convention No. 78 of 1978 – European Convention on Social Security: Article 1(I)[18].
- **Constitution of Czech Republic: Article 10**.
- **Vienna Convention on Law of Treaties (1969): Article 31(3)(b).**
- Government Regulation No. 168/1927 Coll. Implementing Customs Act[19].
- Act [of Czechoslovak Republic] No. 17/1947 Coll. on Recognition of Claims Granted by Foreign Social Security Authorities: Section 1.
- **Act [CR] No. 326/1999 Coll., As Amended, on Residence of Aliens: Section 66 et seq.**
- **Act [CR] No. 133/2000 Coll., As Amended, on Population Register: Section 10(1)[20].**

version is in English). A German translation (not exhaustive) has not been published. Fragments of the Resolution in German are nonetheless cited in: JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT EINSCHLIESSLICH DER GRUNDBEGRIFFE DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS, Tübingen: Mohr Siebeck 282, 283 (6th ed., 2006). This Resolution is not binding.

[12] Only for comparison; this law itself was not applied in the annotated NSS decision.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] The NSS took account of both the English and French versions.

[19] Only for comparison; this law itself was not applied in the annotated NSS decision; in the present case, regarding the use of *immigrant*.

[20] Title II – Permanent Residence of Citizens; Section 10 – (1) *Permanent residence is associated with the Czech citizen's address of residence entered in the population register as a reference connection (address place code) to reference information regarding the address in the basic register of territory identification, addresses and real property which the citizen usually associates with the place where his or her family, parents, place of residence or job are located. Every citizen is entitled to one place of permanent*

Rationes Decidendi:

14.01. Constitutional laws and regulations of the Czech Republic *ipso facto* guarantee to aliens neither the right to enter and reside in the territory of the country, nor the right to social security[21].

14.02. Treaty on social security between the Czechoslovak Republic and the Union of Soviet Socialist Republics of 2 December 1959[22] (hereinafter the "Agreement") guaranteed equal treatment to the citizens of the Contracting Parties (after the CSFR and the USSR ceased to exist), i.e. the Czech Republic and the Russian Federation, permanently residing in the territory of the other Contracting Party (unless provided otherwise in the *treaty* – its Article 2)[23].

14.03. *Relocation* must without major doubt generally be interpreted as a *transfer of the centre of all living conditions* from one of the Contracting States to the other[24].

14.04. Relocation under the Agreement means the waiver of one's hitherto place of residence in Russia and the transfer of the centre of all interests to the Czech Republic. Under Article II of the Protocol to the Agreement, however, such factual steps are subject to approval granted by both Contracting Parties. Considering the restrictions imposed on the migration of persons from the countries of the former socialist bloc, the purposes of which are unacceptable from today's perspective, it is possible to waive the requirement of approval to be granted by the state whose territory the particular person leaves intending to permanently change

residence only, located in a building identified, in compliance with a special law [...], *with a descriptive, evidential, or reference number, and designated for living purposes, accommodation or individual recreation (hereinafter a "building").* [...] However, when assessing the fulfilment of the condition for *relocation* and the establishment of a *permanent connection* to the territory of the state, the NSS rejected the importance of these laws regulating registers and records, and preferred the factual establishment of permanent connections to the territory of the particular state. Nonetheless, the NSS did not rule out the significance of such laws, at least supplemental, for the qualification of a particular person's personal status *vis-à-vis* the territory of a state.

[21] The NSS expressly invoked Article 14(4) of the Charter of Fundamental Rights and Freedoms, which makes the right to freely enter the country dependent on citizenship, and Article 30(1) of the Charter of Fundamental Rights and Freedoms, which guarantees the right to reasonable means of living when a person grows old or becomes unemployed, or when he or she loses their breadwinner, but *only to citizens* of the Czech Republic).

[22] The Agreement was promulgated under No. 116/1960 Coll. The Agreement was denounced by the Czech Republic and ceased to apply on 31 December 2008 – see Announcement of the MZV promulgated under No. 87/2008 Coll. of Int. Treaties.

[23] Article 2 of the Agreement (cit.) *Citizens of a Contracting Party permanently residing in the territory of the other Contracting Party are fully equal to the citizens of the other Contracting Party as concerns social security and employment relationships, unless this Agreement provides otherwise.*

[24] Compared by the NSS to "relocation" employed in the Agreement between the Czechoslovak Republic and France on social security (No. 215/1949 Coll., Section 2), as well as in the Agreement with Luxembourg (No. 18/2002 Coll. of Int. Treaties, Article 14, Article 15).

his or her status. However, the requirement of approval to be granted by the state into which the person immigrates and into which he or she intends to relocate cannot be waived; this requirement traditionally serves a number of other security and other purposes and, as concerns social security, it also prevents the misuse of benefits provided under social security agreements.

14.05. Relocation under the Agreement takes effect no earlier than on the day the approval of the relocation is granted under Article II of the Protocol to the Agreement; a permanent residence permit under Section 66 et seq. of Act No. 326/1999 Coll., on the residence of aliens in the territory of the Czech Republic, must be interpreted as constituting such approval[25].

[25] Act No. 326/1999 Coll., as subsequently amended, on the residence of aliens in the territory of the Czech Republic: Permanent Residence Permit:

Section 66 – (1) *Aliens who meet the following criteria are eligible to receive a permanent residence permit without the condition of a previous continuous stay in the territory:* a) *an alien who applies for this permit for humanitarian reasons, specifically:* 1. *if he/she is a spouse of a refugee and the marriage was solemnised before the refugee entered the territory;* 2. *is a minor child of a refugee or a child that is dependent on the refugee for care if he/she does not apply for asylum; or* 3. *is a former citizen of the Czech Republic;* b) *an alien who applies for the permit for other reasons that are worthy of consideration;* c) *at the alien's request, if the residence of this alien is in the Czech Republic's interest; or* d) *an alien who applies for this permit as the minor child or dependent adult child of an alien who resides in the territory on the basis of a permanent residence permit, if the reason for the application is the reunification of these aliens.* (2) *In addition, a permanent residence permit will be granted at the request of an alien whose previous permanent residence in the territory was cancelled due to the reasons specified in Section 77 (1)(c) or (d), unless 3 years or more have passed since the decision became final and enforceable.*

Section 67 – (1) *A permanent residence permit will be granted after 4 years of continuous residence in the territory to an alien who applies for such permit and who is residing in the territory on a temporary residence permit after the end of proceedings for granting international protection, provided the proceedings for granting international protection, including cassation complaint proceedings (if any), have been ongoing in the past two years or more.* (2) *An application for a permanent residence permit will be granted if the alien is (a) under 18 years of age, (b) unable to take care of himself/herself due to his/her long-term poor health, or (c) alone and over 65 years of age.* (3) *Subject to the fulfilment of the conditions specified in Subsection (1), the application for a permanent residence permit may also be granted if the alien (a) is a parent of the alien specified in Subsection (2)(a) or (b),* (b) *was awarded custody of the alien specified in Subsection (2)(a) or (b) by a decision of the competent authority, or* (c) *is another direct relative, ascendant or descendant, of the alien specified in Subsection (2) on whose personal care the alien specified in Subsection (2) is dependent.* (4) *Subject to the fulfilment of the conditions specified in Subsection (1), the application may also be submitted by an alien who is applying for the permit for other reasons worthy of special consideration.* (5) *The application must be submitted to the Ministry no later than 2 months after the proceedings for granting international protection were terminated with final force and effect.* (6) *The alien specified in Subsection (3) can only be granted the permanent residence permit if such permit was granted to the alien specified in Subsection (2).* (4) *The condition of continuous residence in the territory can be waived for reasons worthy of special consideration, especially if the eligible alien is a person under the age of 15 or if the poor health of the applicant occurred during the applicant's stay in the territory.* (8) *The condition of submitting the application no later than 2 months after the*

14.06. The fact that social (pension) security benefits are no longer paid out in the country from which the citizen has emigrated is not relevant for the determination of whether the emigration constitutes a permanent change of the person's residence, i.e. permanent relocation, which would allow the person to make a claim for pension security from the state of relocation under the applicable international agreement.

14.07. Traditional methods of interpretation of international treaties as instruments of public international law require that the true intentions of the parties be ascertained, i.e. the meaning of the treaty at the moment of conclusion (historical interpretation). It is an interpretation in terms of the good faith of the Contracting Parties.

14.08. International law cannot, as a rule, presume a limitation of sovereignty (in terms of relative sovereignty, i.e. not being subject to the will of another country).

14.09. The fact that the drafting of the international agreement took several decades supports the argument that the agreement reflects the agreed practice of the Contracting Parties (see Article 31(3)(b) of the Vienna Convention on the Law of Treaties).

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proceedings for granting international protection were terminated with final force and effect can be waived in respect of an alien specified in Subsection (3) if the proceedings regarding his or her application for granting international protection were terminated earlier than the proceedings regarding the application for granting international protection submitted by the alien specified in Subsection (2).
Section 68 – (1) *A permanent residence permit will be granted after 5 years of continuous residence in the territory at the alien's request.* (2) *The period of continuous residence as specified in Subsection (1) includes any period of residence in the territory on the basis of a Visa for a stay longer than 90 days, a long-term residence permit, or the period of residence on the basis of a residence document issued under a special law 2), 3a), unless the special law already applies to the alien. This period does not include any periods during which the alien resided in the territory on the basis of being assigned to the territory by a foreign employer, legal entity, or natural person; nor does this period include any periods during which the alien resided in the territory for the purpose of seasonal employment or during which the alien helped with household chores in exchange for food, accommodation and pocket money to cover his or her basic social, cultural or educational needs; any time spent in the territory for the purpose of studies is counted at a weight of one half.* (3) *The period of continuous residence under Subsection (1) also includes any periods during which the alien was not present in the territory, unless any such individual period exceeded 6 continuous months and unless the combined period exceeded 10 months, and also includes any periods during which the alien was not present in the territory due to the fact that the alien was sent to work abroad and this period did not exceed 12 continuous months. Continuous residence is also considered as having been maintained if the alien is not present in the territory for a period that does not exceed 12 continuous months due to serious reasons, specifically pregnancy and childbirth, critical illness, studies, or professional training; this period is not included in the period of residence as provided for in Subsection (1).* (4) *An application for a permanent residence permit can also be submitted by an alien who, at the time the conditions provided for in the preceding subsections are met, is residing outside of the territory. If the validity of the alien's long-term residence permit expires at a time when the alien is not present in the territory, the alien is required to submit the application within 6 months after the validity of the permit expires.*

14.10. Changes in the political and social situation [of a substantial nature and within the last twenty years] in the Contracting States (in the present case, the *Czech Republic* and the *Russian Federation*) prohibit the application of the so-called dynamic interpretation, if such changes have in both Contracting States resulted in the international agreement (*Agreement*) no longer being sustainable, and consequently in the termination of the agreement by denunciation[26], and if the denounced international agreement is neither replaced with any new act of international law, nor is any such instrument under negotiation between the two countries (Contracting Parties). Considering these circumstances, the interpretation cannot be based on those grounds which consequently resulted in the denunciation of the agreement, i.e. the overall concept of the Agreement based on territoriality, on the assumption of any and all financial burdens by the country of permanent residence, without any economic equivalence, and on such calculation of pensions which turns a completely blind eye to the social reality in the Contracting States, and which often treats aliens incomparably better than the citizens of the Czech Republic[27].

14.11. If the international agreement (in the present case, the Agreement) offers no definition of the concepts it employs, the interpretation of "*relocation*" and "*permanent residence*" ought to focus on the usual meaning of said concepts in the laws and regulations of the Czech Republic; we must not, however, dismiss the meaning attributed to these concepts in international agreements of a certain category (in the present case, social security agreements).

14.12. The entry and residence of an alien in the territory of a state (in the present case, the Czech Republic) has always been subject to detailed regulation[28].

[26] The Agreement was denounced by the Czech Republic.

[27] The NSS invoked, *inter alia*, the explanatory report regarding the denunciation of the Agreement presented to the Chamber of Deputies of the Parliament of the Czech Republic as the parliamentary Document No. 378.5, the electronic version is available at: http://www.psp.cz (accessed on September 25, 2010).

[28] In their reasons, the NSS also analyses in great detail the evolution of the permit regime, introduced by a detailed regulation incorporated in Act No. 52/1949 Coll., on population reporting and on permitting residence of aliens. The latter law stipulated that the permit would be granted for no more than 2 years.

After Act No. 68/1965 Coll., on the residence of aliens in the territory of the Czechoslovak Socialist Republic, became applicable, the term of validity of the permit was not defined under the law; the law only stipulated that the validity of the permit could be prolonged (Section 2(2)).

It was Act No. 123/1992 Coll. that classified, for the first time, the residence of aliens in the territory of the Czech Republic into the following categories (•) short-term residence (•) long-term residence: for a period of time necessary to fulfil the purpose thereof, but no more than one year (Section 6), and (•) permanent residence: the validity of the certificate (card) could not exceed five years.

Act No. 326/1999 Coll., on the residence of aliens in the territory of the Czech Republic distinguishes between (•) temporary stay, also granted to the holder of a

14.13. Since Act No. 123/1992 Coll. became applicable, so-called long-term residence in the territory of the Czech Republic within the meaning of a permit regime is conditional upon a specific and clearly defined purpose (employment, study, family reunion, protection against human trafficking, scientific research, etc.). It is therefore not possible, on the one hand, for aliens to declare that they *enter the Czech Republic for a specific and clearly defined purpose (for instance, work – employment, such as in the present case) for a limited period of time,* and on the other hand, to conclude that in that period of time they have already permanently transferred the centre of all their personal, social and economic interests to the territory of the Czech Republic.

14.14. Relocation means that the person's previous permanent residence ceases to exist and a new permanent residence is established in the territory of another country; only one [permanent] residence of such quality may exist at any one time.

14.15. If the alien has not obtained the required consent with his or her permanent residence in the territory of the Czech Republic, he or she cannot base the centre of all of his or her interests[29] in this country for an indefinite period of time, i.e. permanently.

14.16. Consent with the relocation may be granted without any preceding uninterrupted stay in the territory, or after a certain period of uninterrupted stay. The NSS is of the opinion that the permanent residence permit constitutes the consent of a Contracting Party with relocation required under the Agreement (the Protocol to the Agreement). Under the laws applicable in the territory of the Czech Republic, no other authority is authorised to grant consent with the residence of a relocated pensioner. Such consent, the function of which is entirely logical and necessary for the country that assumes the costs of the relocation, must therefore be identified with the act whereby a Czech governmental authority grants the alien's request for permission to reside in the territory of the Czech Republic permanently and without a determination of the purpose of

long-term residence permit, for which residence is dependent on a specific purpose, and (•) permanent residence, which grants the alien the right to reside in the territory on the basis of the permanent residence (Section 65); subject to the fulfilment of the conditions specified under the law, this permit can be granted even if the condition of a previous continuous stay in the territory is not satisfied (Section 66), or after four years of residence (Section 67), or after 5 years of continuous residence in the territory (Section 68 of the statute), and the period of residence includes the period of the long-term residence permit. The Ministry of Interior (*Ministerstvo vnitra*) will cancel the validity of a permanent residence permit if the alien resided or has resided outside of the territory for a continuous period of more than 6 years (Section 77(1)(d) of the statute). The residence permit certificate (card) is issued with a validity period of 10 years, which can be repeatedly extended (Section 79 of the statute).

[29] Must be distinguished from the centre of main interests of a debtor within the meaning of Article 3 of Council Regulation (EC) No. 1346/2000 on insolvency proceedings.

stay; the consent cannot be granted by any other authority, because the alien's entry into the territory of the country is always associated with security, public policy and other criteria.

14.17. The long-established administrative practice on the existence of the *Agreement* has always been based on the connection between relocation and the permanent residence permit.

14.18. Interpretation of an international treaty must also take account of the practice in the application of the treaty that established the agreement of the parties regarding the interpretation thereof.

14.19. Since the Agreement entered into force, a residence permit (or permanent residence permit under the currently applicable Act on the Residence of Aliens in the territory of the Czech Republic) could always be granted in the territory of the Czech Republic immediately after an application was lodged. The only difference lies in the fact that in the 1960s, the administrative authority was given absolute discretion with respect to whether or not to grant a permit, whereas the rule of law requires that such discretion be subject to certain statutory criteria. But the principle has always been the same. We cannot argue that in the 1960s, when the Agreement was concluded, residence permits could only be granted for a limited period of time; comparing this regulation to the current long-term residence rules is incorrect.

14.20. As concerns non-contributory benefits (other than pension benefits) regulated under standard coordination social security agreements based on proportionality, it is quite correct to examine the nature of residence from the material perspective, without accentuating the [textual] designation used for a particular specific type of qualified residence or the connections to a particular country[30]. It is necessary to take account of the material facticity in respect of these agreements.

14.21. As opposed to permanent residence, long-term residence in the Czech Republic is strictly connected to a specific purpose.

[30] The Supreme Administrative Court invoked, in particular (•) Convention of Council of Europe No. 78 of 1978, European Convention on Social Security, which introduces the term "residence" as meaning "ordinary residence", and "temporary residence" as meaning "temporary stay" (•) Convention of the International Labour Organization No. 157 of 1982 on the introduction of an international system for the maintenance of social security rights (regime analogous to Council of Europe Convention No. 78) (•) Resolution (72)1 adopted by the Committee of Ministers on 18 January 1972, which employs the concepts of "residence" and "domicile", and which recommended the member states of the Council of Europe to be guided by these definitions in their laws and regulations, the electronic version is available at: http://www.coe.int (accessed on September 25, 2010) (•) Council Regulation EEC 1408/71 on the application of social security schemes to persons moving within the Community, which employs the concepts of "*residence*" as meaning "habitual residence", and "stay" as meaning "temporary residence", without providing any definition thereof (•) Regulation of the European Parliament and of the Council (EC) No. 883/04.

14.22. Even permanent settlement in the territory of a state (in the present case, the Czech Republic) need not be a definitive solution for an alien, both for subjective and objective reasons. A certain measure of uncertainty in the stability of relationships thus defined is obvious, but in this regard it is similar to the situation of citizens of the Czech Republic (naturally, with one important difference; a citizen is protected by the constitutional guarantee prohibiting his or her involuntary emigration, whereas an alien can, under certain circumstances stipulated under the law, be extradited (Article 14(4), (5) of the Charter of Fundamental Rights and Freedoms)).

14.23. The European Social Charter[31] and the revised European Social Charter[32] are not identical international instruments, but even if they were (for instance, for the purposes of future interpretation, if necessary), we cannot, in this case, draw any conclusions regarding the previously applicable rules of territoriality[33] (in the present case, under the Agreement), i.e. we cannot establish any prerequisites for a claim for social security and determine *relocation*, because European coordination rules are based on different foundations and principles.

[**Factual and Legal Circumstances**]

14.24. The claimant (respondent in the NSS proceedings), a citizen of the Russian Federation, lodged an application for a retirement pension with the respondent (in the position of complainant) on 26 November 2007. In the meantime, the validity of her university education in the Russian Federation for the Czech Republic was recognised. At the beginning of the claimant's residence in the territory of the Czech Republic[34], she still received pension from the Russian Federation Pension Fund. The payer in Russia discontinued payments of the pension at the request of the claimant on 1 November 2007 in connection with her "departure for the purpose of permanent residence in the Czech Republic", despite the fact that the pension was awarded for life (decision of 5 January 1993).

[31] The original version of the European Social Charter was ratified by the Czech Republic. See No. 14/2000 Coll. of Int. Treaties.

[32] Ratified by the Russian Federation as of 1 December 2009. However, given its temporal scope, it would not apply to the factual relationship in the present case.

[33] See the explanatory report to the Agreement submitted as Document 338 to the National Assembly of the Czechoslovak Republic in its 2nd term of office, the electronic version is available at: http://www.psp.cz/eknih/1954ns/tisky/t0388_00.htm (accessed on September 25, 2010). The explanatory report states that the Agreement constitutes an agreement based on the principle of territoriality, i.e. the benefits are to be provided by the state in which the beneficiary lives, subject to the conditions and living conditions prevailing in that country. The same principle was agreed with other countries of the former socialist bloc as well, that is with the German Democratic Republic (1956), Romania (1957) and Bulgaria (1957).

[34] The claimant was granted a long-term residence permit in the territory of the Czech Republic from the 1st quarter of 2006 to the 1st quarter of 2008, and from the 1st quarter of 2008 to the 1st quarter of 2010, and argued that she had de facto relocated to the Czech Republic.

The Consulate General of the Russian Federation issued confirmation that the claimant was permanently residing in the Czech Republic. The claimant was thereby deprived of any material pension security. However, under the laws of the Czech Republic, the claimant only had the status of a *long-term resident* for employment purposes. The claimant lodged an application for retirement pension in the Czech Republic (with the complainant); however, the application was rejected in the first quarter of 2008. The negative decision was based on the complainant's argument that the claimant was not eligible under the Agreement, because she had only been granted a long-term residence permit, not a permanent residence permit. The claimant appealed the decision to the regional court. The regional court set aside the appealed decision of the complainant (social security administration) and referred the case for further proceedings. The complainant lodged a cassation complaint against the decision with the NSS. The NSS granted the cassation complaint, set aside the judgment of the regional court and referred the case for further proceedings; however, the NSS expressed certain opinions, articulated as the *rationes decidendi* in this annotation above, and the regional court which is about to hear the case again[35] is also bound by these decisions.

14.25. The NSS focused on the examination of the conditions stipulated for the award and payment of a pension from pension insurance to a citizen of the Russian Federation (claimant in the proceedings before the regional court), because the court whose decision had been challenged by the cassation complaint argued *that it was not possible to infer that a particular alien had not relocated to the Czech Republic and had not been permanently residing in the territory of this country from the fact that the alien was granted a long-term residence permit under the act on the residence of aliens in the territory of the Czech Republic. If an alien obtains a permanent residence permit, the regional court has no doubt that we can conclude that he or she relocated to the Czech Republic and resides here permanently.* The dispute therefore centred on the issue of whether the established (and ascertainable) facts of the case can justify the legal conclusion that the claimant *relocated to the Czech Republic and has been permanently residing in the territory of this country.* The NSS therefore concentrated on the in*terpretation of "relocation", "permanent residence"* and "*long-term residence*", within the meaning of these concepts incorporated in an international agreement, and in the context of the interpretation of national law[36].

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[35] According to the available information, the new hearing in the regional court had not been terminated by the time this manuscript was completed.

[36] See for example I ALEXANDER J. BĚLOHLÁVEK, ŘÍMSKÁ ÚMLUVA / NAŘÍZENÍ ŘÍM I. KOMENTÁŘ (*Rome Convention / Rome I Regulation. Commentary*), Praha: C. H. Beck (Czech ed., 2009) and I ALEXANDER J. BĚLOHLÁVEK, ROME CONVENTION / ROME I REGULATION. COMMENTARY, New York: Juris Publishing (English ed., 2010) in both citing the passage on the Commentary on Article 19 of Regulation of European Parlia-

14.26. In their cassation complaint the complainant argued that the legal opinion of the regional court conflicts with Article 6 of the *Agreement*, which *is based on the territoriality principle*, i.e. that the decisive criterion for awarding a pension under the Czech pension insurance is the existence of the claimant's permanent residence in the territory of the Czech Republic at the moment of applying for the pension. The complainant maintains that a citizen of the Russian Federation only "permanently resides" (in terms of the Agreement) in the territory of the Czech Republic if he or she was awarded permanent residence within the meaning of the Act on the Residence of Aliens[37] (hereinafter the "Aliens Residence Act") by a decision of the competent governmental authority of the Czech Republic. The claimant, however, had only been allowed long-term (time limited) residence for employment purposes when she applied for the pension. The complainant is of the opinion that the Czech Republic is only the sole centre of interests with respect to persons with permanent residence in the territory of the Czech Republic. The complainant does not consider the claimant's departure for the purpose of permanent residence in the Czech Republic as constituting permanent residence of an alien in the Czech Republic, although the material of the Czech Ministry of Interior (*Ministerstvo vnitra ČR*) of June 2003[38] stipulates that the conditions for the payment of retirement pensions applicable to aliens who have lawfully settled in the country on a long-term basis are the same as those applicable to citizens of the Czech Republic.

ment and of Council (EC) 593/2008 (the 'Rome I Regulation') of 17 June 2008, on the Law Applicable to Contractual Obligations.

[37] Act No. 326/1999 Coll., as amended, on the residence of aliens in the territory of the Czech Republic and amending other laws.

[38] Ministry of Interior of the Czech Republic, Analýza situace a postavení cizinců dlouhodobě žijících na území České republiky (*Analysis of Situation and of Status of Aliens Living in Territory of Czech Republic on Long-Term Basis*) (June 2003). This material employs the concept of "lawful long-term settlement" as a designation of permanent residence of aliens, because the act on the residence of aliens fails to provide any definition of permanent residence, as opposed to Section 10(1) of the act on population register. The Agreement was entered into in 1959, when no definition of permanent residence existed under the act on the residence of aliens, and the time of conclusion of the Agreement must not be held against the claimant and must not curtail the claimant's statutory rights under Czech laws and regulations. In their judgment, the NSS regarded the material as a *working paper* drafted for the purpose of the integration of aliens, and therefore as non-binding. However, the NSS identified with the general aspect of the statement that aliens who have lawfully settled in the territory of the country on a long-term basis are to receive pensions, just as Czech citizens do. Nevertheless, the NSS added that this approach shall be adopted if the claim for the pension actually did accrue under the national laws and regulations (*any person participating in pension insurance in the territory of the Czech Republic for the prescribed period of time will become eligible for retirement pension after completing 25 years of coverage and attaining the retirement age before 2010*), or if such approach is prescribed under an international agreement binding on the Czech Republic.

[Other Legal Conclusions of NSS (Supplementing *Rationes Decidendi* Articulated in the Introduction to the Annotation)]

14.27. The *Agreement* introduced a regime according to which social security was to be implemented by the authorities of the Contracting Party in the territory of which the citizen was living in compliance with the laws of that country (Article 3). Pensions are awarded and paid out by the authorities of the Contracting Party in the territory of which the citizens eligible for pension *permanently reside* at the moment of applying for the pension; ***pensions are awarded under the conditions and in the amount stipulated by the laws of that Contracting Party*** (Article 6). Pursuant to Article 7(2) of the *Agreement*, the authority of the Contracting Party to the territory of which the pensioner relocates awards a pension according to the laws of that Contracting Party, without any review, provided a pension of the same category exists in both countries. If the authorities of the other Contracting Party had been paying out any pension before the relocation, such payments will cease after the relocation (Article 7(1) of the Agreement)[39]. *The Protocol to the Agreement* stipulates that Articles 7 and 8 of the Agreement will only apply if the citizen relocated or returned permanently from the territory of one Contracting Party to the territory of the other Contracting Party with the agreement of both Contracting Parties.

14.28. The NSS was aware of the persisting interpretational problems associated with "residence", "habitual residence" and "domicile" in connection with the conflict of laws rules in which these concepts are employed as connecting factors. The NSS concluded that social security agreements do not adopt the definition of a certain category of residence in the territory of a state as incorporated in the laws regulating the awarding of such status (usually within the competence of security authorities, immigration police, etc.) or laws regulating registers and records[40]. For

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[39] However, the cessation of payments was not considered relevant by the NSS for the purposes of the examination of the status of the person in the territory of the other country. On the contrary, the cessation of the benefits in this case does not influence the conclusion as to whether the person accrued any claim for social security in the state in which the person *settled*, whether under the regime of the applicable international agreement or outside that regime, under general laws and regulations.

[40] See also, for example, Pavel Mates; Miroslava Matoušová, *Právní úprava poskytování údajů z informačních systémů ve veřejné správě (Law Regulating Provision of Information from Information Systems of Public Administration)*, 5 (3) PRÁVO A PODNIKÁNÍ 13-18 (1996).

See also, for example, the Opinion of the NS, File No. 30 Cdo 444/2004 of 2 June 2005, in which the Court expressed its opinion on a problem similar to the issue analysed in the annotated judgment of the NSS. However, the NS analysed the issue from the perspective of the importance of "residence" for private-law relationships. (1) *The contents of the concept of "residence" as employed in Act [CR] No. 99/1963 Coll., the Code of Civil Procedure, or Act [CZE] No. 97/1963 Coll., the Act on Private International Law and Procedure, is not identical to the contents of the concept of "permanent residence"*

the purposes of social security (and not only that, as the author of this annotation would add), we need to focus on the actual situation[41] and the broader scope of circumstances.

[**Further Notes by the Author of the Annotations**]

14.29. The judgment is remarkable for the scope of resources of international (or Community) origin of which it takes account, at least for the purposes of comparison; it also concentrates on the difference between domicile and habitual residence, and the significance of the subjective and the objective element of the connection to a particular territory. By contrast to the prevailing practice in Czech courts, the judgment offers a detailed comparison with the national laws of other countries.

14.30. The judgment also repeatedly refers to a "centre of all living conditions"[42], or "centre of interests", etc. In the circumstances of the present case, though, i.e. as concerns the general personal status of a natural person or in connection with the specific branch of social security, these concepts lack any qualified meaning or legal definition. They are therefore an expression of the general dislocation of a natural person's connections to a place in a particular state in which the person intends to reside and establish all of his or her personal and professional connections. However, we must strictly distinguish between that concept and, for instance, the *centre of the debtor's main interests* within the meaning of jurisdiction laws in insolvency proceedings with international elements in EU law, as introduced by Article 3 of Council Regulation (EC) No. 1346/2000, on insolvency proceedings[43]. That is a *sui generis* concept introduced by said Regulation in so-called *cross-border insolvency* in EU law. One of the differences distinguishing the "centre of main interests" from the general

employed in administrative laws regulating registration of population. (2) *The residence of a natural person means the municipality, or municipal district, in which the person lives with the intention of staying at that address permanently. Residence is especially associated with a place in which the natural person has his or her apartment, family, or at which he or she works, provided he or she also lives there.* The latter decision [NS] is also cited in: MONIKA PAUKNEROVÁ, EVROPSKÉ MEZINÁRODNÍ PRÁVO SOUKROMÉ (*European Private International Law*), Praha: C. H. Beck 136, marg. 207 (2008).

[41] See ECJ Case C-452/93 of 15 September 1994, *Magdalena Fernández v. Commission* [1994] ECR I-4295.

[42] See also, for instance, the judgment of the English Court of Appeal of 1983 *("R" v. Barnet London Borough Council, ex p. Nilish Shah)*, [1983] 2 AC 309, according to which *"Habitual' or 'ordinary' residence refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.* For an analogous decision by an English judge, see also the judgment in *Kapur v. Kapur* [1984] FLR 920.

[43] See ALEXANDER J. BĚLOHLÁVEK, EVROPSKÉ A MEZINÁRODNÍ INSOLVENČNÍ PRÁVO, KOMENTÁŘ (*European and International Law on Insolvency. Commentary*), Praha: C. H. Beck (2008), here the commentary on Article 3 of Council Regulation (EC) No. 1346/2000.

definition of a natural person's main living and other connections is, for instance, the fact that such concept, in terms of European insolvency law, applies to legal persons as well, takes special account of economic relations and accentuates (according to the existing case law) the way such economic relations are perceived and viewed by third parties, i.e. the debtor's creditors[44].

14.31. We have to point out that the logical structure, as well as the reasons for the decision, contributes to it being a very modern and highly professional decision, with balanced reasons. The reasons take account of both domestic resources and resources of international origin, which were very well chosen in their historical connotations. The court articulated a politically very careful, yet pertinent and fitting description of the correct approach to the interpretation of international treaties after the political and social changes in the countries of Central and Eastern Europe in the late 1980s and early 1990s, which resulted in radical changes both inside these countries and in the mutual relations between these countries. This international political and international legal reality was masterfully exposed by the court on the platform of the traditional foundations of the international law of treaties, as primarily expressed in the Vienna Convention on the Law of Treaties (1969). This decision definitely deserves attention, even international attention.

[44] See Alexander J. Belohlavek, *Centre of Main Interest (COMI) and Jurisdiction of National Courts in Insolvency Matters (Insolvency Status)*, 50 (2) International Journal of Law and Management 53-86 (2008).

Conditions for Carrier's Liability in International Carriage of Goods by Road under the CMR Convention and under National Laws of Czech Republic

Judgment of the Supreme Court of the Czech Republic (*Nejvyšší soud České republiky*), File No. 32 Cdo 1658/2009 of 20 April 2010:[1]

Key words:
international carriage of goods | national laws | liability for damage | harm | CMR Convention | damage | consignee

Abbreviations:
NS - Supreme Court of the Czech Republic

Laws and Regulations Applied:

- CMR Convention:[2] Article 17; Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended: Section 756[3].

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[1] The annotation was published in and the *rationes decidendi* were adopted from: Pavel Simon, *Nejvyšší soud České republiky: Předpoklady odpovědnosti dopravce v mezinárodní silniční nákladní dopravě. Odpovědnost za škodu v důsledku ztráty zásilky v mezinárodní silniční nákladní dopravě. (Supreme Court of the Czech Republic: Conditions for Carrier's Liability in International Carriage of Goods by Road. Liability for Damage Resulting from Loss of Consignment in International Carriage of Goods by Road)*, 18 (17) PRÁVNÍ ROZHLEDY 638-642 (2010).

[2] The Convention on Contracts for the International Carriage of Goods by Road (CMR) of 19 May 1956. Czechoslovakia ratified the Convention with a reservation to Article 47, and the CMR Convention entered into force for Czechoslovakia on 3 December 1974, and for the Czech Republic (as a result of succession) on 1 January 1993. Promulgated as an Annex to Minister of Foreign Affairs (*Ministr zahraničních věcí*) Decree No. 11/1975 Coll. of 27 November 1974, as amended by the Protocol to the Convention to which the Czech Republic acceded on 17 May 2006. The Protocol entered into force for the Czech Republic on 27 September 2006, and is published in the Annex to Announcement of the Ministry of Foreign Affairs of the Czech Republic (*Ministerstvo zahraničních věcí České republiky*) No. 108/2006 Coll. of Int. Treaties.

[3] (Cit.) Section 756 – *The provisions of this Code only apply if no international treaty binding on the Czech Republic and promulgated in the Collection of Laws stipulates otherwise.*

Other Related Laws:

- Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended: Sections 610 through 629[4], Act No. 40/1964 Coll., the Civil Code, as amended: Sections 420 through 450[5].

Rationes Decidendi:

15.01. Liability for damage to a consignment assumed by the carrier in the international carriage of goods by road is subject to comprehensive (exclusive) regulation under Article 17 et seq. of the CMR Convention, which takes precedence over any legal regulation incorporated in the Commercial Code; therefore, it cannot be supplemented or restricted by the application of national laws.

15.02. Liability for the loss of the consignment in the international carriage of goods by road is incurred as soon as the consignment is lost, as opposed to the general liability for damage, which requires that the entitled person suffers damage to his or her property. If the CMR Convention does not stipulate that the carrier's liability for damage to the consignment is conditional upon the entitled person (sender or consignee) suffering some harm, the occurrence of such harm cannot be construed as another condition for the carrier's liability under national laws.

[4] Czech law regulating contracts for the carriage of goods incorporated in the Commercial Code – national law. Here, see especially Sections 622 through 624, which read as follows (cit.) Section 622 – (1) *The carrier is liable for damage to the consignment from the moment it is taken over by the carrier until it is handed over to the consignee, unless the carrier could not avert the damage even when exercising all expert care and diligence.* (2) *However, the carrier is not liable for damage caused to the consignment if the carrier proves that it was caused by: (a) the consignor, the consignee, or the owner of the consignment; (b) a defect in the consignment or the natural properties of the consignment, including normal loss (wastage); or (c) defective packing, which the carrier pointed out to the consignor when taking over the consignment for carriage and, if a freight bill or a bill of lading was issued, the defect in the packing was recorded therein; if the carrier failed to point out the defective packing to the consignor, the carrier is only freed from liability for damage caused to the consignment due to the defect if the defect was undetectable when the consignment was taken over for carriage.* (3) *In the case of damage caused to the consignment under Subsection (2), the carrier must exercise expert care and diligence in order to minimise such damage.* (4) *The scope of liability under the preceding subsections can be extended by contract. Provisions in the contract that would limit the liability of the carrier stipulated under Subsections (1) through (3) are null and void.* Section 623 – (1) *The carrier must promptly notify the consignor of any damage that was caused to the consignment before it was delivered to the consignee. However, if the consignee has already acquired the right to receive the consignment, the carrier notifies the consignee. The carrier is liable for damage caused either to the consignor or to the consignee by a breach of this obligation.* (2) *If the consignment is in imminent danger of substantial damage and there is no time to seek the consignor's instructions, or if the consignor is in delay with his or her instructions, the carrier has the right to sell the consignment as appropriate on the consignor's account.* Section 624 – (1) *If the consignment is lost or destroyed, the carrier is obliged to pay the price that the consignment had at the time it was taken over by the carrier.* (2) *If the consignment is damaged or impaired, the carrier is obliged to pay the difference between the price of the consignment when it was taken over by the carrier and the price that the damaged or impaired consignment would have at that time.*

[5] Czech (general) law regulating liability for damage incorporated in the Civil Code – national law.

International Jurisdiction with Respect to Filing Lawsuit in Administrative Court Proceedings – Timely Filing of Lawsuit against Social Insurance (Social Security) Decision with Court (Authority) of EU Member State

1. **Judgment of the *Municipal Court in Prague* (*Czech Republic*) [*Městský soud v Praze* (*Česká republika*)], File No. 5 Ca 358/2006 of 4 November 2009:**[1]

Key words:
force majeure | *export refund* | *circumstances beyond the control of the exporter* | *failures of a third party* | *breach of the exporter's obligation* | *agricultural products* | *carrier* | *customs territory* | *exporter*

Abbreviations:
NSS – Supreme Administrative Court of the Czech Republic (Nejvyšší správní soud České republiky)

States Involved: Czech Republic. Reference to EU law.

Laws and Regulations Applied:

- **Commission Regulation No. 800/1999** establishing common detailed rules for the application of the system of export refunds on agricultural products.

[1] Decision published in: 4 SBÍRKA ROZHODNUTÍ NEJVYŠŠÍHO SPRÁVNÍHO SOUDU ČESKÉ REPUBLIKY (*Collection of Laws of Supreme Administrative Court of Czech Republic*), Praha: Wolters Kluwer Česká republika Ref. No. 2022 (2010). The *ratio decidendi were* adopted from: 16 (8) SOUDNÍ ROZHLEDY 309 (2010).

Rationes Decidendi:

16.01. The scope of "*circumstances beyond the control of the exporter*" under Article 49(3) of Commission Regulation No. 800/1999 establishing common detailed rules for the application of the system of export refunds on agricultural products exceeds the scope of "force majeure"[2].

16.02. The concept of "**circumstances beyond the control of the exporter**" under Article 49(3) of Commission Regulation No. 800/1999 also includes failures of a third party, for instance, a carrier (in the present case resulting in the breach of the exporter's obligation to submit, properly and on time, a document proving exit from the customs territory of the EU).

[2] Commission Regulation No. 800/1999 – TITLE IV PROCEDURE FOR PAYMENT OF REFUNDS – CHAPTER 1, General – Article 49 – [...] 3. Where the T5 control copy or, where appropriate, the national document proving exit from the customs territory of the Community is not returned to the office of departure or the central body within three months of issue owing to circumstances beyond the control of the exporter, the latter may submit to the competent agency a reasoned request that other documents be deemed equivalent. (•) The documents to be submitted in support of such requests shall include the following: (a) where the control copy or the national document has been issued by way of proof that the products have left the customs territory of the Community: – a copy or photocopy of the transport document, and – a document that shows that the product has been presented at a customs office in a third country, or one or more of the documents referred to in Article 16(1), (2) and (4). (•) The requirement covering the documents referred to in the second indent may be waived in the case of exports on which the refund does not exceed EUR 1,200; in such cases, however, the exporter shall submit proof of payment. In the case of exports to third countries that are signatories to the Convention on a Common Transit Procedure, return copy 5 of the common transit document, duly stamped by such countries, a photocopy thereof certified as a true copy, or a notification of exit from the customs office shall constitute supporting documents; (b) where Articles 36, 40 or 44 apply, confirmation by the customs office responsible for checking the destination in question that the conditions for the endorsement of the relevant T5 control copy by the said office have been fulfilled; or (c) where Article 36(1)(a) or 40 applies, the acceptance certificate provided for in Article 45(3)(c), and a document proving payment for the supplies for victualling. (•) For the purposes of this paragraph, a certificate of exit from the customs office to the effect that the T5 control copy has been duly presented and stating the serial number and the office of issue of the control copy and the date on which the product left the customs territory of the Community shall be equivalent to the T5 control copy. Paragraph 4 shall apply as regards the presentation of equivalent proof.

2. Judgment of the *Supreme Administrative Court of the Czech Republic* (*Nejvyšší správní soud České republiky*), File No. 6 Ads 116/2009 of 15 December 2009[3].

Key words:
administrative authority | self-employed person | employed person | moving within the Community | social insurance | social security | court

Abbreviations:
CZE – Czech Republic
EEC – European Economic Community
EU – European Union
Coll. – Collection of Laws of the Czech Republic
SŘS – Act [CR] No. 150/2002 Coll., as amended, **Code of Administrative Justice**

States Involved: Czech Republic. Reference to EU law.

Laws and Regulations Applied:[4]

- **SŘS**: Section 72(1).
- **Council Regulation (EEC) 1408/71** on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community [EU]: Article 86(1)[5].

[3] Decision published in: 4 Sbírka Rozhodnutí Nejvyššího Správního Soudu České Republiky (*Collection of Laws of Supreme Administrative Court of Czech Republic*), Praha: Wolters Kluwer Česká republika Ref. No. 2013 (2010). The *rationes decidendi* were adopted from: 16 (8) Soudní rozhledy 308 (2010).

[4] The laws indicated in bold letters were directly considered in the judgment. The other laws mentioned in this annotation were mainly used for comparison in the reasons of the NSS judgment.

[5] Only for comparison; this law itself was not applied in the annotated NSS decision.

Rationes Decidendi:

16.03. A social insurance lawsuit is filed on time if it is sent within the specified period to the court or the administrative authority whose decision is contested (Section 72(1) of the SŘS)[6], but also it if is sent within the specified period to a corresponding authority or tribunal of another Member State of the EU. This conclusion is based on Article 86 of Council Regulation (EEC) 1408/71[7] on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community [EU][8].

[6] SŘS (cit.) Section 72 – Time Period for Filing Lawsuit - (1) A lawsuit can be filed within two months after the plaintiff was served with a written copy of the decision or after the plaintiff was notified of the decision in any other manner stipulated by law, unless a special statute stipulates another time period. The lawsuit is filed on time if it is submitted within the stipulated time period to the administrative authority whose decision is contested.

[7] The law was repealed as of 1 May 2010.

[8] Council Regulation (EEC) 1408/71 (cit.) Article 86 – Claims, Declarations or Appeals Submitted to Authority, Institution or Tribunal of Member State Other than Competent State – Any claim, declaration or appeal that should have been submitted, in order to comply with the legislation of one Member State, within a specified period to an authority, institution or tribunal of that State shall be admissible if it is submitted within the same period to a corresponding authority, institution, or tribunal of another Member State. In such a case, the authority, institution, or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former State, either directly or through the competent authorities of the Member State concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second State shall be considered as the date of their submission to the competent authority, institution, or tribunal.

Sua Sponte Registration of Tax Non-resident and Free Movement of Services

Judgment of *Regional Court in Pilsen* (*Krajský soud v Plzni*), *Czech Republic*, File No. 57 Ca 48/2008 of 18 December 2009:[1]

Key words:
Slovak citizen | tax non-resident | free movement of services | obstacle to the free movement of services | registration, tax | registration, sua sponte | Tax Office | sole proprietor

Abbreviations:
SpDP - Act [of the Czech Republic] No. 337/1992 Coll., as amended, **on the Administration of Taxes and Fees**
TEC - Treaty establishing the European Communities
TFEU - Treaty on the Functioning of the European Union

States Involved: Czech Republic; Slovak Republic; Reference to EU law.

Laws and Regulations Applied:

- **SpDP**: Act [of the Czech Republic] No. 337/1992 Coll., as amended, **on the Administration of Taxes and Fees.**
- **TEC: Article 49** (before TFEU)[2].

[1] Decision published in: 5 Sbírka Rozhodnutí Nejvyššího správního soudu České republiky (*Collection of Laws of Supreme Administrative Court of the Czech Republic*), Praha: Wolters Kluwer Česká republika Ref. No. 2035 (2010). The *ratio decidendi* were adopted from: 16 (8) Soudní rozhledy (2010).
[2] Currently Article 56 of the TFEU.

Rationes Decidendi:

17.01. Registration of a tax non-resident (in the present case, a Slovak citizen working as a bricklayer – sole proprietor in the Czech Republic) by the Tax Office *sua sponte* under Section 33(14) of the SpDP[3] is not an obstacle to the free movement of services under Article 49 of the TEC (currently Article 56 of the TFEU).

[3] SpDP (cit.) Section 33 – Mandatory Registration of Taxpayers – [...] (14) If the tax payer fails to register or report himself/herself, the tax administrator registers the tax payer *sua sponte* without undue delay after the circumstances giving rise to the said obligation are established by the tax administrator [...].

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Book Reviews

Naděžda Rozehnalová
Contractual Obligations and Legal Status Thereof

Naděžda Rozehnalová, Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu). [***Contractual Obligations and Legal Status Thereof (with Special Regard for European Conflict of Laws Rules)***]. *Brno: Faculty of Law, Masaryk University, 2010, 272 pp.*[1], *ISBN: 978-80-210-5240-6.*

Professor Rozehnalová's work discusses highly topical issues. Such topicality is attributable in large part to the revolutionary changes in European conflict of laws rules in recent years, especially the transformation of the Rome Convention on the Law Applicable to Contractual Obligations of 1980 into a Community (now Union) act – the Rome I Regulation [on the law applicable to contractual obligations], which to some extent carries fundamental changes that affect the 26 (or 27) states.[2] In view of the nature of the theme and the significant crosscutting nature thereof, we can hardly speak of the "uniqueness of the subject of discussion". Nevertheless, the depth to which some of the issues are discussed, even those often avoided by world-renowned authors, is such that we can refer to a certain degree of uniqueness. This is mainly supported by (i) the work's considerable topicality, verging on urgency, and (ii) the regrettably relatively low level of awareness among professionals. Unfortunately, this low level of awareness even affects a number of EU Member States, not to mention non-Member States. This is because they are directly affected by the new contractual conflict of laws

1 Published in Czech. This publication is also mentioned in a separate part of this yearbook [CYIL, Vol. II] (in the bibliography). This monograph is the result of the Research Project "The European Context of Developments in Czech Law after 2004".

2 The Rome Convention is applied in 27 states; the Rome I Regulation, however, is not binding on Denmark.

rules whenever they enter the EU's common market, especially if disputes related to their contracts are heard by courts (or to some extent, by other bodies) in an EU Member State. Regarding this publication, I am impressed, for example, by Section II.1.1, as even erudite professionals are often unaware of the impact that independent interpretation can have. The interpretation of legal concepts in the EU for the purpose of identifying the applicable law in the case of a conflict needs to be carried out entirely independently of any law. This is often difficult for experienced practitioners to understand, and even judges frequently find it very difficult to identify the limits and guidelines for such interpretation, as they are generally held captive by the sturdy shackles of national law, with which they have worked throughout their lives. Autonomous interpretations within the EU, especially autonomous interpretations to determine applicable law, are also (and perhaps especially) carried out independently of the law that is (and for the needs of a particular dispute will be) regarded as governing, as well as applicable substantive legislation. Such autonomous application solely on the basis of EU law is necessary even in those cases in which the parties choose the applicable law, by agreement, in their contract. It may be noted that, to some extent, it is not entirely clear where the author of the work sees the difference between autonomous interpretation and autonomous qualification. For example, I believe that autonomous qualification does not merely entail the "creation of uniform autonomous concepts", as stated, for instance, in the title of Section II.1.1. That is not to say that, on the basis of the work, it can be implied in any way that its learned author does not see or is unable to express the difference. This difference is indeed expressed in numerous places throughout the publication. To be sure, the author discusses autonomous qualification in the abovementioned section. In my opinion, however, it is perhaps somewhat unfortunate that, just as autonomous interpretation is addressed in numerous places in a highly qualified, correct and fitting manner, there was a missed opportunity to grant equal importance to the significance of autonomous qualification. By this I mean that perhaps this difference and the significance of these two very important areas could have been emphasized even more pronouncedly, so that the reader's attention would have been drawn that much more to this difference. Then again, I concede and confirm that this subject has been submitted fully in keeping with the purpose of the publication and the expected readership. In any case, we can round off our evaluation from this perspective by observing that this theme is a very pressing issue, and has been conceived in a highly skilled and lucid form.

The interpretation of numerous concepts and areas is plainly based on the following didactic order: (i) a doctrinal introduction to the subject; (ii) case law (especially the case-law of the ECJ); and (iii) published views (foreign and domestic). This logical structure, which is doggedly adhered to essentially throughout the work, and which provides a fundamental logical thread, is testimony to the author's highly professional, and inherently consecutive approach. As a result of this approach, using an appropriate combination of interpretation and citation, the publication is useful for educational purposes, for academic purposes and for general legal practice.

The author, quite fittingly, has included an issue in Chapter II that may, at first glance, seem rather abstract and theoretical: the competence of the European Community, and within the meaning of the TFEU, the competence of the European Union. The author distinguishes between these two areas very adeptly; she is aware of the need for such a distinction in light of the historical context of the approval and adoption procedure for instruments of European law. Yet this very difficult distinction is served in a manner that in no way leaves the impression that it is purely academic discourse. On the contrary, in this form, it can be used by professionals in the broadest sense, i.e. especially for purposes of practical application, because of its *handy* and *understandable* context. This discourse has been included, absolutely correctly, in a discussion on the international element, as this is something that is unfortunately neglected by much of (domestic and foreign) legal theory, and even more so in practice, i.e. in the interpretation of numerous issues, it is not only possible, but imperative, to go to the root of the matter. It is necessary to refer to the origins of the appropriate sources of European law, and to the basis of the competence of the relevant Community authorities to adopt them. This issue is considerably more significant in relation to European insolvency law, though it is equally important in contractual conflict of laws rules (contractual obligations). The author recognizes this and draws attention to it in a highly professional manner by means of a discourse incorporated in a logical form, and quite evidently in connection with material best related to the issue in question.

I am compelled to mention the maximum degree of transparency as one of the principal pluses of the whole publication. In terms of content, of course, the whole document is interlaced with assessments of the significance of the conflict of laws method and the application thereof in various types of contractual obligations, and generally encompasses the necessary degree of abstraction. The author proceeds strictly according to the content framework of the *Rome I Regulation* (and naturally, the *Rome Convention*), which appears to be the most logical and, moreover, most practical solution. Any other approach would probably have caused confusion in the discourse, unless the subject had been focused on a narrower type of contractual obligation (which is not the case here).

Another area that should not be overlooked in Professor Rozehnalová's *Závazky ze smluv a jejich právní režim* is the interdisciplinary links with procedural law, particularly European civil procedure, within the meaning of international law (international civil procedure). This work is inherently focused on conflict of laws rules in their substantive scope. The links to the procedural field are only reflected to a minimal degree, which is a great pity. On the other hand, it is necessary to take into account the fact that, in terms of its theme, this is a narrowly targeted publication, and therefore any *critical voice* that could be derived from the evaluation under the preceding sentence of this review is not critically addressed to the publication in question, but generally to the relative absence of effort to interlink the substantive and the procedural as two sides of one and the same coin. Indeed, at this point, it should be noted that the author, who is also a recognized specialist in international (civil) procedural law, dwells on international civil procedure in this work, where space has

permitted. She expressly discusses the relationship between conflict of laws rules and procedural rules, for example, in Section II.1.4. Here, the author expresses the very fundamental idea that *"Conditionality on the basis of procedural rules determines the obligation and possibilities of the judge regarding his application and knowledge of foreign law: whether he is ex officio required to apply foreign law, or applies it only on a proposal from a party; whether he is required to determine the content of foreign law, or whether this obligation remains to one side."* This is an assessment with which I agree, and shows that the author obviously understands the nature of the various concepts and individual problems to the finest detail and with great sensitivity, not only from the perspective of academic doctrine, but also in terms of everyday practice in law and application. Indeed, the author is known to be an experienced international arbitrator, and draws on her wealth of experience here at every step. The author rightly assumes that the resulting solution to a number of qualification issues depends on the procedural basis and the space made available for this solution by the *forum*. The author postulates this explicitly, and does not neglect the importance of procedural clauses and *forum* selection clauses. Likewise, where the opportunity is provided by the topic under discussion, the author seamlessly takes into account conceptual differences between continental *civil law* and *common law*. The differences in this respect can be regarded as central to the assessment of certain fundamental, debated and perhaps, to a certain degree, *critical* issues in the field of "European international private law". To some extent, it appears that numerous conceptual discourses are conducted on a platform of conflict between these two *legal worlds*, which differ even in such fundamental matters as the boundary between substantive and procedural areas, etc. The conflict of rule issue in respect of contractual obligations is testimony to this. The author notes this discrepancy in key areas, such as *overriding mandatory provisions* (Section II.1.10), the regulation of which was probably that legendary *stumbling block* in the whole process of formulating the proposal of and approving the *Rome I Regulation* as the current basic source in this field, with simultaneous *temporary* (albeit for a relatively long transition period) *consideration of the Rome Convention*. The combination of these two sources is discussed to the necessary extent and in a manner which is important in terms of legal practice and from an academic perspective, and indeed, from an aspect necessary to meet teaching needs (and for educational purposes in general).

[***Alexander J. Bělohlávek***]

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Michal Tomášek et al.
Czech Law Between Europeanization And Globalization

*Michal Tomášek et al., Czech Law between Europeanization and Globalization [**České právo mezi evropeizací a globalizací**]. Prague: Karolinum Press, 2010, 368 pp., ISBN 978-80-246-1785-5.*

This book has been prepared as a tribute to the majestic 660th Anniversary of the foundation of the Charles University in 2008. The English edition has been preceded by four volumes of the monograph titled "New Phenomena in Law at the Beginning of the 21st Century" and published in the Czech language. The reviewed book concurs to the Czech monograph series and provides a deep insight into the "hot topics" of the Czech law same as to its development at the outset of the new millennium, offering a domestic perspective to the foreign scientific community.

As is the Anniversary of the Charles University, the extent of the presented project is gargantuan. The head of the authorial team, Prof. Tomášek, put a great effort to gather more than 60 of the most prominent legal scientists and scholars same as scholars specialising in linguistics, economy and philosophy at the law faculty of Charles University to participate on this project, therefore this book provides not only overview of the present legal status in the Czech Republic, but truly interdisciplinary and detailed analysis of the presented topics.

The work is selected into four main sections, each precisely tailored by a working team of authors. The first section deals with the issues of the historical impulses for the development of the law and provides the basic insight for the understanding of the direction of the development of the Czech legal system after the fall of the Iron Curtain. It must be stressed that the authors have dedicated a significant part of this section to the development of the constitutional law (section 1.2. (V. Kindl, P. Skřejpková, K. Adamová, R. Seltenreich) and 1.3.(K. Adamová, R. Petráš)) same as to the change in the perception of the proprietary rights (1.1. (K. Malý, L. Soukup, J. Kuklík)) with the onset of the democratic system. This is really crucial issue which has not been paid much attention in the foreign literature as this development has given a fundamental basis for the present legal state in the Czech Republic. Authors are covering this development also from the historical and political point of view so the reader obtains a unique and complex insight into the issues in wider context.

Second section of the book deals with the topic of the transformation of public law from the perspective of the Czech integration into the European framework. The process of Europeanization has a fundamental impact on the Czech domestic law and the authors (M. Tomášek, D. Císařová, T. Gřivna, J. Herczeg, O. Sovová) have highlighted this impact from two different perspectives. The first one deals with the process of Europeanization of the criminal law, where is provided a detailed insight into the evolution of the cooperation in the criminal matters among

the European countries same as the relationship between the national criminal law and the EU law. Importantly, authors deal with the issues of the relation between the process of Europeanization of the criminal law and the protection of fundamental rights and freedoms in the Czech Republic, especially from the perspective of the relation between the Czech Constitutional Court and the ECJ. Authors highlight interesting domestic case law reflecting the European doctrine and demonstrate the different attitude of the Constitutional Court in relation to the instruments of the first and third pillar. Further, the section deals with the issues of the implementation of the European criminal law instruments into the Czech law, especially in relation to the European Arrest Warrant which has been accompanied with the respective amendment of the domestic Criminal Code and the Code of Criminal Procedure same as Charter of the Fundamental Rights and Basic Freedoms. These amendments have been subject to a wide political debate and the authors are dealing with the process of its implementation in great detail - especially with the fundamental issues of possibility to surrender the Czech citizen to another EU Member State and the argumentation of the Constitutional Court in this regard. Last part of criminal section deals with the issues of the criminal liability of the legal entities in the Czech Republic *de lege ferenda*, as this question is being discussed among the legal society in the Czech Republic since the end of the 1990s and up to now, this concept has not been introduced to the Czech law yet. Authors (J. Jelínek, K. Beran) of this section provide description of the unsuccessful attempts to introduce various concepts of the criminal liability and its constructive criticism. A persuasive spectrum of arguments why introduce this kind of criminal liability is being provided same as possible models for the implementation.

The public law section also includes a topic covering the issues of role of the courts in the protection of the environment (M. Damohorský, M. Sobotka, V. Stejskal, K. Žákovská, H. Müllerová) and also issues of the Czech tax law in the context of the law of the European Union.

In the tax section the authors (M. Bakeš, R. Boháč) provide really interesting overview of the basic principles and mechanism of the functioning of the Czech law system and current topics which are being confronted with the overview and trends in the tax law of the European Union (understood as a tax system of the individual Member States and of the EU itself) and the facts lead them to the conclusion that the tax burden is being shifted from direct taxes to indirect ones as an outcome of the European harmonisation of the system of the indirect taxes. As a conclusion, summarization of the problems and challenges of the Czech tax law within the system of the European Union law and its cope with the supranational requirements is being presented.

This section also projects the process of globalization as an important factor for transformation of the public law, covering the issues of the role of the general international law in the post-modern period of fragmentation of international law, where the authors (P. Šturma, V. Balaš, V. Bílková, V. Honusková, S. Hýbnerová, J. Ondřej) specifically analyse the issues of normative conflicts followed by the specific issues of self-contained regimes on the unity of the international legal order. An extensive analysis of the normative conflicts and its interpretation

in light of the case law of different international courts is being provided. The authors of this section comes to the conclusion that the fragmentation of the international law in itself is not a process which leads to the perdition of the system itself, as the self contained regimes do exist on the fundamentals of the general public international law, which provides instruments enabling the maintenance of the synergy of the whole system.

The last section of the book deals with the extensive area of the transformation of the private law in the Czech Republic which is currently being influenced with an extensive debate over the recodification of the private law, including the topics from the commercial law especially the issues of the corporate veil piercing (S. Černá), obligations resulting from torts (J. Dvořák, P. Tégl), law of contracts, whereas this section includes an interesting comparison with Anglo-American, French and German doctrines and case-law. Other subsections deal with issues of private international law and its codification within the EU (M. Pauknerová), recodification of the Czech family law (D. Frintová, O. Frinta), reflection of globalization in Czech labour law (M. Bělina) and Insolvency in the European context (F. Zoulík).

Particularly interesting is the section dealing with the polemics of the need for the recodification of the Czech private international law in the European context, as the Czech private international law, even being one of the first of its kind codifications in 1963 is still being regarded as solid standard even in the foreign literature. M. Pauknerová asserts the question, to which extent it is possible to unify the private international law at the level of the European Union and what significance can be assigned to the domestic codification of this branch of law in individual EU Member States. An outlook and arguments for the recodification of the domestic legislation as a an integral part of the codex of the private law is provided. Further the description of the theoretical backgrounds of the new trends in the codification of the private international law in the EU member states are being analysed, including the inclusion of the general institutes of the private international law such as qualification, overriding mandatory rules, etc. directly into the codification of the substantive law, criticism of the introduction of the influence of the Anglo-American concept of the differentiation and fragmentation of the connecting factors same as other important and relative novelties being introduced within the EU private international law. Taking the institutional basis in the Art. 65 of TEC, the authors lead us through the evolution of the system of the European Private law up to the current state of proceedings, providing a division of the EC regulations according to its general or particular applicability, and summing up the upcoming legislation in the area sketching the main trends and politics in the area. Finally the author arrives at a very interesting conclusion, that due to the specific features of private international law resting upon the proximity of the patterns of the domestic rules in various countries, these rules could exist independently on the other normative (social, political, economical) systems. Further as an important feature of these rules is being highlighted its neutrality because these rules just minister to identify the relevant substantive rules. As the author rightly construes, such prerequisites are extremely important for successful unification of the systems within the EU.

As is apparent from the aforementioned, the presented book provides a very wide coverage of issues elaborated by a group of scholars and therefore it is not possible and not even viable to deal with each of the subsections in this review in greater detail. Each section is accompanied with the selected bibliography encompassing primarily the Czech bibliography relevant for the given topic, providing an indispensable source for researchers and comparative studies.
As a conclusion it must be stated, that the reviewed publication provides an invaluable tool for all foreign scientist and lawyers interested in the current status of the evolution of the Czech law, whereas it covers most of the topics with a comparative approach providing a better understanding of the examined legal institutes to the readers who are not acquainted in detail with the basic principles of the Continental law systems and simultaneously presents to the foreign readers the compendium of state of art of legal science elaborated by the scholastic display-case of the law faculty of the Charles University.

[*Alexander J. Bělohlávek*]

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Ondrej Hamuľák
Law of the European Union in the Case-Law of the Constitutional Court of the Czech Republic: Reflections of the Membership and Issues of European Law in the Constitutional Case-Law

Ondrej Hamuľák, Právo Evropské unie v judikatuře Ústavního soudu České republiky: Reflexe členství a otázek evropského práva v ústavní judikatuře, [***Law of the European Union in the Case-Law of the Constitutional Court of the Czech Republic: Reflections of the Membership and Issues of European Law in the Constitutional Case-Law***]. *Praha: Leges, 2010, 256 pp., ISBN: 978-80--87212-43-1.*

The book "The law of European Union in the case law of the Constitutional Court of the Czech Republic: Reflection of membership and issues concerning European Law in constitutional case law" is the first monographic study in the Czech Republic dealing with questions of European integration in connection with key decisions of the Constitutional Court of the Czech Republic.
The monograph is divided into three parts. Each part of the book begins with a brief prologue outlining issues discussed and concludes with the epilogue with the author's conclusions, generalizations and considerations for future development. The first part entitled "European Community and European Union, nature, relationship and tools of their legal functioning" concerns general questions of

European integration necessary for better understanding the following analysis of the practice of the Constitutional Court of the Czech Republic. The author has managed to make brief, clear and understandable introduction to the basic concepts and relations concerning European institutions and European law determined by their supranational nature. In particular he focused on the distinction between the European Union and the European Communities, between EU law and EC law, as well as on fundamental changes brought about by the Lisbon Treaty.

The focus of the reviewed book lies in its second part. The author takes into account the key decisions of the Constitutional Court dealing with various aspects of European integration and effects of European law, especially cases known as *Lisbon Treaty I., Lisbon Treaty II., Squeeze-out, Sugar Quotas, European Arrest Warrant* and *Drug Ordinance*. The method used is not limited to the chronological description of individual decisions of the Constitutional Court, but analysis of these decisions is divided into several thematic areas. In this part there are subsequently discussed the issue of influence of the European law over the national legal order before accession to the EU and also the impact of such law after accession, which is obviously a crucial issue. The question of the relationship between Czech and European law is then analysed at the level of the constitutional basis for the functioning of European law, at the level of relationship between European and national constitutional law, at the level of limitation of direct applicability of the European law and at the level of possible use of European law as a criterion for adjudication of a constitutional conformity of a national legislation.

Besides the analysed decisions of the Constitutional Court, the author also works with an impressive amount of research literature. He introduces scientific debates and disputes concerning controversial law issues and he adds his own opinions and observations. As an example we can mention the dispute concerning constitutional base for incidence (effectiveness) of European law in the Czech legal order running between (as author labels) "internationalists" and "communitarists", in other words the dispute about the interpretation of Art. 10 and Art. 10a of the Constitution of the Czech Republic. The author prefers the concept of self-enforceability of European law without need of specific constitutional provision concerning effectiveness of European law in national legal order (something like "incorporation clause"). We can agree with the author that a sufficient constitutional base for effectiveness of European law in the national legal order should be found in the Art. 10a of the Constitution (i.e. the provision enabling transfer of competencies of the national state authorities to the supranational institution or organization), in spite of the fact that there is no wording about functioning of European law in the national legal order in that article. The Constitutional Court also took the same position in the *Sugar Quotas* decision, stating that "Art. 10a of the Constitution of the Czech Republic thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order".

The third part deals with one of the crucial issues of constitutional law and political science at all, namely the question of sovereignty of national states in the process of European integration. The author considers, whether European integration can be regarded as a threat to the sovereignty of Member States, and he is right, that the answer depends on how we actually understand the concept of sovereignty. The theories speaking about the "erosion" of state sovereignty in the environment of European integration and the need for redefinition of the "state sovereignty" concept in classical meaning are presented and commented on by the author. In this context, the key findings of the Constitutional Court in the cases of *Lisbon Treaty I.* and *Lisbon Treaty II.* are discussed in details and the author analyses the "pool sovereignty" doctrine adopted by the Court. In the key part of the *Lisbon Treaty I.* decision the Constitutional Court concludes: "The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity *sui generis*, which is difficult to classify in classical political science categories. It is more a linguistic question as to whether to describe the integration process as a "loss" of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of a sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences".

The author supports the concept of pooled sovereignty, whereas he understands the sovereignty as the ability to ensure reproduction of values and goals of society, which can be attributed not only to member states but also to supranational entity as itself. But this sovereignty is, according to the author, conditioned by fulfilling the tasks that the EU should provide and ensure.

Finally we can conclude that the author compresses a remarkable amount of material into a short space without losing clarity, intelligibility and readability of his book and without unacceptable simplifications. The author provides clear and concise analysis of the decision-making of Constitutional Court in European law cases with very rich research background. He managed to capture and highlight key aspects concerning European integration in each analysed decision and provided us with a useful way to understand and think about the European integration process in the context of national constitutional law.

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Alexander J. Bělohlávek
Private International Law of the Countries of Europe

Mezinárodní právo soukromé evropských zemí [***Private International Law of The Countries of Europe***]. *Praha: C. H. Beck, LXVI and 1196 pp., 978-80-7400-309-7*[3].

This book is no doctrinal exposition of private international law. It is neither a book on EU law, as the title could possibly (misleadingly) imply. It is a rather unique publication (both in the international and in Czech bibliography in law), a collection of national rules on private international law applicable in the countries of the European continent. It is not a mere *collection of laws*, though. It is a comprehensive selection of substantive as well as procedural rules, including rules regulating labour law, family law and other areas of law in connection with the so-called *international element*, as they are part of the legal systems of individual countries. The author has included both EU Member States and third countries. Many global publishers naturally like publishing various collections of national laws applicable in the individual areas of law in individual countries and/ or regions. The rules on private international law (conflict-of-law rules or conflict rules) are, however, not exactly on the radar screen of these publishing houses. The only comparable publication was probably issued by C. H. Beck + Stämpfli Cie in 1997. The last none is, nonetheless, much less comprehensive than Bělohlávek's publication issued in 2010. Moreover, chapters on the individual countries and regions also include a foreword presenting the history and the national doctrines of private international law. Obviously, the publication is especially valuable for the translations of the laws contained therein. The author's choice of terminology is based on the combination of purely linguistic methods, doctrinal and substantive interpretation, choice of terms relying on domestic and international case law, extensively cited on a number of occasions. The individual chapters also include an overview of treaties relating to the particular countries, detailed overviews of the institutions authorized to issue apostilles[4] under the 1961 Hague Convention (HCCH) in the Member states of the cited Convention, overviews of the pivotal national bibliography and often references to websites.
In other words, the publication is most valuable both for academics and for all practicing lawyers, including notaries, judges or public authorities.
Although the author has also included certain regional interstate treaties, such as agreements on judicial and legal cooperation between Nordic countries, it is apparent that for instance French-speaking or largely French-speaking countries

[3] Published in the Czech language.

[4] Updated overviews like these are, according to the available information, available for instance only in Austrian literature; otherwise the respective information must be usually laboriously searched in the national sources, on the websites of the individual national central authorities etc.

were allotted much less space. From the countries of the European continent (including Eurasian countries such as Russia and Turkey, both of which are fully covered), namely Western Europe, the author entirely omitted Luxembourg whose private international law definitely cannot be disregarded as unimportant. The chapter on French laws and regulations is rather brief too. That comes as no surprise because French law contains no special comprehensive collection of conflict-of-law rules or rules especially applicable to proceedings with an *international element*. Nonetheless, the author still could have expanded, for instance, the commentary on certain principles or judicial practice in France. Such analysis is incorporated in the chapter on French private international law; but with respect to the specific features of the French approach, the author could have provided more detailed information. Similarly, chapters on the CIS countries contain no information on Belarus and Moldova, whereas Russian and Ukrainian laws and rules are translated and commented on in great detail, just like the laws of the Baltic countries. Perhaps the two *missing* countries will be included in a future update (if any). Books like this one necessarily require more frequent updates as the individual laws are subject to frequent amendments. More changes will probably also result from the fact that the region in question is largely subject to EU law (with effect for EU Member States). Unfortunately, the author does not disregard the influence of EU law on conflict-of-law rules in the Member States and he frequently refers to the former in his detailed footnotes and other comments related to the particular rules in question, as they are reflected in the currently reviewed book.

It is therefore a most elaborate book for a wide spectrum of readers. It will be interesting to see whether the author, whose works are published in various countries, will also present a translation of this book into a foreign language and how often the publication will be updated. We can definitely declare this book the first of its kind in the Czech Republic and possibly very uncommon in other countries too.

[***Květoslav Růžička***]

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Alexander J. Bělohlávek

Protection of Foreign Direct Investment in the European Union

*Alexander J. Bělohlávek, Ochrana přímých zahraničních investic v Evropské unii [**Protection of Foreign Direct Investment in the European Union**], Praha: C. H. Beck, 2010, 416 pp., ISBN: 978-80-7400-345-5.*

The author is an internationally renowned Czech professor and attorney. His book is neither a textbook, nor a treatise on the law of investment protection, as such, provided for in international treaties. A great many publications on this topic, interesting and attractive from the perspective of both academic interest and practice, have been published in the Czech Republic, written by other authors. The author himself has long had an interest in investment protection, and analyses of this particular topic have also been incorporated in his numerous publications on arbitration.

To a certain extent, his present monograph follows on from these publications; the author reports on the present state of the protection of investments under international treaties in the ever-strengthening European Union. The author keeps pace with all the rapid changes, which is, close on the heels of the Lisbon Treaty, a task which is harder than ever. He correctly points out that the protection of international investments under bilateral treaties has developed and intensified. Arbitral tribunals attached to International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes, belonging to the World Bank Group, have helped to establish the interpretation of the individual legal concepts, despite the fact that the wording of the international protection treaties is not entirely uniform.

Nonetheless, the author does not embark on any substantial criticism. It seems that the privileged protection of foreign investors is, in his opinion, characteristic of the present state of affairs. In that connection, I could imagine a few more paragraphs presenting different perspectives, not along the outdated socialist lines of "state sovereignty over resources", but instead pointing out the excessive protection accorded by dispute resolution authorities to investors, to the detriment of important public interests. I would like to emphasize that these doubts were the reason why the efforts to supplement and gradually replace the convolution of bilateral international treaties on investment protection with a multilateral treaty under the auspices of the Organization for Economic Cooperation and Development or the World Trade Organization ultimately failed and subsided.

The degree of participation of the EU Member States in the international treaties on investment protection has always varied. Countries of Western Europe used to conclude international treaties on investment protection with other

countries especially with the aim of supporting their own investors. Conversely, post-socialist states of Central Europe, the Baltic States and the Balkan States have entered into these treaties especially in order to attract foreign investment that would contribute to the development of their economies. Over the last few years, the situation has reversed. The West is seriously in debt, and more and more investors and investments are coming from Asia or other, formerly poor, countries. The author summarizes these changes and contemplates the consequences (still not perceived by us with full clarity) for international law on investment protection. I would like to add that the crisis of the single currency in the past few months has resulted in yet further developments.

The European Union has (or at least endeavours to have) more and more matters under its command. Years ago, the European Commission expressed its doubts, which the Court of Justice substantially confirmed, that by adopting certain rules relating to international treaties on investment protection, the Member States violated or jeopardized EU law. The powers of the European Union in the area of international protection of investments were strengthened by the Lisbon Treaty a year ago. The author subjects the recent and current measures adopted by the European Union in connection with the obligations of the Member States arising from investment protection to rather fierce criticism. Unqualified and absolute preference accorded to European Union law as the law of a transnational organization over international commitments binding on the individual Member States can result in violations of these commitments, casting doubt on the trustworthiness of European states. It is also uncertain which approach will be adopted in relation to the future application of investment protection treaties between the EU Member States and their investors, who profit from the free movement of capital as the fundamental economic freedom.

Considering the unfavourable situation of many European countries, the pressure on new negotiations of international treaties on investment protection often jeopardizes their economic and political interests, which, after all, are difficult to define even at the national level. More intensive participation of the European Union in these bilateral treaties is also difficult to envisage. It could be hard to find the proper pan-European approach; the views adopted by the individual European countries could vary too much, or even contradict each other. Moreover, it is by no means clear to what extent the important third (non-member) states would accept such an "upwards" transfer of powers. After all, even the Member States themselves apparently hesitate to give up all their cards to the European Union. I often ask myself why the Member States, under these circumstances, still accept the frequent modifications of the founding treaties and thereby acquiesce to the ever more oppressive "tightening of the screws".

For me, as a teacher of EU law, it is refreshing to see that the European Union's engagement in investment protection has not been particularly welcomed, which is clearly confirmed by the network of bilateral treaties concluded by the Member States with other Member States, as well as non-member states. This particular field of law has been accompanied, from the very beginning, by too much praise for European integration. It is generally desirable to carefully consider the consequences of the further augmentation of the powers vested in the European

Union, both generally and specifically in relation to non-member states. We have to bear in mind that there are several extensive networks of bilateral international treaties: double taxation prevention treaties, social security treaties, and treaties on individual types of interstate carriage (indeed, the intervention of the European Communities in the negotiation process and in the application of the last mentioned category of treaties by Member States *vis-à-vis* non-member states has an even longer history).

Nonetheless, these general comments do not change the fact that the publication under review represents a fundamental contribution to the Czech monitoring of international law on investment protection. The author devotes a substantial part of the book to a number of recent cases adjudicated by the Court of Justice and by authorities with jurisdiction over international investment disputes, highlighting many of the connections.

[***Filip Křepelka***]

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News & Reports

Comments on Prof. Oskar Krejčí's "Geopolitics and International Law"

An interesting paper by the prominent Czech political scientist and theorist of international relations, Professor Krejčí, published in the first edition of our Yearbook, has prompted me to make a number of comments from the perspective of international law theory. It should be noted that international law experts address globalization, as well as globalist geopolitics to some degree, as evidenced, for example, by a significant study published in 2006 by the UN International Law Commission[1].

Globalization affects international law, for instance, by governing ever more social and international relations.

Professor Krejčí's study deals with the future of international law from the perspective of globalist geopolitics and political science.

Fragmentation leads to legal pluralism, with the constant use of general international law sources. In the second half of the 20th century, the scope of international law increased, expanded and diversified dramatically, giving rise to certain problems. The Commission attempts to examine and address these problems.

The formation and evolution of international law is influenced by multiple factors stemming from the environment in which it is applied, and hence by globalization. These factors include: 1. ideological or philosophical factors, on which international law was and is based (such as the impact of Christianity); 2. importantly, the characteristics of the global political system, also influenced by its determinants, and the forms of this system, such as multipolarity, bipolarity

[1] See Martti Koskenniemi, *Report of the Study Group of the International Law Commission finalized* FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, Helsinki: Erik Castrén Institute of International Law and Human Rights (2007). See General Assembly, Official Records, 61st Session, Supplement No/A/61/10.

and hegemony; 3. the effect of countries' internal systems; 4. geographical factors, or geopolitics (as discussed by Prof. Krejčí); 5. the impact of the scientific and technological progress and development of warfare on the development of international law; and other factors[2].

It is very difficult to categorize and identify the scale and impact of various factors on the formation, interpretation and application of international law, and on the development and perception thereof in a broad, legal philosophy sense.

These factors, along with economic and military factors, can perhaps be expressed by the term, "strength and power". The above factors, especially in a network of political relations, are formed in the process of societal organization according to the axis of power. According to political scientists, "power is the mental and physical ability of the actors (especially states, *author's note*) to achieve the desired effects and act freely. Power is therefore the ability, when necessary, to overcome resistance and achieve control, or influence the actions of the actors. As a social phenomenon, power aids the functioning of society: since it ensures the stability of the fundamental relationships of individuals, groups and classes in society, and sometimes fundamental changes in those relationships, generally speaking, politics (power) is therefore a source of stability and dynamism in the fulfilment of common goals – the internal safeguarding of conditions for the lives of individuals. Power helps achieve the necessary harmonization of cooperation and balance of pressures in the practical activities of individuals and groups"[3].

This understanding goes some way to explaining the emergence, evolution and development of international law, the formation, application and interpretation thereof in political or international political relations, and in the stability and dynamism thereof within an internal and external social policy environment.

The well-known Czech authors Cepelka and Šturma simply highlight the material conditions for the emergence of general applicable international law in the late 19th century, essentially upon the completion of colonization or division of the world (this factor essentially reflects a number of environmental factors, as discussed here). Such expansion and superpower conflicts, along with certain issues of technical progress and improvements in equipment, connected the geopolitical world; the international division of labour and economy, especially among the European powers, was formed, and gave rise to Europe acting in concert, which transformed into global concerted efforts. Here, rules of general international law or the international legal order are formed, and on this basis are a legally mediated, superstructure reflex to the social policy superstructure of the time.

These ideas accurately reflect the birth of general international law[4]. They recalled such fundamental principles of international law as *usus generalis* (*usus longeus*) and *opinio necessitatis generalis* as essential law-forming elements of the emerging general law of a customary nature, which, however, was developed

[2] See Ján Azud, *Právo a prostredie (Law and the Environment)(manuscript)*, available in hardcopy in the Archive of the Institute of State and Law, Slovak Academy of Sciences.

[3] See Oskar Krejčí, Mezinárodní Politika, Praha: Victoria Publishing 238 (2007).

[4] See Čestmír Čepelka, Pavel Šturma: Mezinárodní právo veřejné (*Public International Law*), Praha: C. H. Beck 16-17 (2008).

through international treaties and unification, binding, especially at the beginning, on certain states.

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According to Professor Krejčí, the idea of the formation of modern international law has the same basic power feature as the whole world political system: it is Euro-centric, primarily reflecting the values and interests of Western, West European and North American civilization. Therefore, he claims, third-world countries started to promote new law after the age of colonization, but this did not correspond with the understanding of the powers, which view, for example, UN General Assembly resolutions as a path to contract law. He construes new international law as law that should be universal, or at least representative in a transnational sense; he believes that it should be neither Euro-centric, rejected *by those states, nor customary law to which they did not contribute*[5], *which is an* acceptable argument.

Of the reflections on the future of international law, an interesting opinion is put forward by the American authors Henkin, Pugh, Schachter, and Smith[6], because they employ a distinctive approach to the historical stages of the development of international law. Professor Henkin splits international law into law before and after the Second World War, and notes that the Allied victory gave rise to a new order introducing major changes to international law, represented by the UN Charter, the formation of the UN, and the objectives thereof. However, he claims that the Cold War underscored ideological differences in the approach to international law in general, limiting it to the modest development of new standards for institutions and procedures, emphasizing other entities with special agreements of minimum value. This is how he evaluates the rule of law in international law and international relations. This author clearly highlights the impact of ideology and its environment on international law as one of the factors of the environment in which international law existed. He also draws attention to the changes that occurred after the Cold War.

Before we consider the prediction of international law and the nature thereof offered by Prof. Krejčí in his scenarios of global development[7], it should be noted that theories of international law from the age of bipolarity, particularly the 1960s and 1970s, reflected on the nature of international law[8].

It is worth recalling the *theories of solidarity* (Duguit, G. Scelle) and the revival of natural law theories relating, in part, to international law (e.g. Lauterpacht,

[5] Oskar Krejci, *supra* note 3, at 238.

[6] See Louis Henkin, Oscar Schachter, Hans Smit, International Law Cases and Materials (American Cases Book Series), St. Paul, Minesota: West Group Publishing, Co. (3rd ed. 1993).

[7] See Oskar Krejčí, *Globalistic and International Law, in* I. Czech Yearbook of International Law, Second Decade Ahead: Tracing the Global Crisis, New York: Juris Publishing, Inc. 207, 217 (A. Bělohlávek, N. Rozehnalová eds., 2010).

[8] See Ján Azud, Zásady medzinárodného práva (Niektoré problémy ich obsahu, povahy a výkladu) (*Principles of International Law (Some Problems of its Content, Nature and Interpretation)*), Bratislava: Veda SAV 22-33 (2008).

Brierly), which argue that the basis of effectuality in international law is the *"the will of the international community"*.

According to Rosalyn Higgins[9], UN General Assembly resolutions are not legally binding *per se*, but influence the law-making process and are a rich source of evidence of the evolution of customary law. Richard A. Falk argues that there is a discernible trend from consent to consensus as the basis of international liability, and that *consensus* means the prevailing majority, the predominance of something more than a simple commitment, but something less than unanimity or universality[10].

Tendencies can be identified in the way the rise of global international law is understood. Below are some such opinions. An interesting concept is advocated by the American scientist Wolfgang Friedman, who considered the transformation of the "international law of coexistence", as advanced in the then Marxist doctrine of international law (*author's note*), into the *"international law of cooperation"*, reflecting the "horizontal expansion of international law by incorporating new countries outside the European tradition, and its vertical expansion", by regulating new areas of international activities. Friedman represents a trend known as legal functionalism, focusing on how the law operates.

It is worth noting that the expansion of new areas of international law has also been discussed in *Slovakia*[11] (e.g. Azud, J.).

In the wake of these remarks, it should be pointed out that *current international law is meant to express not only the will of states, but also the interests of people, both in terms of state functions, and particularly in terms of the priority of universal human interests over others.*

Before defining international law from the perspective of the multipolar understanding of the world, we should discuss the *subjects* of international law, which are basically states, but also international organizations and nations struggling for their independence, nations in general, and even to some extent individuals or groups of individuals, and humankind[12].

However, there are varying opinions on this matter. The new approach to the definition of international law has given rise to *certain questions and objections* regarding the concept of "humankind" and "individuals" as subjects of international law, issues related to the formation of international law and bodies representing the subjects of international law (We do not discuss those objections here; they have been analysed in the cited work *Zásady medzinárodného práva (Principles of International Law)*[13].

For example, Prof. Aldo Armando Cocca considers humankind to be a new body of international law. In his view, "this new subject was created not to complement

[9] ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, London: Oxford University Press (1963).

[10] RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY, New Jersey: Princeton University Press 177 (1970).

[11] See JÁN AZUD, *supra* note 8.

[12] We have discussed these issues in detail, for example, *in* JÁN AZUD, MEDZINÁRODNÉ PRÁVO (*International Law*), Bratislava: Veda SAV 14-24 (2003) and JÁN AZUD, *supra* note 6, at 22-30.

[13] *Ibid.*

the concept of international community, but to replace it completely and contribute to the improvement of the general nature of cosmic law, which can rightly be called the law of mankind (*ius humanitatis*)". According to Cocca, humankind also has representatives, astronauts, called "envoys of mankind" by the Space Treaty[14].

Other authors have also argued that states are No. longer the only subjects of international law, having been joined by individuals and groups of subjects, and so what was previously international or interstate law is (or is in the process of becoming) the law of the global community. For example, Philip Jessup[15] wrote about the transition from international law to *"transnational law"*, because this law governs all actions that cross national boundaries, whether relating to states, individuals, international organizations, corporations or other groups. Another author, Wilfred Jenks[16], has written about the *"customary law of humankind"*. Even Percy Corbet[17] considered changing international law to "global law" (In Slovakia, these theories were referred to, at the time, as cosmopolitan theories). Another author, B.V.A. Roling[18], expanded the content of international law from the traditional international law of liberty, as he would have it, towards the current *"international law of welfare"*.

We can summarize the issue and assume a position. In our opinion, if the world establishes new, previously unimaginable forms of openness in the military sphere, and thus clearly moves towards forming a common sovereign law, the right to survival – the link between the interests of the individual and humankind cannot be ignored. Survival is essential for both the individual and humankind. Both entities have the right to survival. The individual is part of humankind. The use of the word "world" in official speeches and documents suggests that states are starting to consider the global dimensions of humankind and the planet. International law is becoming global law, expressing the interests of all humankind, and therefore expressing the interests of humankind and individuals as subjects of international law.

International law, from the perspective of global problems, is also being formed to a large degree by states, representing humankind. Its interests are expressed, in particular, via the platform of a universal international organization – the UN

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[14] Aldo Armando Cocca, *in* Role of the Scientists in Preventing the Arms Race in Outer Space, Praha: Academia (V. Landa, J. Mrázek eds., 1986); Rainer Arzinger, *Legal Aspects of the Common Heritage of Mankind*, *in* Proceedings of the XIIth Colloquium of the Law of Outer Space 4 (1970).

[15] See: Philip C. Jessup, Transnational Law, New Haven, CT: Yale University Press (1956).

[16] Wilfred Jenks, The Common Law Of Mankind, London: Stevens (1958).

[17] Percy E. Corbet: The Growth of World Law, Princeton: Princeton University Press (1971).

[18] Bert V. A. Roling, International Law in an Expanded World, Amsterdam: Djambatan N.V. 83 (1960). Of the more recent international law textbooks, see, for example, D. B. O'Connell, International Law, London: Stevens and Sons (1970); Louis Henkin, Oscar Schachter, Hans Smith, International Law: Cases And Materials (American Casebook Series), St. Paul, Minesota: West Publishing Co. (1993).

States are also responsible for complying with rules, and the individual is faced with the task of influencing public opinion on compliance with international law. New concepts in international agreements, terms such as "astronauts as envoys of mankind" and "common heritage of humankind", and other factors simply document awareness of the unity of the world, its complexity and contradiction, and thus to some extent the personality of humankind, which in itself is not yet competent to act, so has states act on its behalf.

By reference to additional arguments, we can proceed to ***a definition of international law***: "International, global law, as a special system of law, is a summary of principles and norms governing relations between its subjects – primarily in states, nations, peoples struggling for independence, those international organizations granted derived and limited international personality, humankind, whose universal interests are expressed by states, and individuals, where international law directly or indirectly grants them privileges and responsibilities in international relations. Its implementation is ensured by states individually or jointly, with appropriate enforcement measures."

We believe that international law can become, to a significant degree, global law on two levels: first, as the law of humankind, as the global law of Planet Earth *vis-à-vis* civilizations existing on other celestial bodies in space and their law. This would be a certain form of national law, and it would then be necessary to regulate legal relations between them. This reasoning is theoretical and hypothetical, but cannot be excluded. Secondly, the concept of international law in terms of global law would be better suited to realities, especially the future, even more interconnected and dependent world. This would be more realistic if the state were legally a whole global unit[19].

The content of this international global law would be conditional and dependent on the nature of an organization of the world, states or humankind, a federation or other legal form, i.e. a form *sui generis*, such as the legal status of existing intergovernmental organizations, e.g. the EU. This would be a matter of agreement for states, and would require the transfer of state laws to a group of states (the world) as an international organization. The truth of the matter is that this perception clarifies my existing views on international law with regard to global problems[20].

In conclusion, we have expressed our opinion on the concept and definition of international law, even though the United Nations International Law Commission has not wanted to discuss "global law" and has shied away from the problems of international customary law. We believe, however, that international law can also inherently influence, as one of the global problems, the way in which the global problems of the world are addressed.

[19] Ján Azud, Medzinárodné Právo (*International Law*), Bratislava: Veda SAS 21-22 (2003); Zásady Medzinárodného Práva (*Principles of International Law*), Bratislava: Veda SAS 29-30 (2008).

[20] *Ibid.*

Taking into account the forecast of international law made by Prof. Krejčí, we can consider four of the most probable scenarios for a global system. His scenarios are: 1. the consolidation of U.S. hegemony (It should be noted that, for example, the Czech author Jan Eichler argues that U.S. strategic doctrine from 2008 is retreating from unipolarism and militarism[21]; 2. chaos; 3. effective multilateralism; or 4. parallel worlds. In my opinion, these scenarios may be changed, may overlap one another, or may be supplemented, but Prof. Krejčí's idea is essentially acceptable.

In our opinion, effective multilateralism can make effective use of existing international law and the principles thereof, the principles of the UN Charter, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 1970. These principles can be developed, for example, as the principle of the prohibition of the threat and use of force in international relations, the principle of non-intervention, the principle of sovereignty and the principle of national self-determination, supplemented where appropriate by, for example, the right to live in peace, and the principle of human rights and liberties for everyone[22].

Other basic principles of international law, as developed by the UN International Law Commission in its well-known 2006 study, should be recalled: *maxim-lex specialis* derogate *legi generali*; special (self-contained) regimes; Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969); interpretation; conflict between the following standards; hierarchy in international law (jus cogens); the obligation *erga omnes* under Article 103 of the UN Charter, and other principles. All these principles are important in the application of international law.

Based on these remarks, we can perhaps conclude that the future of international law may lie in effective multilateralism, which reinforces international law on the basis of agreements and trust, built on a global political system, as formulated by Prof. Krejčí in Scenario No. 3. Effective Multilateralism.

In my view, however, it is possible to apply the current foundation of international law – in particular, on an equitable basis – and use the principles of international law, as emphasized by numerous international institutions, such as the Permanent Court of Arbitration and the United Nations International Law Commission.

The principles of international law express the most important functions of international law, peace and national security, human rights and freedoms and international cooperation, as well as other tasks. They constitute rules governing the current (and perhaps future) system of general international law, and to

[21] See Jan Eichler, *Bezpečnostní a strategická kultura USA v letech 2001–2008 (The Security Culture and the Strategic Culture of the USA in 2001–2008)*, 45 (2) Mezinárodní vztahy 64 (2010)

[22] See Oskar Krejčí, *supra* note 5. See also political science literature and literature on international relations theory. In connection with global law, for instance, Prof. Krejčí recalls, *inter alia*, the known proposal by the U.S. authors Grenville Clark, Louis B. Sohn, World Peace Through World Law, Cambridge, MA: Harvard University Press (3rd ed. 1966), which was based on the idea of, or transformation of, the UN system.

some extent we might say the "constitution" thereof, the current constitution of the international community; it is important that many of them are mandatory and are superior to others. In this respect, they can be regarded as fundamental principles of international law.

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New UNCITRAL Arbitration Rules

29 June 2010 will be recorded in history as the date when UNCITRAL *(United Nations Commission on International Trade Law*) enacted the new UNCITRAL Arbitration Rules (known as the UNCITRAL Arbitration Rules, as revised in 2010). The "old" and very dependable text of Arbitration Rules has been in force and unchanged since 15 December 1976[1]. On the thirtieth anniversary of its enactment the decision to revise this commendable Rules was made. It may seem bizarre that work on the Act containing 41 articles has taken four years. The Working Group No. II for Arbitration and Conciliation has been operating from 2006 until 2010. Four years of work to revise 41 articles seems quite unbelievable. In comparison, I have been told by an amicable member of the Russian delegation that Vladimir Putin demanded of him, as did a few professors, a draft revision of the Commercial Code within six months. Such a contrast between the preparation period of the Rules short text and the complicated text of the largest state in the world's Commercial Code call for reflection. It illustrates the enormous attention that the world and the society nowadays pay to the quality of dispute settlement procedure in arbitration. The works of the Working Group have been regularly and in great detail described by the Chair of Polish delegation, director Maria Szymańska[2], in her reports systematically published in the Arbitration Bulletin of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw. The last issue contains

[1] Available at:
http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf
(accessed on October 1, 2010).

[2] Legal Advisor, Deputy Director of Law Department in the Ministry of Economy of the Republic of Poland.

detailed information on the discussion regarding the final version of New Rules[3]. The work has started at the 45th UNCITRAL session held in Vienna in September 2006. It lasted for another 7 sessions. The last one, the 52nd was held in New York *from the 1st until the 5th of February 2010.*

For a Polish reader it may be interesting to describe the atmosphere and circumstances under which the activities of the Working Group were held. The auditorium of the United Nations General Assembly, located between the 42nd and 48th Street on the East River bank, is well- known even from television broadcasts. A little less impressive but equally dignified and functional were other rooms of the Working Group plenary sessions in New York and also in the international UNO City in Vienna.

An unwritten custom demands that each delegation wishing to take the floor put vertically a sign with the state's name in front of the delegation's Chair. The Chair of the session should not only have good eyesight, but also should be able to organize the order of representatives wishing to take the floor and grant them access to the floor in that particular order. The Chair of all the sessions was Michael Schneider, born in Germany, Partner of Lalive Law Firm, currently living in Geneva. He carried out an extremely professional job, displaying amazing talents of brief summarizing of notified proposals and searching for compromise. Sixty states[4] are UNCITRAL member states, while 22 states[5] have achieved observatory status. Delegations from the Vatican and Palestine also took part.

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[3] Maria Szymańska, *Zmiany Regulaminu Arbitrażowego UNCITRAL – aktualny stan prac (Changes in UNCITRAL Arbitration Rules – the Current Progress)*, 6 BIULETYN ARBITRAŻOWY (April 2008); Maria Szymańska, *Zmiany Regulaminu Arbitrażowego UNCITRAL – aktualny stan prac (Changes in UNCITRAL Arbitration Rules – the Current Progress)*, 9 BIULETYN ARBITRAŻOWY (January 2009); Maria Szymańska, *Zmiana Regulaminu Arbitrażowego UNCITRAL – rezultaty 50 sesji Grupy Roboczej (Changes in UNCITRAL Arbitration Rules – the Results of the 50th Session of Working Group)*, 11 BIULETYN ARBITRAŻOWY (June 2009); Maria Szymańska, *Zmiana Regulaminu Arbitrażowego UNCITRAL – rezultaty 51 sesji Grupy Roboczej (Changes in UNCITRAL Arbitration Rules – the Results of the 51st Session of Working Group)*, 13 BIULETYN ARBITRAŻOWY (January 2010); Maria Szymańska, *Zmiana Regulaminu Arbitrażowego UNCITRAL – rezultaty 52 sesji Grupy Roboczej (Changes in UNCITRAL Arbitration Rules – the results of the 52nd session of Working Group)*, 14 BIULETYN ARBITRAŻOWY (April 2010); Maria Szymańska, (...), 15 BIULETYN ARBITRAŻOWY (September 2010).

[4] List in alphabetical order in English (Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, India, Iran, Israel, Italy, Japan, Kenya, Latvia, Lebanon, Madagascar, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Republic of Serbia, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Zimbabwe).

[5] List in alphabetical order in English (Argentina, Belgium, Costa Rica, Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait, Libyan Arab Jamahiriya, Mauritania, Mauritius, Netherlands, Panama, Peru, Philippines, Qatar, Romania, The former Yugoslav Republic of Macedonia, Turkey, United Arab Emirates).

Forty other international organizations are members of the Working Group and active role-players, as well as groups from the UN System, both inter-governmental and non-governmental. In order to remain precise, all of them should be mentioned: International Centre for Settlement of Investment Disputes (ICSID), World Bank, Asian-African Legal Consultative Organization (ALLCO), International Cotton Advisory Committee (ICAC), Permanent Court of Arbitration (PCA), Alumni Association of The Willem C. Vis, International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Environmental Law (CIEL), Centre Pour L'etude et la Pratique de L'arbitrage National et International (CEPANI), Centro de Estudios de Derecho, Economia y Politica (CEDEP), Chartered Insitute of Arbitrators (CIARB), Comité Français de L'arbitrage (CFA), Construcion Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Commercial Arbitration C.I.C (FICACIC), Gulf Cooperation Council (GCC) Commercial Arbitration Centre, International Court of Arbitration (ICC), Institute of International Commercial Law, Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Swaps and Derivatives Association (ISDA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration – Lagos (RCICAL), Swiss Arbitration Association (ASA).

According to another unwritten custom a delegation member taking the floor for the very first time in the session should: express thanks for being given the floor, congratulate the Chair of the session for being elected to this function and thank the UNCITRAL Secretariat for the "tremendous work" performed between particular sessions on the preparation of the current session and working documents. After this the speaker can start speaking *to the merits*. This ritual considerably slows down the works of a Working Group and especially so during the first day of the session. It becomes more comical on the fifth day of the session when members of the delegation, who have not spoken yet and are speaking for the very first time, congratulate the Chair of the session for being elected to this function and thank the UNCITRAL Secretariat for the "tremendous work" performed between particular sessions on preparation of documents for the current session, whereas other delegates start packing their documents, glance at their watches and think about the departure of their planes.

The UN is obviously a very specific organization. Wiesław Górnicki[6] called the UN a "glass menagerie". The author has reservations about this description taking into account his 10 years' participation in the legendary United Nations Students' Association. In order to understand the oddity of the slow speed of the Working Group's works it is necessary to understand the specifics of the UN and in particular the need to achieve international consensus for each decision taken. The respect afforded to each delegation's view, discussion of the nuances of each proposal and patience when listening to each idea greatly deviates from the model of the Russian commercial code's revision. I shall leave it to the reader to decide which method is better. It can easily be said that the works of the Working Group have been held in an atmosphere of amazingly constructive cooperation and understanding. There were difficult as well as funny moments, but in the end the works were finalized.

The text of the New UNCITRAL Arbitration Rules was published in English on 12 July 2010, and came into force on 15 August 2010. This is quite a strange date, since in 2010 this day fell on a Sunday, and in many Christian countries this day is a religious holiday, in some even a national one. Shortly after 15 August 2010, the remaining official languages were announced (Arabic, Chinese, French, Russian, Spanish). It may transpire that only from the official publication in non-English languages the delegation members found out or will find out what has been adopted. The Rules will be applicable to arbitration agreements (clauses) entered into after 15 August 2010.

During the four years of its operation the text of the Rules has increased merely from 41 to 43 articles. However, the content and the numbers of particular articles have changed considerably.

The main aim of the revision was to ensure greater efficiency of arbitration proceedings. The world has changed during the last thirty years. The Rules enacted in 1976 were not adapted to investment disputes, even though the Washington Convention had been enacted 11 years earlier[7]. Moreover, the "old" Rules were not fully accommodated to the latest technical and communication innovations currently used in international arbitration.

The revision process has been specifically limited by UNCITRAL. The following rule has been adopted: the revision process will not *"alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex".*

The previous Rules have been widely used to settle commercial disputes everywhere, where the parties had not indicated a particular arbitration institution. They had been used in disputes between private entities, between states, in investment disputes and by arbitration institutions in *ad hoc*

[6] Wiesław Górnicki, Wielki Świat. Ze Wspomnień Snoba-Katorżnika (*Great World. Memories Of Snob-Convict*), Warszawa: Czytelnik (1976); Wiesław Górnicki, O Narodach Zjednoczonych bez Tajemnic (*The United Nations Without Secrets*), Warszawa: Młodziezowa Agencja Wydawnicza (1979).

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, Washington D.C., 575 UNTS 159.

administered arbitrations. The Rules have been unanimously evaluated as being the most efficient instruments, well-suited to arbitration. The New Rules contain more provisions regarding multi-party disputes, intervention of a third party, liability of arbitrators, and the possibility of excluding expert witnesses appointed by the Arbitration Tribunal. The replacement of an arbitrator and the issues of arbitration costs are also regulated differently. In addition, the provisions on preliminary orders are more detailed.

The fourteen most important differences between the "old" and the "new" text will now be highlighted.

First and foremost, Art. 1 abandons the written form of the arbitration agreement. Moreover, the term "commercial" has been abandoned and the Rules' scope of application has been expanded to all legal relationships, contractual as well as non-contractual (*"a defined legal relationship, whether contractual or not"*). The replacement of the word "contract" with "legal relationship" is a revolutionary step.

Art. 2 introduced a possibility of filing a notice of arbitration and any notifications or proposals by any means of communication that provides or allows for a record of its transmission. However, one important limitation has been brought in, namely that the parties shall assign for this purpose one particular e-mail address or fax number. Correspondence sent only to these assigned addresses is considered as delivered.

Art. 4 introduced as a novelty a 30-day time limit for responding to a notice of arbitration. The previous Article 19 of the Rules failed to prescribe any time limit; it only allowed the Tribunal to prescribe a time limit for submitting the response to the statement of claim. Moreover, the New Art. 4 allows the respondent to submit a counterclaim against the claimant, but it also allows the respondent to submit any other claims against parties other than the claimant. Placing this provision at the beginning of the Rules makes it possible to submit any claims even before the constitution of the tribunal. It simplifies the choice of arbitrators, allowing them to be free from potential conflict of interests.

Art. 6 shortened the period during which the parties must agree on the Appointing Authority from 60 to 30 days. It is evident that this body plays an important role in appointing arbitrators, examining challenges, considering replacements of arbitrators, as well as establishing their fees and approving their costs. In the event the 30-day time limit is not adhered to or there is lack of agreement, each of the parties may ask the Secretary General of the Permanent Court of Arbitration in Hague to appoint the Appointing Authority.

The new Art. 7 introduced the possibility for the Appointing Authority to appoint the sole arbitrator in cases where one party proposed to appoint a sole arbitrator and the other parties failed to respond thereto or failed to nominate the second arbitrator. Then, upon a request of the party, the Appointing Authority may appoint the sole arbitrator if it finds it, under the circumstances of the case, more appropriate.

In multi-party disputes, where there are multiple parties as claimant or as respondent, in the event of any failure to constitute the Arbitral Tribunal, the Appointing Authority has been authorized to revoke any appointment already

made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator (Art. 10).
Many innovations have been added in cases of challenges of arbitrators and their disclosure of circumstances essential for deciding about their independence and impartiality (Art. 11-13). The New Rules offer a model of Statement of Independence, which has been attached to the Rules as an appendix. Worth mentioning is that the appendix to the New Rules provides for a model arbitration clause and possible waiver statement allowing to exclude any recourse in the future against the arbitral award.
Article 16 refers to another waiver, namely exclusion of arbitrators' liability. The parties who agreed to the New Rules waive the possibility of having any claims against arbitrators and the Appointing Authority based on any act or omission in connection with the arbitration, excluding intentional wrongdoing. This exclusion concerns the liability of all persons appointed by the Tribunal, it may concern also the court reporter and expert witnesses appointed by the Tribunal.
Art. 17 (5) allows, at a request of any party, a third person or persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement (joinder). The Tribunal may grant a single award or several awards in respect of all parties so involved in the arbitration.
Art. 26 establishes the liability of a party, who requested for interim measures, for any costs and damages caused by the measure, if in the final award the Tribunal decides otherwise, stating that this measure should not have been granted. Upon this basis, the Tribunal may award such costs and damages at any stage of the proceedings. Moreover, the Tribunal's possibility of deciding about preserving evidence has been strengthened.
Art. 27 expressly allows the submission of written witness statements.
Under Art. 28 modern means of communication such as video-conferencing may be used for examining witnesses and expert witnesses in a way not requiring their physical presence at the hearing.
Art. 35 contains a novelty, namely the phrase ***"The arbitral tribunal shall apply the law designated by the parties..."*** has been replaced by ***"The arbitral tribunal shall apply the rules of law designated by the parties..."***. In practice it allows the parties to invoke *inter alia* the rules of ***UNIDROIT Principles of International Commercial Contacts.***
Art. 41 introduced a possibility for the Appointing Authority, and in the absence of such authority, the Secretary General of the Permanent Court of Arbitration to revise the amount of arbitrator fees. It is also now possible to verify the amount of arbitrator fees. After such a verification, the decisions of the Appointing Authority are binding on the Tribunal. During the discussions it was underlined that this mechanism should prevent excessive arbitrator fees. These fees can now also be corrected in the event that they are not ***"reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances"***. The introduction of this provision may also be said to be advantageous for the Tribunal in cases where the previously deposited advance was too low due to the above-mentioned circumstances. At the same time, this provision allows any party to present its comments or objections

regarding the costs of the Tribunal within 15 days. The Appointing Authority shall within 45 days decide whether the amount of the costs was in accordance with the Rules. The introduction of this provision brings *ad hoc* arbitration in line with the standards of institutional arbitration, giving the parties a greater sense of security in such delicate matters as arbitrator fees and costs.

This article merely highlights the most important changes in the New UNCITRAL Arbitration Rules. It is also worth mentioning that members of the Polish delegation, Dir. Maria Szymańska, Prof. Andrzej Szumański and the Author are working on comprehensive commentary on the New UNCITRAL Rules, which will be issued by the publisher C. H. Beck.

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New Czech-Canadian BIT Still Pending

I. Introduction

A new international treaty on the Promotion and Protection of Investments (or Bilateral Investment Treaty (BIT)) between the Czech Republic and Canada was signed on May 6, 2009. When it comes into force, this new treaty will replace the existing BIT, which dates back to 1990[1].

A report on the new BIT appeared in last year's volume of the Czech Yearbook of International Law[2]. In that report, it was explained that the treaty was in the process of ratification in both countries. As of the date of publication of this updated report, the process of ratification is still under way.

In last year's report, the authors highlighted a handful of key amendments that were being made to the BIT. In this updated report, we provide a more complete picture of the changes, many of which are particularly relevant to the theme of this

[1] Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments concluded in Prague on 15 November 1990, Canada Treaty Series 1992 No. 10, and available online at:
http//www.unctad.org/sections/dite/iia/docs/bits/canada_czech.pdf
(accessed on December 18, 2010)

[2] Filip Černý, Jaroslav Heyduk, *New Czech-Canadian BIT Concluded, in* CZECH YEARBOOK OF INTERNATIONAL LAW, SECOND DECADE AHEAD: TRACING THE GLOBAL CRISIS 2010, New York: Juris Publishing 340-344 (A. Bělohlávek, N. Rozehnalová eds., 2010).

year's volume of the CYIL, namely the securing of rights of host states within the system of international investment protection (**II**). We also address the prospect for ICSID arbitration under the treaty, given that, as of the date of publication of this updated report, Canada has not yet ratified the ICSID Convention (**III**).

II. Changes to the BIT

As reported in these pages last year, the need for the renegotiation of the existing BIT between the Czech Republic and Canada arose from obligations of the Czech Republic as a member of the European Union, since certain provisions of the existing BIT were deemed incompatible with EU law. At the same time, the renegotiation of the treaty gave Canada an opportunity to promote its current approach to investment protection, which is set out in its most recent model BIT (the 2004 FIPA)[3].

The earlier note rightly characterized the changes to the existing BIT resulting from the renegotiation as being "significant." The authors chose to highlight four of these: the change in the formulation of the fair and equitable treatment and full protection and security standard (Article III), the introduction of transparency provisions (Annex B), the clarification of the meaning of indirect expropriation (Annex A), and the exclusion from the dispute settlement process of claims relating to investments in financial institutions (Article X(4)). While these are among the most significant changes to the treaty, others merit review here, especially in light of the theme of this year's volume of the CYIL, as mentioned above. We discuss the additional changes below, in the order in which they appear in the new version of the treaty, and by reference to that new version.

In Article II(4), the parties have inserted a non-derogation clause in which they have agreed to recognize that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." This provision is supplemented by other provisions securing the host state's ability to regulate in the environmental field, including in the clarification of the meaning of indirect expropriation and in the first paragraph of the "General Exceptions" clause. These are addressed further below.

Turning to another aspect of the treaty, in Article IV, the new version of the BIT specifies, in paragraph 1(a), that the most-favoured-nation (MFN) provisions contained in Article III do not apply to:

> *(i) any existing non-conforming measures maintained within the territory of a Contracting Party, and*
>
> *(ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes*

[3] FIPA stands for Foreign Investment Promotion and Protection Agreement. The 2004 FIPA is available online at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf (accessed on December 18, 2010).

> *limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors[.]*

The above exception to the application of the MFN provisions also applies to the continuation or prompt renewal of any non-conforming measure (paragraph 1(b)) or to an amendment to any non-conforming measure, but only to the extent that the amendment "does not decrease the conformity of the measure, as it existed immediately before the amendment" with the MFN provisions (paragraph 1 (c)). Paragraph 2 further extends the rights of the host state by specifying that the MFN provisions of the BIT do not apply to subsidies or grants provided by a Contracting Party or a state enterprise, including government-supported loans, guarantees and insurance. These changes are consistent with the 2004 FIPA, except that the Parties have not incorporated the FIPA requirement that existing exceptions to the MFN obligation be specifically listed in a schedule to the treaty. This results in less regulatory transparency for investors.

As discussed in last year's note, the provision on expropriation (Article VI) is supplemented in the new version of the treaty with a "clarification of indirect expropriation", which is contained in Annex A. It is worth noting the language of the last paragraph of Annex A, which provides as follows:

> *Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.*

Further protections for the host state have been included in Article VII, on the transfer of funds. Paragraph 3 preserves a Contracting Party's right to prevent a transfer of funds through the application of its laws in certain enumerated areas, including bankruptcy and the issuing, trading or dealing in securities. The treaty properly qualifies this right by expressly requiring that the Contracting Party act through the "equitable, non-discriminatory and good faith application of its laws." In paragraph 6, the treaty also carves out from the restriction on a Contracting Party's ability to prevent or limit transfers the "equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions"[4].

In Article IX of the new version of the BIT, the Contracting Parties have included an extensive list of "general exceptions" pertaining to the investment obligations contained in the treaty. According to the Government of Canada, whose 2004 FIPA inspired Article IX, the general exceptions are included "in order to meet several important policy goals"[5]. Taking its eight paragraphs in order, Article IX protects a Contracting Party's ability to adopt or enforce measures in the following areas:

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[4] The carve-out from the restriction on a Contracting Party's ability to prevent or limit the transfer of funds is an example of the changes that were required to the BIT by EU law. It is also consistent with the 2004 FIPA.

[5] Foreign Affairs and International Trade Canada, Canada's Foreign Investment Promotion and Protection Agreements (FIPAs) Negotiating Programme, Commentary on Article 10: General Exceptions, available online at:

1. protecting the environment (i.e., measures to protect human, animal or plant life or health or for the conservation of living or non-living exhaustible natural resources);
2. ensuring the integrity and stability of financial institutions and the financial system;
3. addressing balance of payments difficulties;
4. pursuing monetary and related credit or exchange rate policies;
5. protecting its essential security interests;
6. protecting cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions;
7. promoting investments in cultural industries (which are expressly stated to be exempt from the provisions of the BIT); and
8. any measures adopted by a Contracting Party in conformity with a decision adopted, extended or modified by the World Trade Organization pursuant to Articles IX: 3 or IX: 4 of the WTO Agreement (which allows the WTO to waive an obligation imposed by the WTO Agreement on a Member).

Important changes (in addition to those highlighted in last year's report) have been made to the provision on the settlement of disputes between an investor and the host Contracting Party (Article X). Some of these changes are clearly aimed to advance the interests of the host state in the dispute-settlement process. In particular, paragraph 5(a) requires, as a precondition to investment arbitration, that an investor waive its right to initiate or continue any proceedings with respect to the measure that is complained of "except for procedures for injunctive, declaratory or other extraordinary relief, not involving the payment of damages before an administrative tribunal or court under the law of the disputing Contracting Party." Paragraph 5(b) is aimed at avoiding the situation that arose in the parallel arbitrations in the *CME* and *Lauder* cases, where the host state faced two arbitrations, under two separate BITs, arising from the same set of facts. The provision reads:

> *If an investment is held indirectly through an investor of a third state by an investor of one Contracting party in the territory of the other Contracting Party, the investor of a Contracting Party may not initiate or continue a proceeding under this Article if the investor of the third state submits or has submitted a claim with respect to the same measure or series of measures under any agreement between the other Contracting Party and the third state.*

Paragraph 5(c) introduces a three-year statute of limitations for a disputing investor wishing to submit a claim to arbitration. Paragraph 6 provides that an interpretation of the treaty agreed between the Contracting Parties shall be binding on an arbitral tribunal established to hear a dispute between an

http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#10 (accessed on December 19, 2010).

investor and a Contracting Party. Finally, in Paragraph 7, it is specified that each Contracting Party consents to investor-state arbitration in accordance with the specified procedures, and that failure to meet the conditions provided for in paragraphs 2 and 5 "shall nullify that consent." This amendment makes it clear that compliance with the procedure of paragraph 5 (described above) and of paragraph 2 (a six-month "cooling-off" period) is mandatory, and that an investor's failure to comply will deprive the arbitral tribunal of jurisdiction.

Finally, in Article XV, the Czech Republic and Canada have agreed that a Contracting Party may deny the benefits of the treaty to an investment of an enterprise that is itself owned or controlled by investors of a third state where "the denying Contracting Party adopts or maintains measures with respect to the third state that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprises or to its investments" (paragraph 1). A Contracting Party may also deny the benefits of the treaty to a "shell" company (an enterprise that has No. substantial business activities in the territory of the Contracting Party under whose law it is constituted), if that company is owned or controlled by investors of a third state (paragraph 2). These provisions have been adopted directly from the 2004 FIPA.

III. ICSID Arbitration

In the previous section, we highlighted several changes in the provision on the settlement of disputes between an investor and the host Contracting Party (Article X) aimed to advance the interests of the host state. Another change in Article X is intended to give the investor a choice as to the arbitration rules under which the dispute is to be settled. Where the existing BIT refers all disputes to arbitration in accordance with the UNCITRAL rules, the new treaty provides that a dispute may be settled under either the UNCITRAL rules, the ICSID rules (the rules of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington on 18 March 1965 (hereinafter referred to as the "ICSID Convention")) or the rules of the ICSID Additional Facility (the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*). Given the nature of ICSID, the choice of the ICSID rules is available only when both Contracting Parties are bound by the ICSID Convention; the choice of the rules of the ICSID Additional Facility is available provided that one or the other Contracting Party, but not both, is a party to the ICSID Convention.

The Czech Republic has been a party to the ICSID Convention since 1993. Canada signed the ICSID Convention on December 15, 2006, but, for reasons explained below, has not yet ratified it. Consequently, until Canada ratifies the ICSID Convention, an investor is limited to arbitration under either the UNCITRAL rules or the rules of the ICSID Additional Facility.

What are the benefits of arbitration under the ICSID rules, which, for now, is unavailable to investors under the Czech-Canadian BIT? ICSID arbitration

unfolds within a distinctive self-enclosed procedural system. This has the advantage of excluding the possibility of court intervention in the arbitral process and providing for the direct enforceability of a final arbitral award in favour of the foreign investor, without any need for the investor to engage domestic laws on the recognition of arbitral awards and without the host State having the ability to seek to annul or refuse to recognize the award before a domestic court. The ICSID Convention therefore limits the role of courts in arbitrations to which it applies even further than the Model Law and the New York Convention.

What is the status of the ICSID Convention in Canada, and when is it likely to come into force? The federal government has passed legislation implementing the ICSID Convention but it is not yet in force[6]. The government has taken the position that it will seek the support of Canada's ten provinces and three territories prior to ratification[7]. The approach of the federal government is consistent with the view that, to the extent that the ICSID Convention touches on certain matters that are generally of provincial jurisdiction, for example arbitral procedure as a matter of the administration of justice in the province, provincial legislation to implement the Convention is required. On such a view, it is only after all the provinces have adopted legislation implementing the Convention, or have agreed to do so, that Canada could ratify the Convention. As a matter of Canadian constitutional law, the federal government cannot override the constitutional division of legislative powers between the federal Parliament and the provincial legislatures through the signature of international agreements[8].

Contrary to the above view that the ICSID Convention touches on certain matters that are generally of provincial jurisdiction and that the federal government therefore needs provincial consent before it can ratify the Convention, it may be argued that the Convention does not actually touch on matters that are of provincial jurisdiction because, for example, arbitral procedure can fall within federal jurisdiction if the arbitration in question involves Canada (or a foreign State). The federal Commercial Arbitration Act[9] is an example of such an exercise of federal jurisdiction over arbitral procedure. Accordingly, on such a view, the federal government would not need provincial consent prior to ratification[10].

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[6] Settlement of International Investment Disputes Act, S.C. 2008, c. 8.

[7] Foreign Affairs and International Trade Canada, *Minister MacKay introduces bill to protect Canadian investment abroad*, News release, Ottawa (30 March 2007).

[8] This rule was laid down by the Privy Council in the *Labour Conventions Case (Attorney-General for Canada v. Attorney-General for Ontario)*, [1937] A.C. 326. In her concurring reasons, L'Heureux-Dubé J. of the Supreme Court of Canada reaffirmed this rule in the more recent judgment of *Thomson v. Thomson* [1994] 3 S.C.R. 551 at 611. The majority expressed No. disagreement on this point. See also PETER WARDELL HOGG, CONSTITUTIONAL LAW OF CANADA, Scarborough: Thomson Carswell 11-15, 11-16 (5th ed. supp., 2007) similarly, see GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS, Toronto: Irwin Law 270 (2nd ed. 2008).

[9] R.S.C. 1985, c. 17.

[10] Even on such a view, however, Canadian constitutional law would not permit the federal government to designate a province under Article 25 as a constituent subdivision that is party to the ICSID Convention without that province giving its consent and passing implementing legislation.

At the time of writing, only four provinces and two territories had passed implementing legislation[11]. Moreover, the coming into force of the implementing legislation in each province and territory is contingent upon Canada ratifying the Convention. Whether and when the remaining provinces and territories will enact implementing legislation is unclear. It is to be hoped that Canada can soon join the ICSID Convention as a contracting party[12].

IV. Conclusion

This short report demonstrates that many of the changes in the new Czech-Canadian BIT are designed to protect the interests of the host state. It is worth noting that such provisions, properly interpreted, should not be applied to deprive an investor of a meaningful remedy under the treaty in the case of illegitimate or discriminatory state action that harms the interests of the investor. As for the timing of the treaty's ratification, according to discussions with several officials, the new Czech-Canadian BIT should come into force sometime in 2011. And although the Government of Canada is keen to have the ICSID Convention ratified soon as well, it may well be asking too much to hope for its ratification in 2011.

[***Martin J. Valasek***]
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[11] British Columbia: *Settlement of International Investment Disputes Act*, S.B.C. 2006, C. 16; Newfoundland and Labrador: *Settlement of International Investment Disputes Act*, S.N.L. 2006, c. S-13.3; Saskatchewan: *Settlement of International Investment Disputes Act*, S.S. 2006, c. S-47.2; Ontario: *Settlement of International Investment Disputes Act*, S.O. 1999, c. 12 schedule D; Northwest Territories: *Settlement of International Investment Disputes Act*, S.N.W.T. 2009, c.15; Nunavut: *Settlement of International Investment Disputes Act*, S.Nu. 2006, c. 13. See also Reuben East, *Canada Signs International Convention on the Arbitration of Investment Disputes*, 7 (1) Canadian International Lawyer 37, 37-38 (2007).

[12] This Section III has drawn on an earlier article co-authored with Azim Hussain, a colleague at Ogilvy Renault LLP. See Martin J. Valasek and Azim Hussain, *Investor-State Arbitration, Court Intervention, and the ICSID Convention in Canada*, 15 (1) IBA Arbitration News (March 2010).

Interesting Czech Doctoral Theses in International, Private International and European Law[1]

Author: **Helena Hrubešová**

Title of doctoral thesis: **Legal Transactions Concluded via the Internet in the Field of International Private Law**

Chairperson: Prof. JUDr. Zdeněk Kučera, DrSc.; *Supervisor*: Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents*: Prof. JUDr. Květoslav Růžicka, CSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense*: August 29, 2009.

Summary:
Helena Hrubešová's thesis describes transactions concluded over the Internet from an international private law perspective. Because e-contracts are usually concluded between persons from different jurisdictions, the issue arises as to which court will have jurisdiction, which law will apply and whether the judicial decision will be enforced.
In the transactions examined for this study, the Czech, European, and US laws all chose the jurisdiction based on particular contacts of the defendant to the forum. In other words, a US e-seller of CD/digital format containing DRM-protected copyright works can be sued in the Czech Republic based on his or her office, agency, or damage caused in the Czech Republic. However, the limitations of the Brussels I Regulation mean that a Czech court will seldom find its jurisdiction in a consumer e-contract suit over an American e-seller who does not have any office or agency either in the Czech Republic or in other EU Member States, and the Czech consumer will have to sue in the US state court. In either case, the solution may well be prorogation of the forum in the consumer e-contract.
The Czech court will choose the applicable law based on the Czech Statute on International Private Law, Rome Treaty, Regulations Rome I and Rome II. Regulation Rome I has provisions for choosing the applicable law in consumer contracts with an official interpretation of targeting e-commerce into the country

[1] All theses listed *infra* were defended at the Charles University in Prague, Faculty of Law, Department of the Commercial Law during the Academic Year 2009-2010.

of the consumer, based on the interactivity of the web page of the e-seller. If a US state court has jurisdiction and applies the US state's laws, it is quite difficult to foresee which law will be chosen for an e-contract, as the case law and statutes do not stipulate a uniform way of choosing it.

In both the Czech and US state laws, however, consumer rights are protected in the form of a public order reservation. This means that even if foreign law is chosen, the consumer rights of the forum country apply.

The choice of laws in the civil delicts is usually connected to the place where the injury/damage was suffered or where the illegal activity took place.

The choice of laws in the case of intellectual property is always linked to the country that provides the protection to the intellectual property. The issue is that different countries provide IP protection differently. What is protected in the Czech Republic is not necessarily protected according to US federal and state law, which means that the owner of the intellectual property might have different rights in each jurisdiction. This would be especially problematic in the case of recognising and enforcing foreign judicial judgments. Dr. O. Kunz pointed out that this part of the thesis is missing deeper analysis of the cogency of the Internet transactions in terms of Czech case law.

Recognition and enforcement of foreign judicial judgments is usually possible under the condition that it does not contravene the public order. Therefore, foreign judicial judgments on prohibiting particular activities (such as intrusion of privacy) might not be recognizable and enforceable in a country that does not prohibit such activities.

Author: **Ondřej Cech**

Title of doctoral thesis: **Jurisdiction of the Courts in Civil and Commercial Matters According to Council Regulation (EC) No. 44/2001**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* Dr. JUDr. Jan Ondřej, CSc., DSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* September 22, 2009.

Summary:

This thesis deals with the jurisdiction of EU Member States' courts to decide civil and commercial disputes according to Council Regulation (EC) No. 44/2001 (Brussels I Regulation). By way of introduction and for the purpose of comparison, the thesis contains a list of sources in international law governing identical or similar matters. The thesis also explains the mutual relationships among national, community, and international instruments and the principles of applying them in cases where such instruments are mutually incompatible, or, as the case may be, simultaneously inapplicable. This reveals the historical roots of analysed legal regulation; the interpretative sources, methods, and principles are part of a wider legal theoretical introduction. Particular attention is paid to the subject matter,

territory, time, and personal applicability of the Brussels I Regulation, which is ambiguous and complicated. The individual chapters dedicated to these are focused on interesting particularities and problematic issues, as well as a correct interpretation of terms. General conclusions are supported by the relevant case law of the European Court of Justice in particular chapters of the thesis.

The essential legal-theoretical analysis is followed by an interpretation of each particular provision of the Brussels I Regulation related to the courts' jurisdiction. In principle, the text follows a commentary book structure dealing with individual provisions of the Brussels I Regulation. The cornerstone of the thesis overall is an in-depth analysis of individual provisions governing court jurisdiction. The chapters of the thesis focus on general rules on jurisdiction, alternative, special and exclusive jurisdiction, and agreed jurisdiction. The relevant case law of the European Court of Justice is supplemented by recent decisions of the Czech courts.

Greater attention was paid to the choice of court agreement (prorogation). The author of the thesis emphasized the practical importance of this part of the Brussels I Regulation, providing examples for possible wordings of choice-of-courts clauses, accompanied by a detailed drafting explanation. The author also provided examples of pathological clauses. The author concluded his interpretation of particular types of jurisdiction with a defendant's submission to jurisdiction by appearance. In connection with the choice of court agreement according to the Brussels I Regulation, Dr. J. Ondřej also mentioned the question of applying Section 37 (jurisdiction in property matters) of the Czech International Private Law Act.

The thesis contains the comparative jurisprudence of institutes of arbitration proceedings and civil continental litigation. The author incorporated several citations of certain arbitral awards in individual chapters of the thesis. Episodic references to common law of the legal system are alternated with similar examples in Czech law. The whole analysis is within the context of the *acquis communautaire* and European law.

The thesis concludes with the specific issues of preliminary injunctions, the existence of *lis alibi pendens* and so-called related proceedings, all within a chapter that focuses on the conflict of jurisdictions. In its conclusion, the thesis repeatedly refers to "weaker" provisions of the Brussels I Regulation, including proposals for possible solutions that overlap with the opinions of an expert group that addressed the issues of the application of the Brussels I Regulation to the European Commission recently.

Author: **Monika Feigerlová**

Title of the doctoral thesis: **Mandatory Rules in International Commercial Contracts**

Chairperson: Doc. JUDr. Stanislav Plíva, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* Prof. JUDr. Alexander Bělohlávek, Dr.h.c. and JUDr. Milan Müller, PhD. LL.M.; *Date of oral defense:* September 3, 2009.

Summary:
The text of the thesis is structured into three main parts. The first part, which comprises Chapters 1 and 2, addresses the general problems of identification, designation, and categorisation of overriding mandatory rules. The current inconsistency in terminology and in determination of this category of rules is illustrated with examples of relevant pieces of national legislation and applicable international treaties. The thesis compares a new concept of (overriding) mandatory rules adopted in the Rome I Regulation with the Rome Convention and prevailing jurisprudence.
Chapters 3 and 4 discuss the application of mandatory rules before national courts and arbitral tribunals. The "different" approaches of the national judges and arbitrators were analysed with reference to relevant case law, including judgments of the European Court of Justice on the notion of mandatory rules of law. Prof. Bělohlávek suggested clarifying the difference between the application and taking the overriding mandatory rules into account.
Although national courts always apply overriding mandatory rules of *lex fori*, they are reluctant to apply foreign mandatory rules that call for international application. From the authors' point of view, it is highly disputable in theory and practice whether an international arbitral tribunal has to apply overriding mandatory rules of a legal system that is not the proper law of the contract; it is claimed that arbitrators do not have *lex fori*. Under some jurisdictions, however, an arbitral tribunal may not be well advised to disregard the overriding mandatory rules of the forum as such, because the state courts of the forum could set aside an arbitral award at the request of the losing party on the grounds of the violation of public policy. Chapter 5 of the thesis analyzes the legal effects of overriding mandatory rules on international contracts.
According to the author, it is obvious that identifying an immense number of provisions as overriding mandatory provisions undermines the parties' autonomy in international contracts. It is well known that their number increased in all systems during the 20th century with the expansion of economic regulation.
The author sought to find a reasonable balance between general application of the ordinarily designated law (including law chosen by the parties) and exceptional application of overriding mandatory provisions of another law.

Author: **David Mašek**

Title of doctoral thesis: **Liability of the Carrier and Forwarding Agent in International Carriage of Goods**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* JUDr. Oto Kunz, CSc. and JUDr. Marie Zahradníčková, CSc.; *Date of oral defense:* June 4, 2009.

Summary:
This thesis deals with the definition, assessment, and comparison of the legal regulation of the liability of the carrier and forwarding agent in international carriage of goods. In the case of carrier's liability, the air carriage concerned dealt mostly with situations in which the Montreal Convention has recently entered into force. In the case of forwarding agents, the thesis focused mainly on Czech national regulation (due to the fact that the internationally unified regulation has not yet been concluded).
As a result of the international nature of the assessed relations, more jurisdictions are affected in principle. With regard to the international carriage of goods, the international unified regulation must be used. On the other hand, the legal regulation of the international forwarding agency is still based on various national regulations. Dr. M. Zahradníčková questioned the author's conclusion that the general commercial conditions can prevail over statutory provisions of the Czech law.
Comparing the subject matter of the liability of both carrier and freight forwarders, it can be concluded that they share a common purpose: to define which of the contracting parties is liable for damage to the goods carried, and also for other indirect financial losses. However, the scope of their liability is not defined identically due to the scope and nature of their obligations. Whilst the carrier is liable for the execution of the carriage, the freight forwarders' liability is stated in principle regarding the arrangement of the carriage. Nevertheless, both liabilities contain many actual questions regarding its interpretation and application, particularly the acceptance of the Montreal Convention by most of the international community in international carriage by air or the contractual limitation of freight forwarders liability pursuant to Czech law.

Author: **Petr Juliš**

Title of doctoral thesis: **Choice of Law and Jurisdiction in International Commerce**

Chairperson: Prof. JUDr. Zdeněk Kučera, DrSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* Prof. JUDr. Martin Boháček, CSc. and Doc. JUDr. Jan Ondřej, CSc., DSc.; *Date of oral defense:* September 22, 2009.

Summary:
The thesis by Petr Juliš has attempted to describe three legal systems (Czech, English, and European) in order to introduce some legal solutions to problems concerning the jurisdiction and choice of law agreements. It has been shown that although the traditions from which the Czech and English legal systems arise are entirely different, the resolution of the problems in everyday life is often the same. European law has been introduced as an element that seeks (successfully, from the author's point of view) to reconcile the difference between common law and the civil law systems. The thesis covers basic theoretical issues regarding jurisdiction and choice of law agreements. By introducing the problems of submissions and severability of these agreements and, further, issues such as the importance of consent and agreement in international private law, this thesis has sought to provide the reader with basic knowledge on the subject.
As mentioned above, the thesis is dedicated to two major subtopics: jurisdictional agreements and choice of law agreements. The emphasis has been placed on the recent legal regulation of the topics, which have been contrasted with previous regulations, such as the Brussels Convention, and future regulations, such as the Hague Convention and the Rome I Regulation.
With regard to the first major topic, the thesis has introduced the legal framework of jurisdiction agreements in the Czech Republic, England, and the EC, whereby the new Hague Convention has been introduced because it seeks nothing less than to regulate choice of court agreements worldwide. As mentioned above, the convention has also sought to show how important good and precise drafting of jurisdiction agreements can be. According to the author, the reasons can be summarized as follows. Firstly, it was submitted that due to the common law principles of private international law, much of the decision-making authority has fallen to the parties. This means that where a choice of jurisdiction agreement has been concluded, the courts will generally give effect to it. If not, secondary obligations such as obligations to pay damages may arise, which strengthens the authority of the jurisdiction agreement and increases the chances of it being enforced. Secondly, the thesis has shown that many questions about jurisdiction agreements, such as possible variations of the Brussels I Regulation, have not yet been solved or even addressed by the courts. That is precisely why drafting a jurisdiction agreement is even more crucial for the parties' later bargaining position or chances in possible litigation. Thirdly, even where the rules regulating jurisdiction agreements are clear, inept drafting can have serious adverse consequences. It is simply better to use specific words and be clear from the outset to avoid future litigation.
The second part of the thesis introduces the legal framework of choice of law agreements in the Czech Republic, England, and the EC. The thesis has emphasized the Rome Convention, which shall prevail in case of conflict between the national and EC legal regulation (the author used the term 'supersede', which, in the opponents' opinion, may not be suitable here). Due to its universal application (that is, it applies No. matter where the parties to the dispute are domiciled or resident), the Rome Convention applies in more cases and therefore plays an even more important role than the Brussels I Regulation. The author

reaches the conclusion that the greatest problem of the Rome Convention is the lack of ECJ case law, and therefore difficulties with the interpretation in different Contracting States. According to Prof. M. Boháček, it is also interesting to follow the relationship between Czech law and European law; for example, the obligatory written form of the choice of jurisdiction agreement according to Section 37 of the Czech International Private Law Act and the solution brought by the Brussels I Regulation, which the author analyses in detail.
This is not the case of the new Rome I Regulation, which came into force in December 2009. As with every legal instrument, the ECJ will provide a helpful guideline to its interpretation by its case law. Until then, and due to the fact that its terminology has been unified with that of the Brussels I Regulations, practitioners and scholars will be able to take advantage of the case law regarding the Brussels I Regulation.

Author: **David Michel**

Title of doctoral thesis: **Comparison of Freedom of Establishment of Corporations**

Chairperson: Prof. JUDr. Zdeněk Kučera, DrSc. *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* Prof. JUDr. Květoslav Růžička, CSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* May 20, 2009.

Summary:
This thesis focuses primarily on the issue of the freedom to establish corporations, from the point of view of International Private Law.
The author examines this issue mainly under the EC Treaty and its relevant provisions (Article 43 and Article 48), and also in light of the relevant decisions of the European Court of Justice (*Centros, Daily Mail, Cartesio*), stressing the importance of the European Court of Justice in the field of the freedom to establish corporations.
With regard to the domestic legal regulations of the relevant issues, the author examines the regulations of the Czech legal system and compares them with the regulations of German International Private Law. It is important to mention that the abovementioned legal regulations are based on different principles. The Czech legal regulations are based on the principle of incorporation (Art. 22 Czech Commercial Code), while the German legal regulation has adhered to the principle of seat. In this context, the author examines how the German regulation currently drifts from the principle of the seat to the principle of incorporation.
This thesis analyses the current legislation of the EU concerning the specific "European corporations" – Societas Europea and European Private Company – and speculates on the contribution that "European companies" make to the freedom to establish corporations.

The opponents had only positive observations regarding the quality of the thesis. During the oral defense, the question of the regulations regarding the issue of freedom to establish corporations in the new Czech International Law Act proposal was discussed.

Author: **Veronika Burketová**

Title of doctoral thesis: **The Competition Law in Relations with an International Element**

Chairperson: Prof. JUDr. Jan Dvořák, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* Prof. JUDr. Květoslav Růžička, CSc. and Prof. JUDr. Alexander Bělohlávek Dr.h.c.; *Date of oral defense:* September 3, 2009.

Summary:
The thesis examines the means of antitrust/competition legal regulation belonging to different levels of legal regulation, from national law to international treaties, which could be employed to effectively address events that have restricted the natural evolution of the market when such events have contained an international element.
The thesis starts by introducing the universal economic models of behavior of the market's competitors and describing how market barriers (trade restrictions), that is, barriers on the market or between individual markets, generally arise. The focus then shifts to the barriers formed solely by the behavior of the competitors themselves – the private market barriers, caused by two forms of anticompetitive behavior: (i) collusions and forming of cartels, and (ii) misuse of market power. The presumption is that the trade restrictions cause damages to the market allocation efficiency and that the most harmful market disorders are caused by anticompetitive behavior by multinational enterprises (transnational corporations). Due to the fact that multinational enterprises and their cross-border economic activity is hardly regulated solely by individual competition law solely, the thesis suggests that the combined legal norms of three levels (national, regional and international) should be employed in order to effectively address the trade restrictions containing a foreign element. The regions are considered to be territories with homogenous trade and competition conditions. In order to represent this level, two significant regional formations and dominant members of the WTO – the USA and the EU – were selected. The US antitrust law and the EU competition law are believed to play a crucial role in addressing the cross-border economic activity and evolution of the antitrust/competition legal regulation around the world. Therefore, the focus shifts to how the US and EU systems operate against potential and existing restrictions on its markets. These issues are examined in detail and supported by judicial decisions. The thesis describes the evidence used to detect the trade restrictions on the market in each regional jurisdiction and the proceedings employed to ensure the market is clear

and efficient again and that the injured parties are compensated. The US and the EU share the main features of their antitrust/competition law, but there are some differences caused by their different historical and political evolutions. In both systems, the analogical anticompetitive behavior is prosecuted by the state power, either in criminal or administrative proceedings, while private actions claiming compensation are also allowed. Only the conditions and employment of individual measures sometimes differ, as well as the approach to the jurisdictional reach of the antitrust/competition law. Those issues are described in detail.

The truly national level of the competition legal regulation, represented by the competition law of the Czech Republic, plays a minor role as the regional regulation predominates over the national level when there is a foreign element in a competition case. For instance, Czech law mostly does not apply in such cases due to delimitation of the jurisdiction between the EU and its member states.

As the international level of antitrust/competition regulation is understood mainly the system of the WTO treaties and attempts to invoke them in antitrust cases, as well as as-yet-unsuccessful attempts to construct an international treaty on competition. Activity of international institutions such as OECD also belong to this level. Also very important are bilateral treaties concerning competition, such as those between the US and the EU and the practical cooperation of the supreme antitrust agencies in individual antitrust cases with an international element.

The opponent of the thesis, Mr. Belohlavek, drew attention to the problem of defining the international element in relation to competition law; this issue was discussed during the oral oral defense of the thesis.

Author: **Zdeněk Dvořák**

Title of doctoral thesis: **International Family Law of the Chosen European Countries**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* JUDr. Otto Kunz, CSc. and Prof. JUDr. Zdeněk Kučera, DrSc.; *Date of oral defense:* September 22, 2009.

Summary:

This thesis focuses primarily on the issue of family law from the point of view of International Private Law. The author is of the opinion that while it will probably not be possible in the near future to unify or to harmonize the family law of the EU countries, it will be possible to unify the international private law rules in this field.

The author examines this issue mainly under EC regulation Brussels II A and under the respective international treaties in this field, namely the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in

Respect of Parental Responsibility and Measures for the Protection of Children of 1996, the Convention on the Civil Aspects of International Child Abduction of 1980, including the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 2007 and its Protocol.
The issue is further examined from the point of view of both the Czech legal system and the common law (British legal system). The author also describes how parental responsibility works under the British legal system and finds it applicable for the domestic rules of Czech family law.
The author is of the opinion that modern international private law should use the rule of habitual residence as a basic principle. The principle should also be used in domestic Czech international private law. The supervisor positively evaluated the author's definitions of the terms 'habitual residence' and the 'habitual residence of children', which are not understood uniformly in legal theory and practice.

Author: **Martin Winkler**

Title of the doctoral thesis: **Commercial Representation in International Trade**

Supervisor: Prof. JUDr. Zděnek Kučera, DrSc.; *Opponents:* Prof. JUDr. Květoslav Růžička, CSc. and Prof. JUDr. Martin Boháček, CSc. *Date of oral defense:* September 22, 2009.

Summary:
This thesis focuses on the issue of commercial representation from the point of view of International Private Law. With regard to commercial representation, the author examines the following aspects: conflict of laws regulating commercial representation, direct regulation of commercial representation, comparison of domestic private law regulations, and comparison of public law regulations. From the abovementioned examination, the author draws some proposals *de lege ferenda*, which should help not only the legal theory but also the praxis.
Above all, the commercial representation is examined as a specific contract used in international business. The author describes this contract as a specific instrument and distinguishes it from the employee contract and the consumer contracts. Further, the contracts relating to commercial representation, such as commission contract and contracts concluded by the commercial representative on behalf of the represented person, are analysed.
With regard to the conflict of law regulation – the author examines the domestic regulations of the Czech Republic – namely the Private International Law Act, primarily the regulation pursuant to Section 10, Subsection 2. He further analyses the commercial representation under the Rome Convention on governing law for contracts, which also applies in the Czech Republic.

As to the direct regulation, the author examines the issue of commercial representation under the Convention of 1978 on the Law Applicable to the Agency adopted by the Hague Conference.
The author further describes the question of qualification, which arises not only in connection with domestic rules but also in connection with the abovementioned international instruments. In his opinion, Prof. K. Růžička clearly disagreed with the author's recommendation to the contracting parties to close the arbitration clause in favour of the institutional arbitration court, which must decide all disputes arising from the contract according to the *lex mercatoria*.

Author: **Lenka Blahutová**

Title of doctoral thesis: **Current Issues of Carrier Liability for Breach of Contract of Carriage of Goods by Sea**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc. ;*Opponents:* Doc. JUDr. Jan Ondřej, CSc., DSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* June 22, 2010.

Summary:
The transport sector represents approximately seven percent of European GDP and European companies own 41 percent of the total global fleet capacity. As these numbers suggest, transport is an important industry and a major contributor to the functioning of the European and international economies. Maritime transport covers 80 percent of all trade exchange and has become the dominant transport sector for international business.
The Hague, Hague-Visby (known collectively as the Hague-Visby rules), and Hamburg Rules have become the main reason for the lack of uniformity in the field of the carriage of goods by sea due to their different texts and legislative styles. These three sources of law are actually in force in different countries. As maritime transport is mainly international, this heterogeneity causes problems in practice.
Lenka Blahutová's thesis analyzes the maritime carrier's liability for loss of or damage to goods under convention-based regimes.
The Czech Republic has ratified the United Nations Convention on the Carriage of Goods by Sea signed on 30 March 1978 in Hamburg (known as the Hamburg rules). The French Republic has ratified the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, which was drafted in Brussels in 1924 (the Hague-Visby rules). France has also incorporated the Codex on Maritime Law – the Law of 1966. The Czech Republic does not have any specialized codex on Maritime Law and uses general provisions of Commercial and Civil Codes. The thesis compares Czech and French legal systems in the field of maritime law.

The thesis is structured into three parts (chapters). The first part provides a short overview on maritime law history, beginning with Roman law, maritime regulation in Italian cities and free cities of the Rhine and the Baltic Sea. It continues with the *Consolato del Mare* (Regulation of the Sea), which was adopted by the cities on the Mediterranean around A.D. 1300 and the Laws of Oléron, which prevailed in France and England, and then moves on to the *Ordonnance de la Marine* until the new maritime age of the Harter Act and the International Law Association.
The second part of the thesis is more general and is dedicated to the main principles of International Private Law and the basis of legal liability. In order to understand maritime law, it is important to be aware of the basic principles and sources of international private law. It should be pointed out that, according to Dr. Kunz's opinion, the author should pay more attention to the analysis of relevant case law relating to the carrier's liability (taking of evidence, burden of proof, etc.). This chapter aims to analyze three types of regulation in international private law – national, international, and European regulations. The main focus of attention is on regulations and instruments on European level due to the changes in the European Private Law in 2009 (entry into force of Rome I Regulation). The chapter also covers procedural instruments such as the Brussels Convention from 1968 and its successor Regulation, known as Brussels I. The author also pointed out the main questions in terms of European sources of law as the author aims to demonstrate the possible solutions through the Court of Justice's jurisdiction.
Regarding the liability, the thesis explains the basics of legal liability and its forms, including components of liability and its conditions. The thesis also deals with subjective and objective liability as a crucial issue in maritime transport law.
This chapter underlines the main issues of liability in transport law in general. The author also explains the most important legal transport terminology, such as bill of lading, contract of transport, means of transport, regional conferences, international transport, ship, etc.
The third part deals with the carrier's liability for breach of contract of carriage of goods by sea under the convention-based regimes, specifically the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules. The new Rotterdam Rules, as the new convention opened to ratification, is also included. This convention aims to unify the different legal basis.
The thesis identifies, evaluates, and compares a carrier's liabilities under the three conventions and determines the conditions of such liabilities and exemptions. The thesis also covers the Czech and French national requirements of such liabilities.
The third chapter also includes the procedural part and deals with competent jurisdiction and arbitration. The author made special note of arbitration, which is advantageous for both sides of contract of maritime transport (transporter and shipper) and is widely used. The thesis also compares the statutes of limitations for different maritime conventions.
In the final part, the author proposes joining an ongoing debate on whether the maritime transport industry needs all the three abovementioned conventions on the same subject, namely legal regimes relating to carriage of goods. The author underlines here the importance of unifying international maritime law and ponders the future of the Rotterdam rules.

Author: **Michaela Orságová**

Title of doctoral thesis: **Conflicts between State Courts and International Arbitration**

Chairperson: Prof. JUDr. Stanislava Černá, CSc. ; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.;*Opponents:* Prof. JUDr. Květoslav Růžička, CSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* May 20, 2010.

Summary:
This thesis deals with the arbitrator's jurisdiction and with conflicts of proceedings between state courts and international arbitration, comparing different legal orders.
Its first part explains arbitral jurisdiction, the basis of which is the arbitration agreement. It analyzes the regime of the arbitration agreement, the nature and regime of arbitral jurisdiction, the principle of competence-competence, and the court's procedure under Section 106 of the Czech Civil Procedure Code.
The second part of the thesis deals with conflicts of proceedings between state courts and international arbitration, especially from an arbitrator's point of view. The author argues that conflicts of proceedings and inconsistent decisions should be prevented and, in this manner, the parties' legitimate expectations, their rights acquired in good faith, and legal certainty should be protected. In his opinion, Dr. O. Kunz suggested that the author should pay more attention to the recent position of arbitrator in this chapter.
The author made a distinction between conflicts of jurisdiction and conflicts of proceedings on their merits. With regard to the former, the author explains the rule of *lis pendens*, consolidation of related proceedings, *res judicata*, *cause of action estoppel*, *issue estoppel* and the doctrine of *forum non conveniens*, all of which she applies to parallel state and arbitral proceedings.
The author analyzes conflicts of proceedings on their merits based on the general explanation of the abovementioned procedural tools and on a detailed explanation of anti-suit injunctions. The author applies all these procedural tools to parallel state court and arbitral proceedings.
The author would prefer binding transnational rules or international harmonization of national procedural rules. At the same time, she does welcome the non-binding International Law Association's recommendations for arbitrators.

Author: **Lukáš Klee**

Title of doctoral thesis: **FIDIC Conditions of Contracts in the Czech Republic**

Chairperson: Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Supervisor:* Prof. JUDr. Květoslav Růžička, CSc.; *Opponents:* Doc. JUDr. Jan Ondřej, CSc., DSc. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* June 22, 2010.

Summary:
This thesis primarily deals with the application of the FIDIC Conditions of Contract in the Czech Republic. FIDIC, the Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers), was founded in 1913 and now represents the consulting engineering industry around the world. The FIDIC Conditions of Contract are intended to be suitable for construction projects being carried out around the world by all types of employers. FIDIC recommends its conditions for international use on a two-part basis using specific and general conditions. FIDIC warns about changing the general part and recommends making all the changes in the specific part.
FIDIC Conditions of contract are also used in the Czech Republic, mainly within infrastructure public procurement and by some private clients and contractors.
This thesis deals mainly with the First Edition (1999) of the international contract conditions FIDIC CONS (Conditions of Contract for Construction), FIDIC P/DB (Conditions of Contract for Plant and Design-Build), and FIDIC EPC (Conditions of Contract for EPC/Turnkey Projects).
This paper is set out in sections, starting with a brief overview of the history, development, and description of the FIDIC standard forms of contracts. The next chapters deal with specific issues in terms of the use of the FIDIC conditions in the Czech Republic legal system. In addition, some specific institutes are analyzed that often originate from the Anglo-American law system but are used in Czech legal environment. Within the context of this chapter, according to the opinion of Doc. J. Ondřej, the FIDIC conditions and Czech Commercial Code should be analyzed and compared.
Furthermore, the thesis deals with international trade legal issues (including the *lex mercatoria* aspects), FIDIC Conditions of Contract risk allocation and insurance clauses arrangement. The next chapters deal with contract price, claims, claim management system, and dispute resolution. The final section includes a vocabulary of specific construction industry terms in four languages.

Author: **Anna Dolejší**

Title of doctoral thesis: **European Order for Payment and Payment Orders in the Czech Republic, France, and Germany**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.;*Opponents:* JUDr. Ing. Bohumil Poláček, Ph.D., MBA, LL.M. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* September 22, 2010.

Summary:
The main topic of this thesis is the European order for payment procedure, which was adopted by Regulation No. 1896/2006 of the European Parliament and of the Council (EC) creating a European order for payment procedure on 12 December 2006. This thesis describes events preceding the adoption of the regulation, the procedure for adopting it, as well as development of the content of individual provisions of the regulation and the content of the actual adopted and binding regulation.
This thesis compares the European order for payment procedure with national orders for payment procedures in the Czech Republic, France, and Germany. The German and French orders for payment procedures were chosen because the European Commission claims the French *injonction de payer* and the German *Mahnverfahren* were the two most significant sources of inspiration for the European order for payment procedure.
The first chapter focuses on the concept of the order for payment in general, the order for payment in the Czech Republic, including the new electronic order for payment, and special orders for payment based on a bill of exchange or on a cheque.
The next chapter summarizes the most significant events preceding the legislative initiative leading to enactment of the regulation. These include the Storme Proposal, an extension of the treaty establishing the European Community by the ability to adopt measures in the field of judicial cooperation in civil matters, the conclusions of the European Council in Tampere 1999, and the joint programme of the commission and the council of measures for implementing the principle of mutual recognition of decisions in civil and commercial matters.
Chapter 3 concerns the individual stages of the legislative procedure, including the green paper of the commission, the first proposal of the regulation, the opinion of the European Parliament, and the statement of the European Economic and Social Committee, as well as the common position of the Council.
Chapter 4 describes the content of the regulation in general, particularly the position of the regulation as a part of the establishment of an area of freedom, security and justice, a general approach to enforcement of uncontested claims in member states.
The following chapter focuses on individual features of the European order for payment itself. The chapter analyzes the possible solutions with regard to the model of the order for payment and compares the approach of the commission, the European Parliament, the council and the European Economic and Social Committee with the actual adopted text of the regulation.

Chapter 6 concludes the part about the European order for payment procedure. It is one of the most interesting chapters because it describes the national regulation in the Czech Republic, France, and Germany relating to the European order for payment procedure and reveals the significant differences of the European order for payment procedure among the countries. In his opinion, Dr. O. Kunz suggested a more critical approach to the unification of the order for payment procedure within the framework of EU Law. Dr. B. Poláček particularly appreciated the author's practical experience with the order for payment procedure.
The last two chapters include a description of the national French order for payment procedure and the German order for payment procedure.
The most important conclusion of the thesis is that the application of the European order for payment procedure in member states is significantly affected by national principles of procedural law.

Author: **Jakub E. Chmelík**

Title of doctoral thesis: **European Order for Payment and European Small Claims Procedure**

Chairperson: Prof. JUDr. Květoslav Růžička, CSc.; *Supervisor:* Prof. JUDr. Monika Pauknerová, CSc., DSc.; *Opponents:* JUDr. Lucie Banyaiová, Ph.D. and JUDr. Oto Kunz, CSc.; *Date of oral defense:* September 22, 2010.

Summary:
The thesis introduces the reader to the legal basis for adopting the regulations of European Private International Law in the primary legislation of the European Union and the process of harmonising the civil procedure regulations of the EU Member States, including the prospects for future development. The main goal of the thesis is to analyze the legal provisions of the European order for payment and European small claims procedure with comparison with Czech civil procedure regulations.
After deep comparative analysis, the author concludes that the provisions of the European Order for Payment Regulation can be assessed favorably, even though certain issues were not handled in an adequate manner. This particularly concerns regulation of the review of the European order for payment in exceptional cases. One shortcoming related to the adaptation of the European order for payment into the Czech law is that a European order for payment must be delivered to the defendant personally, as is the case with the Czech order for payment.
The provisions of the European order for payment refer to certain characteristic that correspond to the provision of the order for payment under Czech law (for example, the non-evidential model of procedures), as well as substantial differences (especially the possibility of delivering a European order for payment abroad).

Regulation 861/2007 provides only minimal harmonization of the rules for the European small claims procedure, since most of the issues (particularly the option to lodge appeals) have been left to the member states. Under regulation 861/2007, the principal means for speeding up cross-border small claims litigation and reducing the costs thereof are simplifying the European small claims procedure, especially the written procedure, simplifying the course of evidence, and setting the deadlines for issuing decisions. The author argues that the relevant rules set out in Regulation 861/2007 are barely acceptable from the standpoint of securing the right to fair trial and the right to adversarial process. Therefore, the role of the judge in securing these rights in the European small claims procedure is increasing.
In his conclusions, the author prefers further harmonization and unification at the European level. According Dr. O. Kunz's dissenting opinion, the author should mention some negative aspects of the further unification and harmonization of the procedural law in the field of EU Law (such as non-adherence to cultural, historical, and legal traditions in EU Member States).

Author: **Tomáš Mach**

Title of doctoral thesis: **Investment Protection of Holding Structures and the Role of the Institution of the Corporate Veil in Case-Law**

Chairperson: Doc. JUDr. Jan Ondřej, CSc., DSc.; *Supervisor:* Prof. JUDr. Květoslav Růžička, CSc.; *Opponents:* Prof. JUDr. Monika Pauknerová, CSc., DSc. and Prof. JUDr. Naděžda Rozehnalová, CSc.; *Date of oral defense:* September 22, 2010.

Summary:
The objectives of the thesis are to determine the extent to which the institution of corporate veil influences the nationality of persons participating on holding structures, how these structures are viewed in international arbitration, and the extent to which piercing of the corporate veil exists in the case law of the arbitration courts.
The author introduces the reader to the arena of investment protection and provides an historical overview and discussion of international law. The analysis starts with the customary regime of diplomatic protection, followed by analysis of the contemporary particular regimes created by bilateral and multilateral treaties on investment protection. The author discusses the difference between these two regimes, as well as the difference in the position of an individual pursuant these to these regimes.
The thesis also analyzes the basic approaches adopted by municipal laws in determining one's nationality. Subsequently, the thesis discusses the 20th century development of international law that rests in its absorption of rules determining nationality within the scope of subject matter regulated by international law.
Regarding legal persons, the author analyzed the development of the customary

rules of the determination of nationality of such entity. The analysis starts with a discussion of the principle of *siège social* and some rather less systematic applications of this principle in older case law. The discussion then turns to the control test and, in particular, to the incorporation test of corporate nationality, the latter being the prevailing customary rule as summarized by the ICJ in *Barcelona Traction*. The analysis of existing customary international law is complemented by the discussion of two particular regimes of a rather self-contained nature, namely case law of the Iran/USA Tribunal and the European Court of Justice. The author reaches the conclusion that, under contemporary customary international law, the rule of incorporation is *the* rule of determination of nationality of corporations. The principle of effective nationality cannot be considered a valid part of customary international law vis-à-vis juridical persons, as has clearly been shown by recent case law of the ICJ, such as the *Diallo* case.

Probably the most significant contribution is dedicated to the definition and subsequent analysis of the institution of the *corporate veil* in the light of the world's major legal orders (United States, the laws of England and Wales, Germany and France). The author reaches some important conclusions. Case law on *piercing of the corporate veil* in the United States has developed and has more or less settled. In England, on the other hand, although the concept is known to the legal environment due to the closeness of the abovementioned legal sub-cultures, courts generally refuse to apply it and adhere to the principles of a separate entity of a legal persons (*corporate veil*) as set by the House of Lords in *Salomon v. Salomon*. Germany has a comparable theoretical and a practical approach to the case law vis-à-vis piercing the *corporate veil*. However, this approach is based on the fundaments of Germany's civil legal system with its own maxima, which are different from those of American common law. French legal practice is not familiar with this doctrine at all. The second relevant conclusion related to the institution of the *piercing of the corporate veil* is that one cannot really talk of concrete rules and maxima that could indicate that the institution of piercing the corporate veil would have become a general principle of law recognised by civilized nations. The accuracy of this conclusion was confirmed by Prof. M. Pauknerová in her opposing opinion.

In relation to investment arbitration, the arbitrators clearly tend to respect the principle of corporate veil, particularly in situations where the incorporation test is "the test" chosen by the relevant bilateral investment treaty. In the analyzed case law, the arbitral tribunals refused attempts by the defendant state to pierce the corporate veil around the investor. The final chapter of the thesis elaborates a hypothetical example, which demonstrates the possibility of protecting assets through the *corporate veil* by creating special holding structures according to the relevant bilateral investment treaties and case law. The evaluation of the thesis by the opponents was positive. Prof. N. Rozehnalová stressed that the author should define the crucial issues more precisely in the introductory part of the thesis because the author preferred to analyze the particular questions of the doctrine of the *corporate veil* and the protection of the holding structures.

Current Events, Past & Ongoing CYIL / CYArb Presentations

I. Current Events

I.1. Selected Scientific Conferences, Seminars, Academic Lectures and other Professional Events[1]

PRAHA [CZE] 29 January 2010 – Office of the Government of the Czech Republic jointly with the Institute of Legal History Faculty of Law, Charles University in Prague[2].
Workshop ***Menšiny a právo v České republice*** [***Minorities and the Law of the Czech Republic***]

PRAHA [CZE] 19 January 2010 – Faculty of Law, Charles University in Prague[3].
Lecure given by the ex-President of the Federal Council of Austria, **Professor Herbert Schambeck[4].**

[1] Contributions mentioned herein represent a selection from papers related to issues with an international element. CYIL editors hereby apologize to the lecturers for omitting some of them and their topics due to the limited space provided for this section. Editors referred especially to published and other accessible information. Readers are specifically warned that the information about papers presented at the individual conferences and other academic and scientific events is only a selection and definitely does not provide a full report on the entire proceedings and the academic scope of each particular event.

[2] Report: René Petráš, *Academic lecture: Minorities and the Law in the Czech Republic*, 149 (6) PRÁVNÍK 663 (2010).

[3] Details about *The Common Law Society* available at: http://www.societv.cz/ (accessed on February 1, 2011).

[4] Information about the lectures of, *inter alia*, Jiří Šouša, 149 (5) PRÁVNÍK 541-543 (2010).

PRAHA [CZE] 13 April 2010 – Common Law Society[5].
Advocate General of the European Court of Justice, **Eleanor Sharpston, QC** presented the ***first annual Lord Slynn Memorial Lecture***.

PRAHA [CZE] 13 April 2010 – Common Law Society.
Lecture by **Kevin Gibbons** on ***The Law of Trusts***, one of a series of lectures "Introduction to Common Law".

PRAHA [CZE] 13 April 2010 – Common Law Society.
Lecture by **Vít Šislet** on ***Islamic Law in Europe***.

BRNO [CZE] 23 April 2010 – Office for the protection of competition.
The Second Annual **Conference** on ***Competition Enforcement in the Recently Acceded Member States***[6].

BRNO [CZE] 26 – 28 May 2010 – Faculty of Law, Masaryk University.
COFOLA – IVth international Conference of PhD Students and youth researchers (various sections)[7].

OLOMOUC [CZE] 27 – 28 May 2010 – Faculty of Law, Palacký University.
International conference ***Procesněprávní regulace vztahů vyplývajících z práva rodinného*** [***Procedural Regulation of Family Law Relations***] at the **Faculty of Law, Palacký University in Olomouc**[8].
The third part of the conference focused on proceedings in family cases with international elements. Lecturers concentrated, inter alia, on the following issues:

- Andrea Fialová Račilová, *on the relationship between the Council Regulation (EC) no. 44/2001 and the Hague Convention of 2 October 1973.*
- Zdeněk Kapitán, *proceedings regarding the return of minors in cases of international abductions.*
- Markéta Nováková, *law and practice of enforcement of the right of access to a child by his or her parent in cases with international elements.*
- Tereza Pačovská and Michaela Janočková, *criticism of the case law of the Court of Justice of the European Union regarding the possibility of issuing provisional measures under Article 20 of the Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.*

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[5] Details about *The Common Law Society* available at: http://www.society.cz/ (accessed on February 1, 2011).

[6] For further information see: http://www.compet.cz/en/competition/news-competition/second-annual-conference-on-competition-enforcement-in-the-recently-acceded-member-states/ (accessed on February 1, 2011).

[7] Conference proceedings available at:
http://www.law.muni.cz/sborniky/cofola2010/files/sbornik/sbornik.pdf
(accessed on December 28, 2010). The Vth Annual COFOLA Conference is scheduled for 29 April – 1 May 2011.

[8] For information about the conference see for instance Renata Šínova, 149 (11) PRÁVNÍK 1188-1191 (2010).

BRNO [CZE] 22 June 2010 – Department of Environmental Law and Land Law, Faculty of Law, Masaryk University Brno
Conference ***Health Care and Law***[9].

BRNO [CZE] 11 – 14 July 2010 – Faculty of Law, Masary University Brno
Conference ***Economic Tools in the Environmental Law***.

HROTOVICE [CZE] 6 – 10 September 2010 – Institute of Law and Technologies[10]**, Faculty of Law, Masaryk University Brno**
IInd Czech Conference on Information and Communication Technologies ***Czech Law and Information Technologies***.

BRNO [CZE] 7 September 2010 –Faculty of Law, Masaryk University Brno jointly with the Society for Canonic Law
XVIth Conference The Church and the State **– Manželství, děti a rodinný život v nábožensky pluralitním státě [*Matrimony, Children and Family Life in the Country with Religious Plurality*]**.

BRNO [CZE] 9 – 10 September 2010 – Department of Financial Law and National Economics, Faculty of Law, Masaryk University Brno
Summer School of Tax Law[11].

PRAHA [CZE] 13 – 14 September 2010 – Department of Financial Law and Science, Faculty of Law, Charles University in Prague.
Conference ***„Aktuální otázky financí a finančního práva z hlediska fiskální a monetární podpory hospodářského růstu v zemích střední a východní Evropy po roce 2010" (Current Issues Concerning Finance and Financial Law from the Perspective of Fiscal and Monetary Support of Economic Growth in the Countries of Central and Eastern Europe After 2010)***.
The conference was organized by **the Department of Financial Law and Science of the Faculty of Law, Charles University in Prague, in cooperation with the Information and Research Organization Centre for Public Finance and Tax Laws of the Central and Eastern Europe Countries** (Centrum informacji i organizacji badań finansów publicznych i prawa podatkowego krajów europy środkowej i wschodniej). The conference, attended by two hundred delegates from many countries, was very interesting from the perspective of international law, private international law and European law due to the fact that the focus

[9] The next conference within the program is to be eld in the period 12 – 17 September 2011, organised jointly by the Faculty of Law, Masaryk University, Brno [CZE] and by the National Centre of Nursing and Other Health Professions and in cooperation with another institutions. Detailed information available at: http://health.law.muni.cz/ (accessed on December 28, 2010).

[10] Web site of the Institute available at: http://cyber.law.muni.cz/ (accessed on December 28, 2010).

[11] Detailed information available at: http://tax.law.muni.cz/ (accessed on December 28, 2010).

of the conference was indeed most topical, aimed at transnational issues. The conference was therefore not limited to finance and financial law issues, it also discussed highly interdepartmental topics. Guests were invited by and the conference was held under the auspices of *Professor JUDr. Aleš Gerloch, CSc.*, Dean of the Faculty of Law, Charles University in Prague, and *Professor Dr hab. Eureniusz Ruśkowski*, President of the co-organizing centre from Poland.

Contributions Presented at the Conference:

- Milan Bakeš, Praha (Czech Republic). *Aktuální otázky finančního práva ve světle hospodářské a finanční krize* (*Current Financial Law Issues in Light of the Economic and the Financial Crises*).
- Marina Valentinovna Sentsova, Voronezh (Russian Federation). *Nalogovoe pravo Rossii: novye aspekty pravoponimanija i razvitija* (*Russian Tax Law: New Aspects of Legal Understanding and Development*).
- Eugenius Ruśkowski, Bialystok (Poland). *Activity-based budget in the light of theoretical principles and practical experiences of selected countries.*
- Vladimír Babčák, Košice (Slovak Republic). *Daňové právo ako nástroj a forma podpory podnikateľského prostredia* (*Tax Law as the Instrument and the Form of Assistance to the Business Community*).
- Michal Radvan, Brno (Czech Republic). *Ad Valorem Taxation of Real Estate*;
- Krystyna Pitrowska-Marczak, Lodz (Poland). *The legal and economic aspects of public financial management.*
- Lilia Abramchik, Grodno (Belarus). *Nalogovoe proizvodstvo* (*Tax Proceedings*).
- Aksana N. Shupitskaya, Grondon (Belarus). *Objazannosť platiť nalogi kak odna iz važnejših konstitucionnyh objazannostej v respublike Belaruś* (*The Obligation to Pay Taxes as One of the Most Important Constitutional Obligations in the Republic of Belarus*).
- Petr Mrkývka, Brno (Czech Republic). *Předmětové pojetí finanční správy* (topic in translation – *Subject-Matter Approach to Financial Administration*).
- Hana Marková, Praha (Czech Republic). *Stát, veřejný rozpočet a zásady jeho tvorby a realizace v období překonávání důsledků hospodářské krize* (*The State, the Public Budget and the Principles of Formation and Implementation of the Public Budget in the Aftermath of the Economic Crisis*).
- Marcela Žárová, Praha (Czech Republic). *Problémy nedokončené harmonizace přeshraničních fúzí jako bariéry pro volný pohyb kapitálu* (*Problems Associated with the Incomplete Harmonization of Cross-Border Mergers as an Obstacle to the Free Movement of Capital*).
- Alexander Nikolaevich Kostyukov, Omsk (Russian Federation) *Constitutional regulation of state and economy interaction.*
- Anna Jurkowka-Zeidler, Gdansk (Poland). *The new legal framework for crisis management in the EU internal financial market.*
- Valentina Nikolaevna Ivanova, Uljanovsk (Russian federation). *Application of model of a juridical construction of the tax as basic reception of legal techniques for formation of laws on taxes.*

PRAHA [CZE] 23 – 24 September 2010
Second Annual International Czech-Polish Constitutional Law Seminar ***Ústavní systém České republiky a Polské republiky po přistoupení k EU*** [***Constitutional System of the Czech Republic and the Republic of Poland after the Accession to the EU***][12].
Lecturers concentrated, inter alia, on the following topics:

- Aleš Gerloch; *opening speech outlining some of the significant topics.*
- Václav Pavlíček; *concerning Act No. 195/2009 Coll. and its subsequent abrogation by the Constitutional Court.*
- Andrzej Szmyt; *on the successfully completed constitutional procedure of amending the Polish Constitution.*
- Jan Gronský; *critical comments regarding the powers of the Constitutional Court of the Czech Republic.*
- Karel Klíma; *regarding the case law of both constitutional courts on the relationship between constitutional and European law.*
- Tereza Pačovská and Michaela Janočková; *criticism of the case law of the Court of Justice of the European Union regarding the possibility of issuing provisional measures pursuant to Article 20 of the Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.*
- Other lecturers (*inter alia*): Radovan Suchánek; Zbigniew Witkowski; Agnezska Bień-Kacała; Marcin Czyżniewski; Jiří Jirásek; Krzystof Skotnici; Jan Kudrna; Ryszard Mojak; Jarosław Sułkowski; Kararzyna A D Witkowksa.

BRNO [CZE] 21 – 24 September 2010 – Department of the State and Law History, Faculty of Law, Masaryk University Brno
Summer School of the Department of History – Historical Metamorphoses of the Criminal Law[13].

ROŽNOV p. RADHOŠTĚM [CZE] – 14 – 15 October 2010 – Department of Law, Faculty of Economics, VŠB-Technical University of Ostrava
International Conference ***Interaction of Economy and Law***[14].

PLZEŇ [CZE] – 29 and 30 September 2010
Lectures by **Mgr. Adam Szot** and **Dr. Tomasz Demendecki** from the Department of Civil Procedure and International Commercial Law, Faculty of Law and State Administration, Marie Curie-Skłodowska University in Lublin /

[12] Information available for instance at: http://www. mzv.cz/cesko-polske_forum/cz/cesko_polsky_pravnicky_seminar.html; pictures from the seminar at: http://www.jiriblazek.eu/cesko-polsky_seminar_23092010/index.html (accessed on December 28, 2010). For information about the conference see for instance Martin Kopa, 5 (1) ACTA IURIDICA OLOMUCENSIS, Olomouc [Czech Republic]: Palacký University 165-169 (2010).

[13] Detailed information available at: http://tax.law.muni.cz (accessed on December 28, 2010).

[14] Conference proceedings will be published shortly.

Republic of Poland. The lectures were part of the **Introduction to Polish Law** programme.

PLZEŇ [CZE] – 24 November 2010
Academic lecture organized by the Department of Private Law and Civil Procedure, **Dr. iur. Hannes Rösler, LL.M.** (Max Planck Institute Hamburg / Germany) with the topic: ***The Review of Standard Contract Terms – On Consumer, Commercial and General Contract Law*** and **JUDr. Kristián Csach, Ph.D., LL.M.** (Faculty of Law, P. J. Šafárik University Košice / Slovak Republic) with the topic ***Standard Contract Terms in the Law of the Slovak Republic and in the Law of the Czech Republic***.

BRNO [CZE] – 10 – 11 November 2010 – Days Of Law 2010 – Faculty of Law, Masaryk University, Brno (fourth annual international scientific conference)[15]

Sections and Contributions:

Section: Problematic issues of the upcoming recodification of Czech criminal procedure

- Rima Ažubalytė, *Constitutionalization and Internationalization of the Criminal Procedure of Lithuania.*
- Jakub Chromý, Ondrej Štefánik, *Juvenile Delinquency – the Records from Research Work.*
- Jaroslav Fenyk, *The Principle of Legality or the Principle of Oportunity in the New Criminal Proceedings.*
- Jan Kocina, *Offender-victim Settlement in Criminal Procedure.*
- Vladimír Kratochvíl, *Critical Comment a margo basic Principles of Criminal Procedure / Criminal Process Law in the year 2010.*
- Zdeněk Krejčí, *Method of Odor Identification as Evidence in Criminal Proceedings.*
- Josef Kuchta, *Cooperating Defendant and Crown Witness.*
- Ondrej Štefánik, *Proportionality between the Length of Criminal Proceedings and Punishment in the Case-law of the Czech Constitutional Court.*
- Eva Žatecká; Kateřina Přepechalová, *Several Notes to the Position of the Aggrieved Party in Criminal Procedure.*

Section: Contemporary issues of internal administration

- Mustafa Avci, *What Should an Ideal E-Administration Model Comprise?*
- Filip Dienstrbier, *Protection of Personal Data in Administration of Archiving.*

[15] Conference proceedings: Radovan David; David Sehnálek; Jiří Valdhans (eds.), DNY PRÁVA 2010 / DAYS OF LAW 2010 (fourth annual international conference) Conference proceedings, Brno[CZE]: Faculty of Law, Masaryk University, 2010, ISBN: 978-80-210-5305-2. Available at: http://www.law.muni.cz/content/en/proceedings/ (accessed on December 28, 2010). Abstracts of the Conference proceedings available also in hard-copy.

- Monika Horáková, Soňa Pospíšilová, *Right of Association and Assembly – Selected Questions.*
- Jana Jurníková, *The current problems of public administration.*
- Stanislav Kadečka, *Right of Association and Assembly – Selected Questions.*
- Jakub Král, *Protection of Personal Data in Administration of Archiving.*
- Veronika Kudrová, Registry of Students.
- Jiří Nantl, *Powers and Procedures to Deprive Persons of Degrees.*
- Marie Sciscalová, *Administrative Management.*
- Yusuf Sertaç Sertec, *Right to Information within the Case Law of The European Court of Human Rights.*
- Marián Ševčík, *Current Issues of Development of Internal Administration in Slovakia in the Context of Public Administration Reform.*
- Marta Vrbová, *Protection of Personal Data in Administration of Archiving.*
- Pavol Zloch, *Classification of the Activities of Public Administration on Internal Administration.*

Section: Economic aspects of law

- Dominika Borsa, *The Role of Hungary from an Economic Point of View Apropos of an Ecological Catastrophe.*
- Karolína Červená, *Macroeconomic Environment in Slovakia and its Impact on Businesses.*
- Daniel Géč, *Legislative Changes in Regulation of Consumer Credit Providers in Slovakia since 2007.*
- Michal Karabinoš, *Tax Law of the Slovak Republic – an Instrument to FightEconomic Crisis.*
- Anna Kicová, *Tax Law of the Slovak Republic – an Instrument to Fight Economic Crisis.*
- Michal Kočiš, *Transfer Pricing Yesterday and Today.*
- Miroslav Koprla, *Economic Criminality from the View of Empirical Research Alternative.*
- Jana Koprlová, *Economic Criminality in Context of Comparing the Czech Republic and the Slovak Republic.*
- Jaroslaw Marczak, *The Economic Setting for the Requirements of Financial Law.*
- David Müller, *Foreign Direct Investment Restrictions.*
- Krystyna Pitrowska-Marczak, *The Economic Setting for the Requirements of Financial Law.*
- Petr Pospíšil, *To Possibilities of Next Progress in the Event of Unsatisfied Outstandings of Municipality or Region in the Insolvency Proceedings.*
- Johan Schweigl, *A Treatise on Some Negative Aspects of Interfering with Employment Relationships.*

Section: European dimension of financial law – Tax administration in the European administrative area

- Tomas Balco, *Spontaneous Legal Regulation in the Area of Financial Law on Example of Local "Lottery" Fee.*

- Radim Boháč, *Spontaneous Legal Regulation in the Area of Financial Law on Example of Local "Lottery" Fee.*
- Damian Czudek, *The Electronisation of Public Administration in the Czech Republic and Poland with Focus on the Tax Administration.*
- Lubomír Grúň, *The Third Dimension of Financial Law.*
- Tomáš Hulkó, *The Financial Dimension of European Groupings for Territorial Cooperation.*
- Jana Herboczková, *Supervision on the European Financial Markets in the Hands of the EU.*
- David Jeroušek, *Cooperation in Tax Administration in EU.*
- Michal Kozieł, *Tax Revenues of Public Budgets and Their Management.*
- Libor Kyncl, *Financial Sciences and Tax Administration in the European Union.*
- Hana Marková, *European Dimension of Financial Law – Tax Administration within the European Administrative Area.*
- Pavel Matoušek, *Harmonisation of Customs in the European Union Environment and Safety Aspects.*
- Petr Mrkývka, *European Dimension of Financial Law – Tax Administration within the European Administrative Area.*
- Kristýna Müllerová, *Beneficiary of Tax on Real Estate with Regard to Selected Constructional Elements of Tax. Comparison of Czech Republic with the Selected Countries of European Union.*
- Michal Radvan, *The conclusion of the conference – Summary.*
- Tomáš Rozehnal, *Mutual Assistance for Tax Enforcement and the New Czech Tax Code.*
- Petra Schillerová, *International Cooperation in Tax Administration.*
- Alena Salinková, *Principle of Uncertainty and Unconditional Infallibility.*
- Soňa Stará, *Principle of Uncertainty and Unconditional Infallibility.*
- Jana Šimonová, *Legal Regulation of Customs in the European Union – Its Specificities, Perspectives and Negatives.*
- Eva Šulcová, *Deposit Guarantee Schemes.*

Section: European and national dimension of civil law

- Zuzana Adamová, *Copyright and Related Rights in Terms of Actual Harmonization Tendencies in EU.*
- Moise Bojinca, *Solidarism as Theoretical Foundation of the Contract.*
- Sevastian Cercel, *Considerations Concerning the Constitutional and European Dimensions of the Ownership Right as Stated by the Romanian Juridical System.*
- Jan Hrabák, *Comparative Aspects of Concession Contracts.*
- Monika Jurčová; Marianna Novotná, *Future of the Common Frame of Reference.*
- Radim Kostík, *Protection of Property in Decisions of the European Court of Human Rights.*
- Pavel Koukal, *Intangible Assets and its Relation to Corporal Items in Respect of Civil Law Codification Drafts.*

- Martina Kovalčíkova, *The New Concept of Employee's Personality Protection from View of Recodification of the Civil Code.*
- Dušan Marják, Mária Ivanecká, *Future of consumer law in the view of acquis communautaire.*
- Matěj Myška, *The limits of copy for private use.*
- Polina Nesterenko, *The prospects for harmonization and codification of European Private Law.*
- Marián Rozbora, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Ján Švidroň, *An alternative view of "private" law after twenty years of works on new codification of civil law in Slovak Republic.*
- Blanka Tomančáková, *The European Dimension of the Unfair Terms In the Czech Consumer Law.*
- Marius Vacarelu, *European Property – New Form of Civil or Administrative One.*

<u>Section: Citizens and foreigners in domestic, international and European law</u>

- Jaroslav Benák, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Tomáš Blažek, *Securitization of migration: from human rights to security discourse.*
- Daniela Dvořáková, *In tow of Europeanization: forming of the Czech Immigration Policy.*
- Viktor Kučera, *Annulment of citizenship acquired by fraud.*
- Hana Lupačová, *Securitization of migration: from human rights to security discourse.*
- András Pünkösty, *Double citizenship in the context of the constitutional, European and international law.*
- Soňa Rakušanová, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Kateřina Šimáčková, *Arguments for granting full judicial review of decisions on citizenship matters – Ministry of Interior as the patron of the Czech sovereignty.*
- Ladislav Vyhnánek, *Citizenship and local self-government.*
- Jiří Zemen, *A Few Notes on the Topic of Residence of the EU Citizens in the Czech Republic, Mainly from the Constitutional- and Administrative-law Perspective.*

<u>Section: Law against domestic violence</u>

- Kateřina Čuhelová, *Domestic Violence in Judiciary Practice.*
- Radovan Dávid, *Social Protection of Children in Domestic Violence.*
- Lenka Holá, *Possibilities and Limits of Mediation in Cases of Violence between Parents.*
- Anna Hořínová, *Law against Domestic Violence in Practice.*
- Michaela Janočková, *The Influence of Domestic Violence on Case Law regarding International Abduction of Children.*

- Zdeňka Králíčková, *A Few Notes on the Topic of Residence of the EU Citizens in the Czech Republic, Mainly from the Constitutional- and Administrative-law Perspective.*
- Martin Kornel, *Child Protection and Domestic Violence: Inspirations from Abroad.*
- Daniela Kováčová, *Family Tabes. A Few Notes on the Topic of Residence of the EU Citizens in the Czech Republic, Mainly from the Constitutional- and Administrative-law Perspective.*
- Gabriela Kubíčková, *Children as Victims of Domestic Violence.*
- Bronislava Pavelková, *Possibilities and Limits of Mediation in Cases of Violence between Parents.*
- Senta Radvanová, *Endangered and Harmed Child.*
- Jiří Slováček, *ODR in Domestic Violence Law – Foreign Trends and Inspiration.*
- Ivo Telec, *The Child's Personality Injury.*
- Jana Volková, *Term "Domestic Violence" in Decisions of Supreme Administrative Court.*
- Marcela Tóthová, *Children as Victims of Domestic Violence.*
- Dagmar Úlehlová, *Domestic Violence and Intervention Centres.*
- Lenka Westphalová, *Social Protection of Children in Domestic Violence.*

Section: Metamorphoses of private law

- Lenka Bezoušková, *Influential Private Law Codifications in Islamic Countries.*
- Kamila Bubelová, *Usufructus – return of a forgotten institute.*
- Petra Capandová, *Work of a Slovak Work Group within the Subcommittee for Civil Law during the Preparation of the Civil Code 1950.*
- Martin Cempírek, *The History of Transport Dangerous Goods regulations or Private Law versus Public Law in the Transport of Dangerous Goods.*
- Ondřej Horák, *Influential Private Law Codifications in Islamic Countries.*
- Miroslav Frýdek, *Responsibility for blame and result according to Roman law and modern civil law codifications.*
- Hana Kelblová, *Historical development of legal liability for legal defects in the law of the Czech lands.*
- Christian Neschwara, *Das Schicksal der ältesten Materialien zur Kodifikationsgeschichte des österreichischen Zivilrechts. The fate of the eldest materials about the history of the codification of Austrian Civil Law – a report regarding an edition-project for the occasion of the 200th anniversary of the ABGB.*
- Balász Pálvögyi, *The Position of the Freedom of Contract in the Hungarian Law on Migration (1903).*
- Karel Schelle, *The Allgemeines bürgerliches Gesetzbuch (ABGB) and the law of succession.*
- Pavel Salák, *Legacy – Roman Law Institut and Czech Law in 20th Century.*
- Pál Sáry, *The changes of the rules of divorce in the Christian Roman Empire.*
- Ivana Stará, *Family Law in the Time of Czech and Moravian Protectorat.*

- Jaromír Tauchen, *A Few Remarks on the Nazi „Private" Law as a Model for the Law of the Protectorate of Bohemia and Moravia.*
- Renata Veselá, *Family Law in the Time of Czech and Moravian Protectorate.*
- Ladislav Vojáček, *The Conception of Labour Law in 1st half on 20th Century.*

Section: Arbitration – Parties autonomy and mandatory rules of procedure

- Alexander J. Bělohlávek, *The Scope of Autonomy In Appointment of Arbitrators: The Decision in the „Jivraj" case as an Eruption in Stable Axioms of Arbitration*
- Christian W. Konrad, *Reform of the EU´Investment Policy – BIT by BIT.*
- Filip Černý, *Demonstration of the Investor's Autonomy in Investment Arbitration as a Determining Factor of the Nature of the Investment Claim.*
- Hany Elmanaily, *Electronic Arbitration Agreement.*
- Zbyšek Kordač, *Arbitrators´Power From Comparative View.*
- Naděžda Rozehnalová, *The Interaction Between Forum Arbitri and Procedural Rules of the State.*
- Miluše Hrnčiříková, *Consolidation of Arbitral Proceedings as a Safeguard of Justice.*
- Regina Palková, *The Enforcement of Arbitral Awards in the Present Practice of Slovak Courts.*
- Jan Havlíček, *Parties as a Domis Litis in Arbitration.*
- Slavomír Halla, *Binding Nature of Parties´Autonomy in Arbitration.*
- Lucia Kováčová, *Delivery Issue in Arbitration.*
- Martin Orgoník, *European Doctrine of Arbitrability of Competition Law v. Procedural Limits Legis Forum in International Arbitration Proceedings.*
- Jaroslav Králíček, *Restriction of Consumer´s Autonomy alias Application of Procedural Rules of Arbitration.*
- Radka Chlebcová, Karla Hýblová, *Special Features of Arbitration in Common Law.*

Section: Individuals and International public law and European Union law – recent situation

- Vladislav David, *Opening speech.*
- Laura Magdalena Trocan, *The Evolution of Human Rights in Romania*
- Cristina Claudiu Teodorescu, *The Right to Life Guaranteed by the European Convention on Human Rights and it´s Legal Exceptions.*
- Konstantin Cheglakov, *Administrative Investigation of Affairs: The Rather-legal Analysis of the International Practice.*
- Jan Lhotský, *The International Criminal Court in a light of the Review Conference and the newly defined Crime of Aggression.*
- Peter Pavlovič, *The Relationship between Diplomatic Protection and Consular Assistance in the Light of Case Law of the Permanent Court of International Justice and the International Court of Justice.*
- Vladimír Týč, Radim Charvát, *Court of Justice of the European Union as Administrative Court.*

- Katarína Mikulová, *Access of Private Parties to a Judicial Review of EU Legislation under Articles 263 and 267 TFEU.*
- Václav Stehlík, *Current Issues of the Urgent Preliminary Ruling Procedure before the EU Court of Justice.*
- Miroslav Slašťan, *Possibilities of individuals within infringement procedure under Art. 258 and 260 TFEU or how to make Coke from water.*
- Igor Blahušiak, *Access of Citizens to the Court of Justice: The Role of Regulatory Acts.*
- Filip Křepelka, *Consular Protection of EU citizens.*
- Helena Bončková, *Opt-out from the Charter of Fundamental Rights of the EU: Possible Interpretations and Impacts.*
- Radek Fröhlich, *The European Citizens' Initiative.*
- Roman Říčka, *Legal Certainty of the Individual under the Influence of Selected Components of European law – General Principles of Law, (In)direct effect, Liability of the Member State for Damage Caused to Individual by Breach of Union Law.*
- Kateřina Skřivánková, *Position of Consumers in European Law.*
- Vladimíra Pejchalová Grünwaldová, *Protection of the Rights to the Peaceful Enjoyment of Property as a Fundamental Right of an Individual within the Framework of the european Human Rights Protection System.*
- Michal Davala, *Position of Individuals in the Inter-American Human Rights System.*
- Linda Janků, *Genocide in Rwanda: Inkiko Gacaca System as an Example of Prosecution of Crimes under International Law at the Local Level.*
- Lucie Nechvátalová, *The european citizens´initiative.*
- Ivan Císar, *Status of arbitrator in public international law.*
- Martina Cirbusová, *Position of „foreigner" in international law.*
- David Sehnálek, *Individual and the European Judiciary.*

Section: Theory and practice of legal interpretation

- Marijan Pavčnik, *Rechtsstaat als Rechtsprincip (State of Law as the Principle of Law).*
- Ľudmila Gajdošíková, *Practice of the Legal Interpretation of Findings of the Constitutional Court of the Slovak Republic Issued.*
- Ludvík David, *Interpretation of Law in Light of the Borders of Judicial Creation.*
- Marek Pipa, *Legal Interpretation in the Judicial Application of Law and the Judicial Molding of Law.*
- Jaroslav Jakubčo, *Application of Law and the Substantiation of Judgments.*
- Ladislav Eifler, *Is It Possible to Reduce Manner Defectiveness in Legal Norms by Their Interpretation?*
- Adam Sulikowski, *Constitutional Platonism and its Postmodern Critique.*

- Milos Matulda, *The Postmodern Approach and the Interpretation of Law.*
- Žaneta Surmajova, *The Legal Hermeneutic and its Trends.*
- Petr Čechak, *Interpretation of Law and its (I)rationality.*
- Tamas Nótári, *Legal INterpreting and Rhetorical Strategy in Cicero´s Forensic Speeches.*
- Maria Dorková, *Historical Interpretation and its Limits.*
- Marta Tothová, *The Interpretation of Law and the Legal Language.*
- Jan Pinz, *The Role of Interpretation of Law in the Field of the General Legal Theory and the Question of Uniqueness of Law Interpretation.*
- Vaclav Kamaryt, *The Role of Legal Interpretation in the Theory of Law and in the Life.*
- Terezie Smejkalová, *Law and literature in legal interpretation teaching(?)*
- Martin Turčan, *Applicability of Particular Methods of Interpretation in Explanation of Culturally Influenced Norms.*
- Petr Krátký, *Jurisprudential Importance of Plitical Ideas and Ideas of the State for Legal Interpretation.*
- Andrea Barancová, *Problems of the Application in Case of the Withdrawal from Contract in Relation with Inscription in the Evidence of Real Estates.*
- Michal Čepela, *Notes to the Question of the Uniqueness of the Legal Interpretation of the Law Relating to Consumers´and Credit Cooperatives.*
- Lucia Nedbálová, *A Right to Life According to Abortion.*
- Jana Lojková, *The Right to Respect for Family Life in Decisions of the European Court for Human Rights*
- Petr Osina, *Interpretation of Human Rifhts in Islamic Law.*
- Petr Jäger, *Quae sunt Caesaris, Caesari: Religious References in Judicial Opinions.*
- Bohumil Vítek. *On the Concept of Freedom of Conscience.*
- Dušan Čurila, *Freedom of Religion and Formal Justice in Case „Lautsi v. Italy".*
- Blanka Bráková, Bohumila Salachová, *Equality before the Law and Retirement anuity.*

<u>Section: Significance of soft law in commercial law context</u>

- Petr Hajn, *Selfregulation of advertising.*
- Eva Večerková, *Legal and Non-legal Regulation of Misleading and Comparative Advertising.*
- Dana Ondrejová, *Soft Law on The Last Way.*
- Josef Silhán, *Soft Law with Hard Core Effects.*
- Vítezslav Šemora, *On the general application of legally unenforceable instruments adopted by administrative authorities.*
- Petra Jelínková, *The Leniency Programme as one fo the elements of soft law in the area of competition law.*

- Ondřej Hruda, *Self-regulation as a Threat to Competition.*
- Ján Husár, *The Use of Clauses in Shaping the Content of Business Contracts.*
- Bohumil Havel, *Reasonable expectations as soft law?*
- Lenka Doubravová, *Code of conduct and decision making (not only) fo courts.*
- Ľubomír Kľčo, *Normativity of the legal document – UNIDROIT Principles 2004.*
- Petra Novotná, *The FIDIC Suite of Contracts: Selected Issues.*
- Jarmila Pokorná, *Purpose of the Subscribed [Initial] Capital.*
- Josef Kotásek, *Heretical Remarks on Corporate Governance.*
- Filip Rejlek, *Duty of Care [Due Diligence] in connection with OECD Principles of Corporate Governance.*
- Jaromír Kožiak, *New UK Corporate Governance Code.*
- Kateřina Hajná, *Trend of Cimplification of Companies´Operation.*
- Tomáš Hülle, *Piercing of the Corporate Veil and „the End of Independence of Entities Establishing Group of Companies".*
- Michaela Soroková, *Holding Company´s Rules of Conduct.*
- Alena Pokorná, *The Undisclosed Non-Cash Capital Contribution in the Legal Regulation of German Private Limited Company.*
- Zdeněk Husták, *Soft Law and Financial Markets – Lamfalussy Level Three Comittees Standards and Other Standards.*
- Karel Marek, *Business Practices, General Terms and Conditions and Interpretation Rules.*

PLZEŇ [CZE] – 25 – 26 November 2010 – Department of Private Law and Civil Procedure, Faculty of Law, University of West Bohemia, Plzeň
International conference organized by the Department of Private Law and Civil Procedure under the Project: ***Impacts of the Draft New Civil Code on the Applicability of the Existing Case Law of the Supreme Court***[16].

BRNO [CZE] 26 – 28 November 2010 –Faculty of Law, Masaryk University Brno, jointly with Faculty of Social Studies, Masaryk University and with Faculty of Social Sciences, Charles University in Prague
VIIIth International Conference ***Cyberspace***[17].

[16] Project implemented with the support of Grantová agentura České republiky (Czech Science Foundation). More details available at: http://www.fpr.zcu.cz/research/conference_caselaw/program.html (accessed on November 13, 2010).

[17] Detailed information available at: http://www.cyberspace.muni.cz/english/search.php?rsvelikost=uvod&rstext=all-phpRS-all&rstema=12&stromhlmenu=12 (accessed on December 28, 2010).

I.2. Czech Participation at Some Conferences Held Outside of the Czech Republic

Washington, D.C. [USA] – 25 July – 1 August 2010 . The XVIIIth International Congress of the International Academy of Comparative Law hosted by American University Washington College of Law, George Washington University Law School and *Georgetown University Law Center*

- The Czech National Reports provided to the particular sections.

Madrid [ESP] – 3 – 6 November 2010. International Federation of European Law Congress[18].

- Tomáš Doležil, Petr Zákoucký, Vojtěch Láska, *Public Capital and Private Capital in the Internal Market. Securing a Level Playing Field for Public and Private Enterprises.*
- Jiří Kindl, Michal Petr, *The Judicial Application of Competition Law.*
- Jaroslav Šuchman, *The European and National Parliaments.*

The Hague [NED] – 15-20 August 2010. The 74th International Law Association (ILA) Conference

Speakers from the Czech Republic:

- Alexander J. Bělohlávek, Session "Arbitration".
- Jiří Valdhans, Session "Enhancing Party Autonomy and the Limits thereto: Choice of Forum and Choice of Law in International Courts". Individual ILA Members from the Czech Republic taking part in the various Committees and their open working sessions as for example the Committee on "Recognition / Non-recognition in International Law chaired by professor Pavel Šturma etc.

[18] Information about the *Czech Society for European and Comparative Law* available at: http://www.csesp.cz (accessed on December 28, 2010). This web page (available in English and in Czech) also allows access to national reports presented at the Congress.

II. Past and Ongoing CYIL and CYArb Presentations

II.1. Past Presentations in 2010

The CYIL [*Czech Yearbook of International Law*] and the Parallel Project (Periodical) the CYArb [*Czech (& Central European) Yearbook of Arbitration*] Were Presented Jointly with Their Publisher (JurisPublishing Inc.) at the Following Events in 2010:

- *The Washington D.C. XVIIIth International Congress of the International Academy of Comparative Law,* Washington D.C. [USA].
- *The 74th The Hague ILA Conference,* The Hague [NED].
- *The IBA [International Bar Association] Annual Conference,* Vancouver [CAN], 3 – 8 October 2010.
- The International Conference of the Faculty of Law, Trnava University in Trnava [SVK] *"Dies Iurisprudentiae Tyrnaviensis" – "Law in the European Perspective"*, 23 and 24 September 2010.
- The International Conference of the Faculty of Law, Comenius University in Bratislava [SVK] *"Law as a Unifying Factor of Europe – Jurisprudence and Practice"*, 21 – 23 October 2010.
- *The International Symposium regarding selected commercial law issues in a broader context organised by the Department of Commercial Law,* Faculty of Law, P. J. Šafárik University in Košice [SVK] jointly with the Institute of State and Law, Academy of Science Czech Republic, Štrbské Pleso (Tatry) [SVK] 26 – 28 October 2010.
- *The JURIS Conference on Cross-Examination in International Arbitration,* Vienna [AUT], 5 November 2010.

II.2. Selected Ongoing Presentations in 2011

The CYIL an the CYArb Are Going for Presentation (among Others) in the Following 2011 Events:[19]

- The *14th Annual IBA International Arbitration Day,* Seoul [Republic of Korea], 3-4 March 2011.
- The *WJA* (World Jurist Association) Conference on *International Arbitration and ADR – The Impact on the Rule of Law,* Port Louis [Mauritius], 5-7 April 2011.
- The *JURIS Fifth Annual Investment Treaty Arbitration Conference,* Washington D.C. [USA], 5 April 2011.

[19] Further events (international conferences and congresses) scheduled.

- The *JURIS Seventh Annual Leading Arbitrators' Symposium* on the Conduct of International Arbitration, Vienna [Austria], 18 April 2011.
- The *IBA/AAA/ICDR Arbitration Conference*, New York City [USA], 13 June 2011.
- The *JURIS Conference on Cross-Examination in International Arbitration*, New York City [USA] at the Harvard Club, 14 June 2011. The *WJA* (World Jurist Association) *24th Biennial Congress on the Law of the World*, Praha [CZE], 23 – 28 October 2011.

Selected Bibliography of Czech and Slovak Authors for 2010[1]

Opening Remarks

This overview lists only works published in 2010. The individual chapters into which this overview is divided always cover both substantive and procedural issues.

Titles in translations are for reference only.

I. (Public) International Law, including Constitutional Issues and other Public-Law Areas with Transnational Dimensions and Including the Legal Issues of International Business Relations, International Relationships[2]

I.1. [CZE] – [CZECH REPUBLIC] – Titles Published Within Czech Republic

Monographs and Collections

Alexander J. Bělohlávek, Ochrana přímých zahraničních investic v Evropské unii [*Protection of Foreign Direct Investments in the European Union*], Praha: C. H. Beck, 2010, ISBN: 978-80-7400-345-5[3].

[1] Collected by: Alexander J. Bělohlávek, Praha (Czech Republic); Lucia Kovácová, Brno (Czech Republic); Jaroslav Králíček, Brno (Czech Republic).

[2] This sub-chapter includes some publications on selected EU law topics if they cross-boarding another areas of public [international] law and / or constitutional law. *Predominantly EU law publications see the separate sub-chapter below.*

[3] Review on this book by Filip Křepelka; see separate chapter of 2 CYIL (Czech Yearbook of International law) (2011). Publication issued in Czech, Polish and Russian language versions also published in 2010 (Russian version in: Kiev (Ukraine): Taxon and Polish version in: Gliwice (Poland): Wydawnictvo Wokol nas [Publishing House]). See below the separate sub-chapter on the titles of Czech authors published outside the Czech Republic.

Veronika Bílková, Odpovědnost za ochranu (R2P): Nová naděje nebo staré pokrytectví? [*Liability for Protection (R2P): New Hope or Old Hypocrisy?*], Praha: Charles University, 2010, ISBN: 978-80-87146-27-9[4].

Vladislav David, Pavel Sladký, František Zbořil, Mezinárodní právo veřejné s kazuistikou [*Public International Law with Case Law*], Praha: Leges, 2010, ISBN: 978-80-87212-08-0, EAN: 9788087212080.

Petr Drulák, Ondřej Horký, Hledání českých zájmů: obchod, lidská práva a mezinárodní rozvoj, [*Searching for Czech Interests: Trade, Human Rights and International Development*], Praha: Ústav mezinárodních vztahů [*Institute of International Relations*] 231, 2010, ISBN: 978-80-86506-87-6.

William Easterly, Břímě bílého muže: Proč pomoc Západu třetímu světu selhává? [*The White Man's Burden: Why Have the West's Efforts to Aid the Third World Failed?*], Praha: Academia, 2010, ISBN: 978-80-200-1776-5[5].

Aleš Gerloch, Jan Wintr, (eds.), Lisabonská smlouva a ústavní pořádek ČR [*The Lisbon Treaty and the Constitutional Laws of the Czech Republic*], Plzeň: Aleš Čeněk, 2010, ISBN: 978-80-7380-192-2.

Lukáš Hoder, Ľubomír Majerčík, Hubert Smekal, Ladislav Vyhnálek, Mezinárodní trestní soud – perspektivy souzení mezinárodních zločinů [*International Criminal Tribunal – Perspectives of Sentencing International Crime*], Brno, 2010.

Karel Klíma, Ústavní právo [*Constitutional Law*], Plzeň: Aleš Čeněk, 4th ed. 2010, ISBN: 978-80-7380-261-5.

Filip Křepelka, *Implementation and Perception of the Barcelona Objectives in the Czech Republic, in* Bodiroga-Vukobrat (G. G. Sander; S. Baric eds.) *Die Offene Methode der Koordinierung in der Europäischen Union – Open Method of Coordination in the European Union,* Hamburg: Verlag Dr. Kovač 101-113, 2010, ISBN: 978-3-8300-5220-3.

Filip Křepelka, *Probleme mit neuen Sprachversionen des Europarechts, in R. Fischer (Hrsg.), Sprache und Recht in grossen europäischen Sprachen,* Regensburg : Universitätsverlag Regensburg 233-246, 2010, ISBN: 978-3-86845-038-5.

Pavel Molek, Právní pojem pronásledování v souvislostech evropského azylového práva [*Persecution as Legal Term in the European Asylum Law*], Praha: C. H. Beck 208, 2010, ISBN: 978-80-7400-164-2.

Alexandr Ort, Zamyslení nad českou diplomacií[6] [*Essay on Czech Diplomacy*], Plzeň: Aleš Čeněk, 2010. ISBN: 978-80-7380-270-7.

Bohumil Milan Pikna, Evropský prostor svobody, bezpečnosti a práva (prizmatem Lisabonské smlouvy) [*The European Area of Freedom, Security and Law*

[4] Publication issued in Czech. Review: Katarína Šipulová et Lenka Lakotová, *in* 3 Mezinárodní Vztahy (*International Relations*), Praha: Institute Of International Relations Prague 107-110 (2010).

[5] Publication issued in Czech. Review: Tomáš Profant, *in* 3 Mezinárodní Vztahy (*International Relations*), Praha: Institute Of International Relations Prague 115-119 (2010).

[6] Title in Slovak.

(from the Lisbon Treaty Perspective)], Praha: Linde 346, 2010, ISBN: 978-80-7201-114-6.

Miroslav Potočný, Jan Ondřej, Obecné mezinárodní právo v dokumentech [*General International Law In Documents*], Praha: C. H. Beck, 3rd ed. 2010, ISBN: 978-80-7400-330-1.

Naděžda Rozehnalová, Jiří Valdhans, Kateřina Říhová, Zdeněk Kapitán, Tereza Kyselovská, Klára Svobodová, Dana Šramková, Tomáš Rozehnal, Tereza Vojtová, Jan Havlíček, Právo Světové obchodní organizace a další kapitoly z mezinárodního ekonomického práva [*Law Of The World Trade Organization And Other Chapters On The International Economic Law*], Brno: Faculty of Law, Masaryk University, 2010[7].

Radovan Suchánek, Ústava České republiky v praxi: 15 let platnosti základního zákona [*The Constitution of the Czech Republic in Practice: 15 Years of Application of the Basic Law*], Praha: Leges, 2010, ISBN: 978-80-87212-18-9, EAN: 9788087212189.

Jindřiška Syllová, Lenka Pítrová, Helena Paldusová et al., Lisabonská smlouva. Komentář [*The Lisbon Treaty.*[8] *Commentary*], Praha: C. H. Beck, 2010, ISBN: 978-80-7400-339-4.

Michal Tomášek et al. (eds.), Czech Law Between Europeanization And Globalization.: New Phenomena In Law At The Beginning Of The 21st Century, Praha: Charles University in Prague, Karolinum Press, 2010, ISBN: 978-80-246-1785-5[9].

- Karel Malý, *Historical Impulses For The Development of Law*, 22-98.
- Aleš Gerloch (ed.), *Theoretical and Constitutional Impulses for the Development of Law*, 99-207.
- Pavel Šturma, Michal Tomášek (eds.), *Transformation of Public Law* 208-279.

Vladimír Týč, Úvod do mezinárodního a evropského práva [*Introduction Into International And European Law*], Brno: Faculty of Law, Masaryk University, 2010[10].

Zdeněk Veselý, Dějiny mezinárodních vztahů [*History of International Relations*], Plzeň: Aleš Čeněk, ISBN: 978-80-7380-278-3.

František Zbořil, Československá a česká zahraniční politika: minulost a současnost [*Czechoslovak and Czech Foreign Policy: Past and Present*], Praha: Leges, 2010, ISBN: 978-80-87212-38-7, EAN: 9788087212387.

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[7] Publication issued in Czech.

[8] Treaty on The Functioning of the European Union.

[9] The book published in English. This book was published within the Research Project MSM (Czech Republic) 0021620804 entitled „Quantitative and Qualitative Transformation of the Legal Order at the Beginning of the 3rd Millenium – Roots, Sources and Prospects, headed by Professor Michal Tomasek. Further chapters cited under II (below). See book review in this issue (2 CYIL) by Alexander J. Bělohlávek.

[10] Publication issued in Czech.

Radovan Dávid, David Sehnálek, Jiří Valdhans (eds.), Dny práva 2010 / Days of Law 2010 (fourth annual international conference) Conference proceedings, Brno[CZE]: Faculty of Law, Masaryk University, 2010, ISBN: 978-80-210-5305-2[11].

Selected Contributions[12]:

Section: Citizens and foreigners in domestic, international and European law[13]

- Jaroslav Benák, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Tomáš Blažek, *Securitization of migration: from human rights to security discourse.*
- Daniela Dvořáková, *In tow of Europeanization: forming of the Czech Immigration Policy.*
- Viktor Kučera, *Annulment of citizenship acquired by fraud.*
- Hana Lupačová, *Securitization of migration: from human rights to security discourse.*
- András Pünkösty, *Double citizenship in the context of the constitutional, European and international law.*
- Soňa Rakušanová, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Kateřina Šimáčková, *Arguments for granting full judicial review of decisions on citizenship matters – Ministry of Interior as the patron of the Czech sovereignty.*
- Ladislav Vyhnánek, *Citizenship and local self-government.*
- Jiří Zeman, *A Few Notes on the Topic of Residence of the EU Citizens in the Czech Republic, Mainly from the Constitutional- and Administrative-law Perspective.*

[11] Information about all papers presented at the *Days of Law* 2010 Conference is included in a separate subchapter of this section of 2 CYIL (I. Current events, *supra*). The papers are published in the language in which they were presented, i.e. English or Czech. Annotations published in English as well as in Czech or Slovak (if English is not the original language). The overviews of published literature include only contributions from those sections which correspond to or are directly associated with the academic focus of this publication. Available at:
http://www.law.muni.cz, or http://www.dp.law.muni.cz (accessed on February 1, 2011). Abstracts of the Conference proceedings available also in hard-copy.

[12] Detailed list of participants and their contributions see separate part of the publication.

[13] Annotation of the main topic of the Section presented by the host (from the web presentation of the conference): Nationality/citizenship – status or public subjective right, scope, requirements, duties, dual citizenship, procedure, fraudulently acquired citizenship, new legislative attempts, case law issues; alien law – status of foreigners from the perspective of constitutional law, European alien law, asylum as a fundamental right?

Section: Individuals and International public law and European Union law – recent situation

- Vladislav David, *Opening speech.*
- Laura Magdalena Trocan, *The Evolution of Human Rights in Romania.*
- Cristina Claudiu Teodorescu, *The Right to Life Guaranteed by the European Convention on Human Rights and it´s Legal Exceptions.*
- Konstantin Cheglakov, *Administrative Investigation of Affairs: The Rather-legal Analysis of the International Practice.*
- Jan Lhotský, *The International Criminal Court in a light of the Review Conference and the newly defined Crime of Aggression.*
- Peter Pavlovič, *The Relationship between Diplomatic Protection and Consular Assistance in the Light of Case Law of the Permanent Court of International Justice and the International Court of Justice.*
- Vladimír Týč, Radim Charvát, *Court of Justice of the European Union as Administrative Court.*
- Katarína Mikulová, *Access of Private Parties to a Judicial Review of EU Legislation under Articles 263 and 267 TFEU.*
- Václav Stehlík, *Current Issues of the Urgent Preliminary Ruling Procedure before the EU Court of Justice.*
- Miroslav Slašťan, *Possibilities of individuals within infringement procedure under Art. 258 and 260 TFEU or how to make Coke from water.*
- Igor Blahušiak, *Access of Citizens to the Court of Justice: The Role of Regulatory Acts.*
- Filip Křepelka, *Consular protection of EU citizens.*
- Helena Bončková, *Opt-out from the Charter of Fundamental Rights of the EU: Possible Interpretations and Impacts.*
- Radek Fröhlich, *The European Citizens' Initiative.*
- Roman Říčka, *Legal Certainty of the Individual under the Influence of Selected Components of European law – General Principles of Law, (In)direct effect, Liability of the Member State for Damage Caused to Individual by Breach of Union Law.*
- Kateřina Skřivánková, *Position of Consumers in European Law.*
- Vladimíra Pejchalová Grünwaldová, *Protection of the Rights to the Peaceful Enjoyment of Property as a Fundamental Right of an Individual within the Framework of the european Human Rights Protection System.*
- Michal Davala, *Position of Individuals in the Inter-American Human Rights System.*
- Linda Janků, *Genocide in Rwanda: Inkiko Gacaca System as an Example of Prosecution of Crimes under International Law at the Local Level.*
- Lucie Nechvátalová, *The European citizens´initiative.*
- Ivan Cisár, *Status of arbitrator in public international law.*
- Martina Cirbusová, *Position of a „foreigner" in international law.*
- David Sehnálek, *Individual and the European Judiciary.*

Michal Tomášek (ed.), *Vybrané teoretické problémy Evropského práva po ratifikaci Lisabonské smlouvy* [*Selected Theoretical Issues of European Law after the*

Ratification of the Lisbon Treaty], *in* 56 (3) Acta Universitsatis Carolinae – Iuridica, 2010, ISBN: 978-80-246-1855-5.:

- Richard Král, *Prameny práva EU ve světle Lisabonské smlouvy* [*Sources of EU Law in Light of the Lisbon Treaty*], 21-23.
- Lenka Pítrová, *Lisabonská smlouva pod lupou ústavního soudu ČR* [*The Lisbon Treaty under the Magnifying Glass of the Constitutional Court of the Czech Republic*], 51-74.
- Pavel Svoboda, *Vnější smlouvy EU po Lisabonské smlouvě a české právo* [*External Treaties of the EU after the Lisbon Treaty and Czech Law*], 33-50.
- Michal Tomášek, *Příspěvek Lisabonské smlouvy ke zmírnění demokratického deficitu v EU* [*The Lisbon Treaty Contributing to the Alleviation of the Democratic Deficit in the EU*], 7-20.
- Jiří Zemánek, *Institucionální reforma EU podle Lisabonské smlouvy: složení Evropské komise* [*The Institutional Reform of the EU under the Lisbon Treaty: Composition of the European Commission*], 75-86.

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Vojtěch Belling, *Evropská občanská iniciativa aneb Kolik přímé demokracie snese EU?* [*European Civic Movement or How Much of the Direct Democracy will be Accepted by the EU?*]. No. 10, pp. 9-12.

Zdeněk Beránek, *Jordánsko a izraelsko-palestinský konflikt.* [*Jordan and the Israeli-Palestinian Conflict.*]. No. 10, pp. 26 et seq.

Jiří Georgiev, *Proč nezmizel demokratický deficit?* [*Why the Democratic Deficit Did Not Disappear?*]. No. 12, pp. 4-6.

Vít Dostál, *Postlisabonské předsednictví – dobře namazaný stroj?* [*Post-Lisbon Presidency – A Well Smeared Machinery*]. No. 12, pp. 15-18.

Ivana Jemelková, *Evropský parlament podle Lisabonské smlouvy: praktické testování nových mantinelů* [*European Parliament Pursuant to Lisbon Treaty: Testing of New Limits in Practise*]. No. 12, pp. 6-9.

Radomír Jungbauer, *Meziamerický systém a události v Hondurasu* [*The Inter-American System and the Events in Honduras*]. No. 10, pp. 29 et seq.

Jaromír Kadlec, *Historie jazykových zákonů a konfliktů v Belgii* [*History of Language Laws and Conflicts in Belgium*]. No. 10, pp. 8 et seq.

Martin Kusák, *Vnější pravomoci Evropské unie po vstupu Lisabonský smlouvy v platnost* [*External Competencies of the European Union after Lisbon Treaty*]. No. pp. 12-15.

Kristina Larischová et Miloslav Bednář, *Dvacet let od sjednocení Německa* [*Twenty Years Since the Unification of Germany*]. No. 10, pp. 23 et seq.

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Kamil Papež, *Čínská petropolitika* [*Chinese Petropolitics*]. No. 10, pp. 24 et seq.

Lenka Pítrová, *„České záruky" sjednané k Lisabonské smlouvě.* [*The „Czech Guarantees" Negotiatied as Amendment to the Lisbon Treaty*]. No. 12, pp. 18-21.

Lenka Rovná, *„I po přijetí Lisabonské smlouvy zůstavají členské státy hlavními aktéry integrace"* [*The Member States Remaining the Key Player of the Integration Even After the Lisbon Treaty"*]. No. 12, pp. 22-25.

Mezinárodní vztahy [*International Relations*], Praha: Institute of International Relations Prague, 2010, Vol. 45, ISSN: 0323-1844[14]

Andrea Baršová, *Podivné spojenectví: Rada Evropy a vznik Evropského fóra Romů a Travellerů* [*Strange Alliance: Council of Europe and the Establishment of the European Forum for Romanies and Travellers*]. No. 3, pp. 7-29.

Tomáš Bosák, *Britské federalistické koncepce a pojetí Evropy v éře "skvělé izolace"* [*British Federalist Ideas and the Concept of Europe in the Era of „Wonderful Isolation"*]. No. 1, pp. 77 et seq.

Nikola Hynek et Vít Střítecký, *Český diskurz o protiraketové obraně a národní zájem.* [*Czech Discourse on Antimissile Defense and National Interests*]. No. 1, pp. 5 et seq.

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Zdeňka Faulhamerová, Jana Herboczková, *Pravomoci evropských orgánů dohledu nad finančním trhem* [*Powers of EU Supervisory Bodies Over The Financial Market*]. No. 9, pp. 273-278.

Peter Mišúr (ed.)[16], *Dohoda o zpracování a předávání údajů o finančních transakcích mezi Evropskou unií a Spojenými státy americkými vstoupila v platnost.* [*The Agreement on the Processing and Transfer of Financial Messaging Data between the European Union and the United States of America Has Entered into Force*]. No. 9, pp. 279-280.

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[14] Contributions published in Czech. Abstracts regarding the core articles of the individual issues in English. Information on the periodical and abstracts of the papers available in electronic version at: http://www.iir.cz/display.asp?ida=155&idi=401 (accessed on February 1, 2011).

[15] Papers published in Czech. Abstracts regarding the core articles of the individual issues in English, exceptionally in German.

[16] Not the author's paper; it is the editor's material.

[17] Papers published in Czech. Abstracts in English.

Alexander J. Bělohlávek, *Pojem investice z pohledu mezinárodně právní ochrany (podmínky ratione materiae, ratione tempori a ratione voluntatis pro využití mechanismů mezinárodní ochrany investic).* II. část [*Qualification of investment for its international protection (Requirements ratione materiae, ratione tempori and ratione voluntatis to apply the system of the international investment protection).* Part II]. No. 4, pp. 2-18.

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Scott Nicholas Romaniuk, Joshua Kenneth Wasylciw, *'Gender' Includes Men Too! Recognizing Masculinity in Security Studies and International Relations.* No. 1, pp. 23-40.

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Jana Jandová, *Směrem k jednotné evropské politice mezinárodních investic.* [*Towards A Uniform European Policy Regarding International Investments*]. No. 12, pp. 61-62.

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Pavel Svoboda, *Právnicky, a tudíž politicky nekorektně o Lisabonské smlouvě* [*About the Lisbon Treaty from the Legal Perspective, Therefore Politically Incorrect*]. No. 4, pp. 17-18.

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[18] Papers published in English. Information on the periodical and abstracts of the papers available in electronic version at: http://www.iir.cz/display.asp?ida=348 (accessed on February 1, 2011).

[19] Papers published in Czech.

[20] Papers published in Czech (sometimes in Slovak as well) with an abstract in a foreign language. The abstract is most often in English (exceptionally in German or French).

Veronika Bílková, *Trojí spravedlnost pro íránské mudžáhidy?*[21] [*Triple Justice for the Iranian Mujahideen?*]. No. 2, pp. 191-217.

Tomáš Břicháček, *Je vymezení pravomoci EU ohraničené, rozpoznatelné a dostatečně určité?* [*Is the Definition of EU Powers Limited, Recognizable and Sufficiently Unambiguous?*]. No. 6, pp. 5.

Jan Kysela, Pavel Ondřejek, Jana Ondřejková, *Prozatímní provádění mezinárodních smluv jako problém (především) vnitrostátního práva* [*Provisional Application of Treaties As a Problem of (Mainly) National Law*]. No. 10, pp. 988-1009.

Jiří Malenovský, *Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před právem vnitrostátním měřítky pramenů mezinárodního práva.* [*Trust but Verify: Checking the Principle of Precedence of EU Law over National Law from the Perspective of Sources of International Law*]. No. 8, pp. 777-795.

Radek Malenovský, *K problematice soudní kontroly aktů prezidenta republiky* [*Regarding the Issue of Judicial Control over the Acts of the President of the Republic*]. No. 1, pp. 1-45.

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Michal Tomášek, *Fikce jednoty státního území – tertium comparationis předávání v EU a v USA* [*The Fiction of Territorial Unity – „tertium comparationis" for Procedures of Surrender in the EU and Rendition in the U.S.A.*]. No. 4, pp. 400-410.

[21] The original text of the article in Slovak.

[22] *Ibid.*

[23] *Ibid.*

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Jindřiška Syllová, *„Scope of the Treaty", dekrety a český postlisabonský protokol.* [*„Scope of the Treaty", Decrees and the Czech Post-Lisbon Protocol*]. No. 20, pp. 743-746.

Pavel Šturma, *Lisabonská smlouva a závaznost Listiny základních práv EU pro Českou republiku vzhledem k tzv. výjimce (opt-out)* [*The Lisbon Treaty and the Binding Force of the Charter of Fundamental Rights of the EU vis-à-vis the Czech Republic in Connection with the So-Called Opt-Out*]. No. 6, pp. 191-194.

Petr Vojtek, *Základy odpovědnosti státu za škodu a jejich promítnutí do nedostatečné dozorové činnosti, včetně regresních nároků* [*Fundamental Elements of State Liability for Damage and Their Reflection in the Insufficient Supervision, Including Subsequent Claims for Redress*]. No. 16, pp. 571-575.

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David Kosař, *Kritika soudců (a dalších představitelů soudní moci) v judikatuře Evropského soudu pro lidská práva [Criticism of Judges (and Other Judicial Authorities) in the Case Law of the European Court of Human Rights]*. No. 8, pp. 281-290[45].

[44] Papers published in Czech. The contents of the individual issues always provided in German as well. The annotation of the major article of each issue is usually also translated into German.

[45] In that connection see also, for instance, judgment of the NSS (*Nejvyšší správní soud České republiky / Supreme Administrative Court of the Czech Republic*), file no. 6 Ads 41/28 of 7 October 2009 based on ECHR case law and focusing on the limits of admissible criticism of judges in light of Article 10 ECHR. The decision approves of a procedural fine penalizing the attorney's cassation complaint in which he explained the decision of the Regional Court in a pension case by mental reservation and insufficient education of the

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Monika Pauknerová, *Transformation of Private Law*, *in* Michal Tomášek et al., Czech Law between Europeanization and Globalization, Praha: Karolinum Press 280-364, 2010[46].

Naděžda Rozehnalová, *Několik poznámek ke kontraktaci v mezinárodním obchodním styku* [*A Few Notes to Contract Practice in International Trade*], in Pocta Petru Hajnovi k 75. narozeninám [*In Commemoration of Petr Hajn's 75th Birthday*], Praha: Wolters Kluwer ČR 10 et seq., 2010, ISBN: 978-80-7357-510-6.

II.2. [CZE] – [CZECH REPUBLIC] – Selected Titles of Czech Authors Published Outside the Czech Republic

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Alexander, J. Bělohlávek, Rome Convention / Rome I Regulation. Commentary: New EU Conflict-of-Laws Rules for Contractual Obligations, Hungtington, New York [USA]: JurisPublishing, Inc. Vol. I: CLXXIII and 1461 and Vol. II: 1447, ISBN: 978-1-57823-322-9[47].

judge in medicine and his handicap. The attorney could not be pardoned, despite the fact that he was following his client's instructions. On the contrary, this was rather regarded as an aggravating circumstance. The Bar rules impose a high standard of conduct on attorneys *vis-à-vis* courts; the submission filed on behalf of the attorney's client is attributable to the attorney. The NSS especially pointed out that criticism directed against courts is only protected by freedom of speech if it is based on reality and is proportionate and reasonable in relation to the nature of the case. This does not apply to criticism directly attacking the integrity and mental capacity of the judge. The decision was published in 4 Sbírka rozhodnutí NSS (*NSS Reports*) (2010), under the ref. no. 2016. This ratio decidenci and the note were adopted from the *Case Law Selection* published in: 16 (8) SOUDNÍ ROZHLEDY (*Court Review*), Praha: C. H. Beck 309 (2010).
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[46] Publication in English.

[47] Published in English language. The Czech version of the same title was published

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[48] Published in Russian language. The Czech version of the same title was published by Praha: C. H. Beck Publishing House* as of 17 December 2009. The Polish version of the same title was published by Warszawa [Poland] Wydawnictwo C. H. Beck Sp.z o.o.* in December 2010. The English version was published by Huntington, New York [USA]: JurisPublishing, Inc.* also in December 2010.

[49] Published in Polish language. The Czech version of the same title was published by Praha: C. H. Beck Publishing House* as of 17 December 2009. The English version of the same title was published by Huntington, New York [USA]: JurisPublishing Inc.* in December 2010. The Russian version was published in Kiev [Ukraine] Taxon Publishing House* also in December 2010.

[50] Published in Czech. Annotation in English.

[51] Published in English.

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- Monika Pauknerová, Conflict of laws conventions and their reception – Czech Republic 299-304.
- Pavel Dobiáš, Petr Dobiáš, Die Schiedsfähigkeit von Streitigkeit über Immobilien in der Tschechischen Republik [*The capacity to arbitrate the disputes over real-estates in the Czech Republic*], eastlex, No. 6, pp. 226-229, 2010.
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- Jan Bárta, *EASA Emergency AD: Jazykový aspekt některých dokumentů ES majících přímý dopad na subjekty podnikající v členském státě [EASA Emergency AD: Linguistic Aspects Of Certain EC-Documents With Direct Impact On Persons Doing Business In A Member State]*, pp. 62-70.
- Cezary Kosikowsky, *Interwencjonism w gospodarce według prawa Unii Europejskiej [Interventions In Economy Pursuant To EU Law]*, pp. 55-61.
- Ján Matejka, Lenka Vostrá, *Harmonizace práva v České republice – volný*

[52] Published in English.

[53] *Ibid.*

[54] Essays in Slovak and Czech languages (mostly pursuant to the domicile of the particular authors), one essay in Polish. Abstracts in English available separately.

pohyb služeb na příkladu práva autorského [Harmonization of Law in the Czech Republic – Free Movement Of Services On The Example Of Copyright Law], pp. 10-31.
- Mária Patakyová, *Povinnosť a zodpovednosť členov orgánov kapitálových obchodných spoločností podľa návrhu Európskeho modelového zákona o spoločnostiach [Duties And Liabilities of Corporation Board Members Pursuant To The Draft European Model Company Law]*, pp. 32-39.
- Milan Sudzina, *Právomoc súdov, uznávanie a výkon rozsudkov v občianskych a obchodných veciach v práve Európskej únie [Court Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters in the EU Law]*, pp. 113-123.
- Ľubica Širicová, *Cezhraničné aspekty zodpovednostných vzťahov v práve obchodných spoločností [Cross Boarder Aspects of Corporate Liability]*, pp. 250-256.

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Pavel Sojka, *Európsky platobný rozkaz (s osobitným zameraním na slovenský civilní proces)* [*European order for payment procedure (Special Focus to Civil Proceedings in Slovakia)*]. No. 5, pp. 655-674.

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III. EU Law (general, not classified under Chapter I. or II. above)

III.1. [CZE] – [CZECH REPUBLIC] – Titles Published Within the Czech Republic

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Josef Bejček, *Soutěžní politika a fúze v evropském kontextu* [*Competition Policy and Mergers in the European Context*], 366 Acta Universitatis Brunensis Iuridica, Brno: Faculty of Law, Masaryk University, 2010, ISBN: 978-80-210-5067-9.

Josef Bejček, *Vliv evropské justice na právní kulturu nově přijtých zemí EU* [*The Influence of the EU Justice to the Culture of Law in the New Member States*] 2010.

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[57] Publication issued in Czech. The monograph is the output of the Research project

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Section: European dimension of financial law – Tax administration in the European administrative area

- Tomas Balco, *Spontaneous Legal Regulation in the Area of Financial Law on Example of Local "Lottery" Fee.*
- Radim Boháč, *Spontaneous Legal Regulation in the Area of Financial Law on Example of Local "Lottery" Fee.*
- Damian Czudek, *The Electronisation of Public Administration in the Czech Republic and Poland with Focus on the Tax Administration.*
- Lubomír Grúň, *The Third Dimension of Financial Law.*
- Tomáš Hulkó, *The Financial Dimension of European Groupings for Territorial Cooperation.*
- Jana Herboczková, *Supervision on the European Financial Markets in the Hands of the EU.*

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[58] Title in Slovak.

[59] Publication issued in Czech. The monograph is the output of the Research project *Development of Czech Law within the European Context After 2004* implemented by the Faculty of Law, Masaryk University Brno (Czech Republic). Publication reviewed by Mária Patakyová (Slovak Republic) and Kateřina Hornochová.

[60] Available at: http://www.law.muni.cz/content/en/proceedings/ (accessed on February 1, 2011). Abstracts of the Conference proceedings available also in hard-copy.

[61] Detailed list of participants and their contributions see separate part of the publication.

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- Libor Kyncl, *Financial Sciences and Tax Administration in the European Union.*
- Hana Marková, *European Dimension of Financial Law – Tax Administration within the European Administrative Area.*
- Pavel Matoušek, *Harmonisation of Customs in the European Union Environment and Safety Aspects.*
- Petr Mrkývka, *European Dimension of Financial Law – Tax Administration within the European Administrative Area.*
- Kristýna Müllerová, *Beneficiary of Tax on Real Estate with Regard to Selected Constructional Elements of Tax. Comparison of Czech Republic with the Selected Countries of European Union.*
- Michal Radvan, *The conclusion of the conference – Summary*[62].
- Tomáš Rozehnal, *Mutual Assistance for Tax Enforcement and the New Czech Tax Code.*
- Petra Schillerová, *International Cooperation in Tax Administration.*
- Alena Salinková, *Principle of Uncertainty and Unconditional Infallibility.*
- Soňa Stará, *Principle of Uncertainty and Unconditional Infallibility.*
- Jana Šimonová, *Legal Regulation of Customs in the European Union – Its Specificities, Perspectives and Negatives.*
- Eva Šulcová, *Deposit Guarantee Schemes.*

Section: European and national dimension of civil law

- Zuzana Adamová, *Copyright and Related Rights in Terms of Actual Harmonization Tendencies in EU.*
- Moise Bojinca, *Solidarism as Theoretical Foundation of the Contract.*
- Sevastian Cercel, *Considerations Concerning the Constitutional and European Dimensions of the Ownership Right as Stated by the Romanian Juridical System.*
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- Radim Kostík, *Protection of Property in Decisions of the European Court of Human Rights.*
- Pavel Koukal, *Intangible Assets and its Relation to Corporal Items in Respect of Civil Law Codification Drafts.*
- Martina Kovalčíková, *The New Concept of Employee's Personality Protection from View of Recodification of the Civil Code.*
- Dušan Marják, Mária Ivanecká, *Future of consumer law in the view of acquis communautaire.*
- Matěj Myška, *The limits of copy for private use.*
- Polina Nesterenko, *The prospects for harmonization and codification of European Private Law.*

[62] Final summary. Included in this overview in alphabetical order.

- Marián Rozbora, *The Personal Nature of the Rights and Obligations Arising from Breach of Protection of Personality.*
- Ján Švidroň, *An alternative view of "private" law after twenty years of works on new codification of civil law in Slovak Republic.*
- Blanka Tomančáková, *The European Dimension of the Unfair Terms In the Czech Consumer Law.*
- Marius Vacarelu, *European Property – New Form of Civil or Administrative One.*

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Jan Šovar, *Ochrana vnitřních informací na kapitálovém trhu ve světle poslední judikatury Evropského soudního dvora. Informace z legislativy* [*Protection of Inside Information on the Capital Market in Light of the Most Recent Case Law of the European Court of Justice. Information from legislation*]. No. 5, pp. 141-143[65].

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Martin Lyčka, *Právo členských států omezit přístup k veřejným zakázkám a jeho limity z pohledu účastníků výběrových řízení* [*Member States' Right to Restrict Access to Public Procurement and Limitations of this Right from the Perspective of Tenderers*]. No. 12, pp. 428-435.

[63] Papers published in Czech with abstracts in a foreign language. Abstracts in English and in German.

[64] Papers published in Czech. Abstracts in English, exceptionally in German. Only abstracts related to core articles are published, not abstracts to information and articles in the so-called *regular sections* (*"from legislation"* etc.)

[65] Exclusively in Czech. Without annotation in any other language (in the regular section from legislation).

[66] Papers published in Czech.

David Petrlík, *Jednoduchý návod rychlého použití práva Evropské unie v soudní a správní praxi* [*Simple Manual for Prompt Application of European Union Law in Judicial and Administrative Practice*]. No. 8, pp. 280-292.

Právník [*Lawyer*], Praha: Ústav státu a práva Akademie věd České republiky [*Institute of State and Law of the Academy of Sciences of the Czech Republic*], 2010, Vol. 149, ISSN: 0231-6625[67]

Alexander, J. Bělohlávek, *Mezinárodně právní ochrana přímých zahraničních investic a komunitární (unijní) právo* [*Protection of Direct Foreign Investment under International Law and EC/EU Law*]. No. 10, pp. 1010-1052.

Jiří Malenovský, *Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před právem vnitrostátním měřítky pramenů mezinárodního práva* [*Trust but Verify: Checking the Principle of Precedence of EU Law over National Law from the Perspective of Sources of International Law*]. No. 8, pp. 777-795.

Jana Ondřejková, *Smíšená forma vlády a evropská unie* [*Mixed Form of the Government and the European Union*]. No. 7, pp. 655-677.

Petra Pipková, *Soukromoprávní vymáhání antimonopolních pravidel EU – funkce deliktních nároků* [*Private Enforcement of the EU Antitrust Law – the Function of Tort Claims*]. No. 8, pp. 822-845.

Other Publications

Luděk Lisse, *Listina základních práv Evropské unie* [*Charter of Fundamental Rights of the European Union*], 3 (1) Právo, 2010, ISSN: 1802-9116.

Vojtěch Pavel Traurig, *Přístup občanů Evropské unie k dokumentům Komise* [*Access of EU citizens to Commission documents*], 18 (11) Právní rádce[68] 26-28, 2010.

III.2. [CZE] – [CZECH REPUBLIC] – Selected Titles of Czech Authors Published Outside the Czech Republic

Josef Bejček, *European Courts and New EU Member States, in* Dirito e politiche dell Unione Europea, Torino [ITA]: G. Giappichelli Editore 85-91, 2010, ISBN: 978-88-348-9362-3.

Josef Bejček, *Transition Countries Facing Transitory Competition Rules: Moving Shooter Taking Aim at a Moving Target, in* Andreas Heinemann; Roger Zach, The Development of Competition Law: Global Perspectives, Ascola

[67] Papers published in Czech with abstracts in a foreign language. The abstract is most often in English (exceptionally in German or French).

[68] The bibliographical information regarding the periodical is specified in the Chapters above.

Competition Law,Cheltenham [UK]: Edward Elgar 181-208, 2010, ISBN: 978-1-84844-446-1.

III. 3. [SVK] – [SLOVAK REPUBLIC]

Monographs, Collections and Conference Proceedings

Ján Čipkár, (ed.) *Právo a európsky integračný proces 2: reflexia historických, politicko-právnych a eticko-filozofických aspektov a princípov tvorby a pôsobenia práva a právnej kultúry v európskom právnom priestore;* zborník vedeckých prác a odborných článkov v rámci projektu Sociokultúrne determinanty tvorby a pôsobenia práva v európskom právnom priestore. [*Law and the Process of European Integration 2: Reflection of the Historical, Political, Legal and Ethical-Philosophical Aspects and of the Principles of Formation and Effects of Law and Legal Culture in the European Legal Environment*; collection of scientific papers and academic articles under the Project: Socio-Cultural Determinants of the Formation and the Effects of Law in the European Legal Environment], Košice: Univerzita Pavla Jozefa Šafárika v Košiciach [*Pavel Jozef Šafárik Univerzity in Košice*], 2010.

Michael Siman, Miroslav Slašťan, Primárne právo Európskej únie (aplikácia a výklad práva Únie s judikatúrou) [*Primary EU Law (Application and Interpretation of the EU Law with Case Law*], Bratislava: EUROIURIS / Európske právne centrum 1098, 2010, ISBN: 978-80-89406-06-7.

Michael Siman, Miroslav Slašťan, *Súdny systém Európskej únie* [*Judicial System of the EU*], Bratislava: EUROIURIS / Európske právne centrum 782, 2010, ISBN: 978-80-89406-07-4.

Bulletin slovenskej advokacie [*Bulletin of the Slovak Bar*], Bratislava: Slovenská advokátska komora [*Slovak Bar Association*], 2010, Vol. 16, ISSN: 1335-1079[69]

Elena Júdová, *Personálne kritériá aplikácie napadení ES o právomoci v cezhraničných veciach* [*Personnel Criterion in Challenging the EC Rules on Jurisdiction in Cross Boarder Matters*]. No. 4, pp. 26-30.

Helena Barancová, *Rímsky dohovor a nové európske kolízne pracovné právo.* [*Rome Convention and the New European Conflict-of-Law in Employment Relations*]. No. 3, pp. 15-22.

[69] Papers published in Slovak with abstracts in a foreign language. Abstracts in English and in German.

Právny obzor: časopis Ústavu štátu a práva Slovenskej akademie vied [*Legal Horizon: The Review of the Institute of State and Law of the Slovak Academy of Science*], Bratislava, 2010, Vol. 93, ISSN: 0032-6984

Karel Marek, *Vývoj v právní úpravě veřejných zakázek v ČR (podle předpisů EU/ES).* [*The Development of the Provisions on the Public Procurements in the Czech Republic (pursuant to EU/EC Law)*]. No. 1, pp. 36-56.

Other Publications

Ján Klučka, *Poskytovanie cezhraničnej zdravotnej starostlivosti v zahraničí podľa právneho poriadku Európskej únie* [*Cross Boarder Health Care Abroad Pursuant to EU Law*], *in* 7 (4-5) Výber z rozhodnutí Súdneho dvora Európskej únie [*Selected ECJ Decisions*], pp. 5-19, 2010, ISSN: 1336-5312.

IV. Additional Information on Certain Interesting Monographs Published in 2009 Within the Czech Republic[70]

Zdeněk Kučera, *Mezinárodní právo soukromé* [*Private International Law*], Brno: Doplněk / Aleš Čeněk Publishing, 7th ed. 2009, ISBN: 978-80-7239-231-5 / 978-80-7380-171-7[71].

Jan Malíř et al., Česká republika v Evropské unii (2004-2009). Institucionální a právní aspekty členství [*The Czech Republic in the European Union (2004-2009). Institutional and Legal Aspects of Membership*], Praha / Plzeň: Ústav státu a práva AV ČR [*Institute of State and Law of the Academy of Sciences of the Czech Republic*]/ Aleš Čeněk Publishing 256, 2009, ISBN: 978-80-904024-2-3.

Michal Sejvl et al., Aplikace práva EU v České republice. Vybrané problémy [*Application of EU law in the Czech Republic. Selected Issues*], Praha / Plzeň: Ústav státu a práva AV ČR [*Institute of State and Law of the Academy of Sciences of the Czech Republic*]/Aleš Čeněk Publishing 246, 2009, ISBN: 978-80-904024-3-0.

Luboš Tichý, Tomáš Dumbrovský et al., Sovereignty and Integration: Paradoxes and Development within Europe Today, Praha: Faculty of Law, Charles University, 2009, ISBN: 978-80-904209-6-0.

[70] For more details regarding the 2009 bibliography see CYIL (*Czech Yearbook of International Law*), Huntington, New York: JurisPublishing, Inc. 345-358 (2010).

[71] Published in Czech. This is the seventh edition of the basic textbook on private international law in the Czech Republic, extensively used in Slovakia as well.

Important Web Sites

http://www.czechyearbook.org

Czech Yearbook of International Law® and Czech (& Central European) Yearbook of Arbitration

The website is currently available in nighteen languages: English, Bulgarian, Czech, Chinese, French, Italian, Japanese, Korean, Hungarian, German, Polish, Romanian, Russian, Portuguese, Slovak, Slovenian, Spanish, Ukrainian, Vietnamese. This website allows access to the annotations of all core articles and to information about the authors of these articles as well as to the entire remaining contents (except core articles) of both yearbooks (CYIL and CYArb).

I. [CZE] – [CZECH REPUBLIC]

- http://www.cnb.cz
  Česká národná banka [*Czech National Bank as the Central bank of the Czech Republic*][1].

- http://www.compet.cz
  Office for the protection of competition[2].

- http://www.concourt.cz
  The Constitutional Court of the Czech Republic[3].

- http://www.csesp.cz
  Czech Society for European and Comparative Law[4].

- http://www.csmp-csil.org
  The Czech Society Of International Law[5].

- http://www.czech.cz
  Portal „Hello Czech Republic". Basic information about the Czech Republic and news interesting for foreigners. Rather a promotional portal[6].

- http://www.czso.cz
  Czech Statistical Office[7].

- http://dtjvcnsp.org
  Cesko-německý spolek právníků. [*Czech-German Lawyers Association*]. Deutsch-Tschechische Juristenvereinigung e.V[8].

- http://www.en.ekf.vsb.cz
  Faculty of Economics, VŠB Technical University of Ostrava[9].

[1] Website available in English and Czech.
[2] Website available in English and Czech. Basic laws and regulations on the protection of competition in the Czech Republic are also available at the website, both in Czech and in English (unofficial translation).
[3] Website available in English and Czech. Part of the (significant) case law also available in English.
[4] Website available in English and Czech.
[5] Website available in Czech. In English only a brief summary of the webpages.
[6] Website available in English, Czech, French, German, Russian and Spanish.
[7] Website available in English and Czech.
[8] Website available in German.
[9] Website available in English and Czech. Some information (regarding post-graduate studies) also available in German. Department of Law see http://en.ekf.vsb.cz/information-about/departments/structure/departments/dept-119/ (accessed on December 28, 2010).

- http://www.hrad.cz
  Website of the Office of the President of the Czech Republic[10].

- http://www.icc-cr.cz
  ICC National Committee Czech Republic

- http://www.iir.cz
  Institute Of International Relations Prague[11].

- http://www.ilaw.cas.cz
  Ústav státu a práva Akademie věd ČR, v.v.i. [*Institute of State and Law of the Academy of Sciences of the Czech Republic*][12].

- http://www.jednotaceskychpravniku.cz
  Jednota českých právníků [Czech Lawyers Union]

- http://justice.cz
  Czech justice portal including both courts and the Ministry of Justice, prosecution departments, Judicial Academy, Institute of Criminology and Social Prevention, as well as the Probation and Mediation Service and the Prison Service[13].

- http://www.law.muni.cz
  Faculty of Law, Masaryk University, Brno[14].

- http://www.mzv.cz
  Ministry of Foreign Affairs of the Czech Republic[15].

- http://www.nsoud.cz
  The Supreme Court of the Czech Republic[16].

- http://www.nssoud.cz
  The Supreme Administrative Court of the Czech Republic[17].

[10] Website available in English and Czech. This website also allows access to the personal webpage of the President of the Czech Republic.

[11] Website available in English and Czech. This Institute was founded by the Ministry of Foreign Affairs of the Czech Republic.

[12] Website available in English and Czech.

[13] Website available in Czech. The individual websites of the institutions covered by this portal also contain pages or summary information in English.

[14] Website available in English and Czech.

[15] Website available in Czech. Important information from this portal also available in English.

[16] Website available in Czech. Some basic information also in English and French.

[17] Website available in English and Czech.

- http://www.ochrance.cz
  Public Defender of Rights (Ombudsman)[18].

- http://www.ok.cz/iksp/en/aboutus.html
  Institute of Criminology and Social Prevention[19].

- http://portal.gov.cz
  Portal of the Public Administration[20]. This website allows access to the websites of most supreme public administration authorities (including ministries).

- http://www.prf.cuni.cz Faculty of Law, Charles University in Prague[21].

- http://www.psp.cz
  Parliament of the Czech Republic. Chamber of Deputies[22].

- http://www.senat.cz
  Parliament of the Czech Republic. Senate[23].

- http://www.society.cz/wordpress/#awp
  Common Law Society[24].

- http://www.soud.cz
  Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic[25].

- http://www.umpod.cz
  Office for International Legal Protection of Children[26].

- http://www.upol.cz/fakulty/pf/
  Faculty of Law. Palacký University, Olomouc.

- http://www.vse.cz
  The University of Economics, Prague[27].

- http://www.zcu.cz/fpr/
  Faculty of Law, Western Bohemia University in Pilsen[28].

[18] Website available in English and Czech.
[19] Website available in English and Czech.
[20] Website available in English and Czech.
[21] Website available in Czech. Basic information available in English.
[22] Website available in English and Czech.
[23] Website available in English and Czech
[24] Website available in Czech.
[25] Website available in English, Czech, German and Russian.
[26] The Office is the Central authority responsible for protection of children in civil matters having cross-border implications. Website available in English and Czech.
[27] Website available in English and Czech.
[28] Website available in Czech.

II. [SVK] – [SLOVAK REPUBLIC]

- http://www.concourt.sk
  Constitutional Court of the Slovak Republic[29].

- http://www.flaw.uniba.sk
  Faculty of Law, Comenius University in Bratislava (SVK)[30].

- http://iuridica.truni.sk
  Faculty of Law. Trnava University in Trnava (SVK)[31].

- http://www.justice.gov.sk
  Ministry of Justice of the Slovak Republic[32].

- http://www.nbs.sk
  Národná banka Slovenska (National Bank of Slovakia as the Central bank of Slovak Republic)[33].

- http://www.nrsr.sk
  National Council of the Slovak Republic (*Slovak Parliament*)[34].

- http://www.prf.umb.sk
  Faculty of Law. Matej Bel University, Banská Bystrica (SVK).

- http://www.prezident.sk
  President of the Slovak Republic and Office of the President (SVK)[35].

- http://www.uninova.sk/pf_bvsp/src_angl/index.php
  Faculty of Law, Pan European University (SVK)[36].

- http://www.upjs.sk/pravnicka-fakulta
  Faculty of Law, Pavol Jozef Šafárik University in Košice (SVK)[37].

- http://www.usap.sav.sk
  Institute of State and Law, Slovak Academy of Science[38].

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[29] Website available in English and Slovak.
[30] Website available in English and Slovak.
[31] Website available in English and Slovak.
[32] Website available in English and Slovak. This website also allows access to the following portals: Courts, Slovak Agent before the European Court for Human Rights, Slovak Agent before the Court of Justice of the European Union, The Judicial Academy.
[33] Website available in English and Slovak.
[34] Website available in English, French, German and Slovak.
[35] Website available in English and Slovak.
[36] Website available in English, German and Slovak.
[37] Website available in English and Slovak.
[38] Website available in Slovak.

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