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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AS AN EFFECTIVE MECHANISM OF DISPUTE RESOLUTION BETWEEN AN INVESTOR AND A STATE

***E. V. BABKINA*[a], *M. V. KHOMENKO*[b]**

[a]*Belarusian State University, Nezavisimosti avenue, 4, 220030, Minsk, Republic of Belarus*
[b]*KPMG LLP, 1676 International Drive, McLean, VA 22102, USA*
Corresponding author: babkinaelena16@gmail.com

In this article, the authors discuss an effective mechanism of investment dispute resolution at the International Centre for Settlement of Investment Disputes (ICSID). In particular, the authors analyze its structure and jurisdiction rationemateriae and ratione personae, focusing on the problems of applying an umbrella clause. Specifically, ICSID jurisdiction rationemateriae includes disputes of a legal nature that arise directly out of an investment. The authors discuss deviation from a classic interpretation of the term "investment", which traditionally included such components ascontribution, certain duration of the performance of the contract, and assumption of risks arising from the investment agreement and which was later supplemented with factors like contribution to the host state's economy (Salini test) and bone fide performance. ICSID jurisdiction ratione personae, in turn, includes individual entrepreneurs and juridical persons, regardless of their status as a business entity. Nationality of a juridical person is determined in accordance with the principles of international private law (e. g., by the place of its incorporation, principal business operations, or central administrative offices). However, a place of management and control of an investor is often considered as an important criterion in determining its nationality as well. It is generally determined based on all facts and circumstances by analyzing the number of shares owned by the foreign investor, its decision-making power, and the ability to participate in the company's management. Lastly, in this article, the authors also discuss the various ways of expressing consent to ICSID jurisdiction by the parties.

Key words: umbrella clause; investment dispute; foreign investments; International Centre for Settlement of Investment Disputes.

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Авторы:
Елена Васильевна Бабкина – кандидат юридических наук, доцент; заведующий кафедрой международного частного и европейского права.
Хоменко Мария Васильевна – старший юрист.

Authors:
Elena Babkina, PhD (law), docent; head of the department of private international and European law.
babkinaelena16@gmail.com
Maria Khomenko, senior associate.
maria.v.khomenko@gmail.com

МЕЖДУНАРОДНЫЙ ЦЕНТР ПО УРЕГУЛИРОВАНИЮ ИНВЕСТИЦИОННЫХ СПОРОВ КАК ЭФФЕКТИВНЫЙ МЕХАНИЗМ УРЕГУЛИРОВАНИЯ СПОРОВ МЕЖДУ ИНВЕСТОРОМ И ГОСУДАРСТВОМ

Е. В. БАБКИНА[1)]***, М. В. ХОМЕНКО***[2)]

[1)]*Белорусский государственный университет,*
пр. Независимости, 4, 220030, г. Минск, Республика Беларусь
[2)]*KPMG LLP, Интернэшнл Драйв, 1676, Маклин, Вирджиния, 22102, США*

Рассматривается такой эффективный механизм разрешения инвестиционных споров, как Международный центр по урегулированию инвестиционных споров (МЦУИС). Анализируется его структура, компетенции *ratione materiae* и *ratione personae*. Особое внимание уделено проблемам применения «зонтичной оговорки». Предметную юрисдикцию МЦУИС составляют споры, имеющие правовой характер и непосредственно связанные с инвестициями. Показан переход от классического понимания термина «инвестиция», который включал такие составляющие, как вклад, определенный период исполнения договора и принятие на себя его рисков, к его дополнению такими признаками, как вклад в экономическое развитие государства-реципиента (тест *Salini*) и *bonafide*. Отмечается, что в круг субъектов обращения в МЦУИС входят индивидуальные предприниматели и юридические лица, в том числе не имеющие статуса коммерческой организации. Национальность юридического лица определяется согласно нормам международного частного права (принцип инкорпорации, принцип оседлости и принцип центра эксплуатации), однако возможно применение и принципа контроля. Указаны критерии наличия иностранного контроля с учетом конкретных фактических обстоятельств: размер доли, степень влияния при принятии решений, осуществление управления деятельностью компании. Рассматриваются формы выражения согласия государства на юрисдикцию МЦУИС.

Ключевые слова: «зонтичная оговорка»; инвестиционный спор; иностранные инвестиции; Международный центр по урегулированию инвестиционных споров.

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March, 1965 (the ICSID Convention). The ICSID Convention entered into force on 14 October, 1966. In accordance with Article 67 it is opened for signature on behalf of States members of the World Bank and on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, has invited to sign the Convention.

ICSID had 161 Signatory States and 153 Contracting States of the ICSID Convention by the end of 2016, which implies that eight states signed it but did not initiate the domestic ratification procedures. It is worth noting that certain members of the Commonwealth of Independent States, namely, the Kirgiz Republic and the Russian Federation, are among such states. The Republic of Belarus, in turn, signed the ICSID Convention and deposited the ratification instrument on 10 July, 1992. The ICSID Convention entered into force for Belarus on 9 August, 1992.

ICSID is part and is funded by the World Bank Group and is located in Washington, D.C., where the headquarters of the World Bankis located. In addition, ICSID has 15 institutional agreements with other international arbitration institutions and dispute-settlement centers, which enables the Centre to arrange hearings at various venues around the world.

The Centre is an intergovernmental organization with full international capacity. Its core target is the settlement of investment disputes between its Member States and nationals of other Member States. The purpose of the ICSID instruments is to change the character of legal relationship between the parties from public to private: according to Article 27(1) of the ICSID Convention, no Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

Structure of ICSID

The Centre has an Administrative Council and a Secretariat. The Administrative Council is composed of one representative of each Contracting State. The World Bank President is an ex officio Chairman of the Administrative Council but he has no vote on matters before the Administrative Council.

The powers of the Administrative Council, according to Article 6, are as follows:

(a) to adopt the administrative and financial regulations of the Centre;

(b) to adopt the rules of procedure for the institution of conciliation and arbitration proceedings;

(c) to adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

(d) to approve arrangements with the Bank for the use of the Bank's administrative facilities and services;

(e) to determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) to adopt the annual budget of revenues and expenditures of the Centre;

(g) to approve the annual report on the operation of the Centre.

The Administrative Council holds annual meetings and other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

The Secretariat consists of a Secretary-General, one or more Deputy Secretaries-General, and staff. The Secretary-General and any Deputy Secretary-General are elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and are eligible for re-election. The Secretary-General is the legal representative and the principal officer of the Centre and is responsible for its administration, including the appointment of staff in accordance with the provisions of the ICSID Convention and the rules adopted by the Administrative Council. The Secretary-General performs the functions of registrar and has the power to authenticate arbitral awards and to certify copies of such awards.

The duty of the Secretariat includes the maintaining a Panel of Conciliators and a Panel of Arbitrators composed of persons appointed by the Contracting States – up to four representatives for each panel who may but need not be such Contracting States' nationals. The designees are nominated to the Panels for a renewable term of six years. The Chairman may designate ten persons to each Panel. The persons so designated to a Panel must each have a different nationality.

According to Article 14(1) of the ICSID Convention, persons designated to serve on the Panels should be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law is of particular importance in the case of persons on the Panel ofArbitrators.

By the end of July, 2016, there were 625 individuals on the ICSID Panels of Arbitrators and of Conciliators. Belarus made designations to the ICSID Panels for the first time on 29 December 2015 [1, p. 22].

ICSID jurisdiction

Under Article 25(1) of the ICSID Convention, the jurisdiction of the Centre extends 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 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". As a general rule, the Tribunal in each respective claim is the judge of its own competence (Article 41 of the ICSID Convention).

Generally, jurisdiction *ratione materiae* of the Centre is comprised of two components; namely, a dispute (i) must be of a legal nature and (ii) must arise directly out of an investment.

The purpose of the requirement of a dispute's legal nature is to exclude the moral, political, and commercial claims from ICSID jurisdiction [2, p. 103–104]. Notably, the First Draft of the ICSID Convention defined the term "legal dispute" as any dispute concerning legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation [3]. However, this definition was not included in the final wording of the ICSID Convention. Most commentators of the ICSID Convention define the term "legal dispute" by listing typical factual situations and issues that have been subject matters in various ICSID cases, for example, expropriation, breach or termination of agreement, and application of tax and custom rules. Noting that the above examples may be useful, Christoph H. Schreuer, ascholar in the field of international investment law, points out that such approach does notcontribute to the qualification of the legal nature of a dispute. From his point of view, a dispute may be qualified as legal if legal remedies such as restitution or damages are sought and legal rights and obligations are based on the legal norms of treaties or legislation [2, p. 105].

The second component of jurisdiction *ratione materiae* of the Centre requires a direct connection of a dispute with the investment. The First Draft of ICSID Convention contained the definition of the term "investment" – any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years [4, p. 116]. However, the ICSID Convention, as finalized,excluded the above definition of the term "investment" from its language but allowed the Contracting States to define the types of disputes that should be outside of the Centre's jurisdictionon their own. Specifically, under Article 25(4) of the ICSID Convention, any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre.

Seven Contracting States provided such notifications: China excluded from the jurisdiction of the ICSID

the disputes connected with compensation resulting from expropriation and nationalization; Guatemala – disputes arising from the compensation for damages resulting from armed conflicts or civil unrest; Indonesia – disputes arising from administrative decisions of the governmental agencies of Indonesia; Jamaica – disputes arising directly from investment relating to mineral and other natural resources; Papua – New Guinea limited the Centre's jurisdiction to disputes which are fundamental to the investment itself; Saudi Arabia excluded questions pertaining to oil and acts of sovereignty from ICSID jurisdiction; and, finally, Turkey excluded disputes related to the property and real rights upon the real estates that are totally under the jurisdiction of the Turkish courts [5].

Traditionally, a doctrinal notion of "investment" generally includes the following components: contribution, certain duration of the performance of the contract (or performance of an investment activity in another form), and assumption of risks arising from the investment agreement. For instance, disputes arising out of breach of a delivery contract or a bank guarantee agreement supporting such contract are typically not subject to the Centre's jurisdiction (e.g., *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August, 2004). The above components have been commonly referred to in a number of the ICSID arbitration awards on jurisdiction. For example, in its Award on *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* of 30 April, 2014 [6], the Tribunal referred to the requirements of contribution, duration, and risk as "the triad representing the minimum requirements for an investment" and concluded that itlacked jurisdiction over a dispute related to the coal supply agreement because the agreement did not meet the above requirements of an investment.

The list of qualifying requirements of investment was further developed by the Tribunal in *Salini Costruttori SpA and Italstrade SpAv. Kingdom of Morocco* of 23 July, 2001 [7], where the Tribunal considered whether a public procurement activity (construction of a highway) could be treated as an investment. In its Award on Jurisdiction, the Tribunal supplemented the above-mentioned triad with additional requirements that extended the list to five criteria – duration; regularity of profit and return; assumption of risk; substantial commitment; and significance for the host State's development, commonly referred to as the "*Salini* test".

Even though the *Salini* test has been commonly used by the tribunals to determine whether an investment exists, it is not universally applied. For example, in its Award in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* of 24 July, 2008 [8], the Tribunal found that where the Contracting States mutually omitted to define the term "investment" in the ICSID Convention, there is no basis for mechanically applying the five *Salini* criteria in each case because such criteria are not legally enforced and can be negotiated by the Contracting States. Therefore, the Tribunal in this case took a more balanced and flexible approach in application of the *Salini* test, having considered the facts and circumstances of the case and the terms of the consent of the host State to submit the claim to ICSID.

Finally, in addition to the *Salini* test, some tribunals have applied other criteria to determine whether an investment exists. For example, in its Award in *Phoenix Action, Ltd. v. Czech Republic* of 15 April, 2009 [9], the Tribunal concluded that to qualify as an investment, an activity should be performed *bona fide* (i. e., funds should be invested in good faith). In this case, it was found that the operations in question lacked a business plan, a program of re-financing, and economic objectives and, moreover, no real valuation of the economic transactions was ever attempted. Accordingly, the Tribunal concluded that it lacked jurisdiction *ratione materiae* because such operations did not constitute a *bona fide* investment.

Jurisdiction *Ratione Personae*. The settlement of investment disputes at ICSID is available to a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State), on one side, and a national of another Contracting State, on the other side.

Article 25(2) of the ICSID Convention defines the term "national of another Contracting State" as follows:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Notably, the ICSID's jurisdiction *ratione personae* covers a wide range of subjects, including individual entrepreneurs and juridical persons without the status of a business entity. Nationality of a juridical entity is determined by the norms of international private law (e. g., by the place of its incorporation, principal business operations, or central administrative offices). Nationality could also be determined by a place of management and control, where, in accordance with

domestic law of a host State, investment activity is permitted to be performed only through ownership of shares in a domestic entity registered under the laws of such State. In this case, consent to ICSID jurisdiction by the host State through a bilateral investment treaty is not sufficient because such treaties normally do not include provisions allowing domestic entities of the host State that are wholly or partially owned by foreign shareholders to become parties to investment disputes at ICSID. Therefore, a separate agreement that contains consent to ICSID jurisdiction between such domestic entity and the host State is required. In the Award in *SOABI v. State of Senegal (ICSID Case No. ARB/82/1)* of 1 August, 1984 [10], the Tribunal found that it had jurisdiction over the dispute between a Senegal company owned by a Panamanian joint stock corporation that was, in turn, owned by Belgian investors. Notably, at the time when the investment contract was signed, Panama was not an ICSID Contracting State, while Belgium was. The arbitration clause provided: "The undersigned expressly agree that arbitration shall be subject to the rules set out in the Convention for the Settlement of Disputes between States and the Nationals of Other States, produced by the International Bank of Reconstruction and Development. To this end, the Government agrees that the requirements of nationality set out in Articles 25 of the IBRD Convention shall be deemed to be fulfilled".

The requirement of recognition of investor's foreign nationality by the host Contracting State as a prerequisite for the ICSID's jurisdiction *ratione personae* was also discussed in the Award in *Tokios Tokeles v. Ukraine (ICSID Case No. ARB/02/18)* of 29 April, 2004 [11]. In this Award, the Tribunal noted that, where the ICSID Convention does not provide guidance as to how an investor's nationality should be determined, the parties are given significant flexibility in choosing criteria for such determination and method of the parties' consent to these criteria.

Generally, the criteria for determining foreign control of an investor include the number of shares owned, decision-making power, and the ability to participate in the company's management. However, the above criteria should be considered and applied on a case-by-case basis. For example, in the Award in *Vacuum Salt v. Ghana (ICSID Case No. ARB/92/1*) of February, 1994 [12], the Tribunal found that, regardless of the parties' consent to ICSID jurisdiction in the arbitration clause contained in the Bilateral Investment Agreement, it had no jurisdiction over the dispute because only 20 % of the investor's stock was owned by foreign shareholders, and the remaining 80 % was owned by the nationals of the host State, Ghana. Moreover, according to the Tribunal, the fact that Greek nationals held positions as directors of and technical counsel to the company was not sufficient to constitute control of this company. Therefore, because there was no agreement between the investor and the host State to treat the investor as a national of another Contracting State, the Tribunal found that it lacked jurisdiction over this dispute.

A Contracting State to the ICSID Convention is eligible to become a party to an investment dispute as of the date on which the ICSID Convention enters into force for such State. Normally, a Contracting State is represented by its designated territorial entities (constituent subdivision) or governmental agencies. For example, in *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A v. Argentine Republic* of 20 August, 2007 [13], the investment dispute arose out of alleged breach of the water concession contract between foreign investors and the Province of Tucuman that represented the Argentine Republic in the proceedings.

The ICSID Convention does not specify which agency may represent the Contracting State in a dispute, which gives Contracting States significant discretion. Importantly, the term "agency" is not determined structurally (e. g., by reference to form of incorporation, State's share of ownership, etc.) but functionally, i. e., an agency should perform public functions on behalf of the Contracting State [2, p. 151]. However, it is presumed that if a Contracting State designates its governmental agency to the Centre, such agency is authorized to represent the State in investment disputes before the Centre. Accordingly, if a Contracting State does not designate an agency to represent it in an investment dispute at ICSID, there is a presumptive lack of jurisdiction. The ICSID Convention does not specify the time when such designation should be made, and therefore, Contracting States may designateits agencies at any time before or after the dispute has arisen, provided such designation exists on the day a request for arbitration or conciliation is made to the Centre.

Failure to fulfill the requirement *ratione personae,* however, is not an unconditional obstacle for parties to participate in dispute settlement proceedings administered by the Centre. Specifically, the Additional Facility Arbitration Rules adopted in 1978 [14] offer an alternative method of dispute settlement in situations where one of the parties to a dispute is a State that is not a Contracting State of the ICSID Convention or an investor that is a national of the host State. In other words, the Additional Facility is available if only one of the parties meets the *ratione personae* requirements of the ICSID Convention. Moreover, the Additional Facility is also available in casea legal dispute is not subject to the ICSID Convention because it does not arise directly out of an investment. Notably, the provisions of the ICSID Convention do not apply to the investment disputes settled under the Additional Facility Arbitration Rules. The Additional Facility awards are recognized and enforced under the norms of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as amended on 11 April, 2006).

Written consent to ICSID jurisdiction by Contracting States

The prerequisite to settlement of an investment dispute between parties at ICSID is their consent to ICSID jurisdiction in writing. The mere participation of a Contracting State in the ICSID Convention is not sufficient to initiate a dispute-resolution proceeding at ICSID, regardless of whether the Contracting State's consent to be bound to the ICSID Convention is expressed via ratification, acceptance, approval, or accession. The consent to ICSID jurisdiction must be expressed in writing and cannot be withdrawn once given by the State of the investor's nationality, on one hand, and the host States, on the other hand. Pursuant to Article 25(3) of the ICSID Convention, consent by a constituent subdivision or agency of a Contracting State requires the approval of that State unless that State notifies the Centre that no such approval is required.

In practice, consent is given in one of the following ways, namely:

1. In a bilateral treaty for the promotion and protection of investment entered by and between the host State and the State of the investor's nationality ("BIT"). For example, under Article 9(3) of the Agreement between the Government of the Republic of Belarus and the State of Kuwait for the Promotion and Protection of Investment of 10 June, 2001, to initiate settlement of a legal dispute in the ICSID, an investor must submit its written consent to international arbitration at ICSID or the United Nations Commission on International Trade Law (UNCITRAL). Currently, the total number of BITs globally reaches 3000. Moreover, according to the 2016 ICSID Annual Report, the majority of the cases registered in ICSID in 2016 (i. e., 25 cases, or 51 % of all the cases) asserted ICSID jurisdiction on the basis of BITs [1, p. 31].

2. In a direct investment (concession) contract between the investor and the host State. Inclusion of an ICSID arbitration clause in investment contracts is not a common practice. According to the 2016 ICSID Annual Report, only 6 % of all the registered cases were brought on the basis of the parties' consent in the investment contracts. At the same time, expressing consent in an investment contract eliminates the uncertainty around tribunal's jurisdiction over specific dispute sarising out of that contract – an issue related to the so-called "umbrella clause" discussed below.

3. In multilateral investment treaties for the promotion and protection of investment (MITs) and free trade agreements (FTA). This type of international agreement is typically of a regional character. There are currently about 350 operating MITs and FTAs that include, among others, the Energy Charter Treaty of 1994 (ECT) and the North American Free Trade Agreement of 1992 (NAFTA). According to the 2016 ICSID Annual Report, 15 cases (i. e., 31 % of all cases) were brought on the basis of the ECT, and in one case, the investor sought to establish ICSID jurisdiction on the basis of the NAFTA.

4. In the domestic legislation of the host State. For example Article 13(3) of the Law of the Republic of Belarus No. 53-Z on Investments of 12 July, 2013 provides that disputes between an investor and the Republic of Belarus may, at the investor's discretion, be settled through arbitration under the Arbitration Rules of the UNCITRAL or the ICSID Convention if the foreign investor is a national of the Contracting State to the ICSID Convention, unless such disputes are within the exclusive jurisdiction of Belarusian courts or have been settled under a pre-trial procedure through negotiations. In 2016, 10 % of the registered cases asserted ICSID jurisdiction on the basis of the host States' national legislation [1, p. 31]. Accordingly, currently, the most common basis of the parties' consent to ICSID jurisdiction is through an arbitration clause included in BITs.

Some investment agreements contain arbitration clauses that are limited in scope to disputes arising from violation of the obligations under that particular agreement. Others include a provision that creates a broad international law obligation that a host State should observe any commitment with regard to foreign investment made within its territory. Such a provision is commonly referred to as an "umbrella clause". It is estimated that about 40 % of BITs contain such umbrella clauses [15]. Interestingly, certain countries like Great Britain, Germany, the Netherlands, and Switzerland typically include umbrella clauses in their agreements on promotion and protection of investment, while Austria, France, and Japan, for example, do so rarely. Some of the Belarusian BITs also contain umbrella clauses (for example, the Agreement on Promotion and Protection of Investment with the Government of the Italian Republic of 25 July, 1995).

Even though the concept of an umbrella clause is based on the application of the general principle of international public law *pacta sunt servanda*, its enforcement in ICSID arbitration is not universal. For example, in its Decision on the Objection to Jurisdiction in *SGS v. Pakistan* of 6 August, 2003 [16], the ICSID Tribunal considered whether the umbrella clause in the Swiss-Pakistan BIT enables its jurisdiction over the claimant's contractual claim related to the alleged violation of the Pre-Shipment Inspection Agreement (PSI). In particular, the Tribunal took the following position: "We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as "disputes with respect to investments", the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims. In other words, from that description alone, without more, we be-

lieve that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. <…> We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as concerns the Claimant's contract claims which do not also amount to BIT claims, and it is a clause that this Tribunal should respect".

The Tribunal in the Decision on Objection to Jurisdiction in *SGS Société Générale de Surveillance S. A. v. Republic of the Philippines* of 29 January, 2004 [17] took a similar position, i. e., breach of the contractual obligations by the host State *per se* could also constitute a violation of the obligations under the BIT. However, as the Tribunal pointed out, if the parties have included an exclusive jurisdiction clause in their contract, the BIT umbrella clause should not override such contractual provision to refer the claim arising out of the contract to assert ICSID jurisdiction. In support of this position, Russian legal scholars argued that an umbrella clause "[allowed] an investor to bring the claim to two separate venues at the same time, and to initiate two parallel proceedings where two independent dispute resolution bodies would settle the dispute based on the same facts and likely arrive to different conclusions" [18, p. 89]. The rationale of this position does not appear to be convincing. Under a well-recognized principle of civil procedure, national courts must decline to hear a claim where a parallel claim between the same persons, on the same subject matter, and based on the same set of facts has already been initiated at the international arbitration venue. Moreover, national courts typically suspend a case if the decision of the pending arbitration proceeding may impact the outcome of the national court's proceedings. Finally, national courts must dismiss a claim if there is a binding arbitration award resolving a claim between the same persons, on the same subject matter, and based on the same set of facts. Therefore, in practice, the problem of parallel dispute resolution proceedings may arise only in case of a conflict of jurisdiction between ICSID and another international commercial arbitration, both institutional and *ad hoc*.

The Tribunal took a position in support of the enforcement of umbrella clauses in *Noble Ventures Inc. v. Romania* [19]. In this case, the Tribunal applied the rules of interpretation of treaties set forth in the Vienna Convention on the Law of Treaties of 1969 (the "Vienna Convention"). Specifically, Article 31 of the Vienna Convention prescribes that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and that a special meaning should be given to a term if it is established that the parties so intended. Article 32, in turn, provides for the supplementary means of interpretation, namely, the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31. Having applied the above rules of interpretation, the Tribunal looked at the intent of the Parties to the US-Romanian BIT and concluded that the arbitration clause in this BIT that referred to "any obligation [a party] may have entered into with regard to investments" should be regarded "as a clear reference to investment contracts". The Tribunal further concluded that "in including [the arbitration clause] in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT".

To summarize, the ICSID Convention offers a flexible, objective and independent mechanism of investment dispute resolution. The large volume of cases settled through the ICSID's mechanism attests a high demand for it. The first case was registered in 1972. Within fifty years of the Centre's existence, 525 cases were settled at ICSID, and the number of registered cases is growing each year – for example, in 2000, there were 38 registered cases [20, p. 6], whereas in 2015 this number increased to 52 cases [1, p. 21].

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