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Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience

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I. Introduction

It is a great honor for me to have been invited to deliver the first Shihata Distinguished Lecture at the London Forum for International Economic Law and Development. The topic of the present paper is directly linked to Dr. Ibrahim Shihata's major contribution to international law. We all are well aware of his interest and dedication to the International Centre for Settlement of Investment Disputes (ICSID) and to the development and consolidation of its aims and objectives.

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This paper will refer to issues on ICSID jurisdiction under bilateral investment treaties (BITs) as developed through recent arbitration cases, in which Latin American countries or their investors have been involved. First, as an introduction on ICSID and BITs main features, issues on jurisdiction will be dealt with. Then, the following topics: compulsory remedies under domestic jurisdiction and the most favorable nation treatment, legal disputes arising out of investments as a jurisdictional requirement under ICSID and BITs, and forum selection clauses in concession contracts and the right to opt to international arbitration under BITs, will be addressed.[1]

II. ICSID Jurisdiction under Bilateral Investment Treaties

The ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States concluded in Washington in 1965.[2] ICSID, as an organization, is part of the World Bank and is empowered to provide proceedings "for the conciliation and arbitration of investment disputes between [c]ontracting [s]tates and nationals of other [c]ontracting [s]tates."[3] The original idea concerning ICSID jurisdiction towards arbitration was based on consent expressed in agreements between contracting states and investors of other contracting states.[4] ICSID jurisdiction could also be invoked to settle investment disputes covered by national investment laws in which a contracting state accepted ICSID jurisdiction in favor of investors of other contracting parties to the ICSID Convention.[5]

At present, most of the arbitration cases dealt with at ICSID are the consequence of BIT provisions containing a general offer or acceptance by contracting states to settle investment disputes by ICSID arbitration.[6] The Convention tried to provide foreign investors protection through a scheme of direct settlement disputes between the foreign investor, and the recipient or host state. It could properly be inferred from the Convention's primary features that the overall structure is based on the presumption that the recipient state would be a developing country, while the foreign investor would come from a developed country.

1. ICSID additional facility cases, and cases referring to ICSID arbitration under special arrangements or investment agreements in which Latin American countries have intervened, will not be treated in this paper, although when appropriate, brief references will be made.
2. For the text see *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524 [hereinafter *Report of the Executive Directors*].
3. Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Centre for the Settlement of Investment Disputes, in* ICSID CONVENTION: A COMMENTARY 299 (Christoph H. Schreuer ed., 2001).
4. *Report of the Executive Directors, supra* note 2, at 527.
5. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 64, 4 I.L.M. 524, 543 [hereinafter Convention].
6. Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, in* ICSID CONVENTION: A COMMENTARY 287 (Christoph H. Schreuer ed. 2001).

The Convention was designed to replace the old and deteriorated treaty of Friendship, Commerce, and Navigation, the application of which has not matched the growing expectations of increasing investments worldwide.[7] The main guaranty provisions were organized under the traditional formula of trade and commercial protection through state intervention under diplomatic protection.[8] Protection of foreign investment needed something more than the discretionary intervention of a state when confronted with a denial of justice perpetrated by another state against one of its nationals. The answer was foreseen as a reliable and compulsory settlement of disputes through a system of international arbitration based on express consent of the parties involved, the foreign investor, and the host state of that investment.

Consent to ICSID arbitration was paramount to the whole dispute settlement system. Article 25 of the ICSID Convention does not allow exceptions to the rule. Article 25, section one provides that:

> [t]he jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or a constituent subdivision or agency of a Contracting State designated to the Center by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.[9]

The Convention does not prejudge the time at which consent should be given.[10] In that sense, state parties to a BIT consent to offer international arbitration to protected investors. An investor covered by that BIT might give his or her own consent to ICSID arbitration after the dispute has arisen.

In that context, ICSID Arbitration Tribunals (Tribunal) dealing with BITs assumed that article 25 of the Convention is the basic rule that determined the ICSID's jurisdiction, and, as a consequence, that of its tribunals.[11] The ICSID's jurisdiction is based on the consent of the parties, which consent must be in writing and once given cannot be withdrawn unilaterally.[12] In an ICSID arbitration case dealing with the Argentine–USA BIT, the Tribunal concluded that the BIT constituted consent to ICSID arbitration.[13] As a consequence, the consent of the respondent state arises from its generic offer of submission to ICSID arbitration as determined by the Convention. Consent of the investor is assumed when the option is expressed on the request for ICSID arbitration. The BIT

7. *See* Elettronica Sicula S.P.A. (ELSI) (United States v. Italy), 1989, I.C.J. 15.
8. See *id.* for a recent treatment of diplomatic protection issues involving foreign investments.
9. Convention, *supra* note 5, art. 25, at 536.
10. *Report of the Executive Directors*, *supra* note 2, para. 24, at 527.
11. Lanco Int'l, Inc. v. Argentine Republic, 40 I.L.M. 457 (2001) [hereinafter Lanco]; Autopista Concesionada v. Bolivarian Republic of Venezuela, (ICSID Case Sept. 27, 2001), *available at* http://www.worldbank.org/icsid/cases/awards.htm (last visited Oct. 7, 2002) [hereinafter Autopista Concesionada]; Maffezini v. Spain, 40 I.L.M. 1129 (2001) [hereinafter Maffezini]; Olguin v. Republic of Paraguay, (ICSID Case Aug. 8, 2000), *available at* http://www.worldbank.org/icsid/cases/awards.htm (last visited Oct. 7, 2002) [hereinafter Olguin].
12. Convention, *supra* note 5, art. 25(1), at 536.
13. *See* Lanco, *supra* note 11.

expressly provides that such consent shall satisfy the requirement for written consent of the parties to the dispute for purposes of chapter II of the ICSID Convention.[14]

Consent under BITs does not necessarily correspond to consent under ICSID. When an objection is raised to ICSID arbitral jurisdiction provided under a BIT, it follows that jurisdiction should be tested by the Tribunal, which is accomplished through two different sets of legal requirements. First, BIT jurisdictional requirements must be met. Second, ICSID Convention jurisdictional requirements must be also met. Both sets of requirements perform a sort of double filter in order to confirm ICSID jurisdiction.

Consent to ICSID arbitration is linked to the existence of a legal dispute arising out of an investment. The Convention does not define investments, but arbitration under the Convention is conditioned on the existence of a legal dispute arising out of an investment. Commercial transactions are not investments. A commercial dispute cannot be settled by ICSID arbitration. The basic ICSID scheme presupposes the consolidation of a practice already existing in the sixties towards the celebration of the so-called investment agreements in order to activate its arbitration proceedings. An investment agreement, along with the definition of a special regime for a particular investment, would generally include a clause by which both parties—the state and a private foreign investor—agree to settle any dispute concerning the investment to arbitration.

Till the end of the eighties, the caseload of the ICSID was modest. There was a general internal apprehension to arbitration within developing states, as well as dealing with investment agreements in which certain foreign investments were overprotected vis á vis other foreign investors, even of the same nationality. Investment agreements did not cope at all with the main ideological bias towards the so-called "New International Economic Order" as developed from the early seventies. In the late eighties and the early nineties, the input of market economy principles within developing countries marked an impressive difference. In order to gain credibility to attract foreign investment, developing countries started to assume that they should consider offering guaranties and protection to foreign investment. Credibility went hand in hand with the acceptance by states of their international liability in the promotion and protection of foreign investments.

The proliferation of BITs was the direct consequence of new trends towards a market economy where foreign investment in developing countries was the master key to integrate those countries into fruitful global economy relationships. BITs are conceived as generating reciprocal rights and duties among state parties. Those state rights and duties concern the rights and duties of private investors of one country, in the territory of the other. In the formulation of basic principles that will control the relationship between a private foreign investor and a host state, the private investor was absent and replaced by its own state throughout BITs negotiations. This is substantially different from the investment agreements foreseen under ICSID jurisdictional clauses as the basis for consent to arbitration.

The preamble of most BITs expresses the state parties' desire to create favorable conditions for greater investment by investors of one state in the territory of the other

14. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., art. VII(4), S. Treaty Doc. No. 103-2.

state. It also recognizes that the encouragement and reciprocal protection under an international agreement will be conducive to stimulating individual business initiatives and increasing prosperity to state parties.[15]

Since the 1990s Latin American countries have entered into bilateral agreements with developed countries with the aim of promoting private foreign investment as part of their domestic policy towards internal economic growth.[16] This same pattern has been used to encourage mutual investment policies among developing states. The proliferation of those agreements created a worldwide network of legal provisions dealing not only with the promotion, but also most importantly, with the protection of foreign investments. The liberalization of Latin American countries' investment regimes was then a direct consequence of new trends towards development within a global market-oriented economy system.

Apart fom BITs, few states have dealt with provisions on the settlement of investment disputes on multilateral conventions concerning free trade or common market associations.[17] The World Bank and the Asian Pacific Economic Cooperation Organization, however, have produced nonbinding instruments dealing with foreign investment treatment.[18] Some states have also incorporated within their internal legislation, provisions inviting foreign investors to settle their investment disputes through international arbitration.[19]

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15. Agreement for the Promotion and Protection of Investment, Dec. 11, 1990, Gr. Brit.-N. Ir-Arg., 1765 U.N.T.S. 30682 [hereinafter Agreement for Promotion].
16. As of August 2002, Argentina has signed thirty-eight BITs, twenty-five are in force; Bolivia signed eighteen, nine are in force; Chile signed twenty-nine, eight are in force; Colombia signed three, none are in force; Costa Rica signed four, one is in force; Ecuador signed fifteen, nine are in force; El Salvador signed six, two are in force; Honduras signed five, two are in force; Nicaragua signed four, two are in force; Panama signed six, five are in force; Paraguay signed fourteen, nine are in force; Peru signed twenty-three, sixteen are in force; Uruguay signed fifteen, seven are in force; Venezuela signed fifteen, seven are in force; Cuba signed nine, three are in force; Brazil signed ten, none are in force; Dominican Republic signed two, both are in force; Guatemala signed one, none are in force; and Mexico signed two, none are in force. Fourteen Latin American countries are parties to the ICSID Convention, two others have signed it, but not yet have ratified it. Cuba, Brazil, and Mexico have not signed the Convention. *Available at* http://www.worldbank.org/iscid/treaties.htm (last visited Oct. 7, 2002).
17. *See, e.g.*, Energy Charter Treaty, Dec. 17, 1994, 10 ICSID REV.—FOREIGN INV. L.J. 258 (1995); Protocol for the Promotion and the Protection of Investments Made by Countries That Do Not Belong to MERCOSUR, (Buenos Aires Protocol), Aug. 5, 1994; Free Trade Agreement among Colombia, Mexico and Venezuela, June 13, 1994, *available at* http://www.sice.oas.org/Trade/G3_E/G#EPRE.asp; Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR, (Colonia Protocol), Jan. 17, 1994, Mercosur/CMC/Doc. No 11/93; North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 296; Association of South East Asian Nations: Agreements and Statements from the Third Summit, Dec. 15, 1987, 27 ILM 612.
18. *See, e.g.* M. Sornarajah, *Protection of Foreign Investment in the Asia-Pacific Cooperation Region*, 29 J. OF WORLD TRADE 105, 123–28 (1995); *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REV.—FOREIGN INV. L.J. 29 (1992).
19. For the text of these laws, see INVESTMENT LAWS OF THE WORLD (Ocean Publications, Inc., 2002).

In general terms, a BIT contains provisions on guaranties for the admission of foreign investments, as well as guaranties for sums transfered abroad related to the investments. BITs also typically contain provisions for assurances of fair and equitable treatment, most favorable nation and national treatment, and clauses prohibiting direct or indirect expropriation of investments (except in the public interest) and prompt, adequate, and effective compensation. At the same time, BITs generally include provisions on the settlement of investment disputes as part of the guaranties assumed by the host state, in relation to the foreign investment made by nationals of the other contracting state. BITs will also determine the applicable law for the settlement of disputes concerning investments. In general, the applicable law will refer to the law of the BIT, the national law of the host state, including its private international law principles, and principles of international law.[20] Each bilateral investment treaty provides its own definition of protected foreign investment, as well as the definition of nationals, individuals, or juridicial persons, which will be entitled to benefit form rights and obligations created or recognized by the treaty. Under most BITs, there is no need to prove effective foreign investor's control of a national juridicial person. All that has to be proved is the existence of a foreign investment, regardless of the participation of a foreign investment, even in a national enterprise affected in the dispute. BITs, in general terms, assume a broad definition of foreign investment and foreign investor.

On the other hand, the ICSID Convention provides in article 25(2)(b) that any juridicial person, who has the nationality of a contracting state, other than the state party to the dispute on the date of consent to arbitration, can be a party in an ICSID arbitration.[21] As an exception, a juridicial person that has the nationality of a contracting party will be eligible for ICSID arbitration proceedings against that contracting party, if, because of foreign control, the parties have agreed to treat the juridicial person as a national of another contracting party.[22] On the basis of the party's agreement, the Convention will entitle a national juridicial person under foreign control to have recourse through ICSID arbitration against the state of its own nationality.

In *Autopista Concesionada de Venezuela v. Bolivarian Republic of Venezuela*, the Tribunal, in its decision on jurisdiction, affirmed that the investment agreement concluded the dispute between the parties by defining a reasonable criteria of foreign control based on majority shareholding.[23] The Tribunal rejected Venezuela's allegation that foreign control should be defined by economic criteria. Further, it observed that the Convention does not require any specific form for the agreement set forth in article 25(2)(b), and that the parties do have autonomy to settle on a reasonable criterion and to agree on the meaning of nationality and foreign control. The tribunal reaffirmed its findings, concluding that an arbitral tribunal may not adopt a more restrictive definition of foreign

20. Agreement on the Reciprocal Promotion and Protection of Investments (with protocol), Oct. 3, 1991, Spain–Arg. 16 U.S.T.S 29403. Article X(5) provides that the arbitral Tribunal shall decide the dispute in accordance with the provisions of the agreement, the terms of other agreements concluded between the parties, the law of the contracting party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law. *Id.* art. X(5).
21. Convention, *supra* note 5, art. 25(2)(b), at 536.
22. *Id.* art. 25(2)(a).
23. Autopista Concesionada, *supra* note 11.

control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the Convention.[24]

BITs typically also consider natural persons who have the nationality of the host state, as well as the nationality of the other contracting state, as investors covered by their provisions. But the ICSID Convention excludes jurisdiction disputes between a contracting party and a natural person with the nationality of that contracting party.[25] In *Olguin v. Republic of Paraguay*, for example, the arbitration tribunal confirmed its jurisdiction considering the claimant's double effective nationality (Peruvian and American).[26] In cases related to diplomatic protection of a person with double nationality, both states will have the right to exercise it in favor of the same person.[27] Olguín invoked the application of the Peru–Paraguay BIT,[28] claiming that he was a Peruvian national. Paraguay alleged that Olguín was a U.S. National, and that nationality was, under Peruvian law, effective nationality as determined by the place of his permanent domicile and regular place of business.

The Tribunal erred in considering that Olguín had double effective nationality. Under general international law, there is a chance to have more than one nationality, but only one could be considered effective by exclusion of all other nationalities. To affirm, as the Tribunal did, that a natural person has double effective nationality, Peruvian and American, is a contradiction in itself. The Tribunal could rightly have affirmed its jurisdiction by invoking article 1 of the Peru–Paraguay BIT that provides that the treaty covered all natural persons considered as nationals by the domestic law of each contracting party. As Olguin was under the Peruvian law a national of Peru, he was covered under the BIT.[29]

In general terms, it could be affirmed that there is no direct correlation between protected or covered persons as defined by different BITs, with natural or juridicial persons that would be authorized to be part of an ICSID arbitration under the ICSID Convention. The main innovation of BITs as a guaranty for foreign investment is based on the particular scheme agreed upon by contracting states for the settlement of investment disputes. Most BITs provide two different sets of rules concerning settlement of disputes. The first set relates to the settlement of disputes between states parties to the BIT concerning the application or interpretation of the treaty. If the dispute between contracting parties cannot be settled through diplomatic channels, it will, upon the request of either contracting party, be submitted to an arbitral tribunal.[30]

The second set of rules relates to the settlement of disputes between a contracting party and an investor of another contracting party. In general terms, BITs require the

24. *Id.* para. 114.
25. Convention, *supra* note 5, art. 25(2)(b), at 536.
26. Olguin, *supra* note 11, para 61.
27. *Id.* para 62.
28. Bilateral Investment Treaty, Jan. 31, 1994, Paraguay–Peru, *available at* http://www.sice.oas.org/cp_bits/english99/parper.asp (last visited Oct. 7, 2002).
29. In relation to its subject matter jurisdiction, the Tribunal concluded that the dispute was a legal one that arose directly out of an investment. As the ICSID Convention has not defined the term investment, the Tribunal refers to the broad definition of investment set forth by Olguin, *supra* note 11.
30. Agreement for Promotion, *supra* note 15, art. 9.

parties to attempt, as far as possible through direct negotiations between the parties, to settle the dispute amicably. If a solution is not reached within a six-month period, the dispute may be submitted either to a competent domestic tribunal of the contracting party in whose territory the investment was made, international arbitration at ICSID, ICSID additional facility proceedings, or to ad-hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). In general terms, the foreign investor then has an option to settle an investment dispute which arose within the terms of the relevant BIT by submitting it to the domestic jurisdiction of the host state, or to settle by submitting the dispute to international arbitration. Once the election has been made, there is no chance to change it to another. In that context, most BITs provide that the decision of the competent domestic court or of the arbitral tribunal, as the case may be, shall be final and binding for the parties to the dispute.[31]

In the particular case of BITs concluded by Latin American countries with third states, there is a peculiar evolution on the basic rules concerning recourse to international arbitration. In most Latin American countries, historically and as a matter of foreign policy, there is a traditional resistance to submitting to international arbitration, disputes concerning state's rights and obligations. It is relevant to recall that the Latin American countries, at the Annual Meeting of the Board of Governors of the World Bank in 1964, voted as a block against the resolution of the Board of Governors authorizing the Executive Directors of the Bank to prepare a draft of the ICSID Convention.[32]

In the case of Argentina and Uruguay, this resistance influenced the negotiation of special schemes within BITs for the settlement of disputes between the foreign investor and the host state. Special schemes required an obligation of foreign investors to submit their investment dispute to the decision of a competent tribunal of the contracting party in whose territory the investment was made.[33] The possibility for the investor to finally have a remedy through international arbitration was pending upon the confirmation of any one of the following circumstances: (i) a period of eighteen months has elapsed from the moment when the dispute was submitted to a domestic tribunal of the host state, and that tribunal has not given a final decision; (ii) if a final decision of the domestic tribunal has been made but the parties are still in dispute; or (iii) at least one of the parties consider that the dispute continues. Such a situation was reflected in the very first BIT's convened by Argentina with the United Kingdom in 1990,[34] and with the Kingdom of Spain in 1991.[35]

The Argentinean general policy in negotiating settlement of disputes with BITs was inspired by the so-called Calvo Doctrine, in which a private investor was obliged to exhaust local remedies available at the host state before claiming diplomatic protection. The obligation to resort to local courts as a previous requirement to arbitration was locally known as the soft Calvo clause, as opposed to the traditional Calvo clause by

31. Agreement for the Promotion and Reciprocal Protection of Investments, Aug. 27, 1999, Arg.–N.Z.
32. History of the ICSID Convention (1970), Documents Concerning the Origin and Formulation of the Convention, at 606.
33. Olguin, *supra* note 11, art. 8.
34. *Id.*
35. *Id.*

which foreigners waived in contracts with the host state, their rights to claim diplomatic protection. In a way, the so-called soft Calvo clause formula did not prevent the foreign investor from going to international arbitration only after local remedies have been exhausted. The mere passing of an eighteen-month time period from the initiation of local proceedings by the foreign investor would be a sufficient condition to activate international arbitration proceedings, as long as the controversy was still pending, irrespective of the existence or not of a final domestic court's decision. That formula was a contradiction in itself, because it could not seriously be interpreted as an application of the exhaustion of local remedies rule or as a requirement for diplomatic protection.

The Calvo Doctrine finally was replaced in later BITs through the direct recognition of the investor's right to opt between domestic or international jurisdiction. Thus, this new trend was recognized in all subsequent BITs concluded by Argentina with third states, following the general policies already accepted by most Latin-American countries. From the imposition of a soft Calvo clause, Argentina finally accepted the possibility of being bound by a treaty clause, which entitled a party to international arbitration as an option to be performed by foreign investors.

III. Compulsory Remedies under Domestic Jurisdiction and the Most Favorable Nation Clause

In spite of new developments, the problem subsisted for foreign investors of countries that accepted the soft Calvo clause in their BITs. Assuming that there is no option, however, the main question then is if a most favored nation (MFN) treatment clause contained in a BIT could be invoked by a foreign investor in order to have a direct recourse to international arbitration as accepted in another BIT agreed to by the same host state with another country. The same question could properly be reformulated in terms of the possibility of applying the MFN treatment clause contained in a BIT to the settlement of disputes provisions contained in another BIT. That was one of the basic issues discussed on the Provisional Decision on Jurisdiction, in the Maffezini case, which was settled by an ICSID Arbitration Tribunal in 2000.[36]

Mr. Emilio Maffezini, a national of Argentina, presented a request for institution of ICSID arbitral proceedings against the Kingdom of Spain claiming economic damages suffered as a consequence of Argentine–Spanish BIT breaches attributed to Spanish authorities. The claimant's request was based on the Spanish consent to ICSID jurisdiction as set forth in the Argentine–Spanish BIT.[37] Maffezini also claimed the application of pertinent provisions of the Chilean–Spanish BIT of 1991,[38] as a consequence of the MFN treatment clause provided by the Argentine–Spanish BIT.

The Argentine–Spanish BIT provides in article X that if a dispute could not be settled within six months from the date on which it has been raised, it will be submitted to the

36. *See* Maffezini, *supra* note 11.
37. Agreement for the Reciprocal Promotion and Protection of Investments, Oct. 3, 1991, Arg.–Spain [hereinafter Art.–Spain BIT].
38. Agreement for the Reciprocal Promotion and Protection of Investments, Oct. 2, 1991, Arg.–Chile.

domestic tribunals of the host state in the territory in which the investment was made.[39] The dispute could only be submitted to international arbitration if, after the expiration of eighteen-month period from the date from initiation of domestic proceedings, no decision has been rendered on the merits of the claim, or if such decision has been rendered, the dispute between the parties continues. Maffezini argued that the obligation to submit the dispute to domestic courts has been overridden by the implications of the MFN clause in the Argentine–Spanish BIT. Such clause permitted obtainment of the most favorable conditions, including the right to opt for the submission of a claim to arbitration. The claimant emphasized that the right has been recognized by Spain in other BITs concluded with third countries, like the one concluded between Spain and Chile in 1991. The Kingdom of Spain objected the jurisdiction of the ICSID arbitral tribunal arguing that Maffezini has, under the BIT, an obligation to litigate in Spanish national courts.

The Kingdom of Spain argued that the BIT required the exhaustion of local remedies in Spain and that claimant failed to comply with this requirement.[40] It also argued that the claimant did not submit the case to Spanish courts before referring it to international arbitration, as required by the BIT.[41] With respect to the exhaustion of local remedies argument, the Tribunal affirmed that article 26 of the ICSID Convention reversed the traditional international law rule that implied the exhaustion of local remedies, unless it is expressly or implicitly waived. Article 26 of ICSID provides that

> [c]onsent of the parties to arbitration under this convention shall, unless otherwise stated, be deem consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[42]

In sum, the respondent interpreted article X of the Argentine–Spanish BIT as an exhaustion of local remedies rule. The respondent also interpreted the article to mean that if a decision has been reached within eighteen months, there is no chance to submit any dispute to arbitration. The claimant in his account, argued that it was unnecessary to submit the dispute to local courts, because article X of the BIT permitted the submission of an investment dispute to international arbitration, whether or not a domestic court decision has been rendered, and regardless of its outcome.

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39. Article X of the Arg.–Spain BIT provides that:

> [i]f the dispute cannot thus be settled within six months following the date on which either party has raised the dispute, it shall be submitted to the competent tribunal of the contracting party in whose territory the investment was made. The dispute may be submitted to international arbitration in any of the following circumstances: if a decision has been rendered on the merits of the claim after the expiration of a period of 18 months from the date on which the proceedings have been initiated, or if such a decision has been rendered, but the dispute between the parties continues; if both parties to the dispute agree thereto.

Arg.–Spain BIT, *supra* note 37, art. X.

40. *Id.* art. X(3)(a).
41. *Id.* art. X(2).
42. World Bank Group, ICSID Basic Documents, art. 26, *available at* http://www.worldbank.org/icsid/basicdoc/18.htm (last visited Oct. 6, 2002).

The Tribunal finally observed that article X was not an exhaustion of the local remedies requirement, and also stressed that it referred to a decision on the merits, not to a final decision. The Tribunal concluded that recourse to international arbitration was not related to a denial of justice provoked by national courts, and in consequence, an international arbitration tribunal will have the final decision provided that resort to national courts have been observed. Thus, the Tribunal interpreted article X's text in order to assert that it

> ensures that a party accessing the domestic court will not be prevented and will not be able to prevent the case from going to international arbitration after the expiration of the eighteen-month period. This is so whether or not the domestic court has rendered a decision and regardless of the decision it may have rendered.[43]

The claimant challenged the necessity and propriety of referring a dispute to national courts, taking into account the real effect of article X, in conformity with the history and common conduct of the parties after the signing of the Argentine–Spanish BIT. He also questioned whether this situation would provoke, discredit, and show a lack of credibility of national court decisions that could be challenged by the mere fact of submitting the same dispute to international arbitration. The Tribunal, however, rejected the claimant's arguments on the unnecessary submission of a dispute to local courts because its only effect was to provoke temporal moratoria to international arbitration. In the alternative, the claimant argued the application of the MFN treatment clause in order to directly submit the dispute to arbitration. Article IV of the BIT, after assuring fair and equitable treatment for covered investors, provides that in all matters subject to the agreement will be treated no less favorably than that extended by each party to the investments made in its territory by investors of a third country.[44]

The claimant also invoked article X(2) of the Chilean–Spanish BIT,[45] which did not impose an obligation of recourse to domestic courts before submitting a dispute to international arbitration: Chilean investors in Spain were treated more favorably than Argentine investors. The claimant recognized that the MFN treatment does have exceptions within the Argentine–Spanish BIT, but argued that none of them applied to the rules on the settlement of disputes. The respondent alleged that the BIT invoked was *res iter alios acta*, and that the principle of *ejusdem generis* restricted the application of the MFN treatment to substantive matters, as opposed to procedural matters, including jurisdictional questions. Spain sustained that the claimant has to prove that recourse to Spanish domestic courts was less favorable than international arbitration. The claimant answered that the most favorable treatment resides on the option; merely meaning the right to chose either the national or the international jurisdiction. The Tribunal concluded that the MFN treatment was governed by the treaty that contained the clause:

> if, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that these matters are

43. Maffezini, *supra* note 11, at 1134.
44. Arg.–Spain BIT, *supra* note 37, art. IV.
45. *Id.*

> more favourably treated in a third party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty.[46]

The next question to be dealt with by the Tribunal was if a clause on the settlement of disputes was covered by the MFN clause. The Tribunal tackled this issue by reference to international jurisprudence.[47] In dealing with the *ejusdem generis* rule, the Tribunal quoted the Ambatielos Award expressing that the most favored nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.[48] The Ambatielos Tribunal observed that

> administration of justice, when viewed in isolation, is a subject matter other than commerce and navigation, but this is not necessary so when it is viewed in connection with the protection of rights of trades... In so far as the administration of justice is related to the protection of commerce and navigation, it belongs to the same category of subject as that to which the MFN clause itself relates.[49]

Although the Argentine–Spanish BIT does not expressly mention settlement of disputes as included in the MFN treatment, applying the Ambatielos reasoning, the Tribunal considered that there are good reasons to conclude that today, dispute settlement arrangements are inextricably related to the protection of foreign investors.[50] At this point, the Tribunal also noted that the text of the BIT expressly referred to "all matters subject to this [a]greement."[51]

The Tribunal then dealt with limitations on the application of MFN treatment to rules on the settlement of disputes based on public policy. No party to the dispute (claimant or respondent) argued on this issue, and the Tribunal seemed to be conscious that it was creating an important precedent for future applications of MFN clauses. It could reasonably be sustained that the Tribunal was well aware of probable negative consequences of its findings on future attitudes of foreign investors in relation to treaty shopping through claims of MFN treatment. The Tribunal also expressed that the requirement for the prior resort to domestic courts provided in the Argentine–Spanish BIT did not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements, or the subsequent practice of the parties. Accordingly, the Tribunal affirmed the jurisdiction of the ICSID,

46. Maffezini, *supra* note 11, at 1139.
47. Case Concerning Right of Nationals of the United States of America in Morocco, (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27); Ambatielos Case (Greece v. U.K.) 1953 I.C.J. 10; Arbitral Award of the Commission of Arbitration, 12 RIAA 91; Final Award in Asian Agric. Prods. Ltd. v. Sri Lanka, 30 I.L.M 577. The MFN clause was invoked in reference to liability standards in the Swiss–Sri Lanka BIT. The Tribunal found that it was not proven that the Swiss–Sri Lanka BIT contained rules more favorable than the United Kingdom–Sri Lanka BIT. *Id.*
48. Maffezini, *supra* note 11, at 1129.
49. Award of the Commission of Arbitration established for the Ambatielos Claim, 12 RIAA 91 (1963) [hereinafter Award of the Commission]. However, it should be noted that the Commission found that the treaty invoked did not offer a better right or guaranty to the private person.
50. Maffezini, *supra* note 11, at 1129.
51. *Id.* para 54.

and its own competence, rejecting the Kingdom of Spain's objections.[52] Reinforcing its conclusions, the Tribunal referred to the subsequent common conduct of Argentina and Spain vis á vis BITs concluded later with third states, emphasizing the drastic changes on Argentina's attitudes concerning international arbitration of foreign investment disputes. A most important collateral effect of the Maffezini decision on jurisdiction, concerns the Tribunal's recognition that its final conclusion on jurisdiction was in favor of the harmonization and enlargement of the scope of the BIT.[53]

IV. Legal Disputes Arising out of an Investment as a Jurisdictional Requirement under the ICSID Convention and BITs

In the first case settled through an ICSID arbitration under a BIT, where one of the contracting parties was a member of the Latin American region, the Tribunal extensively dealt with legal disputes arising out of investments as a jurisdictional requirement under the ICSID Convention, as well as under the applicable BIT.[54] In *Fedax N.V. v. Republic of Venezuela*,[55] the claimant's request for arbitration concerned a dispute arising out of certain debt instruments issued by the Republic of Venezuela, and assigned by way of endorsement to a company established and domiciled in Curacao, Netherlands Antilles. The claimant invoked the BIT between the Kingdom of The Netherlands and the Republic of Venezuela of 1991.[56]

Venezuela objected to the jurisdiction of the ICSID on the basis that the dispute was not a legal one, and that it did not involve an investment within the meaning of article 25(1) of the Convention. Venezuela alleged that Fedax N.V. could not be considered to have made an investment for the purposes of the Convention because it acquired by endorsement promissory notes issued by the Venezuelan state in connection with a contract made with a Venezuelan company. Thus, the transaction did not amount to a direct foreign investment involving a long-term transfer of financial resources from one country to another. Venezuela further argued that investment in an economic context means "the laying out of money or property in business ventures, so that it may produce a revenue or income."[57] In that sense, the interpretation of article 1(a) of the 1991 BIT in relation to the meaning of the expression every kind of asset should in consequence be restricted.

The Tribunal observed that article 25 of the Convention does not define legal disputes. The draft of the ICSID Convention clearly distinguished legal disputes from conflict of interests. The Report of the Executive Directors stated "[t]he dispute must concern

52. *Id.* para 64.
53. *Id.* para 62.
54. Fedax N.V. v. Venezuela, 37 I.L.M. 1391 (1998) [hereinafter Fedax]. The Tribunal took notice of that fact expressing that "in itself illustrates well the evolution that the legal treatment of foreign investments has had in this region as elsewhere in the world." *Id.* at 1397.
55. *Id.*
56. Agreement on Encouragement and Reciprocal Protection of Investments, Oct. 22, 1991, Neth.–Venez.
57. Award of the Commission, *supra* note 49, at para 19.

the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[58] The Tribunal also noted that in this instance, the case concerns the different views of the parties on questions of legal rights and obligations in connection with the existence of an investment, and its effects on matters concerning an obligation to honor certain debt instruments consisting of six promissory notes, which were issued by the Republic of Venezuela. In dealing with the definition of investment, the Tribunal mentioned the fact that after several attempts to define it during negotiations of the ICSID Convention, it decided to leave any definition of investment to the intent of the parties. In that context, the Report of the Executive Directors expressed that "no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre."[59]

Venezuela argued that a promissory note is not a direct foreign investment. But the Tribunal noted that in article 25(1) the term directly relates to the dispute, and not to the investment. The Tribunal concluded that jurisdiction might exist, even with respect to indirect investments, so long as the dispute arises directly out of such indirect investment. For the Tribunal, that interpretation is consistent with the broad reach of the term investment given throughout the drafting history of article 25 of the ICSID Convention. Such conclusion is also consistent with ICSID practice and decisions.[60]

The Tribunal then emphasized the differences between direct investments under MIGA and ICSID, and also dealt with the expression dispute that arise directly out of an investment to differentiate the jurisdictional scope of article 25 of ICSID Convention from the Rules Governing the Additional Facility jurisdiction. The Tribunal also asserted the need to distinguish between investments from an ordinary commercial transaction.[61] The Tribunal concluded that because the broad scope of article 25(1), loans qualify as an investment as well as, in certain circumstances, the purchase of bonds. Promissory notes are evidence of a loan, and as such, are a typical financial and credit instrument. Thus, there is nothing to prevent the purchase of promissory notes from qualifying as an investment for purposes of ICSID jurisdiction.[62]

58. *Report of the Executive Directors*, *supra* note 2, at para 26.
59. *Id.* para 27.
60. The Tribunal mentioned the reasoning and findings in relation to investments in Kaiser Bauxite v. Jamaica, Alcoa Minerals of Jamaica v. Jamaica, LETCO v. Liberia SOABI v. Senegal and Amco Asia el at v. Indonesia. Award of the Commission, *supra* note 49, at para 25–26.
61. *Id.* para 27–28.
62. Article 9 of the BIT between the Republic of Venezuela and the Kingdom of the Netherlands provides that disputes between one contracting party, and a national of another contracting party concerning an obligation of the former under the agreement in relation to an investment of the latter, will be submitted to ICSID settlement by arbitration or conciliation. The BIT defines the terms investment in article 1(a) providing that the term investments will comprise every kind of asset and more particular though not exclusively: (i) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures, and (ii) titles to money, to other assets or to any performance having an economic value. The Tribunal found that the definition of investment of article 1 of the BIT evidenced that the contracting parties accepted a very broad meaning for the term investment. It also stressed that as under

The Tribunal applied the general practice followed by the contracting parties to the BIT, to affirm that the broad definition of investment in the Venezuela–Netherlands Agreement is not at all an exceptional situation. The same comparative approach was taken by the Tribunal deciding the Maffezini case, in reference to the general practice of Spain in dealing with settlement of disputes provisions in BITs.[63] Even more, when Venezuela decided to exclude from special agreements or investments that are not manifestly direct, it had done so in express terms—such as in the case of the Andean Group Regulation on Foreign Investments and the 1994 Mexico–Colombia–Venezuela Free Trade Agreement.[64]

Concerning the promissory notes, the Tribunal noted that the record shows such a decision was not grounded in the nature of the notes, but whether their subsequent endorsements to foreign holders affected the concept of investment for the purposes of the BIT. The Tribunal concluded that although the identity of the investor will change with every new endorsement, the investment itself would remain constant, while the issuer will enjoy a continuous credit benefit until the note becomes due.[65]

The nature of the transactions involved in the Fedax case, and the fact that they qualify as a foreign investment for the purposes of the Convention and the BIT, made it possible for the Tribunal to distinguish them from an ordinary commercial transaction. The Tribunal emphasized that the promissory notes were issued by Venezuela under the terms of the Law on Public Credit, which governs operations aimed at raising funds and resources for public purposes. This was the Tribunal's reason for concluding that the transactions involved in the case were investments, and not mere commercial transactions.[66]

After the Tribunal rejected all objections to its jurisdiction, Fedax, N.V. stated that its request for arbitration constituted its entire claim, and that instrument should be deemed to be its memorial on the merits. In that request Fedax demanded the payment from the Republic of Venezuela of six promissory notes, plus regular and penal interests. In its counter memorial, Venezuela stated that the President of the Republic and the Council of Ministers had already authorized payment of the promissory notes, including interests. Venezuela also stated that its Executive would require additional sums from Congress to pay unforeseen expenses. Fedax's basis for a settlement was offered in the

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the term titles to money the BIT also included loans, loans should be considered investments for the purposes of the agreement. *Id.* para 29.

63. *See generally* Maffezini, *supra* note 11.

64. The Tribunal also referred to the World Bank Guidelines on the Treatment of Foreign Investment to assure that they are not at all restricted to direct investments.

65. *See* Maffezini, *supra* note 11, para 40 (stating "[t]o the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the Agreement").

66. *See* Fedax, *supra* note 54, para 42 & 43 (stating "[p]romissory notes are also expressly governed by Law in connection with obtaining domestic or foreign credit and contracts of works and services," and "[t]he status of the promissory notes under the Law of Public Credit is also important, as evidence that the type of investment involved is not merely a short term, occasional financial arrangement"). It is worth comparing the Tribunal's findings on public policies with the Maffezini Tribunal's findings through actions taken by SODIGA in prosecuting a public interest towards economic development in the Galician region.

same counter memorial, which requested payment of the promissory notes from the appropriate Venezuelan authorities, and requested the Tribunal to put an end to the proceedings since its object was moot. The Tribunal recognized that the facts alleged by the claimant were not contested by the respondent, and that the main issues referred on the request of arbitration were already partially settled by the parties.[67]

In Fedax, the BIT's broad definitions on legal disputes and foreign investment were considered by the Tribunal in order to satisfy ICSID jurisdictional requirements. The Tribunal then exercised an extensive discretionary power that implies a considerable enlargement of the concept of investments, as previously seen when interpreting or applying the ICSID Convention. The Tribunal's determinations on legal disputes and foreign investments have been implied on the parties' consent to arbitration. In this sense, the definitions under article 25 of the ICSID Convention would remain within the parties' previous express or inferred agreement.

V. Forum Selection Clauses in Concession Contracts and the Right to Opt for International Arbitration under BITs

In recent ICSID cases in which Argentina has been the defendant, several issues have been discussed concerning alleged breaches of concession contracts vis á vis investor's right to opt for international arbitration for the settlement of investment disputes. In a concession contract between a contracting party to a BIT and a foreign investor of the other contracting party, the main problem arises when a forum selection clause has been included for the settlement of disputes concerning the interpretation or application of that contract. In a certain way, state claims to submit contractual disputes to domestic jurisdiction have been generally perceived as a revival of old policies vindicating domestic jurisdiction, as opposed to international jurisdiction for the settlement of investment disputes.

In spite of that presumption, it seems fair to question if there are exceptions to BITs provisions that expressly or implicitly recognize the investor's right to resort to domestic or to international jurisdiction. In that context, most of the problems would occur in situations where foreign investments are at issue with a state's participation in concession contracts. Foreign investment in a concession contract does not transform the nature of the concession contract into an investment agreement. On the other hand,

67. Although the Tribunal acknowledged the existence of a partial agreement, the parties could not submit a final agreement to it, neither have they agreed to request the Tribunal to embody that settlement in an award in conformity with article 43(2) of ICSID Rules. Within the issues remained to be decided by the Tribunal, were the time of payment and the allocation of legal costs and other expenses. "None of these questions detract from the significance of the settlement reached on the merits, this being the basis on which the Tribunal shall render its award." *Id.* para. 28. The Tribunal finally decided that Venezuela had to pay Fedax an amount representing the principal of the promissory notes due, plus regular and penal interest due on the promissory notes, plus the amount representing one half of the charges and costs of the proceeding, for which advance payment was made by applicant. The Tribunal also held that each party should bear its own expenses and legal fees. *See* Fedax, *supra* note 54, at 1391.

foreign investments within a concession contract will be considered investments, which are covered under the applicable BIT.

Another relevant matter concerns the possibility of alleging that any breach of a contract, in which there is a foreign investment covered by a BIT, could automatically be identified as a breach of that BIT. It could be presumed that the answer to the above-mentioned issues can be found within BIT's provisions. However, it should be noted that most BITs clearly differentiate between the definition of foreign investments protected by each applicable treaty and investment disputes to be settled by application of BIT specific clauses. In that sense, the Argentina–USA BIT has defined the term investment dispute for the purpose of applying its provisions concerning the settlement of investment disputes between a contracting party and a foreign investor of the other contracting party.[68] Under the Argentine-USA BIT, investment disputes are limited to disputes concerning investment agreements, investment authorizations, or alleged violations of BIT provisions.

Mere breaches of concession contracts, which could not be considered a violation of a BIT right or obligation, would be excluded from the BIT definition of investment disputes. As a consequence, the settlement of dispute provisions under the BIT would not be applicable to a mere contractual dispute. Under that same line of reasoning, the Tribunal in *Azinian v. Mexico*, in dealing with the merits of the claims submitted by claimants, concluded that a mere breach of a concession contract did not amount to a breach of NAFTA chapter 11.[69] The Tribunal observed that its jurisdiction was confined to determining whether a substantive obligation of chapter 11 of NAFTA had been breached.

In other recent ICSID cases involving Argentina, in order to assess ICSID jurisdiction, alleged breaches of concessions contracts have been claimed to be BIT breaches. As different ICSID Arbitration Tribunals have dealt with that same issue from independent perspectives, we will now turn to the treatment and outcome given to that question through the analysis of these cases.

A. A First Approach: Concession Contracts Clauses and the Definition of Investment Disputes under BITs

Lanco, a company incorporated in the United States, requested the initiation of ICSID arbitration proceedings, invoking the Argentina–USA BIT, alleging damages for breaches of a concession contract and of the BIT.[70] Lanco had participated in the privatization of the Port of Buenos Aires. It held 18 percent of the assets of a national enterprise that had obtained a concession from the federal government for the exploitation of Terminal Three on the Port of Buenos Aires.

Argentina objected to the jurisdiction of the Tribunal based on the fact that claims submitted for arbitration referred to breaches of the concession contract, and the concession contract allegedly breached contained a forum selection clause for the interpretation

68. *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, Arg.–U.S., 31 I.L.M. 124, art. VII [hereinafter Treaty of Reciprocal Encouragement].
69. Arzinian v. Mexico, 39 I.L.M. 537 (1999).
70. *See* Lanco, *supra* note 11.

and application of the contract in favor of domestic tribunals. Argentina argued for the necessary applicability of general principles of law related to the validity of agreements, such as the forum selection clauses, which are based on the free will of the parties as expressed in the concession contract. Argentina also argued for the bonafides interpretation of a contract and pacta sunt servanda. The Tribunal recognized that the concession contract applies to any dispute that may arise under the contract. Clause twelve of the concession contract provided that, 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.

Argentina also alleged that Lanco had no standing by itself to make a claim for performance of obligations arising under the concession contract, due to the fact that it merely has a shareholder equity status in the grantee company, and therefore, is not a party to the contract. On that point, Argentina failed to recognize that the BIT definition of protected investment contained in article I of the BIT is broad enough to include shareholder equity in the grantee company.

The day after the hearing to deal with the objection to jurisdiction, the Tribunal produced a preliminary decision denying Argentina's objections on the basis that claimant has alleged the violation of the BIT. The mere allegation of a violation of the treaty is sufficient to obtain jurisdiction because the alleged breaches were related to an investment agreement. Controversies related to investment agreements, justify *per se*, the possibility for the investor to opt for arbitration under ICSID in accordance with article VII of the BIT.

The Tribunal first interpreted the Argentina–USA BIT to determine if it applied to the dispute presented by Lanco against the Argentine Republic. Next, the Tribunal examined whether the requirements established by article 25 of the ICSID Convention had been met. In reference to the question of BIT application, the Tribunal analyzed whether Lanco's activities in the Argentine Republic could be characterized as an investment, whether there was an investment dispute as defined in the BIT,[71] and whether the conditions established in the BIT for access to ICSID arbitration had been met.

The Tribunal found that the definition of investment in article I(1) of the BIT was broad, and obviously included shareholder equity. Even more, the terms of the BIT did not require that the investor in the capital stock have to have control over the administration of the company or a majority share. The fact that Lanco holds an equity share of about 18 percent of the capital stock of the grantee, allows the Tribunal to conclude that it was an investor within the meaning of article I(1) of the BIT.[72] But, due to the broad BIT definition of investment, Lanco also has certain rights and obligations as a foreign investor under the concession agreement. The Tribunal stressed that Lanco was one of the parties to that agreement, as one of the awardees and guarantors, and "consequently, Lanco is liable to the Argentine State for the obligations arising under the contract in the conditions established therein."[73]

The Tribunal, having found that Lanco was liable under the concession agreement to Argentina, assumed that Lanco was also a party to that agreement. The Tribunal

71. Treaty of Reciprocal Encouragement, *supra* note 68, at art. VII.
72. Lanco, *supra* note 11, para 10.
73. *Id.* para 12.

admitted, without explaining that Lanco, as a foreign party to the concession contract, has a special standing to apply the BIT.

The Tribunal determined that there was an investment for the purposes of applying the BIT, becuase "the investment by Lanco is not merely an investment in stock, but also a [c]oncession agreement made by signing with the Government of Argentina, under which certain rights and obligations arise for the investor."[74] The Tribunal subsequently concluded that the above-mentioned affirmation did not make the concession agreement an investment agreement, since not all the parties are legally situated in like manner. Here, the Tribunal erred in considering that the only requirement to determine the existence of an investment agreement was the existence of a foreign investor as one of the parties to any contract.

The Tribunal emphasized that the concession contract can be characterized, with respect to Lanco, as an investment agreement. Obligations that arise under the bid conditions, to which the concession agreement expressly referred in order to define the character of the awardees forming part of the Grantee, leave no doubt but that Lanco is liable to the Argentine State. That is so, the Tribunal reasoned, not only because of Lanco's direct equity ownership in the grantee company, but also by reason of its direct liability under the concession agreement.

> From this liability, it can be concluded that Lanco is a party to the [c]oncession [a]greement, in its own name and right, and in its capacity as a foreign investor; and for the purposes of the BIT it can be considered that the [c]oncession [a]greement is in effect an investment agreement.[75]

This conclusion of the Tribunal is not founded on law, and it is not explained. It seems to be the result of an erroneous presumption, which in itself contradicts a previous Tribunal assurance. As mentioned above, the Tribunal has expressed that "[t]his, nonetheless, does not make the Concession Agreement an investment agreement".[76]

This faulty presumption implies that any contract, between a state and a private foreign party, will necessarily be defined as an investment agreement, regardless of the foreign party's participation in the agreement. The consequence of that presumption will be that, if there is a dispute related to the interpretation or application of a contract, the private foreign party will automatically be authorized to allege that there is an investment dispute for the purposes of article VII of the BIT, irrespective of the existence a breach of BIT provision.

The Argentine–USA BIT defines what an investment dispute is in order to activate its own settlement of disputes mechanisms. Article VII of the BIT provides that for the purposes of such an article, an investment dispute is a dispute between a party and a national or company of the other Party, arising out of or relating to: (i) an investment agreement between that party and such national or company, (ii) an investment authorization granted by that party's foreign investment authority (if any such authorization exists) to such national or company, or (iii) an alleged breach of any right conferred or created by this BIT with respect to an investment.

74. *Id.* para 15.
75. *Id.* para 16.
76. *Id.*

The Tribunal rejected Argentina's allegation that

> a concession agreement that does not contain specific clauses referring to foreign investments is not an investment contract in the terms and scope of the BIT, not even under the assumption that the Concession Agreement had been entered into by a State Party and a national or company of the other Party controlled 100% by foreigners.[77]

Internal legislation of Argentina distinguishes between investment agreements and concession agreements. This is apparent because the legislation defines and regulates the two types of agreements differently. Under the ICSID Convention, the Tribunal is not authorized to ignore the applicable law, which is defined by article 42.[78]

Under the BIT, there is no doubt that Lanco could claim to have an investment that is entitled to protection as a foreign investment. This protection is not a consequence of an nonexistent investment agreement or a presumption that implies an investment agreement within a concession contract. But this protection is afforded the basis of an alleged breach of any right conferred or created by the BIT with respect to that investment. The Tribunal erred in affirming that the concession contract clause submitting contract disputes to the Argentine administrative tribunals "need not have been made explicit, for if one is to submit to a court [a dispute], it could only be to the contentious–administrative tribunals of the City of Buenos Aires, as this jurisdiction is not subject to mutual agreement."[79]

That statement contradicts Argentine law, which is the law the Tribunal has to apply in conformity with the BIT and the ICSID Convention. The Tribunal is confused with the scope and meaning of the provision it tries to apply. The Tribunal erred in considering that under Argentine law there was no chance to agree on a forum selection clause. It wrongly referred to article 1 of the Federal Civil and Commercial Procedural Code,[80] in order to sustain that there was no legal authorization to depart from original jurisdiction. But the Federal Procedural Code differentiates jurisdiction from competence, what could not be waived or modified is the basic allocation of Court's competences rasone material—civil, labor, penal, or commercial competence. Jurisdiction could be freely agreed. It is also important to state that the general practices and domestic judicial precedents applying that clause are not contested.[81]

The Tribunal's conclusion misleads by stating that, because a foreign investor has rights and duties under a concession contract with the Argentine Republic, that state should bear in mind that the Argentine–US Treaty applies to its relationship with Lanco. On the other hand, the Tribunal has jurisdiction on the basis of alleged breaches of the treaty, even if the alleged breaches have their origin as breaches of a concession contract. But something else assures, as the Tribunal did, that because there is a contract relationship with a foreign investor, the contract should be assimilated to an investment agreement in order to grant to the investor direct recourse to international jurisdiction without alleging the existence BIT breaches.

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77. *Id.* para 18.
78. *See Report of the Executive Directors, supra* note 2, art. 42.
79. Lanco, *supra* note 11, para 19.
80. Código de Procedimiento Civil y Commercial (Editorial Zavalía, Buenos Aires ed., 2002).
81. Conf Serantes Peña, *Código de Procedimiento Civil y Commercial par la Capital Federal Comentado* (Buenos Aires ed., 1999).

Article VII(2) provides for domestic or international jurisdiction for the settlement of disputes at the option of the investor. The basic requirement expressed in article VII(1) refers to the very existence of an investment dispute. In the event of an investment dispute that cannot be settled amicably, the national or company concerned may opt to submit it for settlement to the domestic jurisdiction of the host state, or to any applicable previously agreed dispute settlement procedures, or to a binding arbitration.

The claimant considered the forum selection clause provided by article 12 of the concession contract as a previously agreed procedure in conformity with article VII(2). Argentina considered that previously agreed dispute settlement procedures mentioned in article VII(2), referred to agreements by states parties to the BIT concluded before the entry into force of the Argentina–USA BIT.

The Tribunal rejected both allegations. It stated that the parties could not have selected the jurisdiction of the federal Contentious–Administrative Tribunal of Buenos Aires because it would be practically impossible to select the jurisdiction of courts whose jurisdiction is, by law, not subject to agreement or waiver, whether territorially, objectively or functionally. As the contentious–administrative jurisdiction cannot be selected or waived, submission to the contentious–administrative tribunals cannot be construed as a previously agreed dispute settlement procedure.

The Tribunal's conclusion is in violation of relevant Argentine legislation concerning parties' rights to agree on a forum selection clause. The Tribunal rightly rejected Argentina's allegations, concluding that article VII(2)(b) should be understood as referring to agreements that existed at the time the dispute arose, and that there was no relation to the entry into force of the Argentine–USA Treaty. What the Tribunal ignored, is that Argentina alleged that article VII(2)(b) refers to agreements entered into by the state parties to the BIT and not, as the Tribunal has misunderstood, to agreements entered between the parties to the investment dispute.

The Tribunal's resolution of this issue was irrelevant as to the main objections of the parties concerning the Tribunal's jurisdiction. Argentina did not deny the foreign investor's right to opt to settle an investment dispute through ICSID arbitration. What Argentina objected to was the very existence of an investment dispute to be settled in accordance with the BIT, because the claimant only alleged breaches of the concession contract. On Argentina's reasoning, alleged breaches of the concession contract should be dealt with in conformity to the forum selection clause.

Argentina, when affirming the existence of an agreement between the parties to the dispute, by which they freely consent to select a forum to settle any dispute related to the concession agreement, wrongly introduced the argument that the investor's option was conditioned on the terms of article 26 of ICSID Convention. The basic contradiction in the Argentine invocation of article 26 consisted of qualifying the contractual clause on forum selection (article 12) as an exhaustion of local remedies requirement, which has no relation to either the BIT or the concession contract.

Finally, the Tribunal found that the nature of article 12 of the concession contract was a stipulation to the contrary, as provided by article 26 of ICSID Convention, is highly questionable, in so far that it reiterates the material, objective, and territorial jurisdiction in the case of an administrative concession.

Once again, the Tribunal erred in applying Argentine law by concluding that the alleged forum selection clause, a possibility that may be envisaged by Argentine law, has

not been shown by the respondent.[82] Taking into consideration that the claimant has not challenged *per se*, the validity of the forum selection clause of the concession contract, but rather its applicability to the investor's option under the BIT, it is surprising that the Tribunal sua sponte decided that under Argentine law, there was no legal right to chose, waive, or select jurisdiction by parties' agreement. The Tribunal not only erred on the applicable law, but also produced confusion in assuming the responsibility of the respondent for not proving the right to select jurisdiction when the claimant did not challenge that right.

The Tribunal finally assumed that the only requirement that the BIT did provide for in resort to international arbitration was the exhaustion of a period of six months. The Tribunal did not refer to the existence of an investment dispute as specified by article VII(1) of the BIT as another fundamental requirement to activate international arbitration.

The Tribunal's conclusion that the offer made by the Argentine Republic to cover investors under the Argentine–USA BIT cannot be diminished by submission to Argentina's domestic courts, which the concession agreement remits,[83] is unfounded in relation to allegations of concession contract breaches not covered by the definition of investment disputes for the purposes of applying article VII of the BIT. In that context, it is hard to understand the Tribunal's mention of article 64 of ICSID Convention, which provides that the International Court of Justice will settle any interpretation of the Convention that could be submitted to it by contracting states, a state that does not observe article 26 of the Convention as a rule of judicial abstention of local courts, may expose its own state to an international claim under article 64. It seems here that the Tribunal, in advising the respondent on the consequences of a violation of the Convention, is assuming either a persuasive or a rhetoric competence, which arbitral tribunals do not have. The Tribunal determined its jurisdiction on the basis of the existence of an investment dispute under article VII(1)(a) because the dispute is related to an investment agreement, and also under article VII(1)(c) because the dispute is related to alleged BIT breaches.[84]

In spite of the provisional decision on jurisdiction in Lanco, it is reasonable to assume that there is still enough room to argue that a forum selection clause, accepted by the parties to a concession contract, should prevail when the dispute arise out of a mere contractual breach. After the final hearing on the merits, Lanco unilaterally discontinued the case. Argentina conditioned its acceptance of discontinuation on the Tribunal's decision on costs and expenses generated during the arbitration proceedings. The Tribunal considered that it has no power to deal with costs because it was not entitled to give an award, and determination of costs and expenses should only be expressed on an award. As a consequence, the Tribunal asked the claimant if it would

82. Lanco, *supra* note 11, para 38.

83. *Id.* para 40.

84. The Tribunal further expressed that in addition, there is an investment dispute as defined in article VII(1) of the BIT, which allows the Tribunal to examine arguments regarding the merits of the dispute, whether it arises under the concession contract or the BIT. It should be recalled that the claimant has alleged that Argentina has breached its obligations under article II(2)(a) (fair and equitable treatment) and (b) and article IV(1) (expropriation). *See* Treaty of Reciprocal Encouragement, *supra* note 68, arts. II(2)(a) & IV(1).

empower it, as the respondent has already done, with the authority to allocate procedural costs and expenses. The claimant rejected that proposition, so the Tribunal finally ordered the discontinuation of the case, accepting that it did not have the power to produce a decision on costs and expenses incurred by both parties.

Another interesting issue related to what the Tribunal had to say in reference to its lack of power to determine costs and expenses without the previous authorization of the parties, is the binding nature of a preliminary decision on jurisdiction in cases where, the Tribunal has found itself as not being entitled to deliver an award, in which that provisional decision should be included. Further, Argentina had previously announced to the Secretary General, its intention to submit an application for the annulment of the provisional decision on jurisdiction. The official response of the ICSID Secretariat Staff was that, in conformity with ICSID Convention and precedents, a request for annulment was only possible when an award was delivered. Argentina decided to postpone its request for annulment until the moment the final award was rendered. As the Tribunal did not produce a final award, there was no chance to challenge the annulment of a provisional decision on jurisdiction. It is rather confusing to assume that a provisional decision not confirmed on a final award, would produce legal effects in relation to its possible annulment.

B. A Further Precedent Without a Definition on ICSID Jurisdiction

In *Houston Indus. Energy, Inc. v. Argentine Republic*,[85] a company registered under the laws of the United States of America claimed damages for breaches to a concession contract governing the provision of electricity, concluded between the claimant and the Province of Santiago del Estero (a political subdivision of the Argentine Republic). The claimant also alleged that contract breaches amounted to breaches under the Argentine–USA BIT, including indirect expropriation.

As in Lanco, Argentina objected to ICSID jurisdiction, alleging that there was a forum selection clause in the concession contract providing for the settlement of contract disputes. Thus, the parties to the contract should submit them to the domestic courts of the Province of Santiago del Estero. Argentina did not claim the application of the exhaustion of local remedies rule, but the application of the forum selection clause of the contract. Argentina also argued that there was no investment controversy due to the fact that: (i) the claimant only argued on the violation of a contract, (ii) the claimant was bound by the concession contract to resort to domestic jurisdiction for the settlement of controversies over the contract, and (iii) the claimant did not prove in its memorial that alleged breaches of the contract implied a breach of the BIT.

The claimants argued that the concession contract was an investment agreement under the BIT, and that Argentina was responsible for breaches of the concession contract attributed to its political subdivisions. They strongly relied on the findings of the provisional decision on jurisdiction in Lanco to refute the respondent's objections to

85. Houston Indus. Energy, Inc. v. Argentine Republic, (ICSID Case Aug. 3, 1998), *available at* http://www.worldbank.org/icsid/cases/awards.htm (last visited Oct. 7, 2002) [hereinafter Houston Indus. Energy].

jurisdiction. After the hearing on jurisdiction, the Tribunal confirmed its definition of jurisdiction with article 42.2 of ICSID Convention and Rule 41.4 of the Rules of Arbitration.[86] That order evidenced that the Tribunal was cautious in following the provisional decision on jurisdiction produced in Lanco as a relevant precedent.

After the parties had submitted their memorials and counter memorials on the merits, claimants requested from the Tribunal, under Rule 44 of the Arbitration Rules, the unilateral discontinuation of the case stating that an agreement with the Province of Santiago del Estero have been reached. However, Argentina objected to the discontinuation of the case on reasons that it was not a party to the settlement agreement, and that claimants should support all cost incurred by respondent during arbitration proceedings.

Claimants then presented to the Tribunal an amendment to their claims containing another unilateral request for discontinuation, based this time on the fact that, due to their agreement with the Province, they renounced all their claims submitted to arbitration. At that point, Argentina alleged that the claimants have recognized in their amendment, which included a second unilateral request for discontinuation, stating that there were no legal disputes. As the existence of a legal dispute arising out of an investment is a basic jurisdictional requirement under article 25 of the ICSID Convention, the Tribunal was forced to dismiss the claims on the grounds of lack of jurisdiction. In consequence, Argentina claimed the payment of all costs incurred during the proceedings.

The Tribunal, without defining its own jurisdiction, produced an award[87] discontinuing the case and condemning the claimants to pay the costs incurred by Argentina during ICSID proceedings. The Tribunal's non-definition of its own jurisdiction provoked certain anxiety and confusion among investors and host states with relation to future interpretations regarding the settlement of disputes under BITs when confronted to the applicability of forum selection clauses on concession contracts.

C. Variations on the Same Approach: A New Precedent

In another recent ICSID arbitration case, a French company, Compagnie Genérale des Eaux (CGE), and its Argentine affiliate, Compañía de Aguas de Aconquija, submitted against the Republic of Argentina several claims concerning a Concession Contract concluded in 1995.[88] Claimants stated that the dispute arose out of alleged acts of the Argentine Republic and one of its political sub-divisions (the Province of Tucumán), which caused the termination of a concession contract between Tucumán and CGE. The claimant asserted that all referred acts were attributable to the Argentine Republic, and as such, violated Argentina's obligations under the Argentine–French BIT.[89]

Argentina as the respondent, presented objections to the Tribunal's jurisdiction. The Tribunal decided to join the jurisdictional issue to the merits. After a full presentation of the factual issues and corresponding allegations concerning the merits, the Tribunal affirmed its jurisdiction over the case, but ultimately decided to dismiss the claims on

86. *Id.*, Order of Mar. 15, 1999.
87. *Id.*, Award of Aug. 2001.
88. Compañía de Aguas del Aconquija S.A. v. Argentine Republic, 40 I.L.M. 426 (2001) [hereinafter Compañía de Aguas].
89. Agreement for the Reciprocal Protection and Promotion of Investments, July 3, 1991, Arg.–France [hereinafter Arg.–France BIT].

the merits. The Tribunal concluded that the evidence presented in the proceedings did not establish grounds for finding a violation, by the Argentine Republic, of its legal obligations under the BIT, either through its own acts or omissions, or through attribution to it of acts of the Tucumán authorities.[90]

The claimant then addressed to the Secretary General of ICSID an application for the annulment of the Award and an Ad-Hoc Committee was appointed. The Ad-Hoc Committee finally produced its decision concerning the partial annulment of the award.[91]

1. The Forum Selection Clause as an Objection to ICSID Jurisdiction

During the initial arbirtration, Argentina filed an objection to the jurisdiction of the Tribunal arguing on the same grounds as in previous cases, that the dispute concerned alleged breaches of the concession contract, and that the contract provided a forum selection clause in favour of domestic jurisdiction. It also argued that Argentina was not responsible for acts or omissions related to contracts to which it was not a party. Claimants, however, alleged that international law attributed to Argentina, the actions of the Province, and its officials, and sustained that those actions constituted breaches of Argentina's obligations under the BIT.

The key issue before the Tribunal concerned the legal effect to be given to a forum selection clause in the concession Contract in light of provisions in the BIT and the ICSID Convention respecting settlement of disputes. Article 16.4 of the concession contract between CGE and the Province of Tucumán, provided for the resolution of contract disputes concerning its interpretation, and application to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán.[92] Article 8 of the Argentine–French BIT provided that if an investment dispute arises between one contracting party and an investor of the other contracting party, and that dispute cannot be settled by direct negotiations within six months, the investor has the option to submit the dispute either to the domestic jurisdiction of the contracting party involved in the dispute, to arbitration under the ICSID Convention, or to an ad-hoc tribunal constituted in conformity with UNCITRAL Arbitration Rules.[93]

The Tribunal decided to join the jurisdictional issue to the merits, and finally the arbitration ward rendered in November 2000, which dismissed the objections to jurisdiction raised by respondent. The Tribunal affirmed its jurisdiction, holding that claimants' claims concerning the actions of the federal government of Argentina, as well as those of the Province authorities of Tucumán, were properly characterized as claims arising under the BIT, and not as contractual claims under the concession agreement.[94]

It is possible to argue that there is a substantial difference between the claimant's characterization of governmental acts, or omissions as violations of treaty obligations, and the claimant's possibility to prove such characterization. Proper characterizations are enough to determine pirma facie the Tribunal's jurisdiction. Once jurisdiction has been

90. Compañía de Aguas, *supra* note 88, at 427–29.
91. Compañía de Aguas, Decision on Annulment of July 3, 2002, *supra* note 88.
92. Compañía de Aguas, *supra* note 88, at 451.
93. *Id.* at 450.
94. *Id.* at 438.

asserted, the Tribunal has to deal with allegations of violations of the BIT, even if those violations are the consequence of contractual breaches.

In that context, the Tribunal observed that article 16.4 of the concession contract does not, and indeed could not, exclude the jurisdiction of the Tribunal under the BIT. The claimant's claims "are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothersi*, those claims are not based on the [c]oncession [c]ontract but allege a cause of action under the BIT."[95]

It was also clear to the Tribunal that under international law, acts of organs of both the central government and provincial authorities are attributable to the state, with the result that Argentina cannot rely on its federal structure as a means of restricting its treaty obligations.[96] For the Tribunal, it was most relevant to stress that instituting proceedings against the Province before domestic courts referred to by the concession contract for breaches of that contract, would not "have been the kind of choice by [c]laimants of legal action in national jurisdictions ... against the Argentine Republic that constitutes the 'fork in the road' under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention."[97]

Concerning objections to jurisdiction, the Ad-Hoc Committee observed that the fact that the concession contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal, with respect to a claim based on the BIT's provisions. Article 16.4 of the concession contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under article 8(2) of the BIT.[98]

The Committee held that the Lanco award, cited by the Tribunal, supported the Tribunal's findings on jurisdiction.[99] That award held that it is correct to assert jurisdiction on the basis of claims for breaches of a concession contract that at the same time amount to a breach of the BIT. The above Committee affirmation would be considered partially false in reference to what the Tribunal in Lanco held concerning the identification of a concession contract with an investment agreement. Under that false presumption, the Lanco Tribunal found that it had jurisdiction for claims of breaches of the Concession Contract irrespective of the existence of claims for breaches of the BIT.[100]

The Ad-Hoc Committee did not address the fact that the affirmation of the Tribunal, in relation to the impossibility under Argentine law to select a jurisdiction clause by mutual agreement, was a gross misinterpretation of the law that the Tribunal was obliged to apply under the BIT and the ICSID Convention. However, the Committee did not refer to the Tribunal's jurisdiction on the basis of assuming the assimilation of the concession contract as an investment agreement, but only on the basis of allegations of BIT breaches.

Another interesting question, at least for academic speculation, concerns the legal consequences of the preliminary decision on jurisdiction in Lanco, which as we already

95. *Id.* at 439.
96. *Id.* at 437.
97. *Id.* at 439.
98. *Id.* at 427–29.
99. *See* Lanco, *supra* note 11.
100. *Id.* at 450.

mentioned, has not been incorporated in a final award and therefore, could not be challenged for annulment under ICSID Convention. As a precedent, the provisional decision on jurisdiction has been cited in the Aguas de Aconquija Award and also in the Decision on Annulment where its legal implications were assumed to be *res judicata* when its legal nature seems rather uncertain.

2. The Tribunal Decision on the Merits

CGE alleged that Argentina was directly responsible for its failures to perform certain obligations under the BIT independently from the performances of Tucumán under the concession contract.[101] The Tribunal's findings on the merits distinguished claims based directly on alleged acts, or failures to act, on the part of the Argentine Republic and on the other, claims related to the conduct of Tucumán authorities, which were nonetheless brought against Argentina in conformity with the principle of attribution under international law.

In reference to the so called federal claims, the Tribunal held "that the record of these proceedings does not provide a basis for holding that the Argentine Republic failed to respond to the situation in Tucumán and the requests of the [c]laimants in accordance with the obligations of the Argentine government under the BIT."[102] But when dealing with the so called Tucumán claims, the Tribunal announced that it would resolve the case by analyzing the specific allegations on which the claimants based their claims and their legal significance in light of the terms of the concession contract and the BIT.[103] Taking into consideration the different categories of acts of the Province imputed to Argentina that were alleged to have violated claimants' rights under the BIT, the Tribunal found that the claimants had failed to challenge any of the acts in the Tucumán Courts.[104]

The Tribunal did not accept the claimant's position that their claims by CGE in the contentious administrative courts of Tucumán, for breach of the terms of the concession contract as article 16.4, constituted a waiver of their rights under the BIT and the ICSID Convention.[105] The Tribunal considered that the claims, as presented by the claimants in the instant case, were essentially claims for contractual breaches, notwithstanding that they had been formulated as claims for treaty breaches. But the Tribunal observed that it was impossible to distinguish or separate violations of BIT from breaches of the concession contract without first interpreting and applying the contract. Taking into consideration that the parties to the contract assigned that task expressly and exclusively to the domestic courts of Tucumán, the Tribunal dismissed the claims.[106]

101. Compañía de Aguas, *supra* note 88, at 446.
102. *Id.* at 446.
103. *Id.* at 440.
104. *Id.* at 440–41.
105. *Id.* at 444.
106. *Id.* at 443. The Tribunal held that

> Because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Toucan and have been denied their rights either procedurally or substantially. . . . [G]iven the nature of the dispute between Claimants and the

Due to the fact that the claims arose almost exclusively from alleged acts of the Province that concerned its performance under the contract, the Tribunal held that claimants had to submit their claims to the contentious administrative courts of Tucumán in conformity to article 16.4 of the concession contract. Therefore, the Tribunal held that the claimants should have first challenged the actions of the Tucuman authorities in its domestic courts, and

> any claims against the Argentine Republic could arise only if Claimants were denied access to the Courts of Tucuman to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantially unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic.[107]

The Tribunal introduced some confusion in reference to different sources of state responsibility. When the investor submits a claim for contract breaches to internal courts it is presumed, under the Tribunal reasoning, that there is no access to international arbitration because a contractual forum selection clause. But the Tribunal assumed that if there were a denial of justice provoked by domestic courts, the affected investor would be entitled to claim international responsibility of the state. If that is so, the source of state responsibility will be international customary law and not the BIT. Obviously if there is a denial of justice, exhaustion of local remedies would be considered a pre-requisite for the exercise of diplomatic protection by the contracting state of the investor. Exhaustion of local remedies, followed up by a denial of justice as a venue for the exercise of diplomatic protection, is a question outside the scope of BIT interpretation or application.

In spite of that assessment, the Tribunal declared that its decision did "not impose an exhaustion of remedies requirement under the BIT because such requirement would be incompatible with Article 8 of the BIT and Article 26 of ICSID Convention."[108] Then it could be validly argued that the Tribunal has accepted an exhaustion of the local remedies rule in reference to a potential recourse to diplomatic protection, not to international arbitration as provided by the BIT.

The Tribunal failed to recognize that breaches of a concession contract could amount to or imply BIT breaches. In that sense the Tribunal has abstained from dealing with contract breaches in order to assess the existence or nonexistence of BIT violations.

> Province of Toucan, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract. . . . To make such determinations, the Tribunal would have to undertake a detail interpretation and application of the Concession Contract, a task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán.

107. *Id.* at 443.
108. *Id.* at 444.

> [I]n this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the Private contract between the Claimant and the Province of Tucman, and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.

But the Tribunal seems also convinced that the claimants' claims in the present case only referred to contract breaches, because if such claims were also identified with BIT breaches, recourse to domestic courts would be implied; following the Tribunal's reasoning, the execution of the right to opt under article 8(2) of the BIT.

It should be recalled that the Tribunal has already interpreted article 8(2) of the BIT when dealing with objections to its jurisdiction as applied only to claims for BIT breaches, and consequently, held that it did not apply to claims based on the Concession Contract.[109] The Ad-Hoc Committee rejected the Tribunal's position concerning the investor's right to opt under article 8(2) of the BIT. In that context, the Committee was of the opinion that the Tribunal appeared to have considered that, because claimants' contract and treaty claims could not be separated, a distinct claim based on the BIT was impossible in the circumstances of the case, at least prior to submission of the dispute to the provincial courts.[110]

For above-mentioned reasons, the Ad-Hoc Committee held that the Tribunal's conclusion that the fork in the road was never reached in this case is based on an interpretation of article 8(2) which limits its application exclusively to claims alleging a breach of the BIT.[111] In that context, the Tribunal held that "[a]fter carefully reviewing the extensive memorials and testimony, the Tribunal finds that the record in these proceedings regarding these allegations does not establish a factual basis for attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucuman."[112]

But what the Tribunal held was probably a consequence of certain confusion provoked by the lack of precision of the claimants allegations concerning production and evaluation of evidence related to the violation of articles 3 (fair and equitable treatment) and 5 (expropriation safeguards) of the BIT. It is one thing to allege breaches of the BIT to obtain jurisdiction, but it is quite a different thing to prove these breaches as to obtain recognition of treaty violations on the merits. Claimants should have proved that breaches of the concession contract amounted to breaches of obligations assumed in treaty law. Mere allegations are sufficient bases for jurisdiction, but do not necessarily obtain a favorable award on the merits.

3. *Investment Disputes under the Argentine–French BIT*

Article 8 of the BIT regulates "any dispute relating to investments made under this [a]greement between one [c]ontracting [p]arty and an investor of the other [c]ontracting [p]arty."[113] The Argentine–French BIT does not define investments disputes as the Argentine–USA BIT does in order to apply its settlement of disputes provisions.[114] The Ad-Hoc Committee has stated that the requirements for arbitral jurisdiction in

109. *Id.* at 439 ("By this same analysis, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention.").

110. *Id.* at 443.

111. *Id.* at 446.

112. *Id.*

113. Arg.–France BIT, *supra* note 89, at 301.

114. *See supra* note 68 and accompanying text.

article 8, read literally, do not necessitate that claimant allege a breach of the BIT itself—it is sufficient that the dispute relates to an investment made under the BIT.[115] But the Committee did not explain what that formula of investment disputes meant, and although it has been recognized as a general and broad one, it must be qualified by the requirements provided by the ICSID Convention and the BIT. In any event, the formula will authorize resort to article 8 for any dispute relating to investments made and covered by the BIT.

The Ad-Hoc Committee's literal interpretation of investment disputes goes too far from the aims and objectives of the BIT, as expressed on its preamble. This broad interpretation would be correct in relation to disputes affecting the investment under the terms of rights recognized to investors by the BIT. That being said, the expression under the BIT should be understood as meaning covered by the BIT. In other words, investment disputes should refer to BIT rights and obligations.

It was evident to the Ad-Hoc Committee that any investment dispute may involve issues of interpretation and application of BIT's standards, as well as questions of contracts. Article 8(4) on the applicable law, provides that arbitration shall be based on provisions of the BIT, the legislation of the contracting party which is a party to the dispute, including conflict of laws rules, private agreements concluded on the subject of the investment, and the relevant principles of international law. Thus, when the Ad-Hoc Committee observed that the same dispute could be submitted either to the domestic courts of the contracting party or to international arbitration, it failed in presuming that internal courts would only apply domestic law, as opposed to arbitration tribunals that would decide in accordance to the applicable law provided by article 8(4) of the BIT.[116] Under Argentine law, domestic tribunals are obliged to apply treaties as part of their internal law, which at the same time, do have precedence over domestic law.[117]

Concerning the BIT provisions on the settlement of disputes between a contracting state and an investor of the other contracting state, the Ad-Hoc Committee, in contradiction to what the Tribunal held, observed that the claimants, in opting for ICSID arbitration has taken the fork in the road under article 8(2) of the BIT. In doing so, the claimants took the risk of a tribunal holding that the acts complained of neither individually, nor collectively, rose to the level of a breach of the BIT. In that case, the claimants would have lost both its treaty claim and contract claim.[118] However, a rejection of BIT violations by an arbitration tribunal cannot bar the investors' possibility to a claim for contract breaches, invoking a contract clause providing recourse to domestic tribunals for the application and interpretation of the contract. If an international arbitration award, no BIT violation is recognized, the investor would, in principle, have the chance to resort to a domestic court alleging contract breaches. But as the Ad-Hoc Committee noted, a claim of CGE in domestic courts against Tucumán for breach of a concession contract that also implies a claim relating to investments made under the

115. Compañía de Aguas, *supra* note 88, para 55.
116. *Id.* para 60.
117. *Id.* para 22.
118. "A Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard." CONST. ARG. art. 75, para 22.

BIT, would fall squarely within article 8(2), and constitute a final choice of the forum and jurisdiction.[119]

4. Grounds of Annulment

On March 2001, the claimants filed an application with the Secretary General of ICSID requesting partial annulment of the Tribunal's award dated November 21, 2000. Claimants argued on three out of the five different grounds provided by article 52 of ICSID Convention, in support of its request for partial annulment. The application was based on the fact that the Tribunal had manifestly exceeded its powers; there had been a serious departure from a fundamental rule of procedure; and the award failed to state the reasons on which it was based.

First, claimants relied on the fact that there had been a serious departure from a fundamental rule of procedure.[120] On that point the Committee stressed that the term rule of procedure, referring to the manner in which the Tribunal proceeded, not the content of its decision. Therefore, the Committee cannot find in the record of the Arbitration, or in the award any basis for accepting this allegation.

Claimants also requested for partial annulment of the award on the ground of manifest excess of powers.[121] The Ad-Hoc Committee observed that an ICSID tribunal commits an excess of powers, not only if it exercises jurisdiction that it does not have, but also if it fails to exercise jurisdiction that it possesses. It further considered that "failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of article 52(1)(b)."[122]

In dealing with the manifest excess of powers ground, the Committee followed up the Tribunal's distinction of treatment between claims identified as federal claims and as Tucumán claims. Concerning alleged breaches of the BIT by reason of actions and omissions of the federal government (federal claims), the Committee was of the opinion that the Tribunal carefully considered and properly rejected those claims. As a consequence, it found that the Tribunal committed no excess of powers in relation to federal claims.

In relation to the Tucumán claims, the question for the Committee was to determine whether the Tribunal, having held that it had jurisdiction, was entitled to dismiss them without any overall consideration on their merits. Claimants argued that the Tribunal did not so much dismiss the Tucumán claims as decline to address them. The Committee made a clear distinction between the responsibility of Argentina under the BIT, and the rights and obligations of the parties to the concession contract, and observed that a

119. The Committee concluded that if a claim brought before a national court concerns a "dispute relating to investments made under this Agreement" within the meaning of Article 8(1), article 8(2) will apply. Compañía de Aguas, Decision on Annulment, at para 55.

120. *Id.* art. 52(1)(d).

121. *Id.* art. 52(1)(b).

122. Compañía de Aguas, *supra* note 88, at para 86.

state might breach a BIT without breaching a contract and viceversa.[123] For the Committee, there was a clear distinction to be made between recourse to domestic jurisdiction for contract breaches, and taking into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as the one requiring a fair and equitable treatment (article 3 of the BIT) or an abstention from indirect expropriation (article 5 of the BIT).

Claimants made various allegations as to the conduct of Tucumán, most of them related to measures taken in bad faith. The Tribunal, on the Committee's view, considered some of these allegations, but not all of them. It was clear to the Committee that the Tribunal declined to decide key aspects of the claimants' BIT claims, on the ground that they involved issues of contractual performance or non-performance.[124]

The Committee observed that the Tribunal recognized that it had no possibility to decide on the Tucumán claims, and had to abstain from interpreting or applying the concession contract, because that task had been reserved to the domestic courts.[125] It concluded that the Tribunal, in dismissing the Tucumán claims, failed to decide whether or not the conduct in question amounted to a breach of the BIT.

The Tribunal repeatedly referred to allegations that it considered could not be decided by the Tribunal because of the terms of the forum selection clause of the concession contract. For the Committee, the Tribunal did not dismiss the Tucumán claims on those merits, as no interpretation of either article 3 or 5 of the BIT was produced. It also stressed that it was not its function to form, even a provisional view, as to whether or not the Tucumán conduct involved a breach of the BIT, and in consequence it has not done so.

The Committee considered that the Tribunal in its Award had deprived the claimants of a decision on Tucumán compliance with treaty standards for the protection of investments. In that sense, the basis for annulment could be resumed as a Tribunal's dismissal of the claimants' claims without effectively considering them on the merits.

Finally, in support of its request for annulment, the claimants invoked article 52(1)(e) of the ICSID, arguing that the Tribunal had failed to state reasons on which

123. 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. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty. . . . In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could, or should, have been dealt with by a national court. In such a case, the inquiry, which the ICSID tribunal is required to undertake, is one governed by ICSID Convention, by BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties. *Id.* para 100, 102.

124. *Id.* 443–44.

125. *Id.* para 110 (recalling in a note to its Decision that the Tribunal has expressly recognized that it was impossible to distinguish or separate violations of the BIT from breaches of the concession contract without first interpreting and applying the detailed provisions of that agreement).

its decision were based. The Committee expressed that it was not necessary to consider that particular ground of annulment, due to its previous conclusion that the reasons for dismissal of the federal claims were given by the Tribunal. As to the Tucumán claims, the Committee had already found that the Tribunal had given full reasons for its decision. Being the Tribunal's decision to dismiss the Tucumán claims without any overall consideration of their merits, the Committee held that the question of failure to state reasons would only arise if the Tribunal actually did reach a conclusion adverse to Claimants under articles 3 and 5 of the BIT, in respect to Tucumán claims as a whole.

The Ad-Hoc Committee concluded that the Tribunal committed no annullable error in its rejection of the federal claims (claims concerning the conduct of federal authorities) on the merits, and that rejection is accordingly res judicata.[126] It further decided that the Tribunal manifestly exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT, and its decision in regard to those claims is annulled.[127]

VI. Final Remarks

At present time, more than one hundred cases have been registered at ICSID for arbitration. Almost thirty-five percent of registered cases involved Latin American countries as defendants. Most of the recently registered cases concerned the application of BIT. An increasing number of cases concerning NAFTA's chapter 11 have been initiated under the Additional Facility rules.

In August 2002, from a total of thirty-eight ICSID pending cases, almost forty percent of those cases were brought by foreign investors, invoking settlement of disputes provisions contained on BITs concluded by Latin American countries. In four of those pending cases, Mexico appears as defendant as a result of NAFTA's chapter 11 invocations. There is also one pending case concerning ICSID arbitration as the result of an investment agreement concluded by Venezuela.

From a total of sixty-eight ICSID already concluded arbitration proceeding, fifteen cases involved Latin American countries. Most of the concluded cases concerning Latin American countries were registered under requests of BITs application. From all these cases, seven received an ICSID award on the merits, three of them under Additional Facility proceedings. In one ICSID case there was a partial annulment. In two cases ICSID Tribunals awarded on the basis of lack of jurisdiction. Five cases were unilaterally discontinued by claimants, and in another case, there was settlement on a party's agreement.

Mexico, not being a party to ICSID Convention, was a defendant in three concluded Additional Facility cases. There was also one concluded case in which, by application of a special agreement, Costa Rica appeared as defendant. The rest of the concluded cases involved Argentina, Venezuela, Paraguay, Peru, and Honduras. Two Latin American investors have initiated ICSID proceedings under BITs, one between two Latin American Countries (Peru, Paraguay) and the other between Argentina and the Kingdom of

126. *Id.* para 119(b).
127. *Id.* para 119(c).

Spain.[128] In almost all ICSID cases against Latin American Countries, the defendant states have systematically objected to the tribunal's jurisdiction.

As we have already seen, issues regarding protected foreign investors, definitions of legal disputes arising out of investments, investment disputes as such, forum selection clauses on concession contracts, as well as resort to domestic jurisdiction, have been extensively argued before ICSID arbitration tribunals. Different parameters to solve those questions have been developed by ICSID tribunals to interpret the applicable law on jurisdiction. Even if there is some margin of imprecision in pre-determining the applicable law for future cases, as they stand today, arbitration precedents have worked out a flexible framework to interpret the law, not to reformulate it. Certainty once the rule of law would not restrict reasonable legal arguments in seeking new developments.

So far, arbitration precedents and experience gained by the states, as well as by foreign investors through ICSID litigation, have been quite welcome by all parts. To preserve the system is to persist in credibility and legal certainty as values to be protected in order to attract foreign investment. In that sense the nonpolitical interference of dispute settlements mechanisms, should be a must.

An important collateral effect of ICSID arbitration is its links to transparency controls. Transparency in the arbitration process narrows the possibility of corruption. Direct negotiation by foreign investors and domestic officials concerning areas of privatized public services, have been constantly contaminated by suspicions of corruption. Accountability and publicity of state attitudes are not necessarily contrary to arbitral confidentiality.

The General Secretary of ICSID has largely contributed in advising states and private foreign investors to narrow the gap among their controversial interests with a fair approach towards the implementation of the ICSID arbitration proceedings. It has also develop reasonable criteria when implementing its discretionary powers to determine if a request for arbitration is manifestly outside the jurisdiction of the ICSID.

There is an increasing general interest in the development of common patterns of applicable law to standardize at a universal level, rights and obligations of all parties involved in the promotion and guaranty of foreign investments. Some problems in adapting settlement of disputes mechanisms conceived in 1965 to permanent changes, as well as problems with the different needs of capital exporting and capital importing states, still remain. ICSID arbitration experience has already proved that a proper correspondence between ICSID and BITs, at least on jurisdictional issues, is possible, and most important, desirable.

128. Maffezini, *supra* note 11; Olguín, *supra* note 11.