ISSN : 1875-4120
Issue : Vol. 6, issue 1
Published : March 2009

Transnational Dispute Management
www.transnational-dispute-management.com

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ICSID Jurisprudence: Between Homogeneity and Heterogeneity
A Call for Appeal?

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I. Introduction

The mythical Zaleukos from the former Greek city Epizephyrian Locroi, in south-west Italy, is deemed to be Europe's first lawmaker.[1] In the middle of the 7th century BC, he created written laws in order to harmonise divergent judicial decisions and to put an end to haphazard interpretations.[2] Moreover, he set a high value on safeguarding the consistent interpretation of legal rules in his own legislation as well. It is chronicled that advocates of different interpretations of a norm had to defend their position before the "Assembly of the Thousand".[3] It has been reported that he whose interpretation did not correspond to the actual will of the legislator was strangled.[4] This could also happen to the high Magistrate of the city who was *inter alia* entrusted with the interpretation of legal rules in controversial cases.[5] In other words, his decisions were appealable as well.[6] And although these laws were characterized by great strictness, the fact is that twenty-eight centuries ago the safeguarding of consistency in adjudication constituted an integral part of the legislation of Zaleukos, a legislation which corresponded to the institutional needs of his epoch.[7]

The issue of the coherence of judicial decisions was also addressed by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) in its discussion paper for

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[1] *Hans Hattenhauer*, Europäische Rechtsgeschichte, 4. Auflage, C.F. Müller Verlag, Heidelberg, 2004, 9, para. 17.

[2] *Kurt von Fritz*, Zaleukos, in *Konrat Ziegler* (Hrsg.), Paulys Realencyclopädie der Classischen Altertumswissenschaft, 2. Reihe, 18. Halbband, Alfred Druckenmüller Verlag, Stuttgart, 1967, 2298, 2299; *Franz Dorotheus Gerlach*, Zaleukos. Charondas. Pythagoras. Zur Kulturgeschichte von Großgriechenland, Bahnmaier's Buchhandlung, Basel, 1858, 54.

[3] *Karl-Joachim Hölkeskamp*, Schiedsrichter, Gesetzgeber und Gesetzgebung im Archaischen Griechenland, Franz Steiner Verlag, Stuttgart, 1999, 196.

[4] *Ibid*., 196.

[5] *Ibid*., 196.

[6] *Ibid*., 196.

[7] *Stefan Link*, Die Gesetzgebung des Zaleukos im epizephyrischen Lokroi, Klio Vol. 74 (1992), 11, 21-22; Gerlach *supra* n. 2, 54.

"Possible Improvements of the Framework for ICSID Arbitration" in the year 2004. Although the paper argued that "[s]ignificant inconsistencies have not to date been a general feature of the jurisprudence of ICSID", it proposed the establishment of an ICSID appeals institution which would be intended to foster homogeneity and consistency in the case-law.[8] According to the Working Paper of the next year, however, the debate about the establishment of an ICSID appeals facility had to be postponed, for it was considered "premature" to attempt to establish an ICSID appeal mechanism.[9] Since then, considerable time has elapsed, further ICSID procedures have been initiated and new cases have been adjudicated. This begs the question whether the ICSID jurisprudence proves yet to be so inconsistent that the ICSID system is, indeed, in need of an appellate instance.[10]

After presenting the institutional structure and the review mechanism of the current ICSID system, the present paper tests the homogeneity of the ICSID case-law, using as example the ICSID jurisprudence regarding the state of necessity and the most-favoured nation clause. It should be emphasized that it does not deal with dogmatic analyses, but rather focuses on specific methodological and interpretational issues of the cases selected.

II. ICSID System: Institutional Structure and Review Mechanism

The Centre is hitherto the sole institutionalised forum which is exclusively entrusted with the administration and the supervision of the settlement of investment disputes between foreign private investors and states. It was established under the auspices of the World Bank in 1965 through the ICSID Convention which provides for the mandate, the organisation and the core functions of the Centre. The primary purpose of the ICSID Convention consists in promoting foreign investments and, consequently, economic development by ensuring the fair, effective and impartial settlement of investment disputes.[11] The settlement of investment disputes, in

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[8] *ICSID Secretariat*, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper, 22 October 2004, 15, para. 21, available at http://www.worldbank.org/icsid/highlights/improve-arb.pdf.

[9] *ICSID Secretariat*, Suggested Changes to the ICSID Rules and Regulations Working Paper, 12 May 2005, 4, para. 4, available at http://worldbank.int/icsid/highlights/052405-sgmanual.pdf.

[10] For a detailed assessment see *Aristidis Tsatsos*, Die Rechtsprechung der ICSID-Schiedsgerichte: Zwischen Homogenität und Heterogenität (Die Debatte über die Schaffung einer ICSID-Berufungsinstanz), Dissertation, Berlin, 8 October 2007, 67-210, available at http://edoc.hu-berlin.de/dissertationen/tsatsos-aristidis-2008-01-31/PDF/tsatsos.pdf; see also *Christian Tams*, An Appealing Option? The Debate about an ICSID Appellate Structure, Essays in Transnational Economic Law No. 57 (June 2006); *David Gantz*, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges, Vanderbilt Journal of Transnational Law Vol. 39 (2006), 39 *et seq.*; *British Institute of International and Comparative Law's Investment Treaty Forum*, Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?, Transnational Dispute Management Vol. 2 (April 2005), 6-27, 60-77.

[11] *Lucy Reed*/*Jan Paulsson*/*Nigel Blackaby*, Guide to ICSID Arbitration, Kluwer Law International, The Hague, 2004, 3; *Ibrahim Shihata*, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, ICSID Review/FILJ Vol. 1 (1986), 1, 1-4; *Michael Reisman*, Control Mechanisms in International Dispute Resolution, United States-Mexico Law Journal Vol. 2 (1994), 129, 131-132; *Aron Broches*, Settlement

turn, is carried out by the ICSID arbitral tribunals which are non-permanent judicial bodies. In other words, every separate case is adjudicated by a different ICSID tribunal.

Until the mid-1990s the Centre led a rather shadowy existence. During the years 1966 and 1993 there were only 27 ICSID arbitration proceedings.[12] However, the proliferation of the bilateral investment treaties (BITs) has led the ICSID jurisprudence to a "baby boom".[13] In fact, by the end of June 2007 the total number of cases registered with ICSID amounted to 236.[14] This growth may be traced back to the special features of these treaties. In particular, BITs establish comprehensive international standards for the protection of international investments and they make it possible for private investors to initiate ICSID arbitral proceedings against host states directly, regardless of whether a contractual agreement has been concluded between the host state and the foreign investor. This kind of arbitration has been aptly described as "arbitration without privity".[15] More often than not, BITs contain similar or identical vague provisions whose interpretation and elaboration is subject to the jurisprudence of the different ICSID arbitral tribunals.

According to Article 53 of the ICSID Convention, ICSID awards shall not be subject to any other remedy except those provided for in the Convention itself. This provision reflects the so-called self-contained and exhaustive character of the ICSID review system.[16] Thus, the possibility of any review of ICSID awards through national courts or other international fora is excluded. The only remedy available to set aside an ICSID award is the annulment procedure pursuant to Article 52 which is carried out by an *ad hoc* Committee. The latter can

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of Investment Disputes (1963), in *Aron Broches*, Selected Essays: World Bank, ICSID and Other Subjects of Public International and Private International Law, Martinus Nijhoff, Dordrecht, 1995, 161, 163.

[12] *Christian Tietje*, Die Beilegung internationaler Investitionsstreitigkeiten, in Thilo Marauhn (Hrsg.), Streitbeilegung in den Internationalen Wirtschaftsbeziehungen, Mohr Siebeck, Tübingen, 2005, 47, 53.

[13] *Stanimir Alexandrov*, The "Baby Boom" of Treaty-based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*, LPICT Vol. 4 (2005), 19 *et seq*.; *Eloise Obadia*, ICSID, Investment Treaties and Arbitration: Current and Emerging Issues, News from ICSID Vol. 18, Nr. 2 (2001), 14, 14. During the years 1994 and 2006 the number of BITs increased dramatically from about 700 to 2500. See, in particular, *Rudolf Dolzer*/*Margrete Stevens*, Bilateral Investments Treaties, Martinus Nijhoff, The Hague, 1995, 1 and *UNCTAD*, World Investment Report 2007, New York and Geneva, 2007, 16.

[14] News from ICSID, Vol. 24, Nr. 1 (2007), 2.

[15] *Jan Paulsson*, Arbitration without Privity, ICSID Review/FILJ Vol. 10 (1995), 232 *et seq*.; *Jeswald Salacuse*, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, International Lawyer, Vol. 24 (1990), 655, 661.

[16] *Andrea Giardina*, ICSID: A Self-Contained, Non-National Review System, in Richard Lillich/Charles Brower (eds.), International Arbitration in the 21ST Century: Towards "Judicialization" and Uniformity?, Transnational Publishers, New York, 1994, 199 *et seq*.; *Christoph Schreuer*, The ICSID Convention: A Commentary, Cambridge University Press, Cambridge, 2001, 1083.

annul an award only on one or more of the five grounds set forth in Article 52(1).[17] More important is the fact, though, that Article 53 of the ICSID Convention prohibits any appellate review within the ICSID system expressly and absolutely by stating that an award "shall not be subject to any appeal".[18] Hence, an examination by the *ad hoc* Committee of whether a case was rightly decided as to the law or the facts is excluded.[19] As the *ad hoc* Committee vividly pointed out in the annulment proceedings in *Lucchetti* in September 2007:

> However, even if the reasons in the Award were wrong, this would not justify annulment of the Award, because it is not within the province of an *ad hoc* committee to review a tribunal's finding that it lacked jurisdiction. Lucchetti's *request for annulment is in reality an appeal* against the Tribunal's decision that it did not have jurisdiction *ratione temporis* under Article 2 of the BIT. *Appeals are not permitted, and the Committee may not review the Tribunal's findings of fact and law*.[20] (emphasis added)

In other words, annulment concerns the legitimacy of the process of decision rather than its substantive correctness.[21] This manifests the intention of the founding fathers of ICSID to create a review mechanism of limited scope for unusual situations.[22]

Even so, in the mid-1980s the *ad hoc* Committee performed a review of the substantive correctness of initial awards in the annulment cases *Klöckner I* [23] and *Amco I* [24], which constitute the so-called "first generation of annulment proceedings".[25] The *ad hoc* Committee was widely criticized for failing to respect the distinction between annulment and appeal pursuant to the ICSID Convention.[26] However, the fears heralding the "Breakdown of the

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[17] Article 52(1) ICSID Convention provides: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[18] *Aron Broches*, Observations on the Finality of ICSID-Awards (1991), Selected Essays, *supra* n. 11, 295, 296.

[19] See, for instance, *David Caron*, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, ICSID Review/FILJ Vol. 7 (1992), 21, 24; *Hans Van Houtte*, Article 52 of the Washington Convention – A Brief Introduction, in *Emmanuel Gaillard*/*Yas Banifatemi* (eds.), Annulment of ICSID Awards, Juris Publishing, New York, 2004, 11, 12.

[20] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Peru* (Previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru*), ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 57, available at http://ita.law.uvic.ca/documents/LucchettiAnnulment.pdf.

[21] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Annulment Decision, 29 June 2005, para. 34, available at http://www.investmentclaims.com/IIC_48_(2005).pdf [prior e-mail registration required]; *Susan Franck*, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, Fordham Law Review, Vol. 73 (2005), 1521, 1547.

[22] *Christoph Schreuer*, Three Generations of ICSID Annulment Proceedings, in *Gaillard*/*Banifatem*i, *supra* n. 19, 17, 42; *Broches*, *supra* n. 18, 303.

[23] *Klöckner v. Cameroon*, Decision on Annulment, 03 May 1985, ICSID Reports Vol. 2 (1994), 95, *et seq*.

[24] *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, ICSID Reports Vol. 1 (1993), 509, *et seq*.

[25] *Schreuer*, *supra* n. 22, 17.

[26] See the references in *Schreuer*, *supra* n. 16, 901-902, para. 36.

Control Mechanism in ICSID Arbitration"[27] did not come true, for all subsequent *ad hoc* Committees respected the limited and exceptional character of the annulment process,[28] and so the "ICSID experiment seem[ed] back on track"[29].

Yet, parties dissatisfied with an award attempt to set it aside or to achieve indirectly a review of its legal correctness by requesting annulment. In addition to the aforementioned passage of the annulment proceedings in *Lucchetti*, this is characteristically illustrated by the annulment proceedings in *CMS* of the 25th September 2007. Argentina argued before the *ad hoc* Committee that the interpretation of Article XI of the Argentina-US BIT by the initial ICSID tribunal constituted a manifest excess of powers pursuant to Article 52(1)b of the ICSID Convention.[30] Interestingly, the Committee identified two errors of law with respect to the interpretation of Article XI, and pointed out that these very errors "could have had a decisive impact on the operative part of the Award".[31] Moreover, it added:

> [i]f the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.[32]

Be that as it may, the fact is that the erroneous interpretation had to remain intact, since pursuant to the ICSID Convention the exclusion of appeal is absolute. This explicit exclusion of appeal intends to preserve the finality of ICSID awards. But at what cost?[33]

III. Consistency in Jurisprudence: Preliminary Remarks

At the level of international law there is no principle of binding precedents (*stare decisis*) similar to the common law tradition. For instance, according to Article 59 of the Statute of the ICJ "the decision of the Court has no binding force except between the parties and in respect of that particular case". Similarly, Article 53(1) of the ICSID Convention provides that "[t]he award shall be binding on the parties". The absence of a formal binding precedent does not

[27] *Michael Reisman*, The Breakdown of the Control Mechanism in ICSID Arbitration, Duke Law Journal (1989), 739 *et seq*.
[28] *Schreuer*, *supra* n. 16, 903; *Torsten Lörcher*, ICSID-Schiedsgerichtsbarkeit, Zeitschrift für Schiedsverfahren (2005), 11, 18-19.
[29] *Reisman*, *supra* n. 11, 133.
[30] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007, para. 128, available at http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf.
[31] *Ibid*., para. 135.
[32] *Ibid*., para. 135.
[33] See also *Eric Schwartz*, Finality at What Cost? The Decision of Ad Hoc Committee in Wena Hotels v. Egypt, in *Gaillard*/*Banifatemi supra* n. 19, 43 *et seq*.

mean that the international jurisprudence develops at random. In fact, the jurisprudence of the ICJ is characterized by a high degree of consistency.[34] As the ICJ aptly pointed out:

> Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law: which is to say that its application should display consistency and a degree of predictability ; [35]

In the same vein, the ECtHR emphasized:

> While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.[36]

For its part, the ICSID Tribunal in *Saipem* referred to its duty to secure the homogeneity of the ICSID jurisprudence in order to meet the requirements of the rule of law. In the words of the Tribunal:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[37]

Accordingly, a consistent jurisprudence secures the credibility and the stability of any legal system.[38] Lack of homogeneity calls its legitimacy into question.[39]

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[34] *Alain Pellet*, Article 38, in *Andreas Zimmermann/Christian Tomuschat/Karin Oellers Frahm* (eds.), The Statute of the International Court of Justice: A Commentary, Oxford University Press, Oxford, 2006, 787, para. 309.

[35] *Continental Shelf, (Libyan Arab Jamahira/Malta)*, Judgment, 03 June 1985, ICJ Reports 1985, 13 (39), para. 45.

[36] *Stafford v. United Kingdom*, Judgement, 28 May 2002, para. 68, available at http://cmiskp.echr.coe.int/.

[37] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67, available at http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf.

[38] For the special role of a consistent jurisprudence within the context of international investment law see, in particular, *Tsatsos*, *supra* n. 10, 44-48; *Tams*, *supra* n. 10, 17-18; *Nigel Blackaby*, Testing the Procedural Limits of the Treaty System: The Argentinean Experience, British Institute of International and Comparative Law's Investment Treaty Forum, *supra* n. 10, 16, 19; *Susan Franck*, The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties have a Bright Future?, U.C. Davis Journal of International Law and Policy, Vol. 12 (2005), 47, 55 *et seq.*

[39] *Thomas Franck*, The Power of Legitimacy Among Nations, Oxford University Press, New York, 1990, 153. Indeed, after rendering a contradictory decision by adopting different interpretative approaches than in its previous decisions and advisory opinions regarding the South West Africa/Namibia situation in 1966, the ICJ experienced a dramatic decrease in the number of cases brought before it as well as a crisis of confidence on the part of developing states. See, in particular, *Rudolf Bernhardt*, Homogenität, Kontinuität und Dissonanzen in der Rechtsprechung des Internationalen Gerichtshofs, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 33 (1973), 1, 11 *et seq.*; *Eckart Klein*, South West Africa / Namibia (Advisory Opinions and Judgments) EPIL Vol. IV (2000), 491 *et seq.*; *Christian Tomuschat*, International Law: Ensuring the Survival of Mankind in the Eve of a New Century - General Course on Public International Law, Recueil des Cours Vol. 281 (1999), 23, 412, para. 31.

IV. Testing the Homogeneity of the ICSID Jurisprudence

The homogeneity test concerns the interpretation of similar or identical vague clauses laid down in BITs by the different ICSID tribunals. The rules of interpretation pursuant to Articles 31 and 32 of the Vienna Convention on the Law of the Treaties (VCLT) will be used as consistency benchmarks. According to the prevailing scholarly opinion and to the repeated affirmations of the ICJ as well as of the WTO Appellate Body, they reflect international customary law.[40] Such affirmations ensure the parties to a dispute that the credibility of the relevant dispute settlement mechanism is beyond question.[41] In fact, it is the method of interpretation that determines which results a rule will have.[42] In addition, it is examined whether the ICSID tribunals take into account previous ICSID awards and to what extent they distinguish their rulings from prior ICSID decisions. In the end, it will be shown that the contemporary ICSID regime features a serious institutional deficit.

A. Most-Favoured-Nation Clause

1. Introduction

Under a most-favoured-nation clause (MFN clause) a contracting party to an investment treaty undertakes the obligation to treat investors of the other contracting state no less favourably than investors of a third country.[43] This means that if one state party to a BIT (basis treaty) has concluded a BIT with a third state (third party treaty) which favours investors of the third state over those of the other party to the basis treaty, then investors of the other party to the basis treaty are entitled to claim the additional benefits set forth in the third party treaty.[44] In fact, the purpose of the MFN clause of a BIT is to protect foreign investors against discriminatory treatment vis-à-vis nationals of third countries.[45] The scope of application of the MFN clause is determined by the so-called *ejusdem generis* principle. Accordingly, such a clause "can only attract matters belonging to the same category of

[40] For references see *Jan Klabbers*, International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?, Netherlands International Law Review, Vol. 50 (2003), 267, 271, footnotes 13 and 16 respectively.
[41] *Ibid*., 271-272;
[42] *Ibid*., 274.
[43] *Dolzer*/*Stevens*, *supra* n. 13, 65; *Reed*/*Paulsson*/*Blackaby*, *supra* n. 11, 50.
[44] *Rudolf Dolzer*/*Terry Myers*, After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements, ICSID Review/FILJ Vol. 19 (2004), 49, 50.
[45] See, for instance, *Emmanuel Gaillard*, Establishing Jurisdiction Through a Most-Favored-Nation Clause, New York Law Journal, 02 June 2005, 1, 1, available at http://www.shearman.com/files/Publication/96d2288c-0c69-4fd6-b306-07a676768572/Presentation/PublicationAttachment/4153cee7-3402-4cbf-8631-09c534add1da/IA_060205.pdf.

subjects as that to which the clause itself relates".[46] The application of this rule, though, presupposes a decision as to what subject-matters are of the same category.[47] Traditionally, the MFN clause covers substantive rights and obligations.[48] In a series of cases brought before the ICSID Centre, however, ICSID tribunals had to deal with the question of whether this clause applies also to procedural aspects of investment protection, and specifically to dispute settlement provisions.

2. Case-law

aa. Maffezini v. Spain (Orrego Vicuña, Buergenthal, Wolf), 25 January 2000

The question of the applicability of an MFN clause to dispute settlement mechanisms was addressed for the first time in the seminal case of *Maffezini*. According to the dispute settlement clause of the Argentina-Spain BIT, submission of an investment dispute to international arbitration requires the expiration of a period of eighteen months within which the domestic courts of the host state must settle the dispute (18-month-clause). By invoking the MFN clause of the aforementioned BIT, the investor claimed that he could benefit from the more favourable dispute settlement provision of the Chile-Spain BIT which provided for international arbitration after the expiration of a six month negotiation period. In other words, the Tribunal had to decide whether the 18-month-provision of the Argentina-Spain BIT could be bypassed by virtue of the MFN-clause regarding "all matters" subject to the treaty.

After stressing the fact that the MFN clause at issue had a broad wording and did not provide for any specific reference to dispute settlement provisions, the Tribunal articulated its approach with respect to the interpretation of the MFN clause as follows:

> [I]t must be established whether the omission [to provide expressly that dispute settlement as such is covered by the clause] was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors.[49]

By using this wording, this decision seems to assume that as a rule the MFN clause covers dispute settlement provisions of the third party treaty, unless the interpretation of the clause or the subsequent practice of the contracting states with respect to the conclusion of BITs leads

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[46] *Ambatielos Claim, (Greece v. United Kingdom)*, Arbitration Commission, 06 March 1956, ILR Vol. 23 (1956), 306, 319.
[47] *Endre Ustor*, Most-Favoured-Nation Clause, EPIL Vol. III (1997), 468, 472.
[48] *Reed/Paulsson/Blackaby*, *supra* n. 11, 51.
[49] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 53, available at http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_000.pdf.

to the opposite result.[50] In other words, the interpretation appears to be subject to an investment-friendly approach.

In construing the MFN clause as such, the Tribunal held:

> 54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.
> …
> 55. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred."

On this point, the clause was construed in the light of the historical purpose of international arbitration *in abstracto*. This extreme teleological interpretation[51] is hardly compatible with the objective approach embodied in Article 31 of the VCLT according to which the authentic expression of the will of the parties is to be derived from the text of a treaty.[52] In fact, recourse to such a subjective method is neither a usual nor a recognized interpretative tool. Furthermore, no attention was paid to the contextual element of interpretation. Therefore, the demand of Article 31 VCLT to consider each of the three main elements when interpreting a treaty, namely the text, its systematic context as well as the object and purpose of the treaty,[53] was not taken into account.

After formulating a general principle according to which the extension of the MFN clause to dispute settlement provisions is fully compatible with *ejusdem generis* rule, the Tribunal went on to identify some "public policy considerations" in order to narrow the broad scope of the MFN clause, e.g. the exhaustion of local remedies, dispute settlement subject to "a fork in the

[50] *Locknie Hsu*, MFN and Dispute Settlement-When the Twain Meet, Journal of World Investment & Trade, Vol. 7 (2006), 25, 28.
[51] See *Crnic-Grotic*, Object and Purpose of Treaties in the Vienna Convention on the Law of the Treaties, Asian Yearbook of International Law Vol. 7 (1997), 141, 164.
[52] *Report of the International Law Commission*, 18. Session, Draft Articles on the Law of the Treaties with Commentaries, Yearbook of the International Law Commission Vol. II (1966), 187, 220, para. 11; *Sir Ian Sinclair*, The Vienna Convention on the Law of Treaties, 2nd Ed. Manchester University Press, Manchester, 1984, 115; *Alfred Verdross*/*Bruno Simma*, Universelles Völkerrecht, 3. Auflage, Duncker & Humblot, Berlin, 1984, 492, para. 776.
[53] *Anthony Aust*, Modern Treaty Law and Practice, Cambridge University Press, Cambridge, 2000, 187.

road clause",[54] a dispute settlement clause providing for a particular arbitration forum such as ICSID, or agreement to a highly institutionalised system of arbitration.[55] Again, the articulation of these limitations was not derived from an interpretation of the BIT under the rules of the VCLT.[56]

bb. Siemens v. Argentina (Rigo Sureda, Brower, Bello Janeiro), 03 August 2004

Similar to the *Maffezini* case, the *Siemens* decision held that by virtue of the MFN clause the investor could bypass the 18-month-clause of the Germany-Argentina BIT by "borrowing" the dispute settlement mechanism of the Chile-Argentina BIT which provided for international arbitration after the expiration of a six month negotiation period. A considerable difference among them is that the present Tribunal followed the process of interpretation as described in the VCLT.[57] However, the guideline of the interpretation constituted the purpose of the BIT as laid down in its preamble, namely the promotion and protection of foreign investments.[58] In other words, in reading the clause the Tribunal was led by an investment-friendly approach.

With respect to the interpretation of the MFN clause as such, considerable weight was put upon the teleological element. Hence, the purpose of the clause was understood as to "to eliminate the effect of specially negotiated provisions unless they have been excepted".[59] It is, therefore, not surprising that, although the Tribunal recognized that the wording of the MFN clause contained in the Germany-Argentina BIT was narrower than that in the *Maffezini* case, it considered such a difference in wording to be irrelevant.[60] As a result, the explicit rejection

[54] Such a clause gives to the investor an irrevocable option to choose between the litigation of its claims in the domestic courts of the host state or international arbitration; see, in particular, *Christoph Schreuer*, Traveling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road, Journal of World Investment & Trade Vol. 5 (2004), 231, 239 *et seq.*

[55] *Maffezini*, *supra* n. 49, para. 63; for a more detailed analysis see *Dolzer*/*Myers*, *supra* n. 44, 54.

[56] *Hsu*, *supra* n. 50, 29; *Gaillard*, *supra* n. 45, 2.

[57] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 81, available at http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf.

[58] *Ibid*.

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

[60] *Ibid*., para. 103: "The arbitral tribunal in Maffezini noted that Spain had used the expression "all matters subject to this Agreement" only in the case of its BIT with Argentina and "this treatment" in all other cases. The said tribunal commented that the latter was "of course a narrower formulation". The Tribunal concurs that the formulation is narrower but, as concluded above, it considers that the term "treatment" and the phrase "activities related to the investments" are sufficiently wide to include settlement of disputes." See also *Dana Freyer*/*David Herlihy*, Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?, ICSID Review/FILJ vol. 20 (2005), 58, 72; *Omar Garcia-Bolivar*, The Teleology of International Investment Law - The Role of Purpose in the Interpretation of International Investments Agreements, Journal of World Investment & Trade Vol. 6 (2005), 751, 765; for a more detailed analysis and criticism see *Stephen Fietta*, Most favoured nation treatment and dispute resolution under bilateral investment treaties: a turning point?, Transnational Dispute Management Vol. 2 (June 2005), 1, 8.

of a broad interpretation of the clause at the beginning of the analysis of the Tribunal[61] seems to have a symbolic nature.

cc. Salini v. Jordan (Guillaume, Cremades, Sinclair), 29 November 2004

In *Salini* case, the claimants invoked the MFN clause of the Italy-Jordan BIT in order to bring contractual claims before an ICSID tribunal, notwithstanding the fact that according to Article 9 (2) of the BIT such contractual disputes should be governed by the settlement procedure foreseen in the contract. Specifically, they contended that the MFN clause could import the dispute settlement provisions of the Jordan-USA and the Jordan-United Kingdom BITs which entitled them to refer to ICSID any dispute arising from their construction contracts.

The course of interpretation in *Salini* is characterized by a strict, thought not expressly mentioned, application of the VCLT rules.[62] Unlike *Maffezini* and *Siemens*, this case is featured by a narrower understanding of the function of the MFN clause, since the Tribunal denied its extension to dispute settlement provisions. The starting point of the interpretation was the text of the MFN clause which was distinguished from the wider wording of the respective MFN clause in *Maffezini*.[63] Yet, this distinction alone cannot justify this narrower understanding, since the *Siemens* decision advocated a wide interpretation of an MFN provision with an identical scope of application.[64] Decisive for the outcome of the decision appears to be in the first place that the Tribunal did not apply any presumption when construing the MFN clause.

Furthermore, the *Salini* Tribunal attributed less weight to the element of interpretation pursuant to the object and purpose of the treaty. Instead, it emphasized the contextual method. Specifically, the MFN clause was construed in conjunction with the dispute settlement clause of the BIT. In contrast to *Siemens* and *Maffezini*, it was argued that the intention as expressed in the dispute settlement provision of the BIT, Article 9 (2), was to exclude that the parties to the BIT intended those provisions to be bypassed by virtue of the MFN clause.[65] Finally, this decision shows a case-oriented character, since the Tribunal did not formulate any general principle regarding the function of the MFN clause.

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[61] *Siemens*, *supra* n. 57, para. 81.
[62] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29. November 2004, para. 118, available at http://ita.law.uvic.ca/documents/salini-decision.pdf.
[63] *Ibid*., para. 118.
[64] Both MFN clauses referred to treatment or activities related/granted to investors/investments; see also *Freyer*/*Herlihy*, *supra* n. 60, 74.
[65] *Salini*, *supra* n. 62, para. 118; for an overview of different possible interpretations of an MFN clause see *Freyer*/*Herlihy*, *supra* n. 60, 62.

With respect to the consideration of previous cases, the *Salini* Tribunal elegantly criticized the approach taken in *Maffezini*.[66] However, there was no reference to the *Siemens* case. Apparently, this could be explained by the fact that the latter decision was rendered just four months before the *Salini* decision.

dd. Plama v. Bulgaria (Salans, van den Berg, Veeder), 08 February 2005

Due to the fact that the Bulgaria-Cyprus BIT contained narrow dispute settlement provisions which were concerned only with disputes relating to expropriation and provided for international *ad hoc*, basically UNCITRAL, arbitration, the claimant relied upon the MFN clause of the aforementioned BIT in order to import broader dispute resolution clauses of other BITs concluded by Bulgaria, such as the Bulgaria-Finland BIT, which provide for ICSID arbitration. In other words, the *Plama* Tribunal had to decide whether the MFN provision could be interpreted as importing consent to ICSID arbitration.

The distinctive feature of the *Plama* decision is the explicit and stepwise application of the rules of interpretation pursuant to the VCLT [67] as well as the fact that teleological interpretations in terms of the decisions in *Maffezini* and *Siemens* were rejected as "undeniable in generality" and "legally insufficient".[68] By invoking the principle that an agreement to arbitrate "should be clear and unambiguous", the Court formulated a presumption which advocated a restrictive interpretation, based exclusively on the wording of the MFN clause. Accordingly, "the intention to incorporate dispute settlement provisions must

[66] *Siemens*, *supra* n. 57, para. 115 reads as follows: "The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of "treaty shopping." Indeed, the Maffezini decision caused reactions at the political level as well. Fearing an explosion of cases attempting to bypass dispute settlement provisions on the basis of MFN clauses, the negotiators of CAFTA [now DR-CAFTA, signed on: 05 August 2004] introduced into the CAFTA draft text a so-called "disappearing footnote" which specified that the MFN clause should not be understood in terms of the *Maffezini* case. This footnote disappeared from the final treaty text and was included in its negotiating history as a reflection of the intention of the parties. See, in particular, *Ruth Teitelbaum*, Who's Afraid of Maffezini? Recent Developments in Interpretation of Most Favored Nation Clauses, Journal of International Arbitration, Vol. 22 (2005), 225, 228-229. In the same vein, the MFN provision of the Norwegian draft Model BIT [draft version of 19 December 2007] expressly states in Article 4 (3) that "[f]or greater certainty, treatment referred to in paragraph [1] does not encompass dispute resolution mechanisms provided for in this Agreement or other International Agreements."
Available at http://www.regjeringen.no/nb/dep/nhd/dok/Horinger/Horingsdokumenter/2008/horing---modell-for-investeringsavtaler/-4.html?id=496026.

[67] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 189-197, available at http://ita.law.uvic.ca/chronological_list.htm. But see the criticism raised by *Hsu*, *supra* n. 50, 32-33.

[68] *Ibid*., para. 193.

be clearly and unambiguously expressed".[69] Hence, the principle regarding the function of the MFN clause embodied in the cases of *Maffezini* and *Siemens* was reversed, since its extension to dispute settlement provisions was primarily denied.[70] Finally, the court decided that the MFN clause could not be interpreted as providing consent to ICSID arbitration.[71]

In considering previous ICSID decisions, the court held that the *Maffezini* approach could lead to a "chaotic situation" which "cannot be the presumed intent of Contracting Parties" and that the *Siemens* decision "illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question".[72] These polemical statements towards the *Maffezini* and *Siemens* decisions, the adoption of the reverse assumption with respect to the extension of the MFN clause to dispute settlement provisions as well as the fact that the Tribunal could have reached the same result by applying also the "public policy considerations" of the *Maffezini* decision[73] indicate that the interpretation of the MFN clause is characterized by antithetic ideological approaches.

ee. Gas Natural v. Argentina (Lowenfeld, Álvarez, Nikken), 17 June 2005

The issue in *Gas Natural* case was whether the MFN clause of the Argentina-Spain BIT entitled the investor to bypass the 18-month-clause of the aforementioned treaty by importing more favourable provisions of other BITs concluded by Argentina, such as the Argentina-US BIT, which did not contain any requirement of prior resort to local courts.

Focussing on the need to ensure the independent and neutral adjudication of investment disputes, the *Gas Natural* Tribunal construed the MFN clause of the Argentina-Spain BIT primarily in the light of the historical purpose of international investment arbitration *in abstracto* as follows:

> As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries *inter se*), a crucial element – indeed perhaps the most crucial element – has been the provision for independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of

[69] *Ibid*., para. 204.
[70] *Ibid*., para. 223.
[71] *Ibid*., para. 227.
[72] *Ibid*., para. 226.
[73] And specifically the third consideration pursuant to which the MFN clause does not apply to situations where a dispute settlement clause provides for a particular arbitration forum such as ICSID. See also *Freyer*/*Herlihy*, *supra* n. 60, 77. For a brief dogmatic evaluation of the *Plama* decision from the perspective of the "consent" to ICSID arbitration see *Tsatsos*, *supra* n. 10, 105.

> delays and political pressures of adjudication in national courts. (footnote omitted) … The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or comparable arrangements, and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment.[74]

The wording of the MFN clause was taken into account at a second stage.[75] Thus, the leading element of the interpretational process was an extreme teleological interpretation to which the textual interpretation was subordinated. Such a method is inconsistent with the objective approach laid down in Article 31 VCLT and, as already indicated in the *Maffezini* case, does not constitute a recognized technique of interpretation of international instruments, but rather a policy-oriented approach. Moreover, the contextual element was not taken into account. Similar to the *Maffezini* decision, the demand of Article 31 to perform the interpretation as a unified process by applying all three elements was not met. In addition, unlike the cases so far presented,[76] there was no reference of the VCLT in the corpus of this decision.[77]

Considering prior ICSID arbitral awards, the Tribunal emphasised that its reasoning and conclusions were in substantial agreement with *Maffezini* and *Siemens*, and as regards the *Salini* decision it held:

> This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, *that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment* and that our analysis set out in paragraphs 28-30 above is consistent with the current thinking as expressed in other recent arbitral awards.[78] (emphasis added)

Comparing *Gas Natural* and *Salini*, however, it seems that it was not the terms of the relevant MFN clauses, but rather the divergent interpretations and approaches of the respective Tribunals that led to opposing conclusions.

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[74] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisidiction, 17 June 2005, para. 29, available at http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf.

[75] The textual interpretation took place as follows: "The Tribunal notes that the introductory phrase in Article IV(2) of the BIT speaks of "*all* matters governed by the present Agreement…" Certain matters are expressly excluded, but there is no exclusion for resolution of disputes." *Ibid.*, para. 30.

[76] *Maffezini*, *supra* n. 49, para. 27 and 36; *Siemens*, *supra* n. 57, para. 80-81; *Salini*, *supra* n. 62, para. 75 and 177; *Plama*, *supra* n. 67, para. 26, 117, 147, 158, 160, 194, 196.

[77] In fact, the VCLT is mentioned only once in the twelfth footnote of the decision which reads as follows: "The Tribunal notes Argentina's argument that Spain's position in the *Maffezini* case reflects understanding of the Spain-Argentina BIT consistent with that of Argentina in this case. We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties."

[78] *Gas Natural*, *supra* n. 74, para. 49.

In the end, the Tribunal virtually reversed the Plama principle regarding the function of the MFN clause by stating that such provisions "should be understood to be applicable to dispute settlement, unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise".[79] Finally, the absence of a reference to the *Plama* case could be explained by the fact that the latter was delivered about four months before the *Gas Natural* decision.

ff. Suez/AWG v. Argentina (Salacuse, Kaufmann-Kohler, Nikken), 03 August 2006

Relying on the MFN clause of the Argentina-Spain and Argentina-UK BITs respectively, the claimants in *Suez* case contended that they could bypass the 18-month-clauses laid down in the aforementioned treaties by importing the more favourable dispute resolution provision of the Argentina-France BIT which did not require prior resort to the local courts.

Before interpreting the MFN clauses, the *Suez* Tribunal emphasized that its analysis was guided by Article 31 of the VCLT, "pursuant to which treaty language is to be interpreted in accordance with its ordinary meaning".[80] Indeed, the Tribunal made from the very beginning clear that it was going to meet the requirements of the objective approach set out in Article 31 by stating that:

> the text of the treaty is presumed to be the authentic expression of the parties' intentions. The starting place for any exercise in interpretation is therefore the treaty text itself.[81]

The process of interpretation in this case was guided by no assumption, and, unlike the *Maffezini*, *Siemens*, *Plama* and *Gas Natural* cases, this Tribunal refrained from articulating any general principle with respect to the applicability of MFN clauses to dispute settlement provisions. In other words, this decision is case-oriented just as the *Salini* case. With respect to the interpretation of the MFN clauses as such, the Tribunal applied the interpretative steps laid down in Article 31 VCLT in a comprehensive way by putting considerable emphasis on the textual element[82] as well as on the object and purpose[83] of the BIT. Finally, it concluded that the claimants could take advantage of the more favourable treatment of the third party treaty.

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[79] *Gas Natural*, *supra* n. 74, para. 49.
[80] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19,) and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 03 August 2006, para. 54, available at http://ita.law.uvic.ca/documents/SuezVivendiAWGjurisdiction.pdf.
[81] *Ibid*., para. 54.
[82] *Ibid*., para. 55-58, 61.
[83] *Ibid*., para. 61.

Next, the Tribunal considered the previous ICSID jurisprudence and distinguished its decision thoroughly from the *Plama* case.[84] In the end, it went on to criticize the restrictive assumption adopted in *Plama* by noting:

> The *Plama* tribunal also stated, in its reasons, that an arbitration agreement must be clear and unambiguous, especially where it is incorporated by reference to another text. (footnote omitted) This Tribunal does not share this view. As stated above, it believes that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.[85]

However, there was no reference to the divergent earlier *Salini* case, where no presumption was articulated and the deciding Tribunal emphasized the textual element too. Comparing *Suez* and *Salini* with each other, it seems that their contradictory outcomes resulted from the distinct ways the textual and contextual element were applied as well as from the different weight attributed to the object and purpose of the respective BITs.

gg. Telenor v. Hungary (Goode, Allard, Marriott), 13 September 2006

Due to the fact that the dispute resolution clause of the Norway-Hungary BIT was limited to expropriation claims, the claimant invoked the MFN clause in order to establish ICSID jurisdiction over violations of the standard "fair and equitable treatment". In particular, Telenor argued that by virtue of the MFN clause it was entitled to take advantage of any wider dispute resolution provision in any other BIT entered into by Hungary with other states.

Before interpreting the MFN clause of the Norway-Hungary BIT, the Tribunal in *Telenor* expressly welcomed the principle articulated in *Plama* as follows:

> This Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the Plama tribunal.[86]

Thus, the whole process of interpretation was rooted in the assumption that an extension of the MFN clause to dispute settlement provisions presupposes the existence of a respective "clear" and "unambiguous" wording. Indeed, from a historical viewpoint one could go as far as to say that the applicability of the MFN clause to dispute resolution provisions was raised to the height of the textual requirements of the interpretative doctrine articulated by *Emmerich de Vattel* in the 18th century.[87]

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[84] *Ibid*., para. 65.
[85] *Ibid*., para. 66.
[86] *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 90, available at http://ita.law.uvic.ca/documents/TelenorvHungaryAward_000.pdf.
[87] According to *Vattels* viewpoint "it is not allowable to interpret what has no need of interpretation", that is, if the meaning of a treaty is sufficiently clear from its text, there is no need to resort to rules of interpretation in order to clarify the meaning. However, the elucidation of the meaning of a norm is not the starting point, but the result of the process of interpretation. See, in particular, *Georg Dahm*/*Jost Delbrück*/*Rüdiger Wolfrum*,

Subsequently, the Tribunal put forward four reasons that supported its interpretative approach.[88] In this context, it rejected the extreme teleological interpretation of the MFN clause in the light of the historical purpose of international arbitration *in abstracto* and illustrated an ideological gap in the ICSID jurisprudence by stating:

> Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. … The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.[89]

Surprisingly, the present Tribunal considered the previous divergent *Suez* case, which was delivered about a month before *Telenor*, and distinguished its ruling from it.[90] The validity of the hypothesis posed when presenting the awards in *Salini* and *Gas Natural* according to which the elapse of four months can justify the non-consideration of previous divergent decisions can be, therefore, doubted.

3. Evaluation

The ICSID jurisprudence regarding the application of the MFN clause to dispute settlement provisions reveals a mosaic of different approaches with respect to its interpretation.

On the one hand, by relying on the preamble of the relevant BIT, the *Siemens* Tribunal articulated an investment-friendly approach as *leitmotiv* of its interpretation. Consequently, the Tribunal recognized from the very beginning of the process of interpretation that prominence should be given to the promotion and protection of foreign investments. On the other hand, by relying on the principle that an agreement to arbitrate should be clear and unambiguous, both ICSID Tribunals in the cases of *Plama* and *Telenor* were guided by a restrictive approach according to which the application of an MFN clause to dispute resolution provisions requires a correspondingly explicit wording of the relevant MFN provision. The latter assumption was also endorsed by the Tribunal in *Berschader*, a 2006 investment arbitration proceeding under the Stockholm Chamber of Commerce Rules which

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Völkerrecht, Bd. I/3, 2. Auflage, Walter de Gruyter, Berlin, 2002, 637, para. 3; *Sir Robert Jennings*/*Sir Arthur Watts*, Oppenheim's International Law, Vol. I, 9th Edition, Longman, Great Britain, 1992, 1267, para. 629.

[88] *Telenor*, *supra* n. 86, para. 92-95.

[89] *Telenor*, *supra* n. 86, para. 95.

[90] *Telenor*, *supra* n. 86, para. 98.

was published at the beginning of 2008.[91] Not surprisingly, the outcome of all these proceedings corresponded to the pre-interpretational approach adopted by each Tribunal.

The ICSID Panels in *Salini* and, most notably, in *Suez* brought, in turn, a third understanding with respect to the interpretation of the MFN clause into play, namely the neutral approach. In these cases, the MFN provision was construed without any recourse to pre-interpretational guidelines. Again, those decisions led to divergent outcomes as well. However, this can be explained by the different weight attributed to the teleological method of interpretation as well as by the distinct ways the textual and systematic element were applied. Finally, unlike in the cases of *Maffezini*, *Siemens*, *Plama*, *Gas Natural*, *Telenor* and *Berschader*, in both aforementioned decisions, the respective ICSID Tribunals refrained from articulating any general principle with respect to the relationship between MFN provision and dispute settlement mechanism. In other words, the decisions in *Salini* and *Suez* are case-specific and case-oriented in character.

Furthermore, the process of interpretation in *Maffezini* and Gas *Natural* was at odds with the rules pursuant to Article 31 VCLT. In particular, the recourse to an extreme teleological interpretation of the MFN clause in the light of the historical purpose of international arbitration *in abstracto* constitutes a subjective and not recognized interpretative tool which rather reminds one of a policy-oriented understanding. Moreover, by disregarding the contextual method, the *Maffezini* and *Gas Natural* Tribunals paid no attention to the demand of Article 31 to apply the methods it embodies as a unified whole. In the same vein, the Tribunal in the *Berschader* decision, which was rendered outside the ICSID system, held that the "starting point in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of the original treaty".[92] Again, a subjective reading replaced the call of Article 31 for an objective approach in construing international agreements as well as the hierarchical relationship between Article 31 and 32 VCLT. As a result, these cases do not only disregard the normativity of the rules of interpretation under the VCLT, but they also open the door to arbitrary interpretations that undermine the actual will of the parties to a BIT.

[91] *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, para. 178 and 206, available at http://ita.law.uvic.ca/documents/BerschaderFinalAward.pdf.
[92] *Ibid*., para. 178 and 206; see also the criticism raised in the Separate Opinion of Todd Weiler, *Ibid*., Fn. 15.

B. State of Necessity

1. Introduction

During its economic reform and the privatization of its public services in the 1990s, Argentina concluded numerous BITs, a process that was vividly described as "BIT-Mania".[93] In the late 1990s, however, Argentina's economy started facing a deep crisis. In response to the economic recession, the Argentine Government took at the beginning of 2002 a number of national emergency measures including the termination or suspension of contractual rights of investors, the devaluation of its currency (peso), the termination of its policy to calculate utility tariffs in US dollars and the conversion of those tariffs into Argentine pesos at the rate of one to one ("pesification").[94] Many of these measures affected foreign investments adversely. As a result, numerous proceedings were initiated before the ICSID tribunals against Argentina by virtue of the respective BITs. Currently, there are about 37 pending cases, most of which relate to the emergency measures taken by Argentina as a response to its economic crisis.[95] In order to preclude the wrongfulness of its actions and consequently to exclude its responsibility for violations of BIT provisions such as "fair and equitable treatment", "expropriation" and "umbrella clause", Argentina invokes in these proceedings state of necessity under customary law as it is embodied in ILC Article 25[96] as well as the necessity clause of the BITs it has concluded. The cases presented below concern the interpretation of the same BIT, namely Article XI of the 1991 Argentina-US BIT,[97] relate to

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[93] *Carlos Ignacio Suarez Anzorena*, Multiplicity of Claims under BITs and the Argentine Case, British Institute of International and Comparative Law's Investment Treaty Forum, *supra* n. 10, 20, 20.

[94] For a brief overview of the measures taken as a response to the economic crisis see *Blackaby*, *supra* n. 38, 19; *David Foster*, "Necessity Knows No Law!": LG&E v Argentina, International Arbitration Law Review (2006), 149, 151.

[95] The list of pending cases is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending.

[96] Article 25 provides: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(*a*) The international obligation in question excludes the possibility of invoking necessity; or
(*b*) The State has contributed to the situation of necessity."

[97] Article XI provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

the same investment sector, namely to the gas sector, and have the same factual background, that is, the Argentine economic crisis.[98]

2. Case-law

aa. CMS v. Argentina (Orrego Vicuña, Lalonde, Rezek), 12 May 2005

From a structural viewpoint, the *CMS* Tribunal examined first whether the Argentina crisis constituted a necessity under customary law and then it dealt with the examination of the plea of necessity under the BIT. However, from a substantive viewpoint, the Court interpreted the emergency clause of the BIT in the light of customary necessity, and so the emergency test was subordinated to the rigorous conditions enunciated in ILC Article 25. For instance, by invoking the customary "only way" test requirement which pursuant to the ILC's Commentary excludes the plea of necessity "if there are other (otherwise lawful) means available, even if they may be more costly or less convenient",[99] the Court decided that the measures taken by Argentina were not the only steps at its disposal.[100] The fact that there have been alternative proposals by the economists of the parties appeared to satisfy the Tribunal to draw the aforementioned conclusion. This reveals that that as long as alternatives can be theoretically conceived, the plea of necessity becomes inactive.[101] With respect to the economic crisis as such, the Court noted that the crisis was "indeed severe",[102] yet it could not be held that the wrongfulness of the actions undertaken by Argentina should be precluded because of the relative effects that could be reasonably attributed to the crisis".[103] And without being engaged in investigating the actual situation in Argentina during the crisis, it stated "the crisis did not result in total economic and social collapse.[104]

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[98] For a detailed assessment of the first two ICSID decisions see *August Reinisch*, Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina, Journal of World Investment and Trade Vol. 8 (2007), 191 *et seq*.

[99] *James Crawford*, The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentary, Cambridge University Press, Cambridge, 2002, 184, para. 15.

[100] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 324, available at http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf.

[101] *Reinisch*, *supra* n. 98, 200.

[102] *CMS*, *supra* n. 100, para. 320.

[103] *CMS*, *supra* n. 100, para. 321. This conclusion was followed by the statement: "As in many times the case of international affairs and international law, situations of this kind are not given in black and white but in many shades of grey." See the criticism by *Michael Waibel*, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, Leiden Journal of International Law, Vol. 20 (2007), 637, 644-645.

[104] *CMS*, *supra* n. 100, para. 354. See the critical remarks by *Anne van Aaken*, Zwischen Scylla und Charybdis: Völkerrechtlicher Staatsnotstand und Internationaler Investitionsschutz, Zeitschrift für Vergleichende Rechtswissenschaft Vol. 105 (2006), 544, 559-560.

bb. LG&E v. Argentina (Bogdanowsky de Maekelt, Rezek, van den Berg), 03 October 2006

Unlike the *CMS* award, the *LG&E* decision considered the necessity clause of the BIT to be *lex specialis* to the customary necessity. Setting the methodology to be followed, the Tribunal held that it should be decided whether the conditions that existed in Argentina during the period of crisis could trigger the application of Article XI of the BIT.[105] In particular, it was emphasized that the defense of necessity derives from the BIT and that general international law should be applicable, to the extent required for the interpretation and application of the BIT.[106] Accordingly, the Tribunal examined whether the crisis could be subsumed under the term "essential security interests" of the necessity clause of Article XI. This approach led to a qualitatively different standard of necessity than that of the *CMS* case. For instance, instead of applying the rigorous "only way" test, the Tribunal examined whether the measures adopted by Argentina were a legitimate, necessary and reasonable response to the crisis in a way that reminds one of the proportionality test undertaken by the ECtHR[107] as follows:

> A State may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense, it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a *legitimate* way of protecting its social and economic system.[108] (emphasis added)
>
> …
>
> The Tribunal accepts that the provisions of the Emergency Law that abrogated calculation of the tariffs in U.S. dollars and PPI adjustments, as well as freezing tariffs were *necessary measures* to deal with the extremely serious economic crisis. Indeed, it would be unreasonable to conclude that during this period the Government should have implemented a tariff increase pursuant to an index pegged to an economy experiencing a high inflationary period (the United States). The severe devaluation of the peso against the dollar renders the Government's decision to abandon the calculation of tariffs in dollars *reasonable*. Similarly, the Government deemed that freezing gas tariffs altogether during the crisis period was *necessary*[.] [109] (emphasis added)

After establishing that the emergency measures taken by Argentina are excused by virtue of the necessity clause of the BIT, the Tribunal affirmed that the customary necessity supported

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[105] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 205, available at http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf.

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

[107] For such an interpretative approach see *William Burke-White/Andreas von Staden*, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, University of Pennsylvania Law School, Scholarship at Penn Law, Paper 152 (April 2007), 27-28, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn/wps; See also *Stephan W. Schill*, International Investment Law and the Host State's Power to Handle Economic Crises-*Comment on the ICSID Decision in LG&E v. Argentina*, Journal of International Arbitration Vol. 24 (2007), 265, 280.

[108] *LG&E*, *supra* n. 105, para. 239.

[109] *LG&E*, *supra* n. 105, para. 242.

its position too. Again, it appears that its understanding of the "only way" test pursuant to ILC Article 25 was influenced by its previous flexible approach,[110] since it held that:

> an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was *necessary*, and the tariffs on public utilities had to be addressed.[111] (emphasis added)

Compared to the *CMS* award, furthermore, the severity of the situation in Argentina was evaluated divergently too. In particular, after dealing with the social, economic and political dimensions of an "extremely severe crisis"[112], the Tribunal equated its intensity to a military invasion.[113] Surprisingly, when dealing with the question of necessity, the *LG&E* Tribunal neither mentions nor cites the previous divergent *CMS* award,[114] although one of the arbitrators on the two tribunals was identical.[115]

cc. Enron v. Argentina (Orrego Vicuña, van den Berg, Tschanz), 22 May 2007

A similar pattern to *CMS* was followed by the award in *Enron* which applied the standard of necessity pursuant to ILC Article 25. The Tribunal found that Argentina did not meet the requirements of the rigorous conditions set. It justified its methodological approach by holding that the lack of a definition of the term "essential security interests" under Art. XI of the BIT made reliance on the requirement of the customary standard embodied in Article 25 necessary.[116] Thus, "the treaty becomes inseparable from the customary law".[117] Finally, just as in *CMS*, the intensity of the crisis was not capable of precluding the wrongfulness of the measures adopted by Argentina. The most important aspect of this award is, however, that, when dealing with the issue of necessity,[118] the *Enron* Tribunal refrained from considering the prior divergent award in *LG&E*, although one of the arbitrators on the two tribunals was identical.

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[110] *Tsatsos*, *supra* n. 10, 197; see also the critical remarks by *Waibel*, *supra* n. 103, 646.
[111] *LG&E*, *supra* n. 105, para. 257.
[112] *LG&E*, *supra* n. 105, para. 231.
[113] *LG&E*, *supra* n. 105, para. 238.
[114] But see the references to the *CMS* award in *LG&E*, *supra* n. 105, footnotes 30, 31, 33, 35, 48, 49 as well as the criticism by *Waibel*, *supra* n. 103, 646 and *Schill*, *supra* n. 107, 285.
[115] See also criticism by *Reinisch*, *supra* n. 98, 213.
[116] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 333, available at http://ita.law.uvic.ca/documents/Enron-Award.pdf.
[117] *Ibid*., para. 334.
[118] But see the references to the *LG&E* award, *ibid*., footnotes 59, 60, 63, 67, 68, 74.

dd. CMS v. Argentina (Guillaume, Nabil Elrabi, Crawford), Annulment Decision, 25 September 2007

The *ad hoc* Committee identified two manifest errors of law with respect to the interpretational process followed by the CMS Tribunal. First, the CMS Tribunal had considered the requirements under Article XI as being the same as those under ILC Article 25.[119] Second, it had assumed that Article XI and Article 25 were on the same footing without taking a position on their relationship.[120] In this context, the Tribunal went on to emphasize "in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI" and proposed two possible readings as to the relation of Article XI and customary law, both of which conferred priority to the treaty provision over ILC Article 25.[121] Thus, silently endorsing the methodology followed in *LG&E*, the Committee rejected the *CMS* and, consequently, the *Enron* understandings of the necessity plea and through its non binding proposal it appears to have given some guidelines to future tribunals in order to close the gaps in the case-law regarding the issue of necessity.[122] Nonetheless, pursuant to the current institutional structure of the ICSID system it was not authorized to review the errors identified.

ee. Sempra v. Argentina (Orrego Vicuña, Lalonde, Morelli Rico), 28 September 2007

After noting that two arbitrators of the present Tribunal were also members of the Tribunal which adjudicated the case *CMS* in 2005, the *Sempra* award emphasized that in the present case the interpretation of the BIT as well as the assessment of the facts were different from the *LG&E* decision.[123] In fact, only three days after the annulment proceedings in *CMS*, the award in *Sempra* endorsed expressly the awards in *CMS* and *Enron* and construed the necessity clause of the BIT in the light of ILC Article 25. Thus, it applied the rigorous customary necessity standard, a methodological process that the *ad hoc* Committee had already characterized as manifest error of law. Hence, the heterogeneity of the ICSID case-law regarding the issue of necessity changed its course from that of horizontality, i.e. between ICSID tribunals, to that of verticality, i.e. between a tribunal and the *ad hoc* Committee.

[119] *CMS*, *supra n*. 30, para. 130.
[120] *CMS*, *supra n*. 30, para. 131-132
[121] *CMS*, *supra n*. 30, para. 132-134.
[122] For a more detailed analysis see *Jürgen Kurtz*, ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis, ASIL Insights, Vol. 11 (20 December 2007), available at http://www.asil.org/insights/2007/12/insights071220.html.
[123] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 346, available at http://ita.law.uvic.ca/documents/SempraAward.pdf.

3. Evaluation

The ICSID case-law regarding the Argentine crisis illustrates serious inconsistencies notwithstanding the fact that the respective ICSID Tribunals were dealing with disputes having the same factual background, concerning the interpretation of the same BIT and relating to the same investment sector.

By following two different methodological approaches, the ICSID Tribunals applied two different standards of scrutiny for assessing the national emergency measures taken by Argentina. On the one hand, in *CMS*, *Enron* and *Sempra* the Tribunals interpreted the necessity clause of the Argentina-US BIT in the light of customary international law. Thus, by applying the rigorous customary standard of ILC Art. 25, they rejected the plea of necessity. In fact, such an interpretation of the BIT appears to reflect the principle of "systemic integration" laid down in Article 31(3)(c) VCLT which reads as follows:

> There shall be taken into account together with the context any relevant rules of international law applicable in the relations between the parties.

As the International Law Commission pointed out in its *Report on Difficulties Arising from the Diversification and Expansion of International Law* in 2006, this provision refers to "rules of international law" in general, thus covering all of its sources, including customary law.[124] Indeed, when justifying the interpretation of the BIT in the light of customary law, the Tribunal in *Sempra* emphasised *inter alia* that "[i]nternational law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle".[125] On the other hand, the Tribunal in *LG&E* considered the necessity clause of the BIT to be *lex specialis* to the customary necessity. Hence, the plea of necessity was accepted, since the standard of scrutiny to be applied was a flexible one, including a form of proportionality test instead of the rigorous "only way" requirement of ILC Article 25.

Nevertheless, the most irritating feature of these cases is that the Tribunals in *Enron* and *LG&E* did not consider the previous antithetic awards *LG&E* and *CMS* respectively, notwithstanding the fact that there was a common arbitrator in each of both divergent pairs of decisions. That creates the duel *CMS-LG&E* and *LG&E-Enron*. In addition, this ignoring took place only when the *LG&E* and *Enron* Tribunals went on to deal with the plea of necessity.

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[124] *Report of the International Law Commission*, 58. Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN-Doc. A/CN.4/L.682, 13 April 2006, 215 para. 426 (b); see also *Dahm*/*Delbrück*/*Wolfrum*, *supra* n. 87, 643-644, c).
209, Rn. 415.

[125] *Sempra*, *supra n.* 123, para. 378.

Therefore, the non-consideration of the prior divergent awards appears to be deliberate. [126] Yet, there is at least a deontological duty for Tribunals administered by an institution which is supposed to constitute "a significant step forward toward the establishment of the Rule of Law in international investment"[127] to take into account previous divergent decisions. Remarkably, the *CMS* and *Enron* Tribunals which followed the same methodology and reached the same conclusion were presided over by the same arbitrator. Aside from the fact that the standard of necessity varied from one ICSID Panel to another, it appears that the methodology and the result of the procedure in those cases were significantly influenced by the president of each respective Tribunal.[128]

V. Assessment of Homogeneity

The homogeneity test of the ICSID jurisprudence in the era of "treatification" of international investment law[129] reveals that identical and similar provisions of BITs are interpreted and applied differently according to the composition of the relevant ICSID tribunals. In fact, the awards in *Plama* and *Telenor* demonstrate, first, that ICSID tribunals themselves recognize that the case-law develops inconsistently and, second, that panels do not hesitate to criticize the interpretative approaches taken in other ICSID cases harshly. Finally, the annulment proceedings in *CMS* and the *Enron* award show that the inconsistencies relating to the standards upon which investment disputes should be adjudicated exceed the horizontal course, that is, between tribunals standing on an equal footing, and develop a vertical dimension, namely between ICSID tribunals and the *ad hoc* Committee itself.

In construing BITs, the majority of the tribunals is guided by different approaches whose formulation is based on specific principles they put forward. So, the Tribunal in *Siemens* derived from the preamble of the BIT an investment-friendly approach according to which the interpretation of the BIT should be guided by its object and purpose, namely the promotion and the protection of foreign investments. In contrast, the process of interpretation in *Plama* and *Telenor* rested upon the assumption that an extension of MFN clauses to dispute settlement procedures required a clear and unambiguous wording, that is, a rather host-state-friendly approach. The formulation of such opposite assumptions which determine the course

[126] See also *Waibel*, *supra* n. 103, 646 and *Schill*, *supra* n. 107, 285 who criticize the selective use of precedent in *LG&E*.
[127] See, for instance, *Broches*, *supra* n. 11, 163.
[128] *Tsatsos*, *supra* n. 10, 203.
[129] *Jeswald Salacuse*, The Treatification of International Investment Law: A Victory of Form over Life? A Crossroads Crossed?, Transnational Dispute Management Vol. 3 (June 2006).

of the interpretation and, thus, the outcome of the proceedings, reflects the question of the adherence of the adjudicator to prejudgments according to her or his origin, education and social environment, namely the issue of different preunderstandings ("*Vorverständnisse*"). [130] Indeed, in spite of the fact that the rules of interpretation embodied in the VCLT are relatively clear, these rules are not capable of tackling the question of varying preunderstandings. Therefore, whilst for some ICSID tribunals the protection of foreign investments is prominent, for other tribunals the protection of the interests of the host-state receives priority. In addition to that, in the *Suez* decision the protection and promotion of foreign investments stood on the same footing as the preservation of a fair balance between host-state and investor. In other words, the process of interpretation was rooted in a rather neutral approach. As a result, at the level of preunderstanding there is a split of the ICSID jurisprudence into three different ideological streams.

It should be added, however, that the influential potential of preunderstandings should be restricted when a system itself provides for the direction that an interpretation has to follow. As early as the 1960s, the Report of the Executive Directors of the World Bank emphasized that the ICSID Convention itself maintains a careful balance between the interests of foreign private investors and those of the host-states.[131] Moreover, about twenty-five years ago the balanced approach regarding the course of interpretation in ICSID procedures was underscored in the first *Amco* award as a reflection of the legal-economic neutrality inherent to the ICSID Convention in the following way:

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[130] See, in particular, *Karl Larenz*/*Claus-Wilhelm Canaris*, Methodenlehre der Rechtswissenschaft, 3. Auflage, Springer Verlag, Berlin, 1995, 32; *Wolfgang Gast*, Juristische Rhetorik, 4. Auflage, C.F. Müller Verlag, Heidelberg, 2006, 246, para. 659-660. But see *Rudolf Bernhardt*, Die Auslegung völkerrechtlicher Verträge - insbesondere in der neueren Rechtsprechung internationaler Gerichte -, Carl Heymanns Verlag, Köln/Berlin, 1963, 175-176; *Rudolf Bernhardt*, Interpretation in International Law, EPIL Vol. II (1995), 1416, 1419 and 121; *Tomuschat*, *supra* n. 39, 168-170; *Agnieszka Szpak*, A Few Reflections on the Interpretation of Treaties in Public International Law, Hague Yearbook of International Law, Vol. 18 (2005), 59, 67 and 70; *Santiago Torres Bernárdez*, Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of the Treaties, in *Gerhard Hafner*/*Gerhard Loibl*/*Alfred Rest*/*Lilly Sucharipa-Behrmann*/*Karl Zemanek* (eds.), Liber Amicorum *Ignaz Seidl-Hohenveldern*, Kluwer Law International, The Hague, 1998, 721, 747-748, margin notes 46-47.

[131] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965), in ICSID Convention, Regulations and Rules, ICSID/15 (April 2006), para. 13: "While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases."

> [T]he Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries. [132]

Indeed, a dispute settlement system such as the ICSID established to promote foreign investments by way of negating the political considerations which the diplomatic protection involves as well as the subjective preferences which the adjudication of investment disputes by national courts can entail[133] should not display the irregularities that itself intends to remedy. Needles to say, that in the recent past the fact that the ICSID jurisprudence is permeated by such preunderstandings has been subject to political criticism. By a notice of 1 May 2007, the Government of Bolivia denounced the ICSID Convention.[134] The Ministry of Foreign Affairs of Bolivia justified this action *inter alia* by referring to the ideologisation of the ICSID jurisprudence as well as to the inability of the ICSID system to ensure a consistent development of its case-law.[135] It appears, therefore, that interpretative approaches which do not reflect the legal and economic balance of interests that the ICSID Convention intends to maintain put the credibility and, consequently, the existence of the ICSID arbitration in question. It will be interesting to learn whether and to what extent "alternatives" to the ICSID system such as *ad hoc* and institutional arbitration[136] or the substantive and procedural framework for the protection of property under the ECHR[137] will experience an increase in their case-law with respect to investment-related disputes.

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[132] *Amco Asia Corp. v. Republic of Indonesia*, Award on Jurisdiction, 25 September 1983, ILM Vol. 23 (1984), 351, 369, para. 23.

[133] *Aron Broches*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1972), Selected Essays, *supra* n. 11, 188, 194; *Shihata*, *supra* n. 11, 1-4; *Reisman*, *supra* n. 11, 131-132; *Reed*/*Paulsson*/*Blackaby*, *supra* n. 11, 3.

[134] Bolivia Submits a Notice under Article 71 of the ICSID Convention, ICSID News Release, 16 May 2007 available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement3; Bolivia Denounces ICSID Convention, ILM Vol. 46 (2007), 973.

[135] *Marco Tulio Montanes*, Introductory Note to Bolivia's Denounciation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ILM Vol. 46 (2007), 969, 970; *Fernando Cabrera Diaz*, Bolivia expounds on reasons for withdrawing from ICSID arbitration system, Investment Treaty News, 27 May 2007, available at http://www.iisd.org/pdf/2007/itn_may27_2007.pdf.

[136] For the proportion of investment disputes occurring outside the ICSID system and its quantitative relationship to the ICSID case-load see *Luke Eric Peterson*, Investment Treaty Arbitration: Mapping the Non-ICSID Universe, Stockholm International Arbitration Review (2007), 41, 44 *et seq*.

[137] See, in particular, *Matthias Ruffert*, The Protection of Foreign Direct Investment by the European Convention on Human Rights, German Yearbook of International Law Vol. 43 (2000), 116 *et seq*.; *Hélène Ruiz Fabri*, The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors, New York University Environmental Law Journal Vol. 11 (2002), 148 *et seq*.; see also *Christoph Schreuer*/*Ursula Kriebaum*, The Concept of Property in Human Rights Law and International Investment Law, in *Breitenmoser*/*Ehrenzeller*/*Sassòli*/*Stoffel*/*Wagner Pfeifer* (eds.), Human Rights, Democracy and the Rule of Law, Liber Amicorum *Luzius Wildhaber*, Dike Verlag, Zürich/St. Gallen, 2007, 743, 762 who consider bridging the gaps between international human rights and international investment law entirely feasible.

An additional factor of heterogeneity is constituted by the different weight attributed to a particular element of interpretation embodied in the "general rule" of Article 31 VCLT. It is beyond doubt that there is no hierarchical order between the text, the context as well as the object and purpose of a treaty, for all these elements represent a unified logical whole. The fact that by virtue of the objective approach the starting point of interpretation is the text reflects a temporal, but not a qualitative priority of the textual element. Because of the equality between these elements, divergences in the jurisprudence which result from the attribution of more or less weight to a particular element of interpretation are natural, since the VCLT establishes a hierarchical order only between the "general rule" embodied in Article 31 and the "supplementary means of interpretation" under Article 32. The same holds true, for inconsistencies which emanate from the different way in which a specific element of interpretation is applied. In fact, the elements of interpretation do not require automatic application; instead, ICSID tribunals may have various alternatives at their disposal as regards the inclusion of one particular element in the process of interpretation. As a result, the divergent outcomes in *Salini* and *Suez*, where the textual and the contextual interpretation were performed differently and distinct weight was attributed to the object and purpose of the relevant treaty, stem from the leeway the VCLT itself provides.

Furthermore, there are divergences in the ICSID case-law which neither the flexibility of the rules of interpretation nor the distinct preunderstandings ("*Vorverständnisse*") can justify.

Firstly, this category includes decisions where a previous divergent award is not taken into consideration and, therefore, an ICSID tribunal does not deal with such a divergence. With respect to the MFN clause, it can be doubted whether the elapse of four months since the publication of a previous decision is an insufficient period of time that can justify the non-consideration of a prior divergent decision. The latter was the case in *Salini* and *Gas Natural*, which did not consider the *Siemens* and *Plama* decisions respectively. However, the ICSID Court in *Telenor* considered the antithetic *Suez* decision, which was published one month earlier, and differentiated its ruling from it. Yet, the first three awards regarding the existence of a state of necessity in Argentina constitute clear and indisputable examples of disregard for previous ICSID awards. Although the *CMS*, *LG&E* and *Enron* cases had the same factual background, concerned the gas sector and were related to the interpretation of the necessity clause of the Argentina-US BIT, prior divergent ICSID jurisprudence was not taken into account. Such ignoring reveals dramatic dimensions given the fact that in the cases of *LG&E*

and *Enron* there was an arbitrator who sat on the previous Tribunal which had rendered an antithetic award, namely the awards in *CMS* and in *LG&E* respectively, and that the *CMS* and *Enron* awards which followed the same methodology and, thus, came to the same result were presided over by the same arbitrator. In addition to the similarity of these cases, one could have expected that no more than the one-third continuity in the composition of these Tribunals should have led them to deal with the previous divergent awards. Instead, such a deliberate ignoring poses the question whether it can be attributed to different power dynamics with respect to the composition of the Tribunals.

Moreover, the decisions which do not follow a method of interpretation consistent to the VCLT, that is, decisions applying not recognized rules of interpretation and failing to perform the interpretation as a unified and holistic process in terms of Article 31 VCLT, belong to the class of unjustifiable heterogeneity as well. As such are qualified the methods followed in the cases of *Maffezini* and *Gas Natural* where the MFN clause was primarily construed on the basis of the historical purpose of international arbitration *in abstracto* and no attention was paid to the systematic element. In fact, such techniques constitute policy-oriented approaches and deprive the process of interpretation of its normative character. In other words, they open the door to outcomes according to subjective considerations and preferences.

Hence, the non-consideration of previous awards dealing with identical or similar legal and factual questions as well as the disregard for the internationally recognized method of interpretation indicate that some ICSID tribunals proceed as if they were bound neither by deontological nor by legal rules.

The jurisprudence examined demonstrates that a considerable part of inconsistencies originates from opposite ideological approaches which serve as guidelines to the process of interpretation as well as from the fact that no attention is paid to previous divergent ICSID awards and to the rules of interpretation under the VCLT. As a result, by allowing the emergence of such divergences in the ICSID jurisprudence, the exclusion of appeal pursuant to Article 53 of the ICSID Convention shows a serious institutional deficit which causes legal uncertainty and questions the credibility of the ICSID system. This begs the question: Which mechanisms could possibly heal the institutional pathology of the ICSID system?

VI. Reform Proposals

A. Preventive Mechanisms

1. ICSID Advocate-Generals

From a preventive viewpoint, the homogeneity of the ICSID jurisprudence could be strengthened through the introduction of an institution similar to the Advocate-Generals pursuant to article 222 of the EC Treaty. Accordingly, the EC Advocate-General has the "duty, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the ECJ, require his involvement." The Advocate-Generals represent neither interests of the parties to a dispute nor interests of European Organs. They only serve the European Law.[138] Their essential function is to deliver an opinion advising the Court on how the case in issue should be decided. In fact, their non-binding opinions contain a thorough assessment of the case before the ECJ as to the facts and the law, including a detailed and critical analysis of the ECJ jurisprudence as well as comments on the development of the law in the area concerned.[139] In this way, this form of a horizontal judicial dialogue makes a substantial contribution to the coherence and consistency of the ECJ case-law.[140] A similar institution could be transferred to the ICSID system through an amendment of the ICSID Rules which would require a two-third majority of the members of the ICSID Administrative Council.[141] Unlike in the case of EC Advocate-Generals, the composition of non-binding submissions by the ICSID Advocate-Generals would depend on a request of the party-appointed arbitrators.

2. ICSID Preliminary Rulings

While the institution of the EC Advocate-Generals describes a form of horizontal judicial dialogue, the institution of preliminary rulings under Article 234 of the EC Treaty makes clear that the European law has to be interpreted consistently at a vertical level as well, that is by the national courts of the EC member states.[142] Accordingly, if a national court finds that it

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[138] *Sabine Hackspiel*, Article 222, in *Hans von der Groeben*/*Jürgen Schwarze*, EUV/EGV Kommentar, Bd. 4, 6. Auflage, Nomos, Baden-Baden, 2004, 339, para. 9.

[139] *Takis Tridimas*, The Role of the Advocate General in the Development of Community Law: Some Reflections, Common Market Law Review Vol. 34 (1997), 1349, 1358; *Hackspiel*, *ibid.*, 341, para. 14.

[140] See, for instance, *Kirsten Borgsmidt*, Der Generalanwalt beim Europäischen Gerichtshof und einige vergleichbare Institutionen, EuR (1987), 162, 164; *Hackspiel*, *ibid.*, 341, para. 13; *Tridimas*, *ibid.*, 1386.

[141] Relying on Article 6(3), the ICSID Administrative Council adopted the Additional Facility Rules in 1978. A similar pattern could be followed for the model of the ICSID Advocate Generals as well. For a more detailed analysis see Aron Broches, The "Additional Facility" of the International Centre for the Settlement of Investment Disputes (1979), in Selected Essays, *supra* n. 11, 249 *et seq.*; *Schreuer*, *supra* n. 16, 30-31.

[142] *Ingolf Pernice*/*Franz Mayer*, Article 220 (20th supplemental set, August 2002), in *Eberhard Grabitz*/*Meinhard Hilf* (Hrsg.), Das Recht der Europäischen Union, Kommentar, Bd. III, C.H. Beck Verlag,

has to decide a question of European law in a case pending before it, it will suspend the proceedings and refer the question to the ECJ. Finally, the domestic court decides the case before it on the basis of the binding response of the ECJ.

A system analogous to Article 234 of the EC Treaty[143] could supplement the suggested model of the ICSID Advocates-Generals, since the request for an opinion to be delivered by the ICSID Advocate-Generals would always require the cooperation of the party-appointed arbitrators. Hence, the safeguarding of consistency in the ICSID case-law could be secured to a greater extent by way of granting to the president of each ICSID tribunal a discretionary margin to suspend an ICSID procedure in order to request an opinion by the ICSID Advocate-Generals. The request as such could concern legal questions that have never been dealt by a Tribunal before, a situation where an ICSID Tribunal wants to depart from previous jurisprudence or when a panel has to deal with an issue that has already been decided contradictory.[144] Again, such a reform could also take place by a two-third majority decision of the members of the ICSID Administrative Council.[145] Finally, establishing an option for preliminary rulings depending on the initiative of the president of an ICSID panel could lead to a *de facto* institutionalization of the model of ICSID Advocate-Generals

3. Evaluation

Although the aforementioned proposals could contribute to the homogenization of the ICSID case-law without requiring an amendment of the ICSID Convention, as such they are not capable of guaranteeing a homogenous jurisprudence and protection from unjust decisions. They are merely piecemeal measures of non-binding and preventive character, since the ICSID Convention grants binding force and decision-monopoly as regards the assessment of issues of law or of fact in a given case exclusively to the ICSID panels. In other words, the creation of a more far-reaching mechanism is necessary. To this purpose, a recourse to the domestic law may be helpful. Indeed, at the domestic level, pathological case-law is subject to review by permanent and hierarchically superior courts. As far as the control powers of the superior instances concern only the legal aspects of the initial decision, the model of review corresponds to the concept of cassation. On the other hand, judicial control instances

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München, 2005, 13, para. 32; *Jurgen Schwarze*, The Role of the European Court of Justice in the Interpretation of Uniform Law Among the Member States of the European Communities, Nomos, Baden-Baden, 1988, 21-22.

[143] For proposals concerning the establishment of an ICSID reference procedure similar to Article 234 of the EC Treaty see *Gabrielle Kaufmann-Kohler*, Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?, *i*n *Gaillard/Banifatemi*, *supra* n. 19, 189, 221; *Tams supra* n. 10, 40; *Christoph Schreuer*, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, Transnational Dispute Management Vol. 3 (April 2006),1, 23.

[144] *Schreuer*, *ibid*., 24.

[145] See also *Tams*, *supra* n. 10, 41.

competent to examine whether a case was wrongly or rightly decided both as to the law and the facts reflect the concept of appeal.[146] More often than not, however, this terminological distinction does not reflect accurately the actual scope of review of the hierarchically superior instance.[147] Be that as it may, in both constellations the underlying principle is the maintenance of confidence in the process of adjudication by securing consistency in the jurisprudence as well as in the interpretation and application of the law.[148] Of course, the option of an ICSID appeals mechanism did not elude the attention of the ICSID Secretariat.

B. An ICSID Appeals Mechanism.

1. The Reform Proposal of the ICSID Secretary: A Non-standing Treaty-dependent Appeals Mechanism

The Discussion Paper of 2004 foresaw the establishment of a non-standing ICSID appeals mechanism. Accordingly, the appellate tribunal would be constituted for any new appellate procedure afresh, and would be composed, unless the disputing parties agreed otherwise, of three members.[149] The members of the *ad hoc* appellate tribunal would be selected from a panel of 15 persons.[150] Moreover, the scope of the appellate review would extend to matters concerning clear errors of law, serious errors of fact as well as the five grounds of the annulment procedure set out in Article 52 of the ICSID Convention.[151] Finally, the appeal tribunal would be capable of upholding, modifying or reversing the initial award.[152]

However, such a reform requires an amendment pursuant to Article 66 of the ICSID Convention. This is so because Article 53 of the ICSID Convention excludes the possibility of appeal in an explicit and absolute way.[153] While the amendment of the Additional Facility Rules can be done with a two-third majority of the members of the ICSID Administrative Council, Article 66 requires an additional ratification, acceptance or approval of such an amendment by all contracting states to the ICSID Convention, namely by 143 nations. Trying

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[146] *John Jolowicz*, Appeal, Cassation, Amparo and all that: What and Why?, in *James Crawford*/*David Johnston* (eds.), On Civil Procedure: John Jolowicz, Cambridge University Press, Cambridge, 2000, 299, 300; *Giorgio Sacerdoti*, Appeal and Judicial Review in International Arbitration and Adjudication: The Case of WTO Appellate Review, in *Ernst-Ulrich Petersmann* (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, Kluwer Law International, The Hague, 1997, 247, 247.
[147] *Jolowicz*, *ibid*., 301-303.
[148] *Jolowicz*, *ibid*., 316-320.
[149] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 3, para. 5-6.
[150] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 4, para. 5.
[151] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 4, para. 7.
[152] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 5, para. 9.
[153] *Broches*, *supra* n. 18, 296.

to overcome this actual difficulty, the ICSID Discussion Paper referred to Article 41 VCLT. Accordingly two or more of the parties to a multilateral treaty may under certain conditions conclude an agreement to modify the treaty as between themselves alone.[154] As a result, appellate review of an ICSID award would be possible under the condition that two or more states express their consent in an international investment treaty to permit such a review.[155] In the words of the Discussion Paper: "[i]n any event, availability of the Appeals Facility would in all cases depend on the consent of the parties".[156]

2. Evaluation

Of predominant importance for securing the harmonious development of jurisprudence is personal and institutional continuity. Consequently, an *ad hoc* appeals mechanism would not be able to warrant a homogenous case-law. Indeed, the ICSID annulment jurisprudence has already shown that the personal discontinuity of the *ad hoc* Committee has hindered the consistent interpretation of the terms embodied in Article 52 of the ICSID Convention.[157] Furthermore, if the ICSID appeals mechanism was a non-standing institution, there could emerge conflicts of interest given the fact that the members of the Appeals Facility could also be engaged in other cases as counsels or first instance arbitrators.[158] The neutrality and impartiality of the procedure could be, therefore, called into question. Consequently, the proposal of the Discussion Paper according to which an appeal would be carried by a three-member tribunal whose members would be selected from a panel of fifteen seems to be inappropriate. A possible appellate institution must become a permanent organ.

Moreover, it is highly doubtable whether an appeal procedure based on the provisions of international investment treaties could ever guarantee a constant jurisprudence. An *inter se* modification of the ICSID Convention for this purpose means only that appeal will be

[154] if:
(a) the possibility of such a modification is provided for by the treaty; or
(b) the modification in question is not prohibited by the treaty and:
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

[155] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 1, para. 2.

[156] Annex, Possible Features of an ICSID Appeals Facility, in *supra* n. 8, 2, para. 3.

[157] *Roderic Pagel*, Die Aufhebung von Schiedssprüchen in der ICSID-Schiedsgerichtsbarkeit, Peter Lang, Frankfurt am Main, 1999, 204-206; *Tams*, *supra* n. 10, 25.

[158] *Thomas Wälde*, Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?, in British Institute of International and Comparative Law's Investment Treaty Forum, *supra* n. 10, 71, 76; *Gantz*, *supra* n. 10, 68. For a more detailed analysis concerning conflicts of interest in international investment arbitration see *Judith Levine*, Dealing with Arbitrator "Issue Conflicts" in International Arbitration, Dispute Resolution Journal (February-April 2006), 60, 62-64.

possible for some cases, but not for others. Such a mechanism would constitute a kind of semi-appeal.[159] Furthermore, states can, according to their power and bargaining/negotiating strength, introduce ICSID appeal clauses to an investment treaty in order to favour themselves or their respective investors. However, such a selectivity underestimates the significance of a homogenous jurisprudence and undermines every effort to institutionalise it. In fact, a reform intending to secure the coherence in the case-law would require a more stable and comprehensive institutional structure, namely an ICSID mechanism aiming to be effective for all ICSID member states.

3. A Comprehensive ICSID Appeals Mechanism?

aa. Problem: Pacta Sunt Servanda v. Need for Reform

In spite of the fact that the homogeneity test of the ICSID jurisprudence reveals that the prohibition of appeal according to Article 53 constitutes a serious institutional deficit, a conventional amendment of the ICSID Convention pursuant to article 66 appears to be "to complex to be realistic",[160] since it requires the consent of 143 member states. In other words, according to the existing positive law, its is not permitted to the majority of the ICSID member states to create an ICSID appeals mechanism which would apply for all parties to the ICSID Convention. The principle is clear, rigid and without any ambiguity: *pacta sunt servanda*. Yet, it has proved necessary to soften the rigidity of *pacta sunt servanda*.[161] This begs the question: Which elements of law could pierce the armour of the principle *pacta sunt servanda* in order to allow the creation of an appeals mechanism within the ICSID system?

bb. Attempting to Tackle the Problem

i). Institutional-creative Function of the Teleological Element

The first element that comes into consideration is the substantive rule upon which the entire ICSID system is based, namely the telos of the fair and neutral settlement of investment disputes. This would not be the first time where a recourse to the purpose of the ICSID system brought about a change in it. Indeed, it was the teleological element that led the *ad hoc* Committee in the first two annulment proceedings in *Klöckner I* and *Amco I* to perform an

[159] See also the criticism by *Tams*, *supra* n. 10, 25.
[160] *Schreuer*, *supra* n. 143, 22.
[161] For institutional limitations see *Tomuschat*, *supra* n. 39, 314 *et seq*.

appellate review instead of annulment.[162] In particular, the *ad hoc* Committee in *Klöckner I* pointed out:

> Application of the [first] paragraph [of Article 52 of the Convention] demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, *taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible* with guarantees in order to achieve a harmonious balance between the various objectives of the Convention.[163] (emphasis added)

> [T]he rules in Section 5 of the Convention regarding the interpretation, revision and annulment of the award (Articles 50 to 52) are part of the same system and must be interpreted according to the customary principles of interpretation, including *the principle of effectiveness*.[164] (emphasis added)

> The *ad hoc Committee* … has the power and the duty to interpret Article 52(1)(e). In doing so, it adopts neither a narrow interpretation nor a broad interpretation, but it bears in mind the customary principles of treaty interpretation *and, in particular, the objective of the Convention and of the system it establishes*.[165] (emphasis added)

Endorsing the teleological approach adopted in *Klöckner I*, the *ad hoc* Committee in *Amco I* emphasised:

> The absence, however, of a rule of *stare decisis* in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52(1)(e) by *the Klockner ad hoc* Committee.[166]

In other words, the teleological element has caused a temporary institutional transformation within the ICSID system. More importantly, in addition to the institutional transformation, the international teleological element has led to the creation of international institutions and, in particular, of international judicial bodies by an organ which under conventional understanding was not empowered to do so. This was done by none other than the Security Council of the United Nations. For the purpose of maintaining the international peace and security, Chapter VII of the UN Charter was interpreted in such a way that authorised the Security Council to establish the International Tribunals for the Former Yugoslavia[167] and Rwanda[168] in 1993 and 1994 respectively.[169] Hence, the institutional-creative function of the teleological element within the international order constitutes the first reform-supporting force.

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[162] For the approach followed in *Klöckner I* see, for instance, *Peter Schlechtriem*, Zur Überprüfbarkeit von ICSID-Schiedssprüchen: Die Aufhebung im Falle Klöckner/Kamerun, Praxis des Internationalen Privat- und Verfahrensrechts, Vol 6 (1986), S. 69, 71.
[163] *Klöckner*, *supra* n. 23, 97, para. 3.
[164] *Klöckner*, *supra* n. 23, 120, para. 62.
[165] *Klöckner*, *supra* n. 23, 138, para. 119.
[166] *Amco*, *supra* n. 24, 521, para. 44.
[167] Established pursuant to SC Res. 808 (1993) of 22 February 1993 and Res. 827 (1993) of 25 May 1993.
[168] Established pursuant to SC Res. 955 (1994) of 8 November 1994.
[169] *Jost Delbrück*, Article 24, in: *Bruno Simma* (ed.), The Charter of the United Nations: A Commentary, 2nd Ed., Oxford University Press, Oxford, 2002, 451, para. 20.

ii). Principle of Systemic Integration.

In its *Namibia* Advisory Opinion of June 21 1971, the ICJ emphasized that:

> an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[170]

This statement reflects the principle of systemic integration enunciated in Article 31(3)(c). The release of the integrative forces enclosed in this principle would require the determination of the location of the ICSID system within the international order. Consequently, it has to be examined whether international law provides for appeal mechanisms aiming to secure consistency in the jurisprudence with respect to disputes concerning private property or, more specifically investments, and, if it does, to what extent these international *topoi* are similar to the ICSID system.

The paramount importance of appeal within the international order is underlined by the fact that it is recognized as a fundamental human right in Article 14(5) of the International Covenant on Civil and Political Rights of 1966 (ICCPR). Accordingly, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." In addition, the entire Article 14 ICCPR, and thus Art. 14(5) as well, has been already recognised by the Human Rights Committee of the United Nations as a right from which derogation in situations of public emergency is not permitted.[171] In the same vein, the right to appeal is guaranteed when individuals are called to account for grave crimes which they might have committed. The Statutes of the International Tribunals for the Former Yugoslavia and Rwanda provide for appellate proceedings against first instance decisions.[172] It goes without saying that the Rome Statue of the International Criminal Court which was agreed upon in 1998 and entered into force on 1 July 2002 follows the same pattern as well.[173] Of course, the possibility of appeal is not restricted to situations where the criminal element takes centre stage, but is also available in areas of international law concerning the judicial protection of private property and of investments respectively.

The first system that comes into consideration is the European Convention of Human Rights (ECHR). Article 1 of the First Additional Protocol to the ECHR is dedicated to the protection of property. Accordingly, "every natural or legal person is entitled to the peaceful enjoyment

[170] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 26 June 1971, ICJ Rep. 1971,16, 31, para. 53.
[171] General Comment No. 29: States of Emergency (Article 4), 31 August 2001, para. 15, UN-Doc. CCPR/C/21/Rev.1/Add.11.
[172] See Art. 25 ICTY-Statute and Art. 24 ICTR-Statute.
[173] See Art. 82 ICC-Statute.

of his possessions". As regards the procedural protection, any person, non-governmental organisation or group of individuals has under 34 ECHR the right to bring to the ECtHR applications concerning violations of the Convention or the protocols thereto by a member state. The fundamental reform, made effective in 1998 by the Additional Protocol No. 11, established the compulsory jurisdiction of the ECtHR, thus enabling applicants to bring their claims directly before the Court. The latter procedural guarantee is comparable to the initiation of an "arbitration without privity" proceeding before the ICSID Tribunals by investors claiming the infringement of substantive provisions laid down in a BIT by the host-state. Indeed, in both cases, unidentified individuals have the right of recourse against a state when they feel that the latter has violated its obligation to treat them pursuant to the provisions of an international treaty.[174] That is to say, foreign investors can claim compensation for infringement of their property by the host-state before the ECtHR. Notably, in the dispute over *Iron & Steel Works*, two Italian investors brought their claim against the Republic of Georgia initially before the ECtHR, but in 2006 they changed course and brought their case before an ICSID Tribunal.[175] This incident, as well, reveals how close to each other both institutional structures are located.

As already mentioned, investment treaties contributed to the explosion of the ICSID jurisprudence.[176] Similarly, the reform operated by Protocol No. 11 led to an explosion of the case-law of the ECtHR.[177] Furthermore, by suppressing the European Commission of Human Rights, Protocol No. 11 managed to depoliticise the protection of human rights in Europe,[178] a feature similar to the depoliticisation of the settlement of investment disputes under the ICSID Convention. Admittedly, Protocol No. 11 attached special importance to questions concerning the quality and the consistency of the Court's case-law.[179] Pursuant to Article 43(1) ECHR, "within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber". The acceptance of such a request presupposes, according to Article 43(1) ECHR, that "the case raises a serious question affecting the interpretation or application of the Convention or

[174] See the reference in *Paulsson*, *supra* n. 15, 256, footnote 48.
[175] The award was rendered in February 2008 and remains up to now unpublished. For a brief analysis see *Luke Eric Peterson*, Lid remains on ICSID award in Georgian dispute over Iron & Steel Works, Investment Treaty News, 27 March 2008, available at http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf.
[176] See *infra* n. 13.
[177] *Manfred Nowak*, Einführung in das Internationale Menschenrechtssystem, Neuer Wissenschaftlicher Verlag, Wien/Graz, 2002, 182.
[178] *Nowak*, *ibid*., 179; *Christian Tomuschat*, Human Rights - Between Idealism and Realism, Oxford, University Press, Oxford, 2003, 198-199.
[179] *Explanatory Report to Protocol No. 11 to the ECHR*, Human Rights Law Journal Vol 15 (1994), 91, 95, para. 47.

the protocols thereto, or a serious issue of general importance."[180] A "serious question affecting the interpretation" is *inter alia* present when the judgment concerned is at odds with a prior judgment or when the decision is crucial for the future development of the case-law.[181] In addition to this, the Grand Chamber has jurisdiction to decide on serious questions of fact which can be generalized, thus becoming relevant for future cases.[182] Although not expressly mentioned, the referral to the Grand Chamber under Article 43 is equal to an appeals procedure.[183] Similar to the role of the ICSID within the framework of investment protection, the ECHR as reformed by the Protocol No. 11, which provides among others for an institutionalised appeals procedure as well as for a compulsory individual application, aims at creating an effective international mechanism of legal protection.

Although the law of the World Trade Organization, established in 1994, concerns principally trade issues, it also contains several investment-related provisions laid down in four agreements, namely in the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[184] Disputes between WTO members concerning their rights and obligations under the aforementioned investment-related agreements are to be settled according to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The latter dispute settlement mechanism has replaced the prior power-oriented diplomatic settlement system of the GATT 1947 with a rule-oriented procedure of settlement.[185] A distinctive feature of the depoliticization, or rather the judicialization, of the dispute settlement accomplished by the DSU constitutes, among others, the establishment of the standing WTO Appellate Body.[186]

Similar to the ICSID system, the settlement of disputes within the WTO is carried out by panels, whereas within the framework of the WTO only states or custom territories are

[180] The determination of whether such a request meets the aforementioned conditions is made by a ("filter") panel of five judges of the Grand Chamber. If it accepts the case, then the Grand Chamber has to make the final determination as to whether there was an infringement of the ECHR.
[181] *Explanatory Report to Protocol No. 11 to the ECHR*, *supra* n. 179, 99, para. 100.
[182] *Jens Meyer-Ladewig*, Europäische Menschenrechtskonvention, Handkommentar, 2. Auflage, Nomos, Baden-Baden, 2006, 318, para. 8.
[183] *Nowak*, *supra* n. 177, 186; *Christoph Grabenwarter*, Europäische Menschenrechtskonvention, C.H. Beck Verlag, München, 2005, 83, para. 66.
[184] For a brief overview see *Rudolf Dolzer*/*Felix Bloch*, Der rechtliche Schutz ausländischer Investitionen, in *Herbert Kronke*/*Werner Melis*/*Anton Schnyder* (Hrsg.), Handbuch Internationales Wirtschaftsrecht, Otto Schmidt, Köln, 2005, 1090-1092.
[185] *Sacerdoti*, *supra* n. 146, 270; *Ernst-Ulrich Petersmann*, The GATT/WTO Dispute Settlement System, Kluwer Law International, London, 1997, 186.
[186] *Sacerdoti*, *supra* n. 146, 270.

authorized to make a request for the establishment of a panel.[187] Like in case of ICSID, the WTO panels consist principally of three panellists whose competence and expertise shows, in turn, considerable similarities to those of the ICSID.[188] Against panel reports, however, any party to a dispute may request an appeal from the WTO Appellate Body. The latter does not deal with factual findings. Its scope of review concerns issues of law covered in a panel report as well as legal interpretations developed by a panel, and it may uphold, modify or reverse the legal findings and conclusions of the panels.[189] In other words, the reformed world trade system provides for a second instance entrusted with the duty to secure coherence in jurisprudence as well as the proper interpretation of law.

Comparing all three international systems with each other, one might conclude that from a systemic-institutional viewpoint the ICSID system is located between the ECHR and the WTO. The international integrative forces that operate in the space between WTO and ECHR and circle the ICSID system are released and affect both sides of the ICSID system in order to soften the institutional arrhythmia of the ICSID Convention, which consists in its lack of an appeals mechanism when compared to its two parallel existing international systems. Hence, the principle of systemic integration constitutes the second reform-supporting force.

iii). Principle of Good Faith

Article 31 VCLT establishes that treaties shall be interpreted in good faith. This principle "flows directly from the rule *pacta sunt servanda*, which is enshrined in Article 26 VCLT, and governs the whole process of interpretation.[190] The rule of good faith as enshrined in Article 31 VCLT indicates that the process of interpretation should not lead to manifestly absurd or unreasonable results.[191] This reflects the negative side of the general principle of good faith which consists in offering protection to "certain finalities anchored in the common interest against excessive individualist pretenses".[192] To the negative side of this general rule

[187] See, for instance, Art. 1(1) and Art. 6 DSU in conjunction with Art. XI(1) XII(1) of the Agreement Establishing the WTO Organization. But see, on the other hand, *Hermann Ali Hinderer*, Rechtsschutz von Unternehmen in der WTO, Berliner Wissenschafts-Verlag, Berlin, 2004, 158-160, 357-375, 375-416; *Thomas Schoenbaum*, WTO Dispute Settlement: Praise and Suggestions for Reform, International and Comparative Law Quarterly Vol. 47 (1998), 647, 655-658; *August Reinisch*, Können Verletzungen von WTO-Recht durch einzelne Betroffene geltend gemacht werden? ecolex (2000), 912 , 917 and his references in 913, footnote. 12.
[188] See Art. 8(5) DSU and Art. 37(2)a) ICSID Convention; Art. 8(1)(2) DSU and Art. 14 ICSID Convention.
[189] Art. 17(6) and 17(13) DSU.
[190] *ILC Report*, supra n. 52, 221, para. 12.
[191] *Aust*, *supra* n. 53, 187; Sinclair, *supra* n. 52, 120; see also *Anthony D' Amato*, Good Faith, Encyclopedia of Public International Law Vol. II (1995), 599, 599.
[192] *Robert Kolb*, Principles as Sources of International Law (With Special Reference to Good Faith), Netherlands International Law Review Vol. 53 (2006), 1, 18.

belong, furthermore, the protection against acts which deprive the object and purpose of an international transaction e.g. an international treaty.[193] On the other hand, the positive side of the general principle of good faith consists in enlarging the scope of application of an existing legal rule to such an extent that the latter can be adjusted to new actual needs and requirements.[194] This aspect of the principle portrays its so-called gap-filling and legal development function.[195] Indeed, it is not a coincidence that already in the mid-1950s the principle of good faith was qualified as a „fundamental principle" of international law.[196]

Due to the fact that some ICSID panels applied unreasonable and irrational interpretations, that an adjustment of the ICSID Convention to the present needs is opposed by insuperable institutional obstacles and that in a considerable part of the ICSID jurisprudence the exercise of the judicial function puts the object and purpose of the ICSID system, namely the neutral and free of ideological considerations settlement of investment disputes, into question, the general principle of good faith becomes activated. Since the institutional deficit from which the ICSID system suffers allows the ICSID jurisprudence to fragment, the principle of good faith must act upon Article 66 of the ICSID Convention which subjects the creation of a comprehensive appeals mechanism to the will of all ICSID contracting parties.[197] The principle of good faith supported by the principle of systemic integration as well as by the institutions-creative power of the teleological element can soften the harshness of the proposition *pacta sunt servanda* in order to enable the creation of an ICSID appeals mechanism. Thus, the establishment of a comprehensive ICSID appeals institution becomes possible, even if this does not correspond to the will of all ICSID contracting states.[198]

4. Thesis

Leaving aside any effort to soften the harshness of the proposition *pacta sunt servanda*, the problem is a real and existing one. The ICSID system is no longer able to follow its initial purpose. Institutionally, the ICSID Convention constitutes a rigid and inflexible treaty without

[193] *Ibid*., 18.
[194] *Ibid*., 17-18.
[195] *Ibid*., 24-25.
[196] *Georg Schwarzenberger*, International Law as Applied by International Courts and Tribunals, Vol. 1, 3rd Ed., Stevens & Sons, London, 1957, 19.
[197] To some extent, this line of thinking is based on the approach followed in the *Westland Helicopters* award rendered under the auspices of ICC, 08 June 1982, 05 March 1984 and 25 July 1985, International Law Review Vol. 80 (1989), 596, 613-614. Due to the fact that the member states to the Arab Organization of Industrialization established the aforementioned international body with institutional weaknesses, the award, relying on the principle of good faith, accepted the subsidiary responsibility of the member states to the organization. See further *Kolb*, *supra* n. 192, 24-25.
[198] For such a function of the international legal order see *Christian Tomuschat*, Obligations Arising For States without or against Their Will, Recueil des Cours Vol. 241 (1993), 195 *et seq*.

any possibility for improvement, that is, a treaty without future. Ideologically, the ICSID jurisprudence is inconsistent, for a considerable proportion of ICSID Tribunals serve not only different, but also essentially contradictory values. Now, the ICSID system seems to have two possibilities to choose from: Either a comprehensive appeals mechanism will be established, or it will follow the path of the "obsolete treaties". Indeed, when the League of the Nations proved to be unable to serve its purposes, it was replaced. The same can happen here as well.

VII. Conclusion

Neither the different cultural traditions of international arbitrators nor their different origin can justify contradictory awards. In the final analysis, they are subject to one legal order; that of international law.[199] Systemically, the question "*quis custodiet ipsos custodies*" will always remain unanswered. Jurists are responsible for themselves. And the actual citadel of the fair and balanced adjudication are neither the rules of interpretation nor the recognized competence, but the values to which jurists have devoted themselves.[200] At this point, the strive for homogeneity of Zaleukos meets the aphoristic saying of Herakleitos: "The hidden harmony is better than the obvious".[201]

There remains the hope for a future development of international law towards the Rule of Law[202].

[199] *Tomuschat*, *supra* n. 39, 29, para. 6 where the oneness of the international legal order is demonstrated and 55, para. 40 where the theory of the so-called "clash of civilizations" is rejected.

[200] See *Tomuschat*, *supra* n. 39, 23-436; *Rainer Hofmann*, Concluding Remarks, in *Andreas Zimmermann*/*Rainer Hofmann* (eds.), Unity and Diversity in International Law, Duncker & Humblot, Berlin, 2006, 491, 493; *Hermann Mosler*, Völkerrecht als Rechtsordnung, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht Bd. 36 (1976), 6, 14.

[201] *Manfred Fuhrmann* (Hrsg.), Die Anfänge der abendländischen Philosophie, Fragmente der Vorsokratiker, Bibliothek der Antike, Artemis Verlag, München, 1991, 99, para. 251; *William Harris*, Heraclitus, The Complete Fragements -Translation and Commentary, para. 116, available at http://community.middlebury.edu/~harris/Philosophy/heraclitus.pdf

[202] See, in particular, *Tomuschat*, *supra* n. 39, 23-436.