Some objections to Jurisdiction in Investor – State Arbitration

by Pierre Lalive*

I Introduction

As a subject for this presentation, I have chosen "some objections to jurisdiction in Investor-State arbitration" and this choice would seem to call, if not for an apology, at least for an explanation.

It is hardly necessary to emphasize the importance and increasing number of Investment Treaties today, whether multilateral like the Washington ICSID Convention or the Energy Charter Treaty, regional like NAFTA, Mercosur or the Agreement of Cartagena, or bilateral, like the some hundred treaties signed by Switzerland since 1961.

Last year (2001), in an important paper on arbitration under BITs, Mr. Antonio Parra, the distinguished Deputy Secretary General of ICSID, was able to mention some 2'000 BIT's signed by more then 170 countries. Similarly, Professor Siqueiros, writing last year on "the Mexican experience", stated that:

> "Disputes between investors and sovereign Governments are becoming increasingly frequent", having regard to "the gradual economic interdependence among developed and emergent economies, the growth of regional and subregional trade agreements and the proliferation of bilateral investment treaties..., which explained that "investor-state arbitration has had special significance throughout the world, particularly in Latin America."

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Now, to future historians and many observers, it may well seem to constitute an extraordinary progress, of the Rule of Law and of international relations in general, that so many modern States have been willing to enter into binding commitments (of course in the exercise of their sovereignty, and not as an "abandonment" of their sovereignty as was sometimes contended!). It is remarkable that so many States are or seem ready to accept, under certain conditions, to submit disputes with a foreign private investor to outside adjudication.

The progress is undisputable, as is proved for instance by the case load of ICSID or by recent developments in NAFTA, to mention but those examples. But I would suggest that the overall picture is perhaps less "rosy" than appears at first sight, and that a more realistic approach should also take into account the many and indeed traditional manifestations of State reluctance to accept binding adjudication by third parties. After all, this phenomenon has long been observed in Public International Law, e.g. with regard to the acceptance by States of the "optional clause" of the ICJ, and in the number of objections to the jurisdiction of the International Court.

Let me state at the outset that that deep and traditional reluctance of Governments to undertake binding arbitration commitments (in the broad sense of the term "arbitration") is perfectly understandable and indeed sometimes quite justified, on the part of responsible State authorities. Be that as it may, in spite of the remarkable progress accomplished by some pioneers like the late Aron Broches, it is unlikely that the tendency of States or Governments to object to arbitral jurisdiction will diminish.

This remark is not pessimistic but merely realistic. A fact which leads me to hesitate to answer in the affirmative the stimulating question that we find in our Program for the morning of 15th May: "Will governments view with favor the increasing role and authority of

Arbitrators and institutions in the regulation of trade and investment disputes?"

Before I come to my first "section" (on Procedure), I should perhaps mention a caveat: It is of course quite out of the question to attempt here anything like a complete survey of preliminary objections to jurisdiction, in the context of Investor-State arbitration. What is possible, within the limited time at my disposal, is only to give you just a few (selected) examples of such objections, borrowed from recent international practice.

It is hoped that such examples (which sometimes may be named and sometimes should remain nameless) should suffice to give you some idea of the difficulties in this domain, difficulties which some practitioners always keep in mind and others appear too often to ignore or underestimate at their cost! – And by "practitioners", I do not mean only investors and their counsel, but also diplomats and government advisers called upon to draft BITs or to apply them.

II Procedure

The importance, frequency and practical effects of objections to jurisdiction in Investor-State-arbitration are obvious. A proper understanding of the problem does require in my submission, first of all, some consideration of its procedural aspects. And no practitioner in arbitration, whether counsel or arbitrator, can hope to have a solid grasp of "Investor-State-arbitration" without a fairly thorough knowledge of international procedure and practice.

I have no intention to deal here with, on even to mention, the many procedural issues that may arise in Investment-State Arbitration. As you know, some of them are quite specific like that of a choice or conflict between an international treaty forum and a domestic one, private or administrative; or issues like that of confidentiality, of

representation of the Public Interest, or of admissibility of an *Amicus Curiae* Brief (which was accepted for the first time in NAFTA in the Methanex Case v. USA).

I should like to limit my observations in this Section to one question, i.e. the conduct of the proceedings in case of a challenge to the Arbitrator's jurisdiction. And I shall take, as a convenient starting point, Article 41 of the ICSID Convention:

> 1. "The Tribunal shall be the judge of his own competence.
>
> 2. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Center, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to merits of the dispute".

The so-called principle of "competence/competence" does not call here for any comment: it is quasi-universally accepted (e.g. Art. 36 (6) Statute of the ICJ, Art. 21 UNCITRAL of 1976, Art. 16 of the Model Law of 1985). What is perhaps interesting to note is that the Rule was accepted without any discussion during the elaboration of the ICSID Convention (1 ICSID Reports 31).

The principle may be seen as a counter-part of Art. 25 (1 in fine) of the Convention according to which "when the Parties have given their consent, no party may withdraw its consent unilaterally", for instance by defending some restrictive interpretation of its own consent.

It may also be noted that the power of the Arbitral Tribunal to be the judge of its own jurisdiction, a power recognised by general international law, has never been seriously disputed in ICSID proceedings, and, on the other hand, that the Tribunal's power has an exclusive character, vis-à-vis other national or international organs,

including State Courts (as clearly decided, for instance, in the first ICSID case: Holiday Inns v. Morocco, or in the case LETCO v. Liberia).

An important practical question is raised by Art. 41 para 2 of the Convention: "Should the Arbitral Tribunal deal with the objection as a preliminary question or should it join the objection to the merits of the dispute?" The choice between the two methods is of capital importance for the Parties.

Art. 41 of ICSID is based on a long and consistent practice of both the PCIJ and the ICJ. It is interesting to note that the practice of joining preliminary objections to the merits of the case was initiated by the Permanent Court for the first time in 1933 (Administration of the Prince von Pless (A-B 1933, p149) and then in the case of the Railway Panevezys – Saldutiskis (A-B-75, 1938).

In the first case (Prince von Pless Administration, n° 52 1933 page 14), the PCIJ stated:

> "The question …appears to be inextricably bound up with the facts induced by the Applicant and can only be decided on the basis of a full knowledge of these facts, such as can only be obtained from the proceedings on the merits."
>
> "At the present stage of the proceedings a decision cannot be taken either as to the preliminary character of the objections or on the question whether they are well founded; any such decision would raise questions of fact and law in regard to which the Parties are in several respect in disagreement and which are too closely linked to the merits for the Court to adjudicate upon them at the present stage;
>
> …if it were now to pass upon these objections, the Court would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging the solutions;
>
> Whereas the Court may order the joinder of preliminary objections to the merits whenever the interest of the good administration of Justice require it."

In 1936 (A-B, pp. 66, 9) the Court considered that "the questions raised by the first of these objections… are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter" – so the Court joined the objections to the merits, considering that, in that way, it would be: "in a better position to adjudicate with a full knowledge of the facts" upon the objections (the Pajzs, Cskaky, Esterhazy preliminary objections).

A leading case must be quoted, the famous case of Barcelona Traction (24 July 1964), which contains a full review of the problem. At that time, the Rules of Court contained an Article 62 expressly providing for the possibility of a joinder.

Confronted with four preliminary objections, the ICJ noted that:

> "this is not a case where the allegation [of the Respondent]…"stands out as a clear-cut issue of a preliminary character that can be determined on its own. It is inextricably interwoven with the issues of denial of justice which constitutes the major part of the merits …"?

Another citation from the same Judgement may be particularly worth keeping in mind by Arbitrators when they hesitate or feel somewhat embarrassed on the better course to be adopted under Article 41 of the Washington Convention: should they decide the objection "as a preliminary question" or "join it to the merits".

The Court felt that it "could not pronounce [upon the third objection] at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision".

And it felt it necessary to add the following rather remarkable statement:

> " The Court is not called upon to specify which particular point, relative to the questions of fact and law involved by the

> third Objection, it considers an examination of the merits might help to clarify, or for what reasons it might do so. The Court will therefore content itself by saying that it decides to join this Objection to the merit because "…(quoting the Permanent Court in the Pajzs case) "the…proceedings on the merits…will place the Court in a better position to adjudicate with a full knowledge of the facts " and because". The question raised by…these objections and those arising on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter".

Lastly, two recent decisions of the International Court adopted the same position: The Lockerbie case and the Nigeria-Cameroon case.

One may also mention in passing that the express mention of a joinder disappeared from the Rules of Court in 1972 (a change confirmed in 1978); it was replaced by the possibility for the Court to declare that the objection "does not posses, in the circumstances of the case, an exclusively preliminary character".

The interpretation of this new formula is a matter for doctrinal debate and it is doubtful (to quote the opinion of Shabtai Rosenne, in its leading "Law and Practice of International Court" 3rd Edition ,page 924) whether this change was one of substance or not, and intended to wipe out "virtually consistent case law itself corresponding to a widely felt need and existing independently of the Rules of 1936 – 1946".

As rightly observed by Judge Charles De Visscher, the joining of objections to the merits "is, to a large extent, a question to be decided on a case by case basis". What must be stressed is that the interest of the defending State, which objects to the jurisdiction, is not only or not always to prevent the dispute from being adjudicated: the State may have a legitimate interest in also preventing the discussion of the case before the Tribunal.

As stated by Sir Hersch Lauterpacht (The Development of International Law..., London 1958, 113):

> "The reasons of caution which counsel the occasional joinder of preliminary objections to the merits may, in turn, be mitigated by other considerations. A defendant Government which pleads to the jurisdiction of the Court ought not, without good reasons, and without its consent, to be expected to submit to the effort, expense and uncertainty of engaging in proceedings on the merits."

However, the number of cases in which an objection to jurisdiction has been joined to the merits, either by the International Court or by an international arbitral tribunal is too significant to allow the opinion, (mistakenly expressed by some writers and one or two judges) that the decision to join is exceptional. The text of Article 41 of the Washington Convention should suffice to prove the contrary.

The practice of ICSID Arbitral Tribunals confirms that view. In a number of cases (like AMCO v. Indonesia 1983, 1 ICSID Report 390, Klöckner v. Cameroun (1983, 2 ICSID Report 1318), Atlantic Triton v. Guinea (1986, 3 ICSID Report 39, etc.) the objection was joined to the merits. One reason is clearly expressed in the decision SOABI v. Senegal (1984, 2 ICSID Report 180-189):

> "Neither the letter nor the spirit of the various documents put forward by the Parties, as support for their respective positions on the jurisdiction of the Tribunal....could properly be appreciated, save after a full consideration of the actual subject matter of the Application ... In the result, the Objection to Jurisdiction must be joined to the arguments on the merits, and will be addressed at the same time as the latter." (page 189)

It is now time to conclude this "procedural introduction" and to turn to an examination of the objections themselves.

Whenever challenges to jurisdiction are raised, and they seem to be becoming more and more frequent in "Investor State arbitration", the

Arbitrator is likely to consider issuing an Interim Award – or he may be requested to do so.

And the same is true, *mutatis mutandis,* with regard to objections to admissibility (but there is no need here to deal with this notion, or to attempt to define or distinguish the two concepts.) However, issuing such an Interim Award, and deciding at the outset whether there is or not jurisdiction, is far from being always possible, or simply convenient.

Questions of jurisdiction (or admissibility) and merits are often closely intertwined - and the Parties themselves, in their arguments on jurisdiction, often illustrate, unconsciously or not, this close connection. It is therefore a common feature of recent arbitral practice, whether Investor-State or other international types, that Arbitrators frequently prefer to join the objection to the merits – a fact which, needless to say, cannot be interpreted as indicating any *favor jurisdictionis* on the part of the Arbitral Tribunal!

III Nationality

A strong objection to jurisdiction that a State may raise, (as did Zaire in the case of American Manufacturing and Trading, in 1997) is that the dispute is a purely domestic one, because the investor happens to be a national of the host State. Another possible objection is that the Claimant is a national of a State that is not a party to the ICSID Convention, or has not ratified a particular BIT. Let me just mention one example of each situation.

In a case which shall remain anonymous, the Claimant, after leaving his country of origin in Europe, settled in Latin America and acquired the nationality of State X. Many years later, following a revolution, during which his assets were confiscated, he returned to his country of origin, of which he was still a citizen. The question was whether he was or was not a dual national.

It requires no particular effort of interpretation to discover that the ICSID Convention is exclusively established, as its very title indicates, for the purpose of settling investment disputes "between States and nationals of other States".

It is enough to quote here a leading commentary of the Washington Convention by Schreuer:

> "For natural persons, possession of the host State's nationality is an absolute bar to becoming a Party to ICSID proceedings: the dualnational would be disqualified from invoking the ICSID clause in the BIT... The individual investor's only chance to gain access to the Center may be to relinquish the host State's nationality before consent to ICSID's jurisdiction is perfected..."

And the author adds that:

> "the investor would have to ensure that the renunciation of the nationality is valid under the host State's law..."

In the concrete case I have in mind, there existed a complete disagreement between the Parties on both the facts and the law relating to the possibility for a citizen of State to relinquish his nationality and/or of being deprived of it, either formally by decree or indirectly, in particular circumstances.

In passing, I may draw your attention to the difficulty which International Arbitrators may experience when called upon to interpret and apply not only Public International Law, but also domestic Constitutional and Public Law of a particular State regarding its nationality.

It is worth adding that, during the drafting of the ICSID Convention, "the problem of compulsory granting of nationality was discussed and the opinion was expressed that this would not be a

permissible way for a State to evade its obligation to submit a dispute to the Center...but it was decided that this question could be left to the decision of the Arbitral Tribunal" (Schreuer op. cit. No 47).

In the case Banro American Resource and SAKIMA, Claimants, against the Democratic Republic of the Congo (ARB-98-7, Sept. 1, 2000), the difficulty was of a different nature.

This case is particularly interesting since it illustrates in the clearest manner the specific characteristics of what may be called the ICSID system. The objection of Congo derived from the fact that Canada, the country of nationality of Banro Resource Corp., had not ratified the ICSID Convention. Nor is Canada a party today (for reasons unknown to me).

As stated in the (unpublished) Banro-Congo Award, ICSID arbitration is not open to investors (whether natural or juridical persons) who are not nationals of the State party to the Washington Convention, or are nationals of host States that are not parties to this Convention. As you know, "one of the central features of the system is that, by becoming a party to the Convention, the State of which the investor is a national automatically waives its right to provide the latter with diplomatic protection."

A curious characteristic, perhaps unique, of this case is that Canada exercised its diplomatic protection vis-à-vis the Congo, while the American subsidiary of the Canadian group Banro relied upon the ICSID arbitration clause – a device which the Arbitral Tribunal considered unacceptable.

A fundamental feature of the system (quite apart from the necessity of the State involved to be a party to the ICSID Convention) is of course the fact that the ratification of the Convention is not enough: to be bound to accept ICSID arbitration requires that both parties, the

host State and the investor, must have provided written consent to the jurisdiction (see the preamble of the Convention).

Leaving aside this well-known feature, I should like to draw attention to two other aspects in the Banro Case , which can only be mentioned in a somewhat sketchy manner:

Canada, as already stated, was and is not a party to the ICSID Convention. Under the Mining Convention, the term "Banro" meant Banro Resource, a Canadian Company. That company had consented to arbitrate future disputes with the Congo, under the Mining Convention, and Congo had (contrary to Canada) ratified the Washington Convention.

Note that the Request for Arbitration had been filed, not by the Canadian corporation, but by its American subsidiary, in order to bypass the serious obstacle posed by the fact that Canada was not a party to ICSID.

As clearly stated by the Award: "If Banro American and its Congolese subsidiary are to be considered the Claimants, the condition that the Claimant must possess the nationality of a "Contracting State" would be met; however, the condition pertaining to the consent of the Parties would no longer be met." (72-73)

Since the Company Banro Resource, being Canadian, could not, although a party to the Mining Convention with the Congolese State, benefit from ICSID arbitration, it had used its American subsidiary, as already noted, to file the Request. But at least two obstacles had to be overcome:

(1) Congo had indeed consented to submit to ICSID arbitration, but only, at least expressly, disputes involving the Canadian

company, but not disputes involving the (formal) Claimant, the subsidiary Banro American (and its Congolese subsidiary).

(2) The Mining Convention did not provide for consent by Banro American, at least explicitly, but it was argued that it had consented indirectly, in one of two possible ways, either as a majority shareholder of the Congolese subsidiary or in its capacity as an "affiliate company", since the Canadian corporation had transferred its shares in the Congolese subsidiary, a transfer which included (so the argument went) the right to have recourse to ICSID arbitration.

This line of argument was rejected by the Tribunal on the ground that "Banro Resource, a Canadian company, never had, at any time, *jus standi* before ICSID. Having never existed for the benefit of Banro Resource, the right to access to ICSID cannot be viewed as having been "extended" or "transferred" to its affiliate, Banro American."

An important lesson must be drawn from this decision, which can be summed up as follows: a contractual clause purporting to give access to ICSID arbitration cannot, when "it is inapplicable vis-a-vis the beneficiary that it expressly mentions (for reasons of nationality), "take effect and apply vis-a-vis another entity to which it would have been "extended" or "transferred".

And the Tribunal, referring to the Mining Convention in that case as a "poorely constructed instrument, full of all kinds of contradictions and uncertainties", found it "difficult to understand how the Parties to the Mining Convention were able to insert in the contract a clause so manifestly deprived of its object and purpose and so manifestly inapplicable"! (no 75)

Another possible approach to this fundamental problem of *jus standi* would have been, for the Arbitral Tribunal, to lift or pierce the corporate veil of the Banro Group and, going "beyond procedural

appearances" and looking at the financial reality, to conclude that the real or actual Claimant was not the signatory of the Request for Arbitration, Banro American, but its parent company. The result of this approach would then be that one of the conditions of ICSID jurisdiction would be met, i.e., the condition of consent of the Parties, but the other condition of the competence of the Tribunal would not be met, the nationality of the Claimant!

IV Absence of investment:

It may be tempting for a Defendant State to argue, as a basis for an objection to jurisdiction, that either there was no investment whatever, or no investment under the definition of the BIT or under the particular contract, or to argue that, if there was an investment, it was not a "foreign" investment.

In the ICSID case American Manufacturing and Trading (AMT) v. République du Zaïre (21 February 1997, Clunet 1998 page 243), the State of Zaïre objected that the Claimant AMT (of American nationality) had never invested directly in its own name in Zaïre and that it was merely a partner of a local company, Sinza; from which it followed that the dispute existed only between the State and one of its own nationals, therefor falling outside the scope of the ICSID Convention.

After joining the question of jurisdiction to the merits, the Tribunal decided that none of the objections was justified, and it held, in particular, that there had been consent by both Parties.

In a somewhat similar case (of 1996, 14 ICSID Review 1999, 161), Tradex v. Albania, the Respondent State objected to the jurisdiction of the ICSID Tribunal, in particular on the ground that, under the applicable law of Albania, Tradex was not a foreign investor. This objection was rejected by the Tribunal.

About the Tradex case, I should perhaps add in passing that, according to a second objection, the dispute did not relate to an "expropriation" within the meaning of the applicable law, and therefore was not one concerning a "legal dispute arising directly out of an investment" under Article 25 of the ICSID Convention.

V The question of assignment:

It may well be that, in a particular case, the existence of one of the conditions of jurisdiction (and/or of admissibility) whether nationality, consent in writing, quality of "Investor", etc…) happens to be doubtful or even absent. It may be, more precisely, that an investor or alleged investor fears that the possible institution of proceedings would give rise to valid objections. Then, in order to circumvent that difficulty, the investor may consider acting, in one way or another, through another party, who would be better qualified as a formal claimant.

In the context of questions of nationality, and of dual nationality, I have mentioned a case in which an individual, who may be called "the original Investor", decided to assign or transfer to a legal person of foreign nationality (a foundation) the majority of his shares. We have also seen that, in the case Banro Resource v. RDC, in a context of a group of companies, assignments had taken place between a Canadian parent company, one of its American subsidiaries and Congolese subsidiaries (or sub-sub).

In the first example, the Respondent State, the host State, had objected, not unexpectedly, to ICSID jurisdiction as regards the assignee, the foreign foundation. And this on various, connected, grounds: It argued that the Foundation had been created before the relevant BIT had been concluded and ratified (a treaty said to be non-retroactive). It was said also that the Foundation was not an investor. And in any case the host State, if it had consented in writing to ICSID arbitration as regards the individual, the assignor, had never expressed such a consent with regard to the assignee.

This involves a series of highly delicate questions of Private International Law, concerning the formal and the substantial validity of an international assignment of contractual rights and what law governs the validity (and the opposability) of such a contractual assignment of the Investors rights, as well as questions of Public International Law.

They can only be mentioned here in passing, on the level of Public international law and within the context of the Washington Convention, an important question is whether, in case of assignment of the investor's rights, jurisdiction *ratione personae* can or cannot be presumed in favour on the Claimant.

The case of transfer or assignment of the investor's rights is probably the most important but not the only situation where the identification of the Claimant has created difficulties for ICSID Arbitral Tribunals. It may be said, in general terms, that these Tribunals have shown a certain absence of formalism, a certain flexibility, in that respect. This was the case, in particular, in two situations (as summed up by the Tribunal in the Banro Award):

> "When the request was made by a member company of a group of companies, while the instrument expressed the consent of another company of this group ; and when, following the transfer of shares, the request came from the

transferee company while the consent had been given by the company making the transfer."

Two well-known illustrations are the first ICSID case, Holiday Inns v. Morocco (when the request was filed by the parent companies, while consent had been given by their subsidiaries), and in the case AMCO v. Indonesia, in a similar situation. In the latter case, it was noted that the goal of an arbitration clause – which is to ensure the protection of the Investor – cannot be reached if the competence of the Tribunal is limited to disputes referred to it by the subsidiaries mentioned in the arbitration clause - a subsidiary which is in a final analysis merely an instrumentality through which the parent company was to realise the investment.

With regard to the question of transfer, or assignment, of rights, it was stated that: "The right to avail oneself of arbitration is tied to the investment and can therefore be transferred at the same time as the shares, provided that the host State approved the transfer of the shares" – to which some decisions have added: provided it did not oppose the assignment.

It should be noted that consent expressed by a subsidiary has rather easily been considered to have been given by the parent company (the actual investor), while the converse is less true. Furthermore "the extension of consent to subsidiaries that are not

designated or not yet created, even following a transfer of shares, is readily accepted" (Banro Award n°87).

To conclude on the question of assignments between companies members of the same group, a fundamental distinction should be kept in mind between questions of Private Law and questions of International law. The first category relates to or governs the relationship among companies of the same group and it answers the question whether rights assigned by contractual instrument to one company of the group apply to another company of that group. But the question of whether, under the Washington Convention, the conditions are fulfilled that are required for a State to be considered as a Contracting State is governed by International law.

Lastly, a particularly interesting observation made by the Arbitral Tribunal in the Banro Case deserves to be cited: After referring to the "flexible approach" of many ICSID Tribunals regarding the *jus standi* of subsidiaries and parent companies, the Tribunal noted:"What the Claimants are asking to the Tribunal in the present case, is not to uncover the reality behind the matter or to find a true investor behind the formalities and procedural appearances, but rather; on the contrary, to base its inquiry on the formal and procedural appearance and to turn a blind eye to the reality behind the relationships deriving from the investment."

VI Some other objections to jurisdiction

(A) Absence of prior “amiable” consultations or negotiations?

A few remarks only need be made, at this stage, on another fairly frequent objection to jurisdiction (or, as some would prefer, objections to admissibility of a Request for arbitration), an objection based on the alleged absence of prior consultations or prior amiable negotiations. According to Mr. Antonio Parra (ICSID Review 12, No 2, 90-97, p. 322), "the provisions of most BITs on the settlement of investment disputes urge that such disputes be resolved amicably", and he gives as typical examples that of the 1994 India v. UK. BIT and that of the 1992 Romania v. US BIT.

A great majority of BITs and some national investment laws foresee, as a common condition for the institution of proceedings, that a negotiated settlement should have been attempted. In two cases I have mentioned (AMT v. Zaïre and Tradex v. Albania) the consent clauses, respectively, were subject to the following condition: "if the dispute cannot be resolved through consultation and negotiation...." and "if the dispute cannot be settled amicably".

As everybody knows, this kind of formula is to be found not only in Treaties but in most contractual arbitration clauses and, unless it contains some precisions regarding the consultation period and a notification, it offers ideal dilatory opportunities for the Defendant.

It would seem that a not insignificant number of BITs have been drafted no doubt by great diplomats but by people largely ignorant of international arbitration and unaware of the perils of nice and vague formulas.

In some BITs however, one finds an article providing for a written notification of a request to begin consultation, together with the clause

that arbitration may be requested if no amicable solution is found within 6 months from that notification.

In the Tradex v. Albania case, already mentioned (ICSID Review, vol 40, No 1, Spring 1999, page 159, 182), the Arbitral Tribunal examined 5 letters sent by the Investor to the Government and concluded that these letters were "a sufficient good faith effort to reach an amicable settlement within the meaning of" the applicable law.

Similarly, in the AMT v. Zaïre (ICSID Arbitration), the State raised without success the objection based on prior consultation (Art. VIII) (of the BIT with the USA) providing that any dispute....should if possible be settled by way of consultations.- The Tribunal observed as a fact that the Investor had made indisputably several attempts at serious negotiations, but that they had been fruitless. When an arbitration clause in a contract or in a BIT provides that the Parties should attempt to reach a friendly settlement "whenever possible", it is of course a matter of interpretation of the common intention of the Parties, in each particular case, and no general answer or rule can be suggested.

To conclude, reference may be made to an excellent study by Professor Tibor Varady, of Budapest, on what he calls "the Courtesy Trap" (Journal of International Arbitration, December 1997) who demonstrates, on the basis on many cases, that such "declarations" of good intentions are not innocuous and that "placed within the Arbitration Agreement, even if it is just meant to be a gesture – become a possible stepping stone of various procedural gambits".

The result may be that resort to Arbitration is considered to be premature, or on the contrary, belated, but Varady also shows that the very success of amiable negotiations "might also cause discomfort, particularly if it is not a full success".

B Non exhaustion of local remedies

There is a clear analogy between the condition of prior amiable negotiations and that of prior exhaustion of local remedies, and both can be relied upon, in practice, by a State wishing to object to the jurisdiction of the Arbitrator or to the admissibility of the request.

While many BITs specify that the host State shall give its consent to arbitration, some of them (like a 1990 BIT between Switzerland and Jamaïca) preserve expressly the right of the host State to require that internal remedies be exhausted and this, curiously enough "with no time-limit for rendering a final judicial decision, so considerable delay in fulfilling the commitment to arbitrate is of course possible" (J.-C. Liebeskind, in 20 ASA Bulletin, March 2002, pp 27 ss.)

A possible answer to that objection comes immediately to mind, as suggested by International law cases and doctrinal writings on the subject. It may well be, that under the local law, no real remedy is available or that, in practical terms, there are no "local remedies to exhaust". An attempt to obtain redress before the Courts of the host-State, in the circumstances, would be "obviously futile".

C Choice of Local or choice of International Forum?

In several BITs , a provision is found according to which, if a dispute has not been settled amicably, it may be submitted at the choice of the investor, either to the domestic Courts of the host-State or to international arbitration (sometimes of ICSID, sometimes UNCITRAL or ICC).

In some treaties, such provision is supplemented by another, according to which the Investor's choice of one of the other forum, once made, shall be final. A few years ago, an international dispute was submitted to ICSID arbitration, in rather unusual circumstances, which

enabled the respondent State to raise the following preliminary objections to jurisdiction:

Prior to filing his Request with the ICSID Secretariat in Washington, the Investor had resorted twice to the Courts of the host State, for a specific purpose: First, in order to obtain the restitution of some documents proving his ownership of assets which had been confiscated by that State – a petition which was successful.

Second, in order to obtain the restitution or at least the indemnification of a particular immovable asset, located in the host-State.

On that basis, the host State objected to ICSID jurisdiction. It contended that, by submitting a petition or a claim to the local Courts, the Investor had necessarily opted in favour of domestic jurisdiction and waived its right to benefit from ICSID Arbitration. In other words, the choice of forum offered by a provision of the BIT to the Investor had been exercised once and for all. It was said to be both global and final.

Lack of space does not allow a discussion, of that particular problem undoubtedly of great interest both from a theoretical and a practical point of view. But two general observations may perhaps be made: First, the investor's option should of course be exercised in good faith, according to the general principle of Public International law; just as there should be no abuse, in the opposite direction of the right to object to jurisdiction. Second, there can be no universally valid answer to the problem. It is a question of interpretation of the consent of the Parties, and in particular of the consent of the host State, to decide whether, in a given BIT, the intention was to offer, or not, a global and final choice to the investor. The most that can be said, in general terms, is that the admission of partial choices is likely to create serious practical difficulties, and even conflicts between international jurisdiction and domestic, national jurisdiction.

Quite independently of the particular question of the choice of forum in BITs provisions, conflicts between national and international adjudicating bodies are a source of very great difficulties, which have sometimes occupied ICSID Tribunals. An example is ICSID very first case, Holiday Inns/Occidental Petroleum v. Morocco, a case in which the Arbitral Tribunal affirmed, in the clearest possible manner, the superiority of international tribunals and the duty of the Moroccan Courts, either to suspend their decision or to adapt it to the pronouncements of the ICSID Tribunal.

In the case Waste Management Inc. v. Mexico, an Arbitral Tribunal (presided by B. Cremades) declined jurisdiction, because the investor, having maintained, or instituted new proceedings before Mexican Courts, had thereby *ipso facto* annulled its written consent to NAFTA Arbitration. It was held by the majority, that these two kinds or proceedings (judicial and arbitral), although based on different legal arguments, related to the same alleged breaches of the Mexican State.

In a strong dissenting opinion, Mr. Keith Highet considered that the two kinds of proceedings were substantially distinct, the one relating to contractual obligations under Mexican Law, the other to the breach of obligations based on NAFTA. - In favor of the majority decision, it can be argued that investors should not be permitted to attempt to obtain in fact a double compensation in what is substantially the same dispute. Cumulation of proceedings should be discouraged.

Under the heading of “the problem of overlapping jurisdictions and remedies“ (page 19) B. Cremades has rightly observed, in a recent article,
that :

> "The multiplicity of sources of law and dispute resolution mechanisms creates a real risk of overlapping and duplicated

> claims. …Many investment treaties require either irrevocable election by an investor between international arbitration and domestic litigation, or an express waiver of other dispute settlement procedures, as a pre-condition to access to Investor-State arbitration."

(a) An example of election is Article 8 of the France-Argentina BIT, which offers a choice of fora to the Investor but makes it clear that "once an Investor has submitted the dispute either to the jurisdictions of the Contracting Parties involved or to international arbitration, the choice of one or the other of these procedures shall be final". (what remains to be solved is the precise interpretation of the words "the dispute", and the question whether such dispute could be "divided" by the Investor).

(b) An example of a waiver is provided by article 1121 of NAFTA, with respect to conditions precedent to submission of a claim to arbitration.

M. Cremades observes that: "Notwithstanding these mechanisms, however, the overlapping sources of law have created substantial complexities in Investor-State arbitrations, and are likely to continue to do so." It is impossible to disagree with this opinion: there is no doubt that the frequent "overlap of an investment treaty and a contract as competing sources of law is a significant current issue for Investor-State arbitrations", as shown by recent decisions.

In the case Compania de Aguas…and Vivendi Universal v. Argentina (ICSID Award November 21 2000, 40 ILM 457 (2001)), the Tribunal held that the BIT claims involved allegation that would also amount to breaches of the concession agreement, which was a matter within the exclusive jurisdiction of domestic courts. Hence a decision that the Claimants could only pursue a claim under the BIT after having exhausted the remedies in a domestic courts of the Defendant and suffer a denial of justice there! (Award subject to an annulment proceedings).

Conclusion:

At the end of this survey, both rapid and long, of “some” Objections to Jurisdiction in Investor-State Arbitration, the conclusion can be brief: In this era of globalisation and worldwide integration of markets, we are witnessing an extraordinary growth of arbitration in the field of foreign direct investment. However the proliferation of BITs should not lead hastily to overoptimistic judgements.

When a private Investor is evaluating what kind of legal protection is offered by a particular State, it is probably not enough for him to take into account (together with the draft Contract that is being negotiated) the fact that the State is a party to the ICSID Convention and/or has ratified a BIT with his own national State. What should also be taken into consideration is what may be called the “Arbitral record” of that host State, and its past conduct in judicial or arbitral proceedings. And I should borrow the last word from a recent article by a London Barrister, Mr. Chatterjee, who rightly observes: "Despite the judicial guidelines developed by ICSID tribunals on the competence of those tribunals over their relatively long history, challenges to the jurisdiction of those tribunals under Article 25, Washington Convention have become a common phenomenon".