IV.

CZECH VIEWS ON INVESTMENT LAW

JURISDICTION OF ARBITRAL TRIBUNALS UNDER THE AUSTRIAN-CZECH BIT ARBITRATION CLAUSE AND THE MOST-FAVORED-NATION (MFN) CLAUSE

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Abstract: Article 3(1) of the BIT contains an MFN clause which could embody certain references to the requirements of the UNCITRAL arbitration and promises most-favored-nation treatment only in matters of "investor" and "investment" and makes no provision concerning the arbitration. The Arbitration clause is set out in Article 8 "Settlement of investment disputes". The arbitration clause is clear and unambiguous. Most favored nation clause (MFN) is a standard of treatment, not a customary rule of international law, and thus an MFN obligation exists only when a treaty clause creates it. If MFN clause is to be interpreted, the text of the MFN clause, its context, and the object and purpose of the treaty containing it need to be considered. The Arbitral Tribunal has to deal with the issue of its jurisdiction at some stage after it has been constituted and also during the proceedings. Since the State-Parties have agreed that a dispute on expropriation would be referred to the local authority, an international arbitral tribunal could not ignore this requirement established by the parties. The BIT entered into force in the year 1991, and there is no evidence from that time that it were incapable of being complied with for the reason that the legal system or the judiciary in both States, Austria and the Czech Republic, was not efficient or receptive to claims by foreign investors. The question arises whether or not the arbitration clause under the BIT could be replaced by any other clause in virtue of the MFN clause. The international Arbitral Tribunal would be deprived, by its extensive interpretation of the MFN clause in favor of another arbitration clause in another BIT, of its "raison d´être" and would not have any jurisdiction because the consent of the State Party to arbitrate under BIT in consideration would no longer be valid. The power to arbitrate by the Arbitral Tribunal would be lost.

Resumé: Čl. 3 odst. 1 Úmluvy o ochraně a podpoře investic obsahuje doložku nejvyšších výhod obsahující podmínky vedení ad hoc rozhodčího řízení a poskytnutí doložky nejvyšších ohledně „investora" a „investice", neobsahuje žádné ustanovení týkající se rozhodčího řízení. Rozhodčí doložka je upravena v čl. 8 „řešení investičních sporů". Rozhodčí doložka je jasná a jednoznačná. Doložka nejvyšších výhod stanoví standard zacházení, není obyčejovým pravidlem mezinárodního práva, takže povinnost vyplývající z doložky nejvyšších výrok existuje pouze tehdy, jestliže je obsažena v mezinárodní úmluvě. Při výkladu doložky nejvyšších výhod je nutné vycházet z jejího znění, její celkové souvislosti, s přihlédnutím k předmětu a účelu úmluvy, ve které je obsažena. Rozhodčí soud je povinen zabývat se svoji pravomocí v dané fázi řízení poté, kdy byl ustaven, stejně jako po celou dobu rozhodčího řízení. Pokud státy jako smluvní strany úmluvy sjednaly, že spory týkající se vyvlastnění budou podro-

beny místní jurisdikci, nemůže mezinárodní rozhodčí soud takové ujednání stran pominout. Úmluva o podpoře ochraně investic nabyla účinnosti v roce 1991 a není důkazu o tom, že by nebyla aplikovatelná z důvodu že by právní systém anebo systém soudnictví v Rakousku a České republice byly neúčinné anebo by neprojednávaly nároky cizích investorů v době, kdy smlouva stoupila v platnost. Je otázkou, zda rozhodčí doložka obsažená v úmluvě o ochraně a podpoře investic může být nahrazena jinou rozhodčí doložkou na základě doložky nejvyšších výhod. V důsledku extenzivního výkladu doložky nejvyšších výhod ve prospěch rozhodčí doložky obsažené v jiné úmluvě o podpoře a ochraně investic by byl mezinárodní rozhodčí soud zbaven svého "raison d'être" a pozbyl by tak své pravomoci vzhledem k tomu, že souhlas státu jako strany podrobit se rozhodčímu řízení podle dané úmluvy by nadále neplatil. Pravomoc vedení rozhodčího řízení by zanikla.

Key words: Ad hoc arbitration, Arbitration clause, UNCITRAL arbitration, Bilateral Investment Treaty, Most favored nation clause, Expropriation, Jurisdiction, Rule of exhaustion, Local remedies, The principle of contemporaneity.

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Scope of Application of the Austrian-Czech Bilateral Investment Treaty (BIT)[1]

Article 10 establishes the Treaty's scope of application. The provision of Article 10 *"Application of the Agreement*" stipulates: *"This Agreement shall apply to investments made or to be made in the territory of one of the Contracting Parties in accordance with its legislation by investors of the other Contracting Party after January 1, 1950."*[2]

In accordance with Article 1(2)(a) and (b) of the BIT, the term *"investor",* as it refers to the Republic of Austria, means "*Any natural person having the citizenship of the Republic of Austria and making an investment in the territory of the other Contracting Party."* and *"Any legal entity or partnership under commercial law established in accordance with the laws of the Republic of Austria, having its seat in the territory of the Republic of Austria, and making an Investment in the territory of the other Contracting Party.*"[3]

In accordance with Article 1(2)(a) and (b) of the BIT, the term "*investor*", as it refers to the Czech Republic, means "*Any natural person being the citizen of the Czech (and Slovak Federal) Republic under Czech (Czechoslovak) law, being authorized to make investments under Czech (Czechoslovak) laws, and making an investment in the territory of the other Contracting Party*" and "*any legal entity established in accordance with the Czech (Czechoslovak) laws, having its seat in the territory of the Czech (and Slovak Federal) Republic, and making an investment in the territory of the other Contracting Party."*[4]

Most Favored Nation (MFN) Clause

The most favored nation clause (MFN) is a standard of treatment, not a customary rule of international law, and thus a MFN obligation exists only when a treaty clause creates it. In the absence of a treaty obligation, nations retain the possibility to discriminate between foreign nations in their economic affairs.

The plain text of Article 3(1) is clear: "*Each contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments."*[5]

The MFN clause in this investment treaty does not yield a uniform picture because, in fact, the universe of MFN clauses in investment treaties is quite diverse. This MFN provision *prima facie* is neither restricted in its scope, nor specifically linked to any particular part of the treaty containing it.

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1 Federal Law Gazette for the Republic of Austria, Law No. 513/1991, Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments and Federal Law Gazette for the Czech and Slovak Federal Republic, Law No. 454/1991 Coll., Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments.

2 ibid

3 ibid

4 ibid

5 ibid

MFN treatment under this BIT means that an investor being a party to an agreement, or its investment, should be treated by the other party *"no less favorable"* with respect to a given subject matter than an investor from any third country, or its investment.

The BIT, like many MFN clauses in investment treies, contains specific restrictions and exceptions, which exclude certain areas from its application. Such areas may include *inter alia* regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. Depending on the way these exceptions are drafted, the fact that these limitations are specifically mentioned could be a factor in deciding whether certain other matters are within the scope of a MFN clause.

Article 3(2) of the BIT states as follows: *"The provisions of para. 1 above, however, shall not apply to present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection with a) any membership in an economic or customs union, a common market, a free trade zone or an economic community; b) an international agreement or a bilateral arrangement or national laws and regulations concerning matters of taxation; and c) a regulation to facilitate border traffic."*[6]

It is clear that Article 3 of the BIT expressly states that the MFN obligations are not enlarged. Article 3(2) concerns "*present or future benefits and privileges*" rather than *"treatment"*. The simple fact that these restrictions /limitations are specifically mentioned could not be a factor to grant certain other MFN treatment within the scope of a MFN clause.

Context of MFN

If a MFN clause is to be interpreted, its text and context, and the object and purpose of the treaty containing it need to be considered.

The Preamble of the BIT states: *"DESIRING to develop friendly relations in conformity with the principles of the Final Act of the Conference on Security and Co-operation in Europe, signed on August 1, 1975 in Helsinki, and desiring to create favorable conditions for greater economic cooperation between the Contracting Parties, RECOGNIZING that the promotion and protection of investments may strengthen the readiness to make such investments and thereby make an important contribution to the development of economic relations*,"[7] and does not enlarge the MFN clause by importing *"fair and equitable treatment"*, *"full protection and security"* and an *"umbrella clause"* from another BITs.

Any other standard of the protection cannot be imported into the BIT under object and purpose in connection with the MFN clause.

The rights of the beneficiary with respect to the subject matter are limited in two ways: firstly by the clause itself, which refers to a certain matter, and secondly by the rights conferred by the granting State on the third State.

[6] ibid
[7] ibid

The beneficiary State and/or the *"investor"* may directly claim MFN treatment only for the category of persons or things that receives or is entitled to receive certain treatment or certain favor under the right of a third State (merchants, commercial travelers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) The investor may claim MFN treatment only if it meets the requirements for the category of persons or things that are entitled to receive certain treatment or certain favor under the rights of a third State. The category of persons or things and the relationship of the Claimant are defined by the BIT. Furthermore, the persons or things in respect to which the MFN treatment is claimed must be in the same relationship with the beneficiary State, as are the comparable persons or things with the third States. In addition, the persons or things in respect of which most-favored nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third State (nationals, residents in the country, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).[8]

The Treaty stipulates plainly that *"treatment that is no less favorable"* shall be accorded to *"investors"* and to their *"investments"* than that which it accords to its own investors or to investors of any third states and their investments. If the alleged investments cannot be shown to be *"in the territory"* of Respondent, they are not covered by MFN clause.

An extension to subject matters not covered by the MFN clause is excluded. The MFN clause, in addition, does not combine the MFN obligation with any other standards of treatment as "*fair and equitable treatment*" and "*full protection and security*".

Article 2(1) of the BIT provides that *"Each Contracting Party shall, as far as possible, promote investments made in its territory by investors of the other Contracting Party, permit such investments in accordance with its laws and deal with them fairly and equitably in each case"*.[9]

"Fair and equitable" treatment (of investments) thus does not fall under any MFN clause obligation. It can be said that in Article 2(1) the investor is not mentioned, it means that this provision concerns only an "*investment*". However, even if the investor is not mentioned, it should be obvious that the text relates indirectly to them.

If both *"fair and equitable treatment"* nor *"full protection and security"* are a part of a MFN obligation, the MFN provision does not apply to them nor can the (alleged)

[8] Report of the International Law Commission on the work of its Thirtieth Session held from May 8 to July 28, 1978, document A/33/10, p. 53, Yearbook of the International Law Commission (YILC)-1978, vol. II(2).

[9] ibid

investor legally rely on such a MFN obligation. No other standard of protection can be imported into the BIT under the MFN clause.

Article 2(2) of the BIT expressly deals only with the matter of *"protection"* clearly stating that: *"Investments and earnings yielded by an investment shall have the full protection under this Agreement"*.[10] The obligation of "*full protection*" of the investment is a separate obligation of the State under BIT and, as such, narrow stipulated. No other standard of protection can be imported into the BIT under the MFN clause.

The above applies also to *"expropriation"* which is dealt with by Article 4 which sets separate rights and obligations of the State-Parties or Investors under the BIT.[11] No other standard of protection can be imported into the BIT under the MFN clause.

The same standard applies to the *"umbrella clause"*. The BIT does not contain any "umbrella clause" and Article 7(2) of the BIT is not an "umbrella clause". If the Investor attempts to obtain the benefits of the umbrella clauses of other treaties, Article 7(2) does not provide the benefits that they afford. Again, no other standard of protection can be imported into the BIT under the MFN clause.[12]

Interpretation of Arbitral Clauses

At some stage after having been constituted as well as during the proceedings, the Arbitral Tribunal has to deal with the issue of its jurisdiction. Jurisdiction of the Tribunal arises from the agreement of the parties in the form of arbitral agreement. The first duty of a tribunal which has been called upon to interpret and apply the provisions of a treaty is to attempt to adhere to them in their natural meaning in the context in which they occur.

The arbitral agreement is based on a consensus of the parties to the arbitration because no single party could be forced into arbitration. BITs stipulate an arbitral agreement mostly in the form of an arbitration clause that allows the parties to resolve their future disputes based on the BIT in question as a means of resolution outside of the municipal courts.

Before making use of the arbitration clause, the BIT may require the parties to take their complaint before the municipal court when only a specific issue, such as a dispute over the amount and payment conditions, falls under the jurisdiction of the Arbitral Tribunal.

The Arbitral Tribunal has to follow the arbitration agreement between the parties. If the text of such agreement is clear, there is no place for any interpretation of the will of the parties.

In this regard, rulings of international courts also contain decisions to the effect that where the ordinary meaning of the text is clear and makes sense in its context, there is no occasion to have recourse to other means of interpretation. In the *Phosphates in*

[10] ibid
[11] ibid
[12] ibid

Morocco case, the Permanent Court of International Justice advised that, in case of doubt, an international court should give a restrictive interpretation of a clause in a treaty because such a clause *"must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it."*[13]

However, if the words in their natural meaning are ambiguous or could lead to an unacceptable outcome, then the Court, by resorting to other methods of interpretation, must seek to discover what the parties actually meant "when they used those words".[14] The above is also quoted in an earlier statement of the Court in *the Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations.*[15]

In addition, in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain,*[16] the International Court of Justice drew attention to what it had previously declared in the *Case Concerning Territorial Dispute Libyan Arab Jamahiriya/Chad* (Judgment dated February 3, 1994):

> *"In accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.*"[17]

And finally the ICJ reaffirmed its conclusion in the *Case concerning Rights of Nationals of the United States of America in Morocco.*[18]

Therefore, it is clear that it is not the role of an international court to interpret, revise, or read into treaties what they do not contain, either expressly or by implication, and that the terms (the text) of a treaty must always be adhered to, for the simple reason that a treaty expresses the mutual will of the Contracting States.

If this is the duty of an international court when interpreting a legal text, then the duty of an international arbitral tribunal is the same.[19] If the relevant words make sense in their context, then the matter is resolved.

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[13] *Phosphates in Morocco Case (Italy v. France),* PCIJ, Ser. A/B No. 74, 1938, p. 14.

[14] *Case concerning the Arbitral Award of 31 July 1989 (Guinea- Bissau v. Senegal)*, Judgment of November 12, 1991, ICJ Reports, 1991, para. 48, p. 69.

[15] The *Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports, 1950, p. 8.

[16] *Qatar v. Bahrain*, ICJ Reports 1995 page 18 para. 33.

[17] *Territorial Dispute,* Judgment of February 3, 1994, ICJ Reports 1994, pp. 21-22, para. 41.

[18] Case concerning Rights of Nationals of the United States of America in Morocco, ICJ Reports, 1952, p. 196.

[19] *Wintershall AG v. Argentina,* ICSID case No. ARB/04/14, par. 84.

Arbitration Clause and Its Scope in virtue of Interaction between Article 8 and Article 4 of BIT and MFN

Article 3(1) of the BIT contains a MFN clause which could embody certain references to the requirements of the UNCITRAL arbitration. But Article 3 promises most-favored-nation treatment only in matters of *"investor"* and *"investment"* and makes no provision concerning the arbitration. Throughout the Treaty, this matter is the subject of only two provisions of limited scope, namely Article 4(5), concerning access to the arbitration, and Article 8(1)(2), while Article 8 contains no reference to MFN treatment.[20]

The MFN clause in Article 3 cannot be extended to matters other than those in respect to which it has been stipulated.

The arbitration clause is set out in Article 8 "Settlement of investment disputes". Article 8(1)(2) stipulates that *"Any disputes arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer of obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably between the parties to the dispute" and "If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the Investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL-Arbitration Rules."*[21]

The arbitration clause is clear and unambiguous.

The State-Parties have agreed that "*the investor has the right to have the legitimacy of the expropriation reviewed"*, i.e. the issue to be first referred to the *competent municipal authority*, which prompted the expropriation or it "*has the right to have the amount of the compensation and the conditions of payment*" reviewed "*by an arbitral tribunal according to Art. 8 BIT and only if six months had elapsed without the issue concerning the amount or the conditions of payment having been settled (Article 4(5) in connection with Art. 8(2)*."

The provision establishing the above six-month period provided the competent authority with the opportunity to apply and uphold international law. The proper remedy is thus international arbitration.

Since the State-Parties have agreed that a dispute on expropriation would be referred to the local authority, an international arbitral tribunal could not ignore this requirement established by the parties on any ground – not even on the possible grounds that the Respondent State authority or even the local judiciary was not authorized to issue an "objective" decision on the merits or any similar objections.

[20] ibid
[21] ibid

Any interpretation of a treaty must be made in accordance with the "*effet utile*" principle of each of its provisions – if the BIT were interpreted in any other ways, the Treaty would contain superfluous and useless words. Only an *effet utile* interpretation principle would give full force and effect to all clauses of the BIT.

The former Czechoslovakia (now the Czech Republic) and Austria agreed on including paragraphs (1) and (2) in Article 8 of the BIT. From the date on which it came into force, investors thus could not refuse to comply with those provisions relying on other BITs.

In negotiating the provision of Article 8(2), it is evident that Czechoslovakia and Austria sought an effect which could not be other than that of submitting the dispute to the *Competent Municipal Authority* prior to making an international claim.

The evolution of the negotiations between the State-Parties shows that they envisioned nothing else than the resulting text of Article 8.

Article 8(2) of the *draft* Treaty reads:

"(2) If the difference in opinion under Paragraph 1 cannot be settled within a period of 6 months from the *written notice about this matter and related claims,* the difference in opinion will be settled independently, *even if there is a valid arbitration agreement,* based on a proposal of the Contractual Party or the investor …" For the negotiation regarding the agreement between the Czechoslovak Socialist Republic and Austria on the promotion and protection of investments, one could refer to the unpublicized and unpublished documentation (1989) which is available to the Czech State (former Czech and Slovak Federal Republic, Federal Ministry of Finance), and of which the author has knowledge.

Thus, in the draft Treaty, the State-Parties contemplated a text that gave precedence to the settlement of claims before an international tribunal, even where the disputing parties had recourse to a valid arbitration agreement. In the final version of Article 8, however, the State-Parties eliminated the language whereby a disputant could trump a "valid arbitration agreement" with the international dispute resolution mechanism.

Article 8(2) provides: "If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written *notice containing sufficiently specified claims,* the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the Investor...").[22]

The State-Parties also opted against allowing the grant of jurisdiction to include "related claims." It is thus clear that the State-Parties, by stipulating Article 8 in connection with Article 4, intended to eliminate the possibility that the international forum would take precedence over a local adjudicatory forum as far as the legality of expropriation is concerned, and extend to related claims. As clearly shown, the State-Parties systematically narrowed the range of claims that may be presented to an international tribunal. That intent should be given effect here.

[22] ibid

In this way the *competent municipal authority* of the host State and the investor were given the chance to resolve the dispute without resorting to international arbitration. Conceptually "diplomatic protection" by a State of its own nationals was regarded as one form of invocation of "State Responsibility". Nowadays the responsibility is invoked by virtue of the BIT.

The text of the BIT provides for the right of investor access to UNCITRAL arbitration in the Host State – but the right of access to this kind of ad hoc arbitration is strictly conditioned upon compliance with the provisions of Article 8(2) of the BIT.

It is a general principle of the law of treaties that a third-party beneficiary of a right under a treaty must comply with the conditions for the exercise of the right provided for in the treaty or established in conformity with the treaty.

According to Article 36(2) of the Vienna Convention on the Law of Treaties of 1969, the 'secondary right-holder' under a bilateral treaty (the "investor") who is conferred certain rights, being in no different position from "the third State" (mentioned in Article 36) – must comply with the conditions stipulated for the exercise of the rights provided for in the treaty concerned, which in this case is the "basic" treaty.

The manner in which Article 8 of the BIT is worded (and it is words that determine the intention of the Parties when interpreting a treaty) is apparent – that reference to UNCITRAL arbitration is expressly conditioned upon *inter alia* a claimant-investor first submitting his/its dispute to a competent authority in the Host State, and after a further six month waiting period proceeding to UNCITRAL arbitration.

Therefore, the BIT between Austria and Czech Republic is a treaty which, beyond any doubt, equips foreign investors who are Austrian or Czech nationals with the right of access to international arbitration (UNITRAL) – but this right of access to *ad hoc arbitration* is not provided without any reservation but rather upon the condition of first approaching the competent authority in Austria or in the Czech Republic.

The legitimacy of a condition such as that stipulated under Article 4(5) (e.g. a local-remedies-clause) clearly results from the fact that the States Parties are fully free and autonomous, i.e. they have a discretionary freedom how to regulate the relations amongst them under international law.

Therefore, a local-remedies rule may lawfully be provided for in the BIT – once so provided under the international law, as in Article 8(2) in connection with Article 4(4) and Article 4(5) BIT, it becomes a condition to a Host State's "consent" – which is, in effect, the Host State's "offer" to arbitrate disputes under the BIT, but only subject to acceptance of and compliance by an investor with the provisions of, *inter alia*, Article 8(2); an investor (like the Claimant in a dispute) can accept the "offer" only as so conditioned.

Under the BIT, the Contracting Parties, (i.e. the Republic of Austria and the Czech Republic [former Czechoslovakia)] have been left free to provide (and have specifically provided for) a local-remedies clause before resorting (also) to UNCITRAL arbitration.

Since the Investor (a Czech or Austrian national) may make a claim only under the Austrian-Czech BIT and may not make such claim under any other BIT – it has no option to rely on any other BIT in virtue of the MFN clause but, before exercising its right to resort to UNCITRAL arbitration, it has to comply with the closely correlated conditions mentioned in Article 4(4) BIT simply because such is the expressed will of the Contracting States.

Article 8(2) contains a time-bound prior-recourse-to-local-authority-clause, which mandates (not merely permits) litigation by the investor (for a definitive period) in the domestic forum – which both Contracting Parties have considered to be an appropriate expropriation revision body. The Article mentions what relief should be sought from the domestic authorities, and requires that it should be the same relief that is sought through international arbitration.

Whatever may have been the object of contemplation of the Contracting States when the BIT was agreed upon and adopted between Austria and Czechoslovakia (and there is evidence of this in the present case apart from the text of the treaty – i.e. the BIT), it does definitely indicate a compulsion to comply.

Significance of Article 4(4) in regard to Review of Expropriation

There is an obligation on the part of the investor as a Claimant to comply with all of the paragraphs of Articles 4(4)(5) and 8 [including paragraph (2)] because of the manner in which the text of the entire Article is structured: or to use the language of the Vienna Convention: "the context" of the treaty. Each of the paragraphs – paragraphs (1), (2), (3), (4) and (5) – are interdependent and interlinked.

Article 4 (1) of the BIT states: "*Expropriation measures, including nationalization or other measures having similar consequences, may be applied (…) to investments of investors of a Contracting Party only in cases where these expropriation measures are carried out for reasons of public interest, in accordance with the procedure established under the legislation of that Contracting Party and against compensation*."[23]

Article 4(4) of the BIT stipulates: "The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation."[24]

In the case of bankruptcy the competent municipal authorities in the State of the relevant Contracting Party are the local municipal courts.

Article 8(2) applies only to "the event" mentioned in para (1) taking place and only in the case that "the event" mentioned in Article 4 (4) took place.

It should be concluded that if the "investor" is satisfied with the expropriation or other such measures leading to a similar result, it will not make use of this right, and will not address the competent authority. If it is not satisfied, then the possibility to review the legitimacy of the expropriation is entrusted to the competent municipal

[23] ibid
[24] ibid

authority which in any event must decide on that issue. The investor will have recourse to arbitration only should the authority refuse to decide or not decide. Only then the dispute qualifies as "any dispute" pursuant to Article 4. If the investor fails to address the relevant municipal authority with its request for reviewing the legitimacy of the expropriation, it has no right to sue in a court of arbitration.

Moreover, due to the fact that the "expropriation" in this case arose out of bankruptcy proceedings, the possible remedy is the review under Article 4(4) of the BIT of the legality of court proceedings by the relevant high authority of the court system of the Contracting Party in question.

If a dispute pursuant to Article 4(4) cannot be amicably settled within six months as from the date on which a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the Investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL-Arbitration Rules, while the jurisdiction under the arbitration clause is restricted only to *"the review of the amount and the conditions of payment"*.[25]

Thus, the submission of the dispute to an International Arbitral Tribunal is conditioned upon prior fulfillment of the provision contained in Article 8(2) unless otherwise agreed upon by the parties to the dispute.

The Arbitral Tribunal's competence depends "upon the prior "exhaustion" of local remedies". In the context of BITs, however, even the phrase "exhaustion of local remedies" is now treated (in UN practice) as including also pursuit of time-stipulated remedies in local courts.

Under the general heading: "Exhaustion of local remedies", the UN document entitled "Bilateral Investment Treaties in the mid-1990s" mentions (and elaborates in greater detail) a clause similar to that contained in Article 8(2) of the BIT:

"(d) Exhaustion of local remedies: As has been noted, under customary international law, a home country generally may not espouse a private investor's claim against a host State unless the private investor has first exhausted any local remedies. The question arises as to whether an investor must also exhaust local remedies before invoking a BIT's investor-to-State dispute-settlement mechanism and proceeding against the host country directly. BIT's have answered this question in several different ways. Particularly in the early years of BIT's, a number of them required that the investor should first invoke local remedies by submitting the dispute to the courts or administrative tribunals of the host country. Some BITs that prescribe recourse to local remedies allow the investor to submit a dispute to arbitration under the investor-to-State dispute-settlement mechanism after the dispute has been before the local courts or administrative tribunals for some fixed period of time, even if the local courts or administrative

[25] ibid

tribunals have not concluded their proceedings. This fixed period has varied from as little as three months to as much as two years."[26]

The above quoted UN Publication of 1998 shows that Article 8(2) of the BIT by no means represents a clause unusual in Bilateral Investment Treaties.

There is no reason why an Arbitral Tribunal should not respect a stipulation like that contained in paragraph 2 of Article 8 under which the other Contracting State (in this case, both Austria and Czech Republic) have agreed, on behalf of its nationals, that all disputes raised by them would need to be first taken to courts of national jurisdiction (in this case the national Courts in the Host State) before proceedings are brought before a court of international arbitration. There can be no presumption, as between the Contracting States, that a particular stipulation is *ex facie* oppressive.

According to the principle of contemporaneity, such stipulation has to be shown to be "oppressive" or "impossible to comply with" as of the date on which the relevant Treaty comes into force, or it must be found dispensable or negligible for any other reason.

Article 44 of the ILC's Articles (under the heading "Admissibility of Claims") provides that "the responsibility of a State may not be invoked if…(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted"; the local remedy (i) must be available and (ii) must be effective. But this is a stipulation of international law applicable between States or State entities – it is not applicable in the case of a secondary-right-holder like an investor.

This is made clear in the commentary to Article 44 made by ILC:

"The present articles are not concerned with questions of the jurisdiction of international Courts and Tribunals, or in general with the conditions for the admissibility of cases brought before such Courts or Tribunals. Rather they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *litispendence* or election as they may affect the jurisdiction of one international Tribunal *vis-à-vis* another. By contrast, certain questions which would be classified as question*s* of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies."[27]

The manner in which Article 4(4)(5) and Article 8 of the BIT is worded makes it apparent that consent to UNCITRAL Arbitration is expressly conditioned upon

[26] *Bilateral Investment Treaties in the mid-1990s,* UN Publication, 1998, p. 93

[27] *Yearbook of ILC, 2001*, Vol. II, Part Two, Commentary to Article 44, pp. 120-121. para 1.

claimant-investor, *inter alia*, first submitting their dispute to a competent authority in the Host State, and the right to settlement during a six month waiting period, before it proceeds with submitting the dispute to UNCITRAL arbitration. The language used by the Contracting States in the above Articles of the BIT make sense in their context.

The BIT came into force in 1991 and since then there has been no evidence that Articles 4(4), 4(5) and 8(2) were incapable of being complied with due to the legal system or the judiciary in both States, Austria and the Czech Republic, was not efficient or receptive to claims by foreign investors. The state of the legal system, administration or national courts in the Host State from that date (1991/1995) onwards was of little relevance to "*the principle of contemporaneity*", it means that that the terms of the Treaty have to be interpreted according to the meaning they had (and in the circumstances prevailing) at the time the Treaty was concluded.

Conclusion

The question arises as to whether or not the arbitration clause under the BIT could be replaced by any other clause in virtue of the MFN clause.

The replacement of the arbitration clause by means of the MFN is not allowed. The MFN clause does not expressly stipulate that it also applies to the dispute resolution mechanism; otherwise, it would make it possible to choose and use provisions from various different BITs. If that were true, a host state which has not specifically agreed with such approach could be confronted with a large number of permutations of dispute settlement provisions from various BITs to which it has been the party. Such a chaotic situation – and, in fact, one counterproductive to harmonization – cannot be the presumed intent of the Contracting Parties.

In an UNCITRAL investment dispute under a BIT, every international Arbitral Tribunal is constituted based upon the claims raised by the alleged investor under the BIT concerned in UNCITRAL arbitration. The "offer" to settle the dispute and to arbitrate it, which is stipulated (here) in Articles 8 and 4, is accepted by an investor, as claimant, in that it raises claims in an investment dispute.

When extensively interpreting the MFN clause, at the very moment the Arbitral Tribunal would *import* any other arbitration clause *in lieu* of the arbitration clause that was agreed upon by the States Parties under the respective BIT, the "offer" made by the Contracting State Party in accordance with Articles 4 and 8 would not be accepted and the Arbitral Tribunal's power to settle the dispute applying the arbitration clause contained in the BIT would be invalid.

Further, when extensively interpreting the MFN clause in favor of another arbitration clause taken from another BIT, the international Arbitral Tribunal would be deprived of its "raison d´être" and would not have any jurisdiction because the consent of the State Party to arbitrate under the BIT concerned would no longer be valid. The Arbitral Tribunal's power to arbitrate would be lost.