

**LA FUTURE CONVENTION SUR LES ACCORDS EXCLUSIFS
D'ELECTION DE FOR ET L'ARBITRAGE**

Procédures parallèles et conflits de traités éventuels, notamment avec
la CIRDI et la *Convention de New York pour la reconnaissance et l'exécution
des sentences arbitrales étrangères*

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Parallel proceedings and possible treaty conflicts, in particular
with ICSID and the *New York Convention on the Recognition and Enforcement
of Foreign Arbitral Awards*

prepared by Andrea Schulz, First Secretary

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Summary

In 2002 / 2003 the International Chamber of Commerce carried out an empirical study among member companies concerning business practices relating to choice of court agreements. It was reported that it is common practice for parties to conclude both a choice of court agreement and an arbitration agreement. Moreover, recently a number of arbitral decisions were rendered under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID) which was elaborated under the auspices of the World Bank and has 142 Contracting States. The ICSID tribunals had to decide whether they had jurisdiction although the arbitration agreement coexisted with a choice of court clause.

This paper examines whether there is a need to include additional rules into the future Hague Convention on Exclusive Choice of Court Clauses, either dealing with the risk of parallel arbitral and court proceedings at the jurisdiction stage, or with possible conflicting obligations to recognise an arbitral award under ICSID or the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, and an irreconcilable judgment rendered by the chosen court under the future Hague Convention.

The conclusion is that no additional rules are needed. Both State courts and arbitral tribunals closely scrutinise the validity of the choice of court and arbitration agreement, the real will of the parties and the coverage of the clauses. In most cases the result of such scrutiny is that one of the clauses is not valid (e.g. because it has been superseded by the other, more recent one) or that the "triple identity test" of both clauses covering the same parties, object and cause of action is not met. In the context of ICSID, moreover, where often the arbitration agreement is contained in a bilateral investment treaty ("BIT") between two States, and the choice of court agreement is contained in an investment contract between a private investor and the host State, arbitral tribunals are guided in their interpretation by a number of standard clauses in BITs which regulate the relationship between choice of court and arbitration agreements. The ultimate choice always lies with the investor, and it is therefore considered neither a breach of the ICSID Convention nor of the BIT by the host State to conclude a choice of court agreement.

The paper closely examines the well-documented arbitral case law under ICSID and some scarce court decisions outside ICSID on this issue and concludes that the risk of parallel proceedings is rather small, although such parallel proceedings are not completely excluded. This, however, is also the case for parallel court proceedings because the chosen court under Article 5 of the preliminary draft Convention and a court seised but not chosen under Article 7 can have different views concerning the validity or coverage of the choice of court agreement and both decide to hear the case. Nevertheless, no additional rules were considered necessary to deal with the latter situation. As concerns arbitration, the Convention does not deal with it (Article 2(4)), and Article 5(2) does not prevent a court from staying or dismissing the proceedings under its internal law because of a valid arbitration agreement. This allows States to comply with their obligations under ICSID and the New York Convention to respect a valid arbitration agreement.

At the stage of recognition and enforcement, the risk of irreconcilable decisions is already minimised because it is rather unlikely that there will be parallel arbitral and court proceedings covering the same parties, object and cause of action. Moreover, Article 23 as proposed by the Drafting Committee in Preliminary Document No 28, in particular its paragraph 3, would enable Contracting States to comply with their obligation under ICSID or the New York Convention to recognise an arbitral award, should the exceptional situation arise that both a judgment under the Hague Convention and a conflicting arbitral award are presented for recognition and enforcement.

I. Introduction*

1 In 2002 / 2003, when discussions were taking place about which future direction the Judgments Project should take, the International Chamber of Commerce (ICC) carried out an empirical research among member companies. The aim was to gain insight into commercial practices concerning the use of choice of court agreements. During the presentation of the results to the Informal Working Group on the Judgments Project, it was mentioned that it was common practice to include both a choice of court agreement and an arbitration agreement into a contract drafted. This existing practice raises some questions. The purpose of this paper therefore is to shed light on the following issues:

2 Where there exist both a choice of court agreement and an arbitration agreement, is it necessary to insert any additional rules into the Chapter on jurisdiction of the preliminary draft Convention on Exclusive Choice of Court Agreements in order to avoid a possible conflict?

3 At the stage of recognition and enforcement, could it happen that an arbitral award conflicts with a judgment rendered by the chosen court? Is it necessary and possible to include rules for this into the Chapter on recognition and enforcement of the draft Convention on Exclusive Choice of Court Agreements?

A. General issues

4 In general, it also happens in purely internal cases (which, at the jurisdiction stage, are outside the scope of the preliminary draft Convention on Exclusive Choice of Court Agreements) that parties include both a choice of court agreement and an arbitration agreement into their contract. Nevertheless, published case law on how to resolve such a situation is not very frequent. One reason for this is that arbitral awards are often not made public. But court decisions discussing the issue are not published too frequently, either. From the little that can be found, it can however be concluded that national legal systems have developed mechanisms to resolve such a situation. The courts will normally examine in the first place whether the arbitration agreement would cover the dispute at issue and whether it is valid.¹ In that case, courts would normally defer to arbitration, thereby respecting the choice of the parties. If there is also a choice of court agreement, validity of the arbitration agreement and the interpretation of the will of the parties will be examined particularly thoroughly. If the arbitration agreement is found to be invalid or not to cover the parties or the dispute at issue, the court would examine whether it has jurisdiction, *e.g.* on the basis of the choice of court agreement. Real conflicts will be rare because often, only one of the two clauses is found to be valid and / or to cover the dispute at issue.

5 Where both clauses are valid and could, at first glance, cover the dispute at issue, it seems that courts try to avoid the possible conflict by interpreting what is "the real will" of the parties. Courts might take a closer look at the content of the choice of court and arbitration agreement, taking into account that there are two of them. In an English

* The Permanent Bureau would like to thank Nicola Timmins, former legal intern, for the very valuable research carried out in preparation of this paper.

¹ In a recent English case where the court was faced with both kinds of clauses, the choice of court agreement was ultimately found not to have been validly incorporated into the contract. See *Siboti KS v. BP France SA* [2003] England and Wales High Court (Commercial Court) 1278 = [2003] 2 *Lloyd's Report* 364. Similarly, in a 2002 Dutch case, the choice of court clause in favour of a German court was found to be invalid as to form under Article 17 of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968 (so-called "Brussels Convention"; latest consolidated version in *O.J.* No C 27 of 26 January 1998, p. 1, which today has been largely superseded by the "Brussels Regulation" (*infra* note 104)). The choice of court agreement in favour of a German court conflicted with an arbitration agreement in favour of Dutch arbitration. The Dutch courts were successfully seised for a declaratory judgment that there was no valid choice of a German forum (Hof Leeuwarden, 23 October 2002, No 0100223, *Nederlandse Jurisprudentie* 2003, No 289 (pp. 2383 *et seq.*)).

case² the court was faced with two related proceedings brought by the same plaintiff against the same defendant. One of these proceedings was instituted before the court. It was based on a charter party, which contained a choice of court agreement in favour of the English courts. The other set of proceedings was based on a transportation agreement, which contained an arbitration clause, and was instituted under the ICC Arbitration Rules. In the court proceedings relating to the charter party, the defendant raised issues relating to the transportation agreement both by way of defence and as a counterclaim. The plaintiff's request to stay the counterclaim (deriving from the transportation contract which contained the arbitration agreement) until the arbitral tribunal had determined the dispute concerning the transportation agreement was denied by the court, mainly because the parties had knowingly and deliberately included two different dispute resolution clauses into their two contracts, although the conclusion and execution of these two contracts was closely related.³

6 Sometimes courts also find indications to the contrary, namely where the disputes are not only related but the same: The parties cannot be taken to have agreed to arbitrate the same dispute before two different tribunals.⁴ In this context, it is sometimes held that overlapping clauses should be viewed as mere options, and the exercise of one option (arbitration or jurisdiction) necessarily prevents the same as well as the other party from subsequently making use of the other option concerning the same dispute.⁵ Or the court may find that one agreement was concluded earlier and is superseded by the more recent one. It seems, therefore, that the will of the parties, as interpreted by the courts, is a strong – and normally sufficient – guideline for courts. And although it could happen that one party seizes the chosen court and the other (or even the same party, as in the case mentioned above) an arbitral tribunal, it is likely to happen only in rare cases that both dispute resolution bodies interpret the two clauses to cover the same subject matter, and each body assumes that the clause conferring jurisdiction on it does prevail over the other clause.

7 One purpose of this paper is to examine whether the future Hague Convention on Exclusive Choice of Court Agreements should give instructions to State courts on how to deal with such a situation in an international case. It seems that there is no such need because already now, courts and arbitral tribunals are normally able to deal with the coexistence of an arbitration agreement with a choice of court agreement in national and international cases, and practical reasons do not seem to require a different solution of this issue in the future Hague Convention. The mechanisms developed by courts for the internal cases could also be used in an international case. In this respect, attention is drawn in particular to Article 5, paragraph 2, of the preliminary draft Convention, which states that: "A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in the court of another State." *E contrario*, it may be argued that the court may well decline jurisdiction under its internal law on the ground that there is a prevailing arbitration clause, if that is the result of the interpretation of the will of the parties. According to its Article 2, paragraph 4, the preliminary draft Convention does not deal with arbitration and proceedings related thereto. As the Explanatory Report (Prel. Doc. No 26) states in paragraph 57, the purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration.

² *Bulk Oil (Zug) A.G. v. Trans-Asiatic Oil Ltd. S.A.* [1973] 1 *Lloyd's Report* 129. See also the comment by D. Roughton, "Double trouble, The problem of duplicate proceedings in international arbitration", *Herbert Smith arbitration*, July 2002, p. 1.

³ *Bulk Oil (Zug) A.G. v. Trans-Asiatic Oil Ltd. S.A.* (*supra* note 2) at p. 138.

⁴ See D. Roughton (*supra* note 2), p. 1 *et seq.*

⁵ See D. Roughton (*supra* note 2), p. 1 *et seq.*

B. Possible treaty conflicts

8 Another question is whether a court of a State party to the future Hague Convention on Exclusive Choice of Court Agreements might nevertheless be placed in a situation where it could either comply with an obligation under that Convention, or with an obligation under another treaty in the area of arbitration – either at the jurisdiction stage or at the stage of recognition and enforcement. This situation should of course be avoided. At the jurisdiction stage, Article 5(2) of the preliminary draft Convention in the interpretation mentioned above should exclude a treaty conflict if this interpretation is shared.

9 The answer to this question requires some introductory remarks on arbitration as such. Arbitration is private dispute settlement, as opposed to dispute resolution by State courts. It can be divided into institutional arbitration and *ad hoc* arbitration.⁶ Institutional administration is characterised by an arbitral institution that administers arbitration and provides logistical support. The best-known institution in this area is the International Chamber of Commerce in Paris, which administers arbitration proceedings, supplemented by the “International Court of Arbitration”. The latter accompanies and supports arbitration proceedings at all relevant stages, including the appointment of arbitrators and the review of the arbitral award.

10 Arbitration can further be divided into national and international arbitration, depending on either the nationality of the parties⁷ or the subject matter of the dispute.⁸ The *UNCITRAL Model Law on International Commercial Arbitration*,⁹ in its Article 1(3), combines both approaches. The preliminary draft Convention on Exclusive Choice of Court Agreements, in its Article 1, relies on the residence of the parties, their relationship and all other elements relevant to the dispute, regardless of the location of the chosen court. Therefore it seems clear that it could, depending on the definition of international arbitration used by the State(s) concerned, overlap with both national and international arbitration cases.

11 From another perspective relevant for the present paper, almost all arbitration, even if it concerns parties having different nationalities, or disputes concerning an international subject matter, is “national”: The parties can choose procedural arbitration rules, *e.g.* of the ICC or UNCITRAL, or agree on their own *ad hoc* rules, but their autonomy is limited in two ways: Where institutional rules (*e.g.* those of the ICC) are chosen, these rules also determine to what extent parties may modify them. For the rest, the prevailing opinion today is that the seat of the arbitration, as chosen by the parties, determines the “nationality” of the arbitration including the applicable (State) legal framework setting limits to party autonomy.¹⁰ The arbitration laws of the seat State will govern the proceedings where parties have not chosen different rules or where the law of that seat State restricts or excludes party autonomy. There are only very few exceptions to this rule which, ultimately, links any arbitration proceedings to the internal law of a particular State. One such exception is the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID), which was elaborated under the auspices of the World Bank. Under this Convention, the International Centre for Settlement of Investment Disputes was set up. Its jurisdiction covers disputes between Contracting States and private investors who are nationals of other Contracting States (Article 25 ICSID). Another example of “a-national” arbitration is the Kuala

⁶ See further on this distinction and its details, J.K. Schäfer, “Einführung in die internationale Schiedsgerichtsbarkeit”, *Juristische Ausbildung* 2004, p. 153 (154).

⁷ This is the approach taken by Article 1(1) a) of the (Geneva) *European Convention on international commercial arbitration* of 21 April 1961, 484 UNTS 364.

⁸ This is the approach taken by the ICC Court of Arbitration and, *e.g.*, French national law; see J.K. Schäfer (*supra* note 6), p. 154.

⁹ Available at < www.uncitral.org >.

¹⁰ This is also the approach chosen by Article 1(2) of the *UNCITRAL Model Law on International Commercial Arbitration*. See further J.K. Schäfer (*supra* note 6), p. 157.

Lumpur Regional Centre for Arbitration (KLRCA), which was established by the Asian-African Legal Consultative Committee.¹¹

12 It is neither possible nor necessary to examine the arbitration laws of all States of the world in this paper, in particular because they only set limits to the autonomy of the parties to define their own arbitration rules. The number of variations therefore seems almost unlimited. ICSID, however, provides truly international, autonomous treaty rules concerning certain arbitral proceedings, and a solid body of arbitral awards has been published – several recent ones among them dealing with the relationship between State courts' jurisdiction and the jurisdiction of ICSID arbitral tribunals in cases where both a choice of court agreement and an ICSID arbitration agreement were involved. Therefore, ICSID and its relation with a future Hague Convention on Exclusive Choice of Court Agreements will be examined in more detail in this paper. Another Convention deserving attention for different reasons is the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (hereinafter: New York Convention). This paper will discuss whether there is likely to be an overlap, and whether this could lead to a treaty conflict that has to be resolved.

II. Possible overlap between some specific Conventions on arbitration and the future Hague Convention on Exclusive Choice of Court Agreements

A. Jurisdiction and parallel proceedings

1. The *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (Washington, 18 March 1965)¹²

a) Introductory remarks

13 Under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID), the International Centre for Settlement of Investment Disputes was set up. It provides facilities for arbitration and conciliation for disputes between Contracting States and private investors who are nationals of other Contracting States. It is recalled that, according to Article 2(5) of the preliminary draft Convention, proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto. Therefore, as long as the investment dispute is of a civil or commercial nature, there would be an overlap with the scope of ICSID.

14 Some key Articles of ICSID read as follows:

"Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

¹¹ See Asian-African Legal Consultative Committee (ed.), *Report of the Seventeenth Session held at Kuala Lumpur, 1976*, p. 133; H. Arfazadeh, "New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur", *Journal of International Arbitration* 8 (1991), No 4, pp. 103 *et seq.*; see also J.K. Schäfer (*supra* note 6), pp. 156 *et seq.*

¹² For the text of ICSID see < www.worldbank.org/icsid/basicdoc/basicdoc.htm >.

As at 20 December 2004 there are 142 Contracting States. For a list of Contracting States to ICSID with the date of the entry into force see < www.worldbank.org/icsid/constate/c-states-en.htm > (last visited 22 May 2005). For online decisions and awards see < www.worldbank.org/icsid/cases/awards.htm >.

"Article 26

Consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

"Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, 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 the merits of the dispute."

15 In the cases discussed in this paper there are normally at least three different agreements:

1. The home State of the investor and the host State are party to the ICSID Convention;
2. The home State of the investor and the host State enter into a bilateral investment treaty ("BIT");
3. The investor and the host State enter into an investment contract.

16 ICSID provides a framework for arbitration of disputes concerning private international investment between private investors and host States. Like a few other treaties, *e.g.* the European Convention on Human Rights, it confers rights to be asserted under public international law against a State upon private individuals.¹³ However, ICSID itself does not *require* the States party to ICSID to allow such disputes to go to arbitration; the establishment of the Centre is merely an offer to those (host States and investors) who wish to make use of it. Recourse to ICSID arbitration is entirely voluntary, and the foreign investor is free to waive the right to ICSID arbitration, *e.g.* by entering into a choice of court agreement in the investment contract.¹⁴ However, once the parties have consented to arbitration under the Washington Convention, neither can unilaterally withdraw its consent (Article 25(1) ICSID).¹⁵

17 Recently, a number of decisions rendered by ICSID arbitral tribunals were published which had to deal with coexisting arbitration agreements and choice of court agreements. The following paragraphs will first look into the ICSID decisions in order to identify under which conditions ICSID tribunals assume jurisdiction. Subsequently, it will be examined what impact the criteria identified would have upon proceedings brought before State courts, in particular in relation to the future Hague Convention on Exclusive Choice of Court Agreements.

b) Jurisdiction of ICSID Tribunals

18 For an ICSID tribunal to have jurisdiction consent by the parties to the dispute is required (Article 25(1) ICSID). Although the Convention requires such consent to be in

¹³ O. Spiermann, "Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties", *Arbitration International* 20 (2004), p. 179, at p. 184 and *passim*.

¹⁴ O. Spiermann (*supra* note 13), p. 207.

¹⁵ See on this C. Kehoe, "Dispute resolution through ICSID", *Herbert Smith arbitration*, July 2002, p. 6, and, in further detail, *infra* paras. 25 *et seqq.*

writing, this requirement is interpreted in a very broad sense.¹⁶ It is accepted that consent may be given in one of three ways –

1. By a direct agreement between the host State and the investor (e.g. in the investment contract);
2. By a provision in the host State's investment legislation which is accepted by the investor; or
3. By an offer made by the host State in a treaty (e.g. a BIT), which is thereafter accepted by an investor of the other Contracting State.

19 Traditionally, consent would take the form of an arbitration clause in an investment contract entered into by the parties to the dispute.¹⁷ Nowadays, however, most cases that come before ICSID tribunals are based on unilateral commitments made by host States in their national legislation¹⁸ or, more frequently, in a BIT¹⁹. Such advance consents by governments can be found in about 20 investment laws and in over 900 out of the roughly 2000 BITs, which exist today.²⁰ Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties:²¹ The *North American Free Trade Agreement* (NAFTA),²² the *Energy Charter Treaty*,²³ the *Cartagena Free Trade Agreement*²⁴ and the *Colonia Investment Protocol of Mercosur*.²⁵

20 A unilateral commitment made by the host State in its internal legislation or in a BIT concluded with the home State of future foreign investors is considered to constitute a "standing offer" to submit to ICSID jurisdiction. It has to be accepted by the investor performing some act to perfect consent. This is frequently done by the investor bringing a request for arbitration to ICSID, which is normally considered sufficient to constitute "consent in writing".²⁶

¹⁶ B.M. Cremades, "Litigating Annulment Proceedings. The Vivendi Matter: Contract and Treaty Claims", in E. Gaillard & Y. Banifatemi (eds.), *Annulment of ICSID Awards*, 2004, p. 87 (88 *et seq.*); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction of 27 November 1985 (hereinafter: *Southern Pacific Properties v. Egypt*), 16 *Yearbook of Commercial Arbitration* 16 (1991) (excerpts), at paras. 61 *et seq.*

¹⁷ J. Gill, M. Gearing & G. Birt, "Contractual Claims and Bilateral Investment Treaties. A Comparative Review of the SGS Cases", *Journal of International Arbitration* 21 (2004), p. 397.

¹⁸ This applies to the laws of, e.g., Albania (see *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction of 24 December 1996, 14 *ICSID Review – Foreign Investment Law Journal* 161 (1999), available at < www.worldbank.org/icsid/cases/tradex_decision.pdf >, at pp. 194 *et seq.*), Egypt (see *Southern Pacific Properties v. Egypt*, *supra* note 16, at paras. 61 *et seq.*; further on this case see C. Kehoe (*supra* note 15) at p. 8) and Kazakhstan (S.A. Alexandrov, "Breaches of Contract and Breaches of Treaty. The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*", *The Journal of World Investment & Trade* 5 (2004), p. 555, with further references at p. 576). Consent through the host State legislation is mainly encountered among developing countries in a law offering incentives to investors. See further S.A. Alexandrov (*ibid.*), at p. 575.

¹⁹ C. Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", *The Journal of World Investment & Trade* 5 (2004), p. 231 (231).

²⁰ C. Kehoe (*supra* note 15), p. 8; O. Spiermann (*supra* note 13), p. 179.

²¹ C. Kehoe (*supra* note 15), p. 8.

²² *North American Free Trade Agreement* between Canada, Mexico and the United States of America; signed on 17 December 1992, entered into force on 1 January 1994. Available at < www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42 >.

²³ O.J. No L 380 of 31 December 1994, p. 24.

²⁴ *Free Trade Agreement* between Colombia, Mexico and Venezuela of 13 June 1994, Spanish version available at < <http://comunidad.vlex.com/pantin/g3.html> >.

²⁵ *Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur*, signed on 17 January 1994, original Spanish version available at < www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC1193.HTM >; English translation available at < www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp >.

²⁶ C. Schreuer (*supra* note 19), p. 231; C. Kehoe (*supra* note 15), p. 8; B.M. Cremades (*supra* note 16), p. 89.

21 The cases discussed here have in common that the agreement on ICSID arbitration was contained in a BIT concluded between the host State and the home State of the foreign investor, and the choice of court agreement²⁷ was contained in the respective investment contract concluded between the foreign investor and the host State. The foreign investor resorted to ICSID arbitration, and the defendant host State invoked the choice of court agreement designating its own courts. The ICSID tribunals therefore had to discuss whether they had jurisdiction in spite of the choice of court agreement.

22 As it becomes clear from these decisions, this depends first and foremost on the interpretation of the ICSID arbitration agreement and on the interpretation of the choice of court agreement. Where the agreement to arbitrate is founded on a BIT, there is no uniform solution. Jurisdiction clauses in BITs vary in scope. At one end of the spectrum is a narrow jurisdiction clause that provides only for the settlement of disputes relating to obligations under the BIT – in other words, disputes based on claims for breach of the treaty. At the other end of the spectrum would be a quite broad grant of jurisdiction that takes the form of a clause providing for the settlement of “any disputes arising between a Contracting party and the investor”.²⁸ Recent case law of ICSID tribunals has provided some guidance for certain categories:²⁹

aa) Exhaustion of domestic remedies

23 Sometimes the BIT itself provides clear instructions in that it requires the investor to exhaust domestic remedies (*i.e.* proceedings before the courts of the host State) before recourse to ICSID arbitration is allowed.³⁰ In that case, there is no risk of competing proceedings before courts and ICSID tribunals. On the contrary – the court proceedings are a precondition for the arbitration. This can be explained by the fact that the right to ICSID arbitration, which is conferred upon an individual by the ICSID Convention, is in nature similar to diplomatic protection. It is a right of both the individual and its home State under public international law.³¹ For the home State to grant diplomatic protection to one of its nationals against a foreign State, public international law requires the individual to exhaust domestic remedies before the courts of the alleged infringing State first, thus giving that State the possibility to resolve the problem by its own means. Only if internal remedies fail, the State may be held liable at the international level. Recourse to ICSID arbitration can be influenced by this reasoning: The host State, by submitting to ICSID arbitration (with or without the exhaustion of domestic remedies as a precondition) accepts to be possibly held liable by an individual under public international law, and the home State of the individual (as well as the individual by instituting ICSID arbitration) renounce to the exercise of diplomatic protection under general public international law. The latter is replaced by the specifically agreed ICSID proceedings (see Article 27 ICSID),³² under conditions to be defined by the three parties involved (the host State, the home State of the investor and the investor).

²⁷ In *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, 18 *ICSID Review – Foreign Investment Law Journal* 301 (2003) (hereinafter *SGS v. Pakistan*), the competition was not between an arbitration agreement in favour of ICSID and a choice of court agreement designating the courts of the host State, but between an arbitration agreement in favour of ICSID and another arbitration agreement in favour of national arbitration in Pakistan. See also “Introductory Note” by S.A. Alexandrov, 42 *ILM* 1285 (2003).

²⁸ See for an overview S.A. Alexandrov (*supra* note 18), at p. 573; C. Schreuer (*supra* note 19), at p. 232.

²⁹ It has to be kept in mind, however, that decisions by ICSID tribunals do not bind future ICSID tribunals as precedent.

³⁰ See Article 26, second sentence, ICSID: “A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” See further on this issue C. Schreuer (*supra* note 19), p. 231; B.M. Cremades (*supra* note 16), p. 89; L. Reed, J. Paulsson & N. Blackaby, *Guide to ICSID Arbitration*, The Hague / London / New York, 2004, pp. 57 *et seq.*

³¹ O. Spiermann (*supra* note 13), p. 181.

³² L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), p. 109.

24 In relation to the future Hague Convention on Exclusive Choice of Court Agreements, it can be stated that where the exhaustion of domestic remedies before the courts of the host State is required before ICSID arbitration may be sought, no parallel proceedings before ICSID tribunals and courts of the host State can arise.

bb) Fork in the road clause

25 In addition to the clause requiring the exhaustion of domestic remedies in the host State, as permitted by Article 26 ICSID and found nowadays in particular in older BITs,³³ there are other standard clauses in BITs which make it easier for the Tribunal to determine whether it has jurisdiction in spite of the existence of a choice of court agreement in the investment contract. Some BITs grant access to international arbitration only provided that no decision has been made at first instance in proceedings in the host State's domestic courts.³⁴ Another standard clause is the so-called "fork in the road clause". It means that parties may well include various options of dispute resolution into the various layers of contractual and treaty relations conferring rights and obligations upon them. As soon as one party makes a choice among these options and institutes proceedings in one of the possible fora (State courts, national arbitration or ICSID arbitration, for example), however, this is a "road of no return", and all other options lapse for *both* parties.³⁵ Article 8(2) of the Argentina-France BIT³⁶ provides an example:

"Once an investor has submitted the dispute either to the courts or tribunals of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final."

26 While in case of the "exhaustion of domestic remedies requirement", concurrent proceedings are logically excluded but consecutive proceedings are required, here we have a strict alternative. So parallel proceedings should not arise in this case, either. Clauses of this kind are a common feature in recent BITs, notably those of the United States.³⁷ Under the fork in the road clause, the loss of access to international arbitration applies if the same dispute between the same parties is submitted to the domestic courts or to the administrative tribunals of the host State. Schreuer, a leading commentator on ICSID, points out that not every appearance before a court or tribunal of the host State will constitute a choice under a fork in the road provision. While such disputes may relate in some way to the investment, they are not necessarily identical to "the dispute" referred to in the BIT's provision on investor-State dispute settlement.³⁸ Sometimes ICSID tribunals found that the parties to the disputes envisaged by the two agreements

³³ C. Schreuer (*supra* note 19), p. 239.

³⁴ See C. Schreuer (*supra* note 19), p. 239 with examples in note 47; L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), pp. 58 *et seq.*

³⁵ This approach was applied, *inter alia*, in *Lanco International, Inc. v. Argentine Republic*, ICSID Case No ARB/97/6, Preliminary decision on jurisdiction, 8 December 1998, 40 *ILM* 457 (2001) with Introductory Note by S.A. Alexandrov, *ibid.*, at p. 454 *et seq.* (hereinafter: *Lanco v. Argentina*), at para. 31. See also *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 16 *ICSID Review – Foreign Investment Law Journal* 212 (2001), available at < www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf >, at para. 63. See in detail on "the fork in the road" C. Schreuer (*supra* note 19), pp. 239-249.

³⁶ Available at < www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MAEJ9330021D >.

³⁷ C. Schreuer (*supra* note 19), p. 240.

³⁸ C. Schreuer (*supra* note 19), pp. 241, 245, 247.

on choice of court and arbitration, respectively, were different,³⁹ or that the subject matter was not the same.⁴⁰ In practice, litigation before domestic courts seems to take place most often between sub-entities of both the investor company and / or the host State on issues arising out of the investment contract or only related to it while ICSID arbitration takes place between the foreign investor who is party to an investment contract, and the host State itself.

27 Schreuer summarises the conditions for a determination that the investor has exercised the choice under the fork in the road clause in favour of the host State's courts or administrative tribunals and that, consequently, there is no access to international arbitration, as follows:⁴¹

"1. The domestic proceedings must have been instituted prior to the choice of international arbitration. Typically, the decisive date will be the date at which arbitration proceedings are instituted. If by that date the investor has submitted the dispute to domestic courts or tribunals, the provision will apply. If by that date, the investor has not done so, the fork in the road provision will not operate against arbitration.

2. The dispute before the domestic courts or administrative tribunals must be identical with the dispute in the international proceedings. If the claim before the international tribunal alleges a breach of the BIT, the dispute before the domestic courts or administrative tribunals would also have to concern an alleged breach of a right conferred or created by the BIT. Therefore, if the dispute before the domestic courts or tribunals concerns a different claim, such as a contract claim or an appeal against a decision by a regulatory authority, the fork in the road provision will not apply and the arbitral tribunal will be free to proceed. Complications may arise in cases where several types of claims are brought before the arbitral tribunal – for example, BIT claims and contract claims – and only the contract claims are pending before the domestic courts.

3. The parties in the domestic proceedings must be identical with the parties in the international proceedings. The host State that is to be the respondent in the international arbitration must be the defendant in the domestic proceedings. The foreign investor that seeks arbitration must be the party that has submitted the dispute for resolution to the courts or administrative tribunals of the host State."

28 From the above it becomes clear that, where the instrument conferring jurisdiction on an ICSID Tribunal contains a fork in the road clause, such Tribunal will decline jurisdiction, should the same parties have brought the same dispute already before the chosen court. Thus, in relation to the future Hague Convention on Exclusive Choice of Court Agreements, it can be stated that in these cases, no parallel proceedings before ICSID tribunals and courts of the host State should arise.

³⁹ This was the case, e.g., in *Azurix Corp. v. The Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction, 8 December 2003 (hereinafter: *Azurix v. Argentina*), available at < www.asil.org/ilib/azurix.pdf >, at para. 90, and in *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 21 November 2000, 40 *ILM* 426 (2001) (hereinafter: *Compañía de Aguas v. Argentina*, Award). This part of the award was upheld by the *Ad hoc* Committee at the appeal stage (see *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on annulment, 3 July 2002, 41 *ILM* 1135 (2002); hereinafter *Vivendi v. Argentina*, Decision on annulment, at paras. 79 *et seq.*).

⁴⁰ This was held in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, 17 *ICSID Review – Foreign Investment Law Journal* 395 (2002), available at < www.worldbank.org/icsid/cases/genin.pdf >, at paras. 331 *et seq.*, and in *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, available at < www.worldbank.org/icsid/cases/me_cement-award.pdf >, at para. 71. Both the parties and the subject matter of the dispute were found to be different in *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No ARB/01/8, Decision on Jurisdiction, 17 July 2003, 42 *ILM* 788 (2003), at para. 80; *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, available at < www.asil.org/ilib/Enron.pdf >, at paras. 96 *et seq.*

⁴¹ C. Schreuer (*supra* note 19), p. 248.

cc) BITs lacking specific clauses

29 In the absence of any of the clauses mentioned above, the question arises whether the choice of court and the choice of ICSID arbitration are intended in the alternative, cumulative, or whatever else should be their relationship. Is it likely that both an ICSID tribunal and State courts are seised and, by interpreting the clauses, both assume jurisdiction?⁴² How should State courts and arbitral tribunals deal with this problem?

30 It has to be kept in mind that Article 26, first sentence, of the ICSID Convention, which reads "Consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy" is a rule of interpretation, not a mandatory rule.⁴³ Moreover, where the choice of court clause was not explicitly made exclusive, ICSID tribunals have held that Article 26 does not provide that what may be agreed otherwise, e.g. in a choice of court agreement, excludes ICSID arbitration. In that case, the remedies under the ICSID Convention are not exclusive (from the perspective of ICSID) but neither are those otherwise agreed – again from the perspective of ICSID.⁴⁴ This interpretation could conflict with the future Hague Convention's presumption of exclusivity of the choice of court agreement. It has to be kept in mind that the definition of an "exclusive" choice of court agreement under the preliminary Hague Convention is different. It does not contain any reference to arbitration; the important thing is only that it implies a choice of one or more courts to the exclusion of any other **State** courts. Thus the mere fact that a choice of court agreement under the Hague Convention is exclusive does not yet say anything about its relationship with a possible agreement to arbitrate. Therefore a closer look at the possibility of parallel proceedings is necessary.

31 In the first decision on the relationship between a choice of court and a choice of arbitration, the ICSID tribunal seemed to assume that the open offer of the host State contained in a BIT, to arbitrate under ICSID, would, when accepted by the investor through the opening of arbitral proceedings, supersede a choice of court agreement in an investment contract, *inter alia* because it was (through the acceptance of the investor, expressed by instituting ICSID arbitration), the more recent agreement as compared to the investment contract.⁴⁵ Later decisions have clarified, however, that it is not as simple as that.

⁴² This was indeed the case in *SGS v. Pakistan* (*supra* note 27), but from the case law published this seems to be an absolute exception. The ICSID tribunal asserted jurisdiction over breach of treaty claims (but not for breach of contract claims; see *SGS v. Pakistan*, *supra* note 27, paras. 186 *et seq.*) on the basis of the BIT despite not only the existence of a contractual choice of court agreement but also of ongoing parallel national arbitration proceedings in Pakistan. In defense of this Pakistani arbitration, the Pakistan Supreme Court had even issued an injunction restraining SGS from participating further in the ICSID arbitration, and ordered that domestic arbitration begin. The ICSID tribunal recommended that the contractual arbitration be stayed "until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute, and that award is no longer capable of being interpreted, revised or annulled pursuant to the ICSID Convention" (*SGS v. Pakistan*, Procedural Order No 2 of 16 October 2002, 18 *ICSID Review – Foreign Investment Law Journal* 293 (2003), at 305). Subsequently, in its decision on jurisdiction, the Tribunal withdrew its recommendation to stay the national arbitration but, at the same time, refused an application to stay its own proceedings until the contractual claims had been determined in the national arbitration proceedings (*SGS v. Pakistan*, *supra* note 27, paras. 186 *et seq.*). See also the comments on this case by S.A. Alexandrov (*supra* note 18), pp. 556 *et seq.*

⁴³ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (hereinafter *SGS v. Philippines*), ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, available at < www.worldbank.org/icsid/cases/SGSvPhil-final.pdf >, para. 146; O. Spiermann (*supra* note 13), p. 199.

⁴⁴ *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Decision on jurisdiction, 3 August 2004 (hereinafter: *Siemens v. Argentina*), 44 *ILM* 138 (2005), at para. 181.

⁴⁵ See *Lanco v. Argentina* (*supra* note 35).

32 As the cases discussed below will show, the basic assumption is that an ICSID tribunal always has jurisdiction over an alleged breach of the substantive provisions of a BIT (a treaty claim). A *prima facie* test is applied: if, assuming that the claimant's allegations were correct, this would amount to a breach of treaty, this jurisdictional requirement is satisfied.⁴⁶ On the other hand, a choice of court clause in favour of domestic courts is normally interpreted as not conferring jurisdiction over treaty claims upon domestic courts.⁴⁷ In several cases concerning BITs lacking any specific clauses (e.g. exhaustion of domestic remedies, fork in the road or other clauses yet to be discussed), ICSID tribunals have therefore held that treaty claims under public international law, arising out of the BIT, were assumed to fall under the ICSID arbitration clause while contractual claims arising out of the private investment contract were assumed to be covered by the choice of court agreement contained therein.⁴⁸ Treaty claims, characterised by ICSID tribunals as being governed by public international law, would most likely not fall within the scope of the future Hague Convention on Exclusive Choice of Court Agreements because they are not "civil or commercial" in nature. Concerning treaty claims, there should therefore be no conflict between ICSID arbitration and proceedings governed by the future Hague Convention.

dd) Umbrella clauses

33 Some BITs contain a so-called "umbrella clause" which "elevates" some or all breaches of the private investment contract to violations of the BIT, that is to breaches of a treaty under public international law.⁴⁹ In the BIT, the host State undertakes the obligation to comply with all its obligations arising out of investment contracts, and therefore a violation of the contract with the foreign investor also amounts to a breach of the said clause in the BIT.⁵⁰ It depends on the facts of the specific case and the wording of the provisions in question where the line is to be drawn between contractual breaches that do, and those that do not rise to the level of treaty violations.⁵¹ There is also a view that every breach by the State of a contract with an alien invokes the State's

⁴⁶ *Siemens v. Argentina* (*supra* note 44), at para. 180.

⁴⁷ O. Spiermann (*supra* note 13), pp. 210 *et seq.*

⁴⁸ See, e.g., *Compañía de Aguas v. Argentina*, Award (*supra* note 39), at para. 53, with abstract by B.A. Maric, *ibid.* at p. 425; and the comments by B.M. Cremades (*supra* note 16), at pp. 90 *et seq.*; *SGS v. Pakistan* (*supra* note 27), at paras. 186 *et seq.*

⁴⁹ C. Schreuer (*supra* note 19), at pp. 249 *et seq.*; S.A. Alexandrov (*supra* note 18), at p. 556. J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 403, note 31, state that in a sample of BITs taken from the publication *Investment Treaties* (ICSID ed. 2003), 94 of 236 (about 40%) contained umbrella clauses. Other phrases have also been used to describe these clauses, including elevator clauses and minor effect clauses.

⁵⁰ In *Compañía de Aguas v. Argentina*, Award (*supra* note 39), at the jurisdiction stage the arbitral tribunal held that its jurisdiction was limited to breaches of treaty obligations. Subsequently, when considering the merits the Tribunal found that the proof of the treaty claims against Argentina depended almost entirely on the whether the Province of Tucumán had complied with its contractual obligations *vis-à-vis* the investor. Because the investor and the province of Tucumán, in their investment contract, had agreed on the jurisdiction of the administrative tribunals of that province for contractual disputes, the arbitral tribunal felt obliged to refrain from deciding about the treaty claims. It stated that the investor had the duty to pursue these claims before the administrative tribunals first, as agreed. Only if this did not give him justice, he could resort to ICSID arbitration against Argentina. The Tribunal distinguished this from a requirement to exhaust local remedies and attributed the duty to the agreed choice of court only (*ibid.* at paras. 77 *et seq.*).

This part of the decision was annulled by an *Ad hoc* Committee. Such Committee may annul the award on one of five grounds listed in Article 52(1) ICSID. Here, the *Ad hoc* Committee held, if one attempts a translation into terms used in the context of the preliminary draft Convention on Exclusive Choice of Court Agreements, that the contractual claim arose as an incidental question in the arbitral proceedings on the treaty claim and could therefore be decided incidentally, as a necessary step on the way to the decision on the treaty claim, even though jurisdiction for a decision on the contractual claim in its own right was vested in the courts of the host State pursuant to the choice of court agreement (*Vivendi v. Argentina*, Decision on annulment (*supra* note 39), at paras. 102 *et seq.*). For an even clearer definition of the umbrella clause, see *SGS v. Philippines* (*supra* note 43), at paras. 121 *et seq.*

⁵¹ S.A. Alexandrov (*supra* note 18), at p. 565.

international responsibility⁵² but this is not the view generally adopted by ICSID tribunals. However, the umbrella clause tends to narrow the gap between contract and treaty violations and intends to achieve more than what is already the norm under customary public international law.⁵³ The question therefore is whether, in cases where a claim could be characterised as being based both on the investment contract and on a treaty (the BIT), there could be parallel proceedings before State courts and an ICSID tribunal causing a conflict between the future Hague Convention and ICSID.

34 In *SGS v. Pakistan*, the Tribunal was faced with an investment contract concluded in 1995 between SGS, a Swiss investor, and Pakistan, which contained a clause in favour of national arbitration in Pakistan. The BIT between Switzerland and Pakistan, which entered into force on 6 May 1996, that is after the conclusion of the investment contract, contained a clause in favour of ICSID arbitration and a clause which, according to SGS, elevated all breaches of the investment contract to breaches of the BIT. The Tribunal did not follow this reasoning. It considered its jurisdiction to be limited to treaty claims based upon a breach of a substantive provision of the BIT, no matter whether they were based on the same facts as a contract claim.⁵⁴ The Tribunal stated, moreover, that the “umbrella clause” was not worded clearly enough to “elevate” all contract claims to treaty claims. The reasons given were based on judicial self-restraint and the policy concern not to undermine the forum choice made by the parties to the investment contract.⁵⁵ The decision was widely criticised in doctrine, not so much for its aim and intended effect but for the narrow interpretation given to the umbrella clause which was considered to go against its wording and intention.⁵⁶

35 ICSID tribunals normally try to be consistent with decisions of previous ICSID tribunals⁵⁷ although those do not have a binding effect of precedent, but only six months after *SGS v. Pakistan*, another ICSID Tribunal in the almost identical case of *SGS v. Philippines* came to an opposite conclusion concerning the umbrella clause⁵⁸ and, consequently, its own jurisdiction over treaty claims which arose from contract claims,⁵⁹ while at the same time finding a different way to respect the choice of court agreement. The Tribunal asserted its jurisdiction over the alleged breach of such contractual commitments which, by way of the umbrella clause, also constituted a breach of treaty obligations. However, the Tribunal stated that the umbrella clause did not make “the determination of how much money the Philippines is obliged to pay (...) a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract”.⁶⁰ *SGS v. Philippines* became the first case in which a choice of court agreement was explicitly given effect in respect of ICSID’s jurisdiction:⁶¹ The Tribunal ruled that contractual claims were inadmissible before

⁵² For an overview of doctrine defending this “maximalist approach”, see P. Weill, “Problèmes relatifs aux contrats passés entre un Etat et un particulier”, 128 *Recueil des Cours* 95, 1969, at 134-137. Weill, however, does not seem to share the approach and reports that case law does not normally follow it, either (*ibid.* at p. 137).

⁵³ S.A. Alexandrov (*supra* note 18), at p. 566.

⁵⁴ *SGS v. Pakistan* (*supra* note 27), at paras 186 *et seq.*

⁵⁵ See *SGS v. Pakistan* (*supra* note 27), at para. 168; J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 405.

⁵⁶ See, e.g., S.A. Alexandrov (*supra* note 18), p. 570; C. Schreuer (*supra* note 19), pp. 252 *et seq.*; J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 405.

⁵⁷ For a discussion on this, see *SGS v. Philippines* (*supra* note 43), at para. 97; but also C. Schreuer (*supra* note 19), p. 256, on the difficulty of developing a *jurisprudence constante* through *ad hoc* tribunals of varying composition and in the absence of binding precedent.

⁵⁸ *SGS v. Philippines* (*supra* note 43), at paras. 115, 121, 122, 125.

⁵⁹ *SGS v. Philippines* (*supra* note 43), at paras. 136-155, 162-163.

⁶⁰ *SGS v. Philippines* (*supra* note 43), at paras. 127 *et seq.*

⁶¹ O. Spiermann (*supra* note 13), p. 198.

it due to the existence of the choice of court agreement in favour of two specific courts of the Philippines in the investment contract. It stayed⁶² the proceedings awaiting a determination of the contractual claim (*i.e.* the amount payable by the Philippines to SGS) in accordance with the contractual dispute settlement procedures⁶³ and stated: "The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims."⁶⁴

36 The Tribunal in *SGS v. Philippines* clarified that "treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction."⁶⁵

37 Recently, another ICSID Tribunal equally based its decision on the distinction between contract claims and treaty claims. It held in *Joy Mining v. Egypt* that it had jurisdiction over treaty claims, but all the claims before it fell outside the BIT and the ICSID Convention because there was no "investment". The Tribunal stated that "it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here."⁶⁶ The Tribunal went on to say that, in the absence of an investment and in light of the fact that all the claims involved were contract-based claims, "it is necessary to conclude that in the absence of any ICSID jurisdiction, only the forum selection clause stands. There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction; even less so is there room here to adopt the solution of *SGS v. Philippines*, directing the parties to local courts first and suspending ICSID jurisdiction until that first step is completed."⁶⁷

38 It can therefore be said that the fear expressed by some authors⁶⁸ that the decision in *SGS v. Philippines*, because of the wide interpretation given to the umbrella clause, might change the cautious approach taken by the *SGS v. Pakistan* Tribunal in its respect for the forum choice of the parties, was without reason. In *SGS v. Philippines* and

⁶² In this case, the tribunal drew inspiration from a decision of the tribunal sitting under Annex VII of the *United Nations Convention on the Law of the Sea* (10 December 1982, 21 *ILM* 1261 (1982) = 1833 *UNTS* 3). That tribunal had resolved the competition between the Annex VII tribunal and the possible exclusive jurisdiction of the European Court of Justice (ECJ) by staying its proceedings while the issue was resolved by the ECJ. *MOX Plant (Ireland v. United Kingdom)*, Permanent Court of Arbitration, Order No 3, 42 *ILM* 1187 (2003), at paras. 20–30 and at p. 1199.

⁶³ *SGS v. Philippines* (*supra* note 43), at paras. 136–155, 163, 169–177.

⁶⁴ *SGS v. Philippines* (*supra* note 43), at paras. 134, 153.

⁶⁵ *SGS v. Philippines* (*supra* note 43), para. 154.

⁶⁶ *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, 44 *ILM* 73 (2005) (hereinafter: *Joy Mining v. Egypt*), at paras. 63, 75, 81 *et seq.*

⁶⁷ *Joy Mining v. Egypt* (*supra* note 66), at para. 89. Surprisingly, after having denied ICSID jurisdiction, the Tribunal went even further and examined the forum selection clause which referred the dispute to domestic courts but provided in addition for a separate mechanism of arbitration under the UNCITRAL rules. The Tribunal found that conditions for UNCITRAL arbitration were met, that the option of resorting to Egyptian courts was therefore precluded and that the claimant was "under an obligation to observe the Contract forum selection clause in so far as resort to UNCITRAL proceedings has been agreed to and to abide by the decisions on the merits by the tribunal thus seized of the matter." (*ibid.* at paras. 92, 97 and 99).

⁶⁸ J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 412.

subsequent decisions involving umbrella clauses, ICSID tribunals paid tribute to the choice of court agreement by either staying the arbitration proceedings until the contractual dispute had been decided by the chosen court, or declining their own jurisdiction. So while the ways to uphold exclusive jurisdiction clauses are different, the concern as such seems to be common among ICSID tribunals.

ee) Clauses establishing ICSID jurisdiction over “any disputes relating to investments”

39 It is in principle accepted that ICSID tribunals can also have jurisdiction over purely contractual claims, either based on a contractual agreement or on a clause in the BIT to that effect.⁶⁹ Some BITs refer “any disputes relating to investments” to ICSID arbitration, and this is interpreted as covering both contract and treaty claims.⁷⁰ It will therefore be interesting to examine how ICSID tribunals, having jurisdiction by way of the said clause over any claim relating to an investment, be it treaty-based or contractual, have dealt with the presence of a choice of court agreement.

40 The first body to address this explicitly was a so-called *Ad hoc* Committee, an appellate body established under Article 52 of the ICSID Convention which was requested to annul the award made in *Compañía de Aguas v. Argentina*⁷¹ (at the appeal stage, due to a subrogation, commonly referred to as *Vivendi v. Argentina*⁷²). While the BIT between Argentina and France does not contain an umbrella clause⁷³ elevating breaches of contract to breaches of treaty, it confers jurisdiction upon ICSID tribunals over “any dispute relating to investment”, that is also for claims which do not assert violations of the BIT’s substantive provisions but only breaches of contract.⁷⁴ The *Ad hoc* Committee therefore did not need to distinguish between contract and treaty claims because it had jurisdiction over both, as long as they related to an investment. It nevertheless distinguished between the two types of claim, found the claims at issue to be (also) treaty claims and stated that the existence of a forum selection clause in an underlying contract does not strip an ICSID tribunal of jurisdiction over treaty claims, including treaty claims arising out of the contract. The Tribunal which had jurisdiction over treaty claims that were in fact contract claims elevated to breach of treaty, had the *duty* to decide the incidental preliminary question whether there had been a breach of contract, in order to come to its decision to decide on whether there was a breach of treaty.⁷⁵

41 One author concludes from this that once treaty claims are asserted, treaty-based arbitral tribunals are bound to decide on those claims (provided all other jurisdictional requirements are met) and cannot abdicate this responsibility on the grounds that the treaty claims are intertwined or inextricably linked with contract claims. Neither contractual forum selection clauses nor parallel proceedings in domestic courts or arbitration under such clauses can bar a treaty-based arbitral tribunal from discharging its responsibility to decide on claims for the breaches of the treaty.⁷⁶ This conclusion is

⁶⁹ *SGS v. Pakistan* (*supra* note 27), at para. 161; J. Gill, M. Gearing & G. Birt (*supra* note 17), pp. 398, 412; S.A. Alexandrov (*supra* note 18), at pp. 575 *et seq.*

⁷⁰ See, e.g., S.A. Alexandrov (*supra* note 18), at p. 556; C. Schreuer (*supra* note 19), at pp. 249 *et seq.*

⁷¹ *Supra* note 39.

⁷² *Vivendi v. Argentina*, Decision on annulment (*supra* note 39).

⁷³ J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 402.

⁷⁴ C. Schreuer (*supra* note 19), p. 249.

⁷⁵ *Vivendi v. Argentina*, Decision on annulment (*supra* note 39), paras. 102, 111; see also S.A. Alexandrov (*supra* note 18), at p. 562, in support of this approach with further references.

⁷⁶ S.A. Alexandrov (*supra* note 18), at p. 564.

indeed true, but only for *treaty* claims (which would probably not be “civil or commercial” and therefore not be covered by the Hague Convention). The question remains whether purely contractual claims that do not also amount to a breach of treaty would be heard by an ICSID tribunal if the investment contract contained an exclusive choice of court clause.

42 In response to this question, the *Vivendi* Committee developed the “essential basis test”. It stressed that “In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”⁷⁷ “On the other hand, where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.”⁷⁸ In the same vein, an ICSID tribunal confirmed its jurisdiction over the *treaty* claims of a dispute arising directly from an investment. Although arising out of a contract which contained an exclusive jurisdiction clause, the dispute as formulated by the claimant was considered to be a dispute under the Treaty. The *prima facie* test that, if the claimant’s allegations were correct, this would amount to a breach of treaty, was satisfied.⁷⁹

43 Therefore, it seems that where a contractual claim would be covered both by the choice of court clause and the reference to ICSID arbitration in a widely-phrased BIT, the ICSID tribunal would try to assess whether the “centre of gravity” of the dispute is treaty-based or contract-based, and only exercise jurisdiction if the former is the case. It can therefore still be said that ICSID tribunals try to respect previously agreed dispute resolution clauses, at least insofar as contractual claims are concerned.⁸⁰

c) Conclusion

44 It seems that parallel proceedings before State courts under the future Hague Convention on Exclusive Choice of Court Agreements and arbitral tribunals under ICSID are rather unlikely to arise. A careful application of the so-called “triple identity test” as concerns the same parties,⁸¹ object and cause of action⁸² will often resolve the problem at an early stage, in particular because litigation before domestic courts often involves not the host State as a defendant, but some State agency, while ICSID proceedings are brought against the host State itself.⁸³ But even where all three elements are the same in the disputes concerned, clauses requiring the exhaustion of domestic remedies before ICSID arbitration can be started, or making a choice between State courts and arbitration final and irrevocable (fork in the road), further reduce the potential for parallel proceedings. Finally, in the remaining cases it seems that ICSID tribunals are generally reluctant to accept jurisdiction over purely contractual disputes that do not also amount

⁷⁷ *Vivendi v. Argentina*, Decision on annulment (*supra* note 39), at para. 98. See further on this test L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), at p. 59 *et seq.*

⁷⁸ *Vivendi v. Argentina*, Decision on annulment (*supra* note 39), at para. 101.

⁷⁹ *Siemens v. Argentina* (*supra* note 44), at para. 180.

⁸⁰ *SGS v. Pakistan* (*supra* note 27), at para. 161; J. Gill, M. Gearing & G. Birt (*supra* note 17), p. 411.

⁸¹ The fact that the parties to the choice of court agreement and to the ICSID proceedings were not the same contributed to the decision of the ICSID Tribunal to assume jurisdiction, *e.g.*, in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, 42 ILM 609 (2003) (hereinafter *Salini v. Morocco*), at paras. 30 *et seq.*

⁸² See *Joy Mining v. Egypt* (*supra* note 66), at paras. 74 *et seq.*

⁸³ Whether the acts of the agency can be attributed to the host State is then a question concerning the merits of the arbitration. This was the case in *Compañía de Aguas v. Argentina*, Award (*supra* note 39); see also B.M. Cremades (*supra* note 16), at p. 91.

to treaty claims, and that they normally respect a choice of court agreement⁸⁴ for contractual disputes which is contained in the investment contract.

45 Since the investor can always waive international arbitration by agreeing to a forum or arbitration clause in an investment contract to which the host State is also a party,⁸⁵ the host State would not breach the BIT when concluding the choice of court agreement or relying on it.⁸⁶ This is also because, if the investor subsequently accepts the host State's standing offer in the BIT by requesting ICSID arbitration, this will prevail over the choice of court agreement as far as both cover the same parties, object and cause of action.

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)⁸⁷

46 The widely ratified⁸⁸ 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (hereinafter: New York Convention) first and foremost applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought (Art. I). However, Article II(3) obliges a court of a Contracting State, at what is called the "jurisdiction stage" in our context, to enforce not only an arbitral award but also an arbitration agreement as such: The court of a Contracting State, when seised of an action in a matter in respect of which the parties have concluded an arbitration clause within the meaning of that Convention, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said clause is null and void, inoperative or incapable of being performed. Moreover, Article II(1) requires that each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

47 Following what was said above, the validity of the arbitration clause and, in the affirmative, its coverage of the dispute and the interpretation of what the parties have agreed upon also come first here. The said obligation to "refer the parties to arbitration", according to paragraph 3, does not apply if the court finds the agreement to be null and void, inoperative or incapable of being performed. If the court finds that the arbitration agreement does not cover the parties or the dispute before it, or that it was replaced by a choice of court agreement,⁸⁹ the New York Convention allows the court to exercise jurisdiction because it can be assumed that there will be no arbitral proceedings.

48 If, on the other hand, the court finds the arbitration agreement to be valid, and to

⁸⁴ In *Lanco v. Argentina* (*supra* note 35), at para. 26; *Salini v. Morocco* (*supra* note 81), at para. 27; *SGS v. Philippines* (*supra* note 43), para. 138, the choice of court agreement was found not to override the choice for ICSID arbitration because it represented no "real choice". The concession or investment contract contained a clause submitting any disputes arising out of the contract to administrative tribunals which would anyway have had jurisdiction under the law of the host State, and the jurisdiction of which was neither open to prorogation nor derogation by the parties. Such a "choice of court agreement" was considered to be a declaratory statement of the legal situation under the domestic law of the host State, and the "real agreement", based on the will of the parties, was seen in the choice for ICSID arbitration. See also the "Introductory Note" by E. Gaillard and Y. Banifatemi, 42 *ILM* 606 (2003), and O. Spiermann (*supra* note 13), at pp. 193, 199.

⁸⁵ O. Spiermann (*supra* note 13), p. 207.

⁸⁶ It is worth mentioning that in *Lanco v. Argentina*, the choice of court agreement was held not to be exclusive, and the ICSID Tribunal concluded from this that it did not imply a waiver of the right to ICSID arbitration (see on this O. Spiermann, *supra* note 13, p. 191 for further details). In the preliminary draft Convention, however, "exclusive" means "to the exclusion of any other **State** courts" since the Convention does not apply to arbitration and related proceedings (Article 2(4)). On a possible addition of the words "or other dispute resolution bodies" see *infra* paragraph 53.

⁸⁷ 330 *UNTS* 38, No 4739 (1959).

⁸⁸ As at 24 May 2005, it has 135 States Parties, see < www.uncitral.org >.

⁸⁹ T.T. Arvind, "The Draft Hague Judgments Convention: Some Perspectives from Arbitration", *Netherlands International Law Review* 2004, p. 337, at p. 348, points out that such waiver of an arbitration agreement, under the New York Convention, is covered by the agreement being "inoperative". This word, which appeared in earlier drafts of the Convention on Exclusive Choice of Court Agreements, was however deleted in December 2003.

prevail over any existing choice of court agreement (either because the latter is not valid, or because it does not cover the parties or the dispute, or because it was superseded by the arbitration agreement), the effect of Article II(3) is to create a partial incompetence of the State courts, namely to try the merits of the case. The prevailing opinion is that the duty to “refer the parties to arbitration” does not mean that the court has to impose arbitration, but merely has the duty to stay or dismiss the proceedings before it, and this also only upon request by one of the parties.⁹⁰ Clearly, the will of the parties remains decisive also at this stage.

49 Unlike the ICSID Convention, the New York Convention does not regulate who is the ultimate judge of who is competent – the arbitrator or the State court. Under almost all internal laws the court has the last word on the question whether the arbitrator has competence. Most laws allow the arbitrator to rule provisionally on the plea that he lacks competence and to proceed with the arbitration if he finds that he does have competence. However, the laws differ concerning whether the court can be requested by a party to scrutinise the arbitrator’s view on his competence during the arbitration – which may cause delay in the arbitration – or only after the award is made.⁹¹ In the first case, there is a risk of parallel proceedings,⁹² but these are not on the merits. They concern the jurisdiction issue and will result in a court decision that ultimately decides this question with binding effect also for the arbitral tribunal, thereby avoiding parallel proceedings on the merits.

50 It is said that the absence of a provision in the New York Convention concerning the concurrence of the arbitrator’s view on his competence with a questioning of this view in court during the arbitration is not to be felt as an omission because this can be left to “the prudence of the courts”.⁹³ Others, however, feel that a provision to this effect would have had the benefit of erasing the differences in national law on this point.⁹⁴

51 In the introduction above it was explained that arbitration, with very few “a-national” or “international” exceptions like ICSID or the Kuala Lumpur Regional Centre for Arbitration (KLRC), is governed by procedural rules chosen by the parties and the arbitration laws of the State where the arbitration takes place. This statement has to be slightly expanded in an international context; where, *e.g.*, arbitration in Switzerland and / or court proceedings in the United States were agreed and the United States court is then seised, that court’s procedural law will decide how to deal with the arbitration clause.

52 The arbitral proceedings to which the New York Convention applies are no exception to what was said before concerning a purely internal competition between choice of court and arbitration agreements. Therefore, it can be assumed, as stated above, that arbitral tribunals and State courts have sufficient mechanisms at their disposal to deal with these situations, which will normally avoid parallel proceedings. The obligation under the New York Convention to “refer the parties to arbitration” *where* there is a valid arbitration agreement, confirms this position. *Whether* there is indeed a valid arbitration agreement in a case where there also is a choice of court agreement depends on the application of

⁹⁰ A.J. van den Berg, *The New York Arbitration Convention of 1958*, Deventer / Antwerp / Boston / London / Frankfurt 1981, pp. 129 *et seq.*, 131 *et seq.*, 137 *et seq.*

⁹¹ A.J. van den Berg (*supra* note 90), pp. 131 *et seq.*

⁹² If there is already a court judgment in the same dispute between the same parties when arbitration is sought, the principle of *res judicata* would make the arbitration agreement inoperative; see A.J. van den Berg (*supra* note 90), p. 158.

⁹³ P. Sanders, “The ‘New York Convention’”, *International Commercial Arbitration II* (1960), p. 293, at p. 307.

⁹⁴ See, *e.g.*, A.J. van den Berg (*supra* note 90), p. 132.

rules on formal and substantive validity under national and international law, and ultimately to a large extent upon the interpretation of the “real will of the parties”.

3. The jurisdiction stage – Conclusion

53 The overall conclusion is that Article 5 of the preliminary draft Convention and internal law are sufficient to avoid a treaty conflict between the future Hague Convention and arbitration treaties. Moreover, there does not seem to be too great a risk of parallel proceedings which would require additional rules in the future Hague Convention on Exclusive Choice of Court Clauses. The only way to minimise such risk at all would be to restrict the definition of choice of court agreements covered by the future Hague Conventions to “an agreement (...) that (...) designates (...) the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of any other courts **or dispute-resolution bodies.**” The risk of different views on the validity of the choice of court agreement, however, as it exists already under Articles 5 and 7 for parallel court proceedings, would remain. In light of the rather exceptional nature of the situations described above, and existing practice of courts and arbitral tribunals which has led to reasonable results in most cases so far, this drastic limitation of scope and importance of the future Hague Convention does however not seem to be justified.

B. The recognition and enforcement stage

54 As explained above, although it is unlikely that parallel⁹⁵ proceedings are initiated and pursued until a decision is rendered in each of them, it is not absolutely impossible. For parallel *court* proceedings, this is implicit in the preliminary draft Convention on Exclusive Choice of Court Agreements because the chosen court and the court seised but not chosen might come to different results when applying the criteria for the validity of the choice of court agreement, and the criteria allowing to disregard such agreement under Article 7.⁹⁶ The same can of course happen where an arbitration agreement and a choice of court agreement are at issue and both dispute resolution bodies conclude that they have jurisdiction over the same dispute. Likewise, the interpretation of the “real will of the parties” by the two dispute resolution bodies may differ, thus giving rise to parallel proceedings and ultimately to conflicting decisions.

55 Above, it has been described that this is not all too likely to happen and does therefore not require a rule in the future Hague Convention on Exclusive Choice of Court Clauses at the jurisdiction stage. Consequently, conflicting decisions should be very rare as well. For this reason, the discussion below will focus on possible treaty conflicts, in particular between the Hague Convention on the one hand, and ICSID and the New York Convention on the other hand. What if a court is requested to recognise and enforce a foreign arbitral award under one of these instruments, and at the same time the recognition and enforcement of a foreign judgment between the same parties and

⁹⁵ Where we are faced not with *parallel* but with *successive* proceedings because the BIT requires the exhaustion of domestic remedies before ICSID arbitration may be instituted, this implies that the host State thereby agrees that the ICSID arbitral award shall prevail – both internally and internationally – over a preceding domestic court decision. So these decisions would not be considered irreconcilable, and there would not be a treaty conflict.

⁹⁶ At its meeting from 18-20 April 2005, the Drafting Committee discussed this question with regard to Article 11. The question was whether the duty not to recognise a judgment that had been rendered in contravention of a choice of court agreement should extend to judgments from non-Contracting States only, or also to judgments from Contracting States. The tentative result of the discussion was that Contracting States should not be addressed by Article 11. Their obligations are described in Articles 5 and 7, and it should be trusted that they duly comply with them (see A. Schulz, “Report on the Meeting of the Drafting Committee of 18-20 April 2005 in Preparation of the Twentieth Session of June 2005”, Prel. Doc. No 28 of May 2005, para. 29).

concerning the same dispute is sought under the future Hague Convention on Exclusive Choice of Court Agreements?

1. **The Convention on the Settlement of Investment Disputes between States and Nationals of other States**

56 One particular attraction of ICSID arbitration is the requirement that each Contracting State, whether or not a party to the dispute, is required to recognise an award pursuant to the ICSID Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of that State's courts. The ICSID regime for recognition and enforcement of arbitral awards is much more rigid than other international commercial arbitration regimes,⁹⁷ e.g. the New York Convention discussed below.

"Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

(2) (...).

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

57 Like in Article 9 of the preliminary draft Convention on Exclusive Choice of Court Agreements, "enforcement" in the ICSID terminology does not refer to the actual execution through coercive measures such as seizure etc., but to the act of the requested State which declares the award enforceable, or that the award creditor has the legal right to execute the award.⁹⁸ In the terminology of the Hague negotiations, this would therefore correspond to the declaration of enforceability, the registration for enforcement or the *exequatur*.

58 Under Article 54(1) of the ICSID Convention, all awards shall be *recognised* as binding like a final judgment given in the requested State. *Enforcement* (i.e. the declaration of enforceability) is made mandatory, as far as monetary obligations are concerned. ICSID awards are not subject to any review by the local courts prior to enforcement (Article 54 ICSID). The ICSID Convention contains no grounds for refusal of recognition and enforcement. All objections must be raised during the arbitration, if necessary under the review procedure provided for in the ICSID Convention.⁹⁹ No grounds for refusal of recognition or enforcement may be invoked under internal law, either, at this stage.¹⁰⁰

59 By this self-contained "a-national" system, ICSID awards are sheltered from the scrutiny of national courts until an award must be executed.¹⁰¹ It can therefore be said

⁹⁷ L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), pp. 95 *et seq.*

⁹⁸ L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), p. 95.

⁹⁹ On this review regime, see *supra* para. 40 and L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), pp. 97 *et seq.*

¹⁰⁰ L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), p. 96. It is reported that all these considerations normally remain mere theory since ICSID awards are generally complied with voluntarily by the debtor State – *inter alia* out of concern that non-compliance may have a negative political fallout within the World Bank Community (*ibid.* at p. 107, indicating that out of the over 20 ICSID awards rendered in 2002, only three led to execution proceedings).

¹⁰¹ Enforcement as such (or "execution" in ICSID terminology) is left to the internal law of the requested State (Article 54(3) ICSID) and normally requires the assistance of local courts which issue judgments and / or order attachment of assets of the award debtor. At this "execution" stage, internal law may set time limits, establish requirements as to currency, or require evidence that the award is not subject to annulment. Moreover, the ICSID Convention does not obligate a Contracting State to execute an ICSID award in circumstances where an equivalent final judgment of its own courts could not be enforced. See L. Reed, J. Paulsson & N. Blackaby (*supra* note 30), pp. 95 *et seq.*, 106 *et seq.* As under other conventions, there will probably be different views on whether the public policy exception may be invoked not only at the stage of granting *exequatur* (which is excluded by the ICSID Convention), but also during enforcement proper ("execution"). But even if this controversial approach were accepted, it would require very careful examination in each individual case whether

that from the point of view of the ICSID Convention, there is an absolute obligation to declare an ICSID award enforceable. This raises the question whether the preliminary draft Hague Convention allows the requested State to comply with its obligation under ICSID.

60 From the perspective of the preliminary draft Convention on Exclusive Choice of Court Agreements, under Article 9(1) *f*), the existence of a conflicting *judgment* rendered in the requested State is a ground to refuse recognition and enforcement of a judgment rendered by the chosen court. If the judgment used as a basis to refuse recognition and enforcement was rendered in another State, the test (which is a real one in case of judgments from other Contracting States and a hypothetical one in case of judgments from non-Contracting States) is whether it was rendered in contravention of the Hague Convention. This means, in other words, that an earlier judgment rendered by a court that was (or would have been) allowed to do so under Article 7 of the future Hague Convention is an obstacle to recognising the judgment rendered by the chosen court.

61 Like other instruments on the recognition and enforcement of judgments, Article 9 contains no parallel provision for arbitral awards that might be a reason not to recognise a judgment rendered by the chosen court under the Hague Convention. As concerns the treatment of such situation under the Conventions of Brussels¹⁰² and Lugano¹⁰³ and the Brussels I Regulation,¹⁰⁴ it is held that the rules for judgments rendered in the requested State or capable of being recognised there apply by analogy: The principle of priority as embodied in these instruments is said to provide an appropriate solution for cases where an earlier arbitral award is recognised in the requested State on the basis of its internal law or of a treaty, with or without exequatur. It is held that the award prevails over the later judgment of a foreign State's court.¹⁰⁵ An arbitral award rendered in the *requested* State, on the other hand, is not sufficient to oppose the recognition and enforcement of a foreign judgment.¹⁰⁶

the existence of a judgment rendered in the requested State or to be recognised under the future Hague Convention would reach the public policy threshold at the enforcement stage.

¹⁰² *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968, so-called "Brussels Convention". Latest consolidated version in *O.J.* No C 27 of 26 January 1998, p. 1. Today, it has been largely superseded by the "Brussels I Regulation" (*infra* note 104).

¹⁰³ *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 16 September 1988, *O.J.* No L 319 of 25 November 1988, p. 9.

¹⁰⁴ *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, *O.J.* No L 12 of 16 January 2001, p. 1.

¹⁰⁵ P. Schlosser, "Conflits entre jugement judiciaire et arbitrage", *Revue de l'arbitrage* 1981, p. 371 (391), P.F. Schlosser, *EU-Zivilprozessrecht, Kommentar*, 2nd ed. 2003, No 29 on Articles 34-36 of the Brussels I Regulation; J. Kropholler, *Europäisches Zivilprozessrecht*, 7th ed. 2002, No 59 on Article 35 of the Brussels I Regulation.

¹⁰⁶ P.F. Schlosser (*supra* note 105), No 22 on Articles 34-36 of the Brussels I Regulation; S. Leible in T. Rauscher (ed.), *Europäisches Zivilprozessrecht, Kommentar*, 2004, No 44 on Article 34 of the Brussels I Regulation. This distinction can be explained by the purpose of Article 1 No 4 of the Brussels and Lugano Conventions and the Brussels Regulation, which excludes arbitration from the scope of these instruments because the drafters of these instruments did not want to interfere with existing international instruments on arbitration; see P. Jenard, "Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters", *O.J.* No C 59 of 5 March 1979, p. 1, in Third Chapter, on Article 1, under IV D.; P. Mankowski in Rauscher (ed.) (*ibid.*), No 26 on Article 1 of the Brussels I Regulation; P.F. Schlosser (*supra* note 105), No 23 on Article 1 of the Brussels I Regulation. The position of S.V. Berti, "Zum Ausschluss der Schiedsgerichtsbarkeit aus dem sachlichen Anwendungsbereich des Luganer Übereinkommens", in I. Schwander & W.A. Stoffel (eds.), *Beiträge zum schweizerischen und internationalen Zivilprozessrecht, Festschrift für Oscar Vogel*, Freiburg / Switzerland, 1994, p. 337 (349), according to which an arbitral award rendered in the requested State is also sufficient, has not found wide support.

62 If this reasoning were adopted for the (drafting and) interpretation of Article 9(1) *f* (and *g*), as proposed by the Drafting Committee in Prel. Doc. No 28¹⁰⁷ at para. 37), it seems that a requested State could refuse to recognise and enforce a judgment rendered by the chosen court if it is under an obligation to recognise and enforce an earlier ICSID award between the same parties and concerning the same subject matter.

63 Another, perhaps more appropriate way to solve any possible conflict between treaty obligations to recognise decisions under ICSID and under the future Hague Convention on Exclusive Choice of Court Agreements is to apply Article 23 in its new version as proposed by the Drafting Committee at its meeting from 18-20 April.¹⁰⁸ This solution does not need to draw on analogies but addresses the problem directly and at a more general level. Moreover, it is in line with the purpose of Article 2, paragraph 4, according to which the preliminary draft Convention does not deal with arbitration and proceedings related thereto in order to avoid interference with existing instruments on arbitration.¹⁰⁹

64 The proposed Article 23(4) contains a rule on the relationship with other instruments on the recognition of judgments. However, paragraph 4 does not deal with obligations under other international instruments *not* to recognise judgments given by a chosen court (e.g. because of the obligation to recognise an older judgment of another court or an arbitral award which is inconsistent with the "Hague" judgment). These cases are covered by the proposed paragraphs 1-3:

- Where only States Party to both the Hague Convention and ICSID are involved, ICSID would prevail (para. 1). In case of a duty to recognise an ICSID award and a conflicting Hague judgment, the award would be recognised.

¹⁰⁷ *Supra* note 96.

¹⁰⁸ "Article 23 *Relationship with other international instruments* (as proposed by the Drafting Committee in Prel. Doc. No 28)

1. Except as provided in paragraphs 2 and 4, this Convention shall not affect any international instrument in force in a Contracting State, whether concluded before or after this Convention, unless a contrary declaration is made by the Contracting States bound by such instrument.

2. This Convention shall prevail over any international instrument applicable in a Contracting State, whether concluded before or after this Convention, if the chosen court is situated, or a party is resident, in a Contracting State in which the instrument is not applicable.

[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty concluded prior to the adoption of the text of this Convention[, and in respect of which the Contracting State has made a declaration under this paragraph].]

Alternative version of paragraph 3:

[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty which entered into force for that Contracting State prior to the date on which this Convention entered into force for that Contracting State[, and in respect of which the Contracting State has made a declaration under this paragraph].]

4. Notwithstanding paragraph 2, this Convention shall not restrict the application of an international instrument in force in a Contracting State, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement. [However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]

5. [Notwithstanding paragraphs 2 and 4, this Convention does not affect the ability of one or more Contracting States to apply or to enter into international instruments which, in relation to specific subject matters, govern jurisdiction or the recognition or enforcement of judgments, even if all States concerned are Parties to this Convention.]

6. For the purposes of this Article, "international instrument" means an international treaty or rules made by an international organisation under an international treaty."

¹⁰⁹ See paragraph 57 of the Explanatory Report (Prel. Doc. No 26).

- Under paragraph 2, the Hague Convention claims precedence where the chosen court is situated, or a party is resident, in a Hague State that is not also an ICSID State. Where there is an "older" treaty obligation versus an ICSID State that is not Party to the Hague Convention not to recognise the "Hague" judgment but the ICSID award instead, this would create a treaty conflict. However, this conflict is resolved by paragraph 3:

Example: State A (Party to Hague and ICSID Convention) is requested to recognise a judgment rendered in State B (also Party to Hague and ICSID Convention) stating that State B, which has assets in State A, does not owe anything to an investor who is resident in, and a national of, State C (Hague but not ICSID State). At the same time, State A is requested to recognise and enforce an ICSID award for a sum of money rendered against State B in favour of the investor.

As one of the parties (the investor) is resident in a "Hague State" which is not also an "ICSID State", the Hague Convention would prevail under Article 23(2) as proposed in Preliminary Document No 28.¹¹⁰ This would lead to the recognition of the judgment that State B owes nothing to the investor, which would be irreconcilable with the ICSID award. However, under Article 23(3) as proposed in Preliminary Document No 28, the obligation to enforce the ICSID award would ultimately prevail.

65 In these situations, the proposed Article 23(3) would have the effect that, if a State Party to the future Hague Convention, by complying with its obligations to enforce a judgment under Article 9, would breach an "older" treaty obligation under ICSID, the latter would prevail.

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

66 Like ICSID, the New York Convention obliges Contracting States to recognise and enforce foreign arbitral awards. It also applies to foreign awards resulting from purely domestic arbitration and, provided that no declaration to the contrary is made, to arbitral awards from non-Contracting States.

"Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. (...)"

67 Unlike ICSID, however, the New York Convention contains some grounds for refusing the recognition and enforcement of a foreign arbitral award. Among these grounds, only Article V(2) *b*) can be considered with regard to the situation discussed in this paper. It reads:

¹¹⁰ *Supra* note 96.

"Article V

(1) (...)

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) (...)

b) the recognition or enforcement of the award would be contrary to the public policy of that country."

68 While it could be argued that the effect of *res judicata*, either of a judgment rendered in the requested State itself or of a foreign judgment recognised there, is part of public policy, doubts remain: If this were the case, rules like Article 9(1) *f*) (and *g*), as proposed by the Drafting Committee in Prel. Doc. No 28¹¹¹), which are almost standard clauses in treaties on the recognition and enforcement of foreign judgments, would be superfluous.

69 But, as the discussion of Article 23 above has shown, there is no need to resolve the issue at the level of Article 9 of the future Hague Convention and / or the public policy exception under Article V(2) *b*) of the New York Convention. Article 23 of the future Hague Convention – in particular in the version proposed by the Drafting Committee in Preliminary Document No 28 – resolves, or rather avoids, all possible treaty conflicts.

¹¹¹ *Supra* note 96.