BERICHTE UND URKUNDEN

Decision on Jurisdiction of the ICSID Tribunal in the Case *Československá obchodní banka* v. *Slovak Republic*

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Introduction

The present contribution deals with the decision of the Tribunal of ICSID on Objection to Jurisdiction in Case No. ARB/97/4 *Československá obchodní banka, a.s.* v. *the Slovak Republic*, rendered in Washington, D.C., on May 24, 1999. This decision is very interesting from several points of view. It is the first case before the International Centre for Settlement of Investment Disputes (ICSID) opposing a national of one former socialist country of Central and Eastern Europe and another country of the same region. Both the Czech and Slovak Republics are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (usually referred to as the Washington Convention of 1965 or ICSID Convention), the Czech Republic as of April 22, 1993 and the Slovak Republic as of June 26, 1994.

Secondly, the case is of particular interest because the object of this dispute concerns the repayment of the loan arising from the Consolidation Agreement, which was designed to facilitate the privatization of the Bank and its operation in the Czech and Slovak Republics after their separation. The dispute thus seems to have a close link to the split of the former Czechoslovakia and the distribution of its property, as well as to the ongoing process of privatization of banking sector in the Czech Republic. And, finally, the decision is very important for the interpretation of the State consent to ICSID jurisdiction and the very broad meaning of "investment" that is embodied in the ICSID Convention.

The contribution will be structured into four parts. First of all, I have to briefly present facts and the procedural background of the case. Next, I will focus on

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three key issues as follows: a) consent to ICSID jurisdiction; b) quality of the Claimant as a "national of a Contracting State"; and c) meaning of "investment dispute".

1. Basic Facts on the Dispute

Československá obchodní banka, a.s. (ČSOB), a commercial bank organized under Czech law (Claimant) filed its Request for Arbitration with the ICSID on April 18, 1997, charging the Slovak Republic (Respondent) with a breach of the "Agreement on the Basic Principles of a Financial Consolidation of Československá obchodní banka, a.s." (Consolidation Agreement), which was concluded on December 19, 1993 by the Ministry of Finance of the Slovak Republic, the Ministry of Finances of the Czech Republic, and ČSOB. The Claimant alleged that the breach consisted in the failure of the Slovak Republic to cover the losses incurred by the Slovenská inkasní spol. s.r.o. (Slovak Collection Company), as agreed to in the Consolidation Agreement. It sought fulfilment by the Respondent of its obligations under the Consolidation Agreement and damages for the losses sustained, plus costs. At the outcome of arbitration, the sum was about 13 billion crowns. Up to Summer 1999, the sum amounted to as much as 15,5 billion crowns (i.e. more than 370 million USD). Due to the interests, the sum is higher now.

The Consolidation Agreement provided, *inter alia*, for the assignment by ČSOB of certain non-performing loan portfolio receivables to two so-called "Collection Companies", one to be established by the Czech Republic, the other by the Slovak Republic, in their respective national territories. The Consolidation Agreement also stipulated that each Collection Company was to pay ČSOB for the assigned receivables. The Collection Companies were established by the respective Republics according to the Consolidation Agreement. Thereafter ČSOB and the newly created Slovak Collection Company concluded the "Loan Agreement on the Refinancing of Assigned Receivables" (Loan Agreement), with the effective date of December 31, 1993. Section 7 of the Loan Agreement, entitled "Security", refers to the Consolidation Agreement and declares that pursuant to the latter agreement, "the repayment of the loan including interests thereon is secured by an obligation of the Ministry of Finance of the Slovak Republic". This obligation is confirmed at the bottom of the Loan Agreement where the Minister of Finance of the Slovak Republic, on behalf of his Ministry, "consents to and acknowledges the contents of this Agreement and, in particular, confirms its obligation under Section 7 of this Agreement."

The Claimant based its Request for Arbitration on the "Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments" (Bilateral Investment Treaty or BIT), signed on November 23, 1992, Article 8(2) thereof confers jurisdiction on the Centre to hear this dispute, and on two other grounds (see *infra* sub 2.). In accordance with Rule 6(1) of the ICSID Rules of Procedure

for Arbitration Proceedings (Arbitration Rules), this Tribunal was deemed constituted and the proceedings to have begun on August 20, 1997. The parties were notified by the Acting Secretary-General of ICSID that Andreas Bucher (Swiss), appointed by the Claimant, Piero Bernardini (Italian), appointed by the Respondent, and Thomas Buergenthal (USA), designated as President of the Tribunal by the Centre, had accepted their appointments. On October 6, 1997, the Tribunal held its first session with the parties at the seat of ICSID in Washington, D.C. At this session, the counsel for the Respondent declared that the Slovak Republic considered that the instant dispute was not within the jurisdiction of the Centre and the competence of the Tribunal and would interpose objections to jurisdiction. The President thereupon suspended the proceedings on the merits and fixed the time limits for the written phase of the proceedings relating to jurisdiction (by end of January, April, July and October 1998). The oral hearing on jurisdiction was held in Washington on January 5 to 7, 1999.

2. *Consent to ICSID Jurisdiction*

Under the system created by the ICSID Convention, consent by both parties is an indispensable condition for the exercise of the Centre's jurisdiction under Article 25(1). The Convention only requires that consent be in writing, leaving the parties otherwise free to choose the manner in which to express their consent. The Tribunal referred to the earlier ICSID decision[1] and recalled that "the question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention" (para. 35).

In this case, the Claimant invoked ICSID jurisdiction by pointing to three independent bases of consent. First, the Claimant invoked the Bilateral Investment Treaty (BIT) as an international treaty in force between the two States. Second, the Claimant submitted that even if the BIT had not entered into force as between the two Contracting States, it was binding on the Slovak Republic by virtue of the fact that the Slovak Foreign Ministry, in a Notice published on October 22, 1993 in the Official Gazette of the Slovak Republic, declared that the BIT had entered into force on January 1, 1993. Finally, the Claimant contended that Article 7 of the Consolidation Agreement incorporated the BIT by reference because it provided that "this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Reciprocal Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992." This was said to bind the Slovak Republic regardless of whether the BIT itself entered into force.

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[1] *Amco Asia et al.* v. *Indonesia*, Decision on Jurisdiction of September 25, 1983, 23 I.L.M. 359 (1984).

a) The BIT

The question whether the BIT is in force was relevant in this case since Article 8 of the BIT contains an ICSID arbitration clause.[2] If the BIT entered into force on January 1, 1993 or on some other date, the Slovak Republic would be bound by the consent so given, because Article 8 provides for the settlement of investment disputes at the option of the party initiating the arbitration proceedings, either under the ICSID Convention or the arbitration rules of UNCITRAL. Since the Claimant by its Request for Arbitration submitted the dispute to ICSID, the Claimant would be deemed to have accepted ICSID jurisdiction on April 18, 1997, the Respondent having already unequivocally consented to it. However, the Respondent denied ICSID jurisdiction because the BIT never entered into force. It presented some convincing arguments based on the international law of treaties. Article 12 of the BIT provides that "each Party shall give notice to the other Party of the completion of the constitutional formalities required for this Agreement to enter into force". The Tribunal accepted the Respondent's view, that this language shows that the parties were aware and mutually recognized that the signature of the BIT by the two heads of government (precisely by the Slovak Prime Minister and the Czech Deputy Prime Minister) was not sufficient to bring the treaty into force and that further formalities were required under the respective constitutions. The above quoted stipulation, included in the "Entry into force" provision of the BIT, in the Tribunal's view "must be deemed to have some meaning as required under the principle of effectiveness (*effet utile*)" (para. 39). It may, consequently, not be disregarded as a mere procedural formality not affecting the coming into force of the BIT, which was the Claimant's submission. This is so particularly when the language is read in the light of Article 24(1) of the Vienna Convention on the Law of Treaties (1969). The Tribunal also noted that the Parties agreed that no such exchange of notice had taken place. The documents on file in this case indicated that this was also the position of the Czech Republic.

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[2] Article 8 of the BIT reads as follows:

1. Any dispute which may arise between the investor of one Party and the other Party in relation to any investments made in the territory of such other Party, shall be subject to negotiations between the parties to the dispute.

2. If the dispute between the investor of one Party and the other Party continues after a period of three months, the investor and the Party shall have the right to submit the dispute to either:

a) the International Centre for Settlement of Investment Disputes with special regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and nationals of other States, open for signature in Washington, D.C. on 18 March 1965, provided, however, that both Parties are parties to such Convention; or

b) an arbitrator or an international arbitration tribunal established in accordance with the arbitration rules of the United Nations Organization Commission for International Trade Law. Parties to the dispute may agree in writing upon modifications of such rules. The arbitration award shall be final and binding on both parties to the dispute.

3. The dispute shall be resolved by such agency referred to in Section 2 above as was the first one to which a proposal for the resolution of the dispute was submitted.

The argument of the Claimant relied on the second sentence of Article 12 of the BIT providing that the treaty shall come into force as of the date of the division of Czechoslovakia in the two Republics. The Claimant contended that this provision should prevail over the above-quoted "procedural formalities" calling for the exchange of notices on the completion of the constitutional requirements found in the first sentence of Article 12. On the other hand, the Tribunal accepted Respondent's interpretation which is "more consistent with the requirements of the principle of effectiveness". The provision should be interpreted to mean that once the exchange of notices had taken place, the treaty would be effective as of the date of division, the division being another condition for the coming into force of the BIT (para. 41).

The Tribunal did not review in its decision either the numerous declarations by different authorities of the two States and the expert opinions expressing conflicting views on the entry into force of the BIT, or the question whether the BIT can be characterized as a "Governmental Treaty" or a "Presidential Treaty" according to Czech and Slovak constitutional law and practice. It found it unhelpful to do so. The Tribunal refused, however, the argument of the Claimant which made reference to Article 46 of the Vienna Convention. Under that provision a State's right to invoke the fact that its consent to be bound by a treaty violates a provision of its internal law regarding competence to conclude treaties is limited to cases in which such violation was manifest, that is, "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". However, this provision deals with the "Invalidity of Treaties", whereas the Slovak Republic claimed that the BIT never came into force due to the non-compliance with Article 12 (para. 40). The Tribunal accordingly held that "the uncertainties relating to the entry into force of the BIT prevented that instrument from providing a sound basis upon which to found the parties' consent to ICSID jurisdiction."

b) The Notice

The second argument of the Claimant was that the BIT was binding on the Slovak Republic by virtue of the fact that the Slovak Foreign Ministry, in a Notice published on October 22, 1993 in the Official Gazette of the Slovak Republic, announced that the BIT had entered into force on January 1, 1993. The Claimant considered the publication to constitute a sufficient basis upon which to found the Slovak Republic's consent to ICSID jurisdiction, even if the BIT itself did not enter into force. Respondent, on the other hand, contended that the publication of the BIT in the Official Gazette did not result in its entry into force, nor give that treaty any other legal effect under Slovak law. It should be noted that ICSID practice indicates that the exchange of written consent required for ICSID jurisdiction can be satisfied not only by bilateral investment treaties, but also by other forms of acceptances. For example, many investment laws of developing countries provide for the State's acceptance of ICSID jurisdiction. The aforemen-

tioned laws differ from the present case in that the alleged consent by the Slovak State was not contained in a domestic legislative act but in a Notice of the Ministry, announcing that the BIT had entered into force on January 1, 1993. Even if the Notice were to be characterized as a unilateral declaration by the Slovak Republic, it still needs to be asked whether it was "the intention of the State making the declaration that it should become bound according to its terms", as required by the principles of international law. In the Tribunal's view, the Slovak Republic's intention to be bound by the treaty through the Notice has not been established because, in particular, the entry into force of the BIT appears to have been conditioned on an exchange of notices which did not take place (para. 48).

The Tribunal next turned to the question whether the Slovak Republic was estopped because of the Notice from denying that it was bound by the arbitration offer under the BIT. The Tribunal did not give an affirmative answer. An essential element of estoppel is that "there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement".[3] However, the Claimant nowhere alleged that it had been misled by the Respondent. Instead, it is clear from a drafting history of the Consolidation Agreement that it had not relied on the BIT being in force. In the draft, prepared after the date of the Notice, ČSOB initially proposed arbitration in Prague and referred to the BIT "after it is ratified".

c) The Consolidation Agreement

The third submission of the Claimant was that the consent to ICSID jurisdiction was satisfied by Article 7 of the Consolidation Agreement which incorporated the BIT by reference, regardless of whether the BIT itself entered into force. The Respondent submitted that the reference to the BIT was made in the context of a choice-of-law provision, with both Czech law and the BIT equally governing the interpretation of the contract. Since the BIT never came into force, the reference to it should be disregarded. The Tribunal examined the negotiating history of the provision. The documents submitted by both parties show that the Consolidation Agreement was subject of various drafts due to changes requested by Respondent. ČSOB proposed various drafts in the period between November 15 and December 17, 1993, including a governing law provision referring to Czech law only and an arbitration clause referring disputes to the Arbitration Tribunal of the Chamber of Commerce and Industry in Prague. However, this reference was not accepted by Respondent. After further revisions the parties agreed to a final draft, which included the following provision: "This agreement shall be governed by the laws of the Czech Republic and the Treaty on the promotion and mutual protection of investments between the Czech Republic and the Slovak Republic after it is ratified." The Consolidation Agreement made no express references to any method of dispute settlement, but before it was signed on December 17/19,

[3] Cf. I. Brownlie, Principles of Public International Law, 4th ed., 1990, 641.

1993, the above provision was amended by deleting the words "after it is ratified" and by replacing it with the date of the signature of the BIT.

The negotiating history indicates that the issue of the dispute settlement method had been discussed by the parties and that the proposal to resort to domestic arbitration in the Czech Republic had been rejected by the Slovak party. Moreover, the provisions of the BIT were well known to the negotiators for both parties. The Tribunal concluded, therefore, that "by referring to the BIT, the parties intended to incorporate Article 8 of the BIT by reference into the Consolidation Agreement, in order to provide for international arbitration as their chosen dispute-settlement method" (para. 55).

3. Is the Claimant a National of a Contracting State?

The Respondent also challenged the jurisdiction of the Centre on the ground that the Claimant did not meet the requirement of Article 25(1) of the ICSID Convention, which provides that the dispute must be between a Contracting State and a national of another Contracting State. According to the Respondent, the dispute was between two Contracting States because a) the Claimant was a state agency of the Czech Republic rather than an independent commercial entity; and b) the real party in interest to this dispute is the Czech Republic.

a) National of Another Contracting State

Although the concept of "national", as the term is used in Article 25(1), is in Article 25(2) declared to include both natural and juridical persons, neither term is defined as such in the Convention. Standing alone, the Respondent's submission that some 65 % of ČSOB's shares are owned in one form or another by the Czech Republic and some 24 % are owned by the Slovak Republic could demonstrate that ČSOB was a public sector entity rather than a private company. However, the test, accepted by both parties to this dispute, has been formulated as follows: "... for the purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function".[4]

In the Respondent's view, the ČSOB has served as agent or representative of the State to the international banking and trading community, its subsequent reorganization has not changed its status and, moreover, the dispute arose out of the functions the bank performed in that capacity. In fact, the non-performing receivables, which became the subject of the Consolidation Agreement and played a role in this dispute, had grown out of ČSOB's earlier lending activities during the State's non-market economy period. In support of its contention, the Respondent next

[4] A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 135 Hague Recueil des Cours, 1972, 354–355.

submitted that the ultimate goal of the Consolidation Agreement was the privatization of this bank.

In response to these arguments, the Tribunal concluded that, notwithstanding the fact that ČSOB was state-controlled and that the underlying dispute arises out of the "command-economy" era, the ČSOB's conduct was essentially commercial, and that ČSOB was therefore not acting as an agent of the Czech State. That is because, in the Tribunal's view, "the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, ČSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature" (para. 20).

b) Real Party in Interest

As one of the important arguments against ICSID jurisdiction, the Respondent also pointed to two assignments, dated April 24, 1998 and June 25, 1998, which ČSOB concluded with the Czech Ministry of Finance. These assignments, according to the Respondent, transformed the Czech Republic (the assignee) into the real party in interest for this arbitration by relieving the bank of the economic risk arising from the claims relating to the Slovak Collection Company receivables. The substance of the second instrument (and it superseded the first assignment of April 24, 1998) is as follows: ČSOB agrees to assign to the Czech Republic all claims ČSOB has against the Slovak Collection Company relating the receivables transferred to the latter under the Loan Agreement as well as the claims ČSOB has against the Slovak Republic under the Consolidation Agreement. The specified "consideration" which assignee is required to pay assignor consists of an amount equal to 90% of the nominal value of the receivables as of December 31, 2002. This payment is to be made within three days following the termination of the arbitration proceedings, but no earlier than the above-mentioned date. If the arbitration should not be completed by December 31, 2002, the assignee is required to increase that amount to a "deposit" of 100% of the agreed upon nominal value of the receivables. On the other hand, if the assignor should receive any payment in settlement of the receivables, the consideration is to be reduced by 75% of the amount so received.

The Tribunal decided, however, that since the Claimant instituted the arbitration proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effects the assignments might have had. It pointed out that "the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted" (para. 31). But even if the Tribunal were to accept the Respondent's argument, this case would not have to be dismissed for lack of jurisdiction. In any event, the second assignment does not deprive the Claimant of an interest in the outcome of the case because the assign-

ment becomes effective only after these proceedings terminate and because the assignor remains entitled to a share (either 25 or 10 %) of the amount received by the assignee (para. 32).

4. Legal Dispute Arising out of an Investment

The third set of the Respondent's objections challenged ICSID jurisdiction on the ground that the dispute between the Parties was not a "legal dispute arising directly out of an investment" as required by Article 25 of the Convention. The Slovak Republic first stressed the political nature of the dispute and its close link with the dissolution of the former Czech and Slovak Federal Republic. However, in the Tribunal's view, the ČSOB's claim is based on Article 3 of the Consolidation Agreement and does not seek a determination relating to the division of assets and liabilities between the two Republics. While it is true that investment disputes frequently have political elements, "such disputes do not lose their legal character as long as they concern legal rights or obligations or the consequences of their breach. Given these considerations, the Tribunal is satisfied that the ČSOB's claim is legal in character" (para. 61).

The Slovak Republic also based its objection on the ground that the dispute in this case was not related to an "investment" and, moreover, that it did not arise "directly" out of an investment within the meaning of Article 25(1) of the Convention. According to the Tribunal, the Convention does not define the term "investment" and various proposals to define it during the drafting negotiations failed. Therefore, investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation is also found in the first paragraph of the Preamble to the Convention which declares that "the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein".

The Slovak Republic submitted that loans as such do not qualify as investments under Article 25(1) of the Convention, nor under Article 1 of the BIT. The Tribunal considered, however, that the broad meaning of investment is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. The contractual scheme embodied in the Consolidation Agreement shows that the ČSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from other transactions involving the restructuring of the ČSOB. In the Tribunal's view, "the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of ČSOB in both Republics. This undertaking involved a significant contribution by ČSOB to the economic development of the Slovak Republic within the meaning of the Convention" (para. 88).

In this context the Tribunal pointed out that the parties to the Consolidation Agreement referred to "the special position and role of the ČSOB in managing the central foreign exchange source for both Republics and in performing foreign

banking transactions, and the extraordinary role that ČSOB plays in the economy of both Republics ..." (Article 1). According to Article 5 of the above Agreement, "the development of ČSOB in the Czech Republic and in the Slovak Republic shall reflect the needs of the Company and the interest of the shareholders in maximizing the value of ČSOB." The Tribunal also noted that although the ČSOB's loan did not cause any funds to be moved in the territory of the Slovak Republic, a transaction can qualify as an investment even in the absence of a physical transfer of funds.[5] The Tribunal concluded that this must have been also the view of the parties when they accepted a reference to the BIT in Article 7 of the Consolidation Agreement. The contrary conclusion, the Tribunal said, would deprive this reference of any meaning (para. 89).

The Tribunal concluded, accordingly, that the ČSOB's claim and the related loan facility were closely connected to the development of ČSOB's banking activity in the Slovak Republic and that they qualified as investments within the meaning of the Convention and the BIT. For all the above reasons, the Tribunal unanimously decided that this dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

5. Conclusions and Perspectives

This Decision on Jurisdiction is, in fact, more than a simple jurisdictional ruling. While considering the meaning of investment, the Tribunal made a thorough analysis of the legal instruments involved in this dispute, in particular the Consolidation Agreement and the Loan Agreement, and came to the conclusions on the nature of the transactions. That is why some reflections may be presented in a form of preliminary conclusions. On the one hand, the case seems to confirm the relevance of general international law to the field of international investments disputes. Like in other areas of international economic law (e.g. WTO Dispute Settlement Body), the application of the law of treaties has proved to be crucial in ruling on the objection to the BIT as a basis for consent to ICSID jurisdiction. The Tribunal took a balanced approach and rightly refused to accept the BIT or an alleged unilateral act (the Slovak notice) as a valid legal basis. On the other hand, the Tribunal extended the rules of interpretation embodied in the Vienna Convention on the Law of Treaties to the Consolidation Agreement (a kind of State contract) and came to the conclusion of the incorporation of an arbitration clause by reference to the BIT.

As to the second objection, the Tribunal confirmed that the nature the Bank's activities (essentially commercial rather than governmental) should prevail over the State ownership as well as over the ultimate goal of the Consolidation Agreement (to facilitate the privatization which involves the exercise of governmental functions). ICSID thus confirmed the earlier interpretation of the meaning of

[5] See *Fedax N.V.* v. *Republic of Venezuela*, Decision on Objections to Jurisdiction, July 11, 1997, 37 I.L.M. 1378 (1998), at para. 41.

Article 25 para. 1 ("national of another Contracting State"). The only new step may be seen in the extension of ICSID jurisdiction also on the privatization and pre-privatization activities in the countries transforming their former command economy into a market economy.

The main contribution to the development of ICSID law seems to be in a very broad notion of investment. It is a well known fact that the ICSID Convention does not define the term "investment" and this lack of definition was deliberate.[6] As explained in the Report of the Executive Directors of the World Bank: "No attempt was made to define the term 'investment' given the essential requirements of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."[7] Although several distinguished authors supported a broad approach to the interpretation of the term "investment", until the mid-1990s the practice of ICSID has not proved the acceptance of loans and other credit instruments as investments. As pointed out by Ibrahim Shihata, "notably missing from the above inventory of disputes submitted to the Centre are disputes arising out of loan agreements".[8]

This situation changed in the 1990s. After some decisions concerning the ICSID jurisdiction over loan contracts within the context of an investment operation, the landmark case seems to be *Fedax N.V.* v. *Republic of Venezuela*,[9] a case concerning certain debt instruments (promissory notes) issued by the respondent state and assigned by way of endorsement to the claimant company. In fact, the Tribunal in the ČSOB case referred at several occasions to this authority. However, justified may be the decision on jurisdiction in the particular case, it nevertheless raises an issue of general nature. The development of arbitration risks diluting the notion of investment into the notion of property and the notion of investment operation into that of transaction. Such a dilution would be dangerous because it could make from treaties on protection of investments a kind of instrument on protection of any property of foreigners.[10] Too broad interpretation of the concept of "invest-

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[6] Cf. A. Broches, The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, Columbia Journal of Transnational Law 5, 1966, 261–280, at 268: "During the negotiations several definitions of 'investment' were considered and rejected. It was felt in the end that a definition could be dispensed with 'given the essential requirement of consent by the parties'. This indicates that the requirements that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction."

[7] Doc. ICSID/2, 1 ICSID Reports, 1993, 28, para. 27.

[8] I.F.I. Shihata, Towards a Greater Depolitization of Investment Disputes: The Roles of ICSID and MIGA, ICSID Review – Foreign Investment Law Journal 1, 1986, an updated version published as off-print by ICSID, 1992, at 8.

[9] Case No. ARB/96/3, op. cit. 6.

[10] Cf. D. Carreau/P. Juillard, Droit international économique, 4th ed., L.G.D.J., Paris, 1998, 399–400: "Une telle dilution serait dangereuse: elle déséquilibrerait l'édifice conventionnel en privilégiant l'obligation de protection, qui, normalement ne devrait s'appliquer qu'aux seuls investissements, pour la transformer en une sorte d'assurance contre tous les risques qui peuvent menacer les bien des étrangers. Il y aurait là comme une nouvelle illustration du proverbe: 'qui trop embrasse, mal étreint'."

ment" used by some recent arbitral tribunals could also discourage states from giving consent to ICSID arbitration and thus even undermine a success of this institutional mechanism for settlement of investment disputes.

As to the case of the ČSOB, it is clear that the decision on jurisdiction may somehow prejudge the possible future decision on the merits. However, it follows from the circumstances of the case, the successful privatization by the Czech Government of the Bank which was sold to the Belgian investor (KBC Brussels) and the ongoing negotiations in which the minority shareholder (the Slovak Republic) is seeking to sell its part of the ČSOB to the same investor, that there may not probably be any future decision by the Tribunal in this case. On the contrary, it seemed, at least in July 1999, to be very likely that a friendly settlement, based on the payment of the Slovak loan from money to be received as a price of 24,13 % shares of the ČSOB, would be reached in a near future.[11] To date, however, the negotiations have been unsuccessful. Therefore both the Tribunal's decision on the merits and an agreed friendly settlement are possible outcomes of the dispute.

[11] Cf. information in MF DNES, http://www.idnes.cz/ ... ekonomika (26.7.1999).