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INSTITUTE OF LAW STUDIES

XXVIII

POLISH YEARBOOK
OF INTERNATIONAL LAW

2006-2008

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OF INTERNATIONAL LAW

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DEAR READER,

It is our pleasure to present you – although with a delay – a new volume of the Polish Yearbook of International Law, covering years 2006–2008. Because of organizational difficulties (including certain changes within the Board of Editors) we were unable to publish the Yearbook regularly. We have decided therefore to edit this volume without further hesitation. Exceptionally you do not find our usual sections like book reviews or Polish practice in international law – the Editors will take care to include the most important examples of the practice into following volumes.

On behalf of the Board of Editors we would like to promise that we shall do our best to publish the following volumes on time. We shall be pleased to call all potential authors to provide us with proposals of papers for publication. Every submitted article will be carefully examined and considered for including into one of the forthcoming issues of the Yearbook. We thank you in advance for your interest and cooperation.

Respectfully,

Prof. Dr hab. iur. Władysław Czapliński

Director, Institute of Law Studies

Polish Academy of Sciences

Editor, Polish Yearbook of International Law

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ul. Kossaka 72, 85-307 Bydgoszcz
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LIST OF THE AUTHORS OF THE CURRENT ISSUE OF POLISH YEARBOOK OF INTERNATIONAL LAW

Natalia Buchowska, Dr iur., lecturer at Adam Mickiewicz University in Poznań, Faculty of Law and Administration, Chair of International Law and International Organizations. Main research subject area focuses on law of international organizations and particularly law –making competences of international organizations. Also interested in areas of customary international law women's rights.

Grzegorz Domański, has been a partner in Domański Zakrzewski Palinka company since 1997. He is a professor of law at the Management Faculty of Warsaw University. He specialises in issues related to civil and commercial law, securities, privatisations, and in domestic and international arbitration. He is an arbitrator in the Arbitration Court at the Polish Chamber of Commerce.

Izabela Gawłowicz – Ph. D. holder in public international law, assistant professor in International Law Department, Faculty of Law and Administration, Szczecin University; Bologna Process and ECTS Faculty Coordinator, International Law Association Member. Main areas of interest: diplomatic and consular law, diplomatic protection, international protection for refugees, international criminal jurisdiction, human rights protection

Łukasz Gruszczyński is a graduate of the Jagiellonian University (M.A., 2000) and the Central European University (LL.M., 2002). He also holds a Ph.D. from the European University Institute (2008). His research interests relate to international trade law, European law and risk regulation, both on international and national level. Currently he works as a research fellow at the Institute of Law Studies of the Polish Academy of Sciences. His Ph.D. thesis will be published in 2010 by Oxford University Press.

Paweł Grzegorzcyk, Dr. iur., is university lecturer at Adam Mickiewicz University, Poznań; Faculty of Law; Department of Civil Procedure, a member of Research and Analysis Office at the Supreme Court of Poland, appointed to work in Civil Chamber, specialized in international and constitutional problems of civil procedure.

Piotr Łaski – Professor in public international law, the Head of the International Law Department, Faculty of Law and Administration, Szczecin University; International Law Association Member. Main areas of interest: the territory in public international law, the state's responsibility and sovereignty in public international law.

Piotr Milik is a doctor of international law, assistant professor at the Warsaw University, his researches concentrate on the problems of international criminal law, especially functioning of International Criminal Court and another criminal bodies as hybrid courts constructed by UN.

Pavel Svoboda – The author is senior lecturer at the Law Faculty, Charles University in Prague and ambassador (permanent representative of the Czech Republic to the Council of Europe).

Daniel Šmihula Dr.iur. is a Slovak lawyer and political scientist. He graduated from Medical Faculty (1996, MUDr.) and Law Faculty (2001, Mgr.) of Comenius University in Bratislava (Slovakia). From 1998 to 2001 he was a student of the Society for Higher Learning (main subject: International relations). In 2002 became a doctor of law in international law (JUDr.). In 2001–2004 he was a PhD – student of the Institute of Political Science of SAS in Bratislava (the main subject: International relations) and in 2002–2008 a postgraduate student of the Law Faculty of the University of Vienna in Austria (Doctor iuris in European law). Since 2002 he has been an employee of the Government Office of the Slovak Republic and a researcher of the Institute of Political Science of the Slovak Academy of Science. He is also a University teacher at the University of Central Europe in Skalica (Slovakia). The main scope of his research activity are human rights, legal status of national minorities, rules of the international system and violence in international relations.

Marek Świątkowski, Dr iur., has been a partner in Domański Zakrzewski Palinka company since 2006. He is a graduate of the Faculty of Law and Administration at Warsaw University. He practises in the corporate advisory area, specialising in mergers and acquisitions, joint ventures, commercial contracts and foreign investment in Poland.

Karolina Wierczyńska, Dr. iur., a graduate of the Gdańsk University, holds the Ph.D from the Polish Academy of Science. Currently works as the assistant professor at the Institute of Law Studies of the Polish Academy of Sciences. Her research interests relate to the question of human rights, subjects of the international law and also individual criminal responsibility and the responsibility of the state.

Natalia Buchowska* ■

THE ISSUE OF NULLITY OF LAW-MAKING RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

INTRODUCTION

International organizations with law-making powers when exercising their competence to make law directed to their member states are obliged to operate in conformity with the mandate entrusted to them by their founding treaties. An organization's statute should specify the objective scope of legislative powers, designate a body or bodies competent to issue legal acts, specify the procedure according to which law is made by the competent body or bodies, and possibly delineate the form and character of legal acts. If a law-making resolution is issued in conformity with the provisions of the statute, it is valid and binding for the organization's member states.

However, if one analyses the issue of legislative powers of international organizations, one must inquire what happens if some of the above-mentioned requirements are not fulfilled. For example, what happens if a given resolution is issued by a competent body, but according to a procedure inconsistent with the one specified in the statute, or the competent body exceeds its objective legislative powers by issuing an act in a form different from the prescribed one. These issues raise the immensely important question of nullity of international organizations' resolutions.¹

* **Natalia Buchowska, Ph.D.**, Chair of International Law and International Organizations, Faculty of Law and Administration, Adam Mickiewicz University in Poznań.

The electronic version of this article may differ from its hard copy version with regards to the formatting of the text, but the substantive content of both versions is the same.

¹ The question of nullity of acts issued by international organizations is shortly addressed by K. Skubiszewski in the monograph *Uchwały prawotwórcze organizacji międzynarodowych. Przegląd zagadnień i analiza wstępna* [Law-making Resolutions of International Organizations. Survey of Problems and Preliminary Analysis], PWN, Poznań 1965, pp. 112–117;

The question of nullity of law-making resolutions of international organizations is relevant not only for the organization itself but obviously also for the member states – the addressees of these resolutions. First, the member states, which are obliged to implement certain resolutions, must be certain they implement an act that is both binding and valid. Second, in order to implement a law-making resolution, states may undertake certain legal or factual actions. Resolution's potential nullity would result in a series of consequences, including the problem of restoring factual and legal conditions that existed before a null and void resolution had been implemented.

The complex problem of nullity of resolutions entails many issues requiring consideration. First of all, there is an issue of the causes of nullity. In other words, the question is what types of events make the resolution lose its validity. Then, there is a problem of effects of nullity of the resolution. Is it possible for a null and void resolution to have any legal effects? Is it possible to validate such null and void resolution? Another issue concerns the declaration of nullity and the applicable procedure. In this context, there is yet another question whether member states or an organization itself have competence to question the resolution. Last but not least, the final issue – connected with all problems mentioned above – relates to whether the organization's statute explicitly addresses the question of nullity of organizational acts. If it does, the founders of the organization probably answered the questions formulated above. If it does not, further doubt as to adequate procedure will emerge. All these issues will be addressed in detail in the subsequent sections of this article.

Beforehand, however, it seems necessary to make a few general comments concerning nullity in international law. As far as nullity of acts in international law is concerned, it must be noted that until now no general rules with respect to this issue have been developed. A related question was addressed in two Vienna Conventions on the Law of Treaties,² but naturally these treaties apply only to interna-

the problem of nullity of legal acts receives more attention, among others, in works of E. Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 *American Journal of International Law* 239 (1983); *'Ultra-Vires' Acts in International Organizations – The Experience of the International Labour Organization*, 48 *British Yearbook of International Law* 259 (1976–77); *Unconstitutional Acts in International Organizations: The Law and Practice of the International Civil Aviation Organization (ICAO)*, 28 *International & Comparative Law Quarterly* 1 (1979) and by E. Lauterpacht, *The Legal Effects of Illegal Acts of International Organizations*, [in:] *Essays in Honour of Lord McNair*, London, Dobbs Ferry, New York: 1965, and R. Y. Jennings, *Nullity and Effectiveness in International Law*, [in:] *Essays in Honour of Lord McNair*, London, Dobbs Ferry, New York: 1965.

² What is meant here is the 1969 Vienna Convention on the Law of Treaties (UNTS, vol. 1155, p. 331; issues concerning nullity are regulated in articles. 42–53, 65–69, and 71; 2). The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (UNTS, 1986, p. 218, it has not yet entered into force due to lack of enough ratifications).

tional agreements. Although it may be useful to take advantage of solutions proposed in these Conventions, this will not always be possible with regard to law-making resolutions of international organizations.

Some commentators have pointed out that, for purposes of international law, one may also refer to internal law systems as a source of knowledge on nullity. Although solutions applied in internal law systems may differ from each other, it seems that there are three main connotations of nullity.³

1. TYPES OF NULLITY

In international legal literature, three types of nullity are distinguished. First, a defective legal act may be designated as “non-existent act”. The defect may be so grave that one cannot consider a particular act to be adopted. Consequently such act must be regarded as non-existent. One example is an act adopted by an entity, which is totally deprived of the capacity to act in the particular area (an entity which does not have the capacity to act cannot produce any legal effects).⁴

Second, a legal act can be affected by absolute nullity (be null and void *ab initio*). This differs from the first type as the act is not considered as non-existent. In other words, such an act exists in the legal sense, but from the very beginning it does not produce any legal effects – it is null and void *ab initio*. In this case, the declaration of nullity does not come as a result of any evaluation, e.g. by a court or any other competent body, as this type of nullity arises automatically along with the cause of its nullity. A possible decision of a court (or any other competent body) is thus declaratory in nature – it only states that a prerequisite for absolute nullity is met, which means that an act is null and void by the power of law. This cause of nullity is also specific in the sense that a legal act affected by it cannot be validated and all actions undertaken on the basis of such an act shall be deemed illegal.⁵ An example of a legal act affected by absolute nullity is an international agreement, which on the day of its conclusion includes a provision that conflicts with a peremptory norm of international law.⁶

The third type of nullity is labelled as relative nullity (voidability). In this case, a legal act is not null and void *ab initio* and nullity is not automatic. A legal act

³ Jennings, *supra* note 1, pp. 65–67.

⁴ *Ibidem*.

⁵ *Ibidem* and J. Sandorski, *Nieważność umów międzynarodowych* [Nullity of International Agreements], PWN, Poznań: 1978, pp. 25–6.

⁶ See Art. 53 of the Vienna Convention on the Law of Treaties.

affected by relative nullity may be annulled by a court or any other competent body and a decision of such a body will be of constitutive nature. Nullity is declared with *ex tunc* effect. Since nullity is declared in this case with retroactive effect, until such declaration occurs, the act may produce legal consequences. In other words, certain actions may be taken on its basis. As these actions are undertaken in the performance of a null and void act, a question arises whether they are valid. In the answer to this question, it has been assumed that acts in law undertaken in good faith on the basis of a null and void act should not in themselves be deemed illegal, but states may be expected to undertake any possible actions aimed to restore the conditions which would exist if an illegal act had not been adopted.⁷

The analysis of the doctrine and existing treaty law indicates that international law is familiar with all types of nullity. Here, it is worth citing the opinion of R.Y. Jennings. Commenting on the view that there is a straightforward alternative in international law between absolute nullity on the one hand and full validity on the other, he states that:

“[I]t is tempting, therefore, [...] to conclude that international law, like classical Roman Law, has a simple dichotomy: that an international act is either absolute nullity or it is valid. But this simple solution [...] is too stark to be made to fit the facts of international society. [...] For the distinction between absolute nullity on the one hand and various shades of nullity on the other is founded essentially not upon availability of courts but upon the actual needs of society.”⁸

2. CAUSES OF NULLITY OF RESOLUTIONS ADOPTED BY ORGANIZATIONS

In analyzing the causes of nullity of resolutions adopted by international organizations, it should be noted that the main source of difficulty with pointing out specific reasons for nullity is the fact that most statutes of organizations with law-making powers do not include any provisions indicating grounds for nullity of resolutions. There are no such provisions, for example, in agreements founding the International Civil Aviation Organization (ICAO), World Health Organization (WHO), World Meteorological Organization (WMO), regardless of the fact that all of these organizations have the power to enact law-making resolutions (i.e. resolutions legally binding on their member states).

In view of the above, one may attempt to analyse the extent to which it would be possible to apply here an analogy based on the causes of nullity of international

⁷ Jennings, *supra* note 1.

⁸ *Ibidem*, pp. 68–69.

agreements. Unlike resolutions of organizations, the issue of nullity of international agreements has been regulated in treaty law. Both Vienna Conventions on the Law of Treaties enumerate the causes of nullity, set up the procedure for invalidating agreements and specify effects of a nullity declaration. This issue has also been discussed in international law scholarship.⁹

Undoubtedly, the application of the above-mentioned analogy could be helpful. However, one should bear in mind that there are essential differences between a treaty and a resolution of an international organization.¹⁰ The main difference lies in the fact that a treaty as an international agreement is concluded under the freedom of contract rule, whereas a resolution of an international organization is a unilateral act taken by a particular organization on the basis of principles and within the scope specified in its founding act. This means that the law-making process by international organizations is much closer to legislative patterns applied in internal law rather than those resulting from the law of treaties. Therefore, it is arguably not possible to apply a simple analogy between nullity of agreements and nullity of resolutions of organizations.¹¹ In order to obtain adequate knowledge on the validity of resolutions of organizations, one has to refer to the law of international organizations.

This brings us to the principle whereby any international organization, as an entity created by states by virtue of an international agreement, derives all its powers from the founding agreement that delimits all its activities. As a consequence of this principle, another more precise principle can be formulated whereby law-making resolutions are always taken on the basis of authorization included in specific provisions of an organization's statute.¹² A kind of departure from this principle is an application of the doctrine of implied powers. At the same time, it is clear that one may not imply powers of an organization with reference to adoption of law-making resolutions (effective *pro foro externo* and binding).

Analysis of relevant literature and practice of organizations shows that any time an organization creates law effective *pro foro externo*, this is done on the basis of treaty provisions that indicate the competent body, its powers to make law, the

⁹ See, inter alia, extensive study on this issue in Sandorski, *supra* note 5.

¹⁰ In this respect, it is necessary to reject the view presented in literature (e.g. R. Sonnenfeld, *Uchwały Rady Bezpieczeństwa ONZ. Zagadnienia prawne* [Resolutions of the United Nations Security Council. Legal Aspects], PISM, Warszawa: 1979, p. 26), that resolutions of international organizations are *sensu largo* a part of the law of treaties.

¹¹ Skubiszewski clearly and firmly argues that "the validity of a law making act of international organization should be examined with regard to criteria other than those used for evaluating the validity of treaties," see Skubiszewski, *supra* note 1, p. 112

¹² Lauterpacht, *supra* note 1, p. 89.

applicable procedure, and possibly the type of such an act.¹³ Therefore, these elements set the validity requirements for a law-making resolution. If “it is generally assumed [...] that nullity is a reverse of validity inherently connected with it”¹⁴ then it may be admitted that each infringement of the above-mentioned requirements would be followed by a nullity. Such a view has been presented in the literature, and holds that one should look for causes of nullity of law-making resolutions in breaches of requirements included in the treaties relating to performance of law-making powers.¹⁵

An important clue can be also found in the Treaty establishing the European Community (TEC)¹⁶ that points out the grounds for nullity of acts issued by this organization (and which is an exception in international law). Art. 230(2) TEC¹⁷ enumerates the following grounds of nullity: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. However, one must remember that any generalizations or adoption of standards of one organization for another one must be made very carefully. Thereby in case of nullity of acts of international organizations, the most important should be “particular needs and functions of individual organizations”.¹⁸

Having in mind the above-mentioned reservations, one may attempt to formulate some general comments on the causes of nullity of law-making resolutions of international organizations. First, the cause of nullity of law-making resolutions lies in the fact of adopting a resolution by a body having no competence to do so or exceeding its powers. The following cases will belong to this group:

- adopting a resolution on the basis of powers stemming from a norm not contained in the organization’s founding document (e.g., adopting a reso-

¹³ For details on law making resolutions and law making powers of organisations see: Buchowska, *Uchwały organizacji międzynarodowych jako źródło prawa międzynarodowego* [Resolutions of International Organizations as a Source of International Law], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 3/2000, pp. 49–59 and *Kompetencja prawotwórcza organizacji międzynarodowych* [Law-making Powers of International Organizations], [in:] P. Wiliński (ed.), *Prawo wobec wyzwań współczesności*, Wydawnictwo UAM, Poznań: 2004, pp. 326–36.

¹⁴ See J. Sandorski, *supra* note 5, p. 23.

¹⁵ *Ibidem*, p. 113.

¹⁶ After the Treaty of Lisbon of 13 December 2007 amending the Treaty on the European Union and the Treaty establishing the European Community, the TEC shall be referred to as the Treaty on the functioning of the European Union (TFEU), see Official Journal of EU 2007/C 306/01.

¹⁷ After the Treaty of Lisbon this will be Art. 263 TFEU, for consolidated version of the Treaty see: Official Journal of EU 2008/C 115/01, p. 47 onwards.

¹⁸ Lauterpacht, *supra* note 1, p. 116.

- lution by referring only to a norm originating from other resolution of the organization);
- adopting a resolution by a body lacking law-making powers (e.g., the organization's statute contains no provision giving powers to a given body to adopt law-making resolutions despite the fact that it has powers to adopt non-binding resolutions);
 - adopting a resolution falling within the powers of another body;
 - adopting a resolution on matters beyond legislative competence of a given body (e.g., in the WHO – in matters other than enumerated in Art. 21 of the WHO Constitution), this also includes cases of adopting a resolution beyond the scope of powers of the whole organization (e.g. in the European Community – in matters not enumerated in Art. 3 TEC),
 - adopting a resolution in a character or form other than indicated in the statute (e.g., adopting a binding resolution instead of a recommendation, or in the case of European Community adopting a regulation instead of a directive).

Second group of causes of nullity includes cases in which procedural norms are violated. Solutions adopted in the TEC as well as the jurisprudence of the ICJ indicates that only essential and fundamental violations of the procedure can be a cause of nullity.

Art. 230 TEC refers exactly to infringement of an essential procedural requirement. The European Court of Justice specified that this category includes infringements of various degree of importance such as infringements made by a given body with regard to its own rules and regulations, lack of justification in an act or insufficient justification, omission of the obligation to consult other bodies, or no announcement of an act.¹⁹

Under general international law, procedural irregularities may affect validity of a resolution only if they are of a fundamental character. This was confirmed, for example, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case.²⁰ The ICJ, rejecting the argument presented by India that contested resolutions of

¹⁹ M. M. Kenig-Witkowska, A. Łazowski, R. Ostrihansky, *Prawo instytucjonalne Unii Europejskiej* [Institutional Law of the European Union], CH Beck, Warszawa: 2004, p. 316; C. Mik, *Europejskie prawo wspólnotowe: zagadnienia teorii i praktyki* [European Community Law: Theoretical and Practical Aspects], vol. 1., CH Beck, Warszawa: 2000, pp. 757–58; J. Tyranowski, *Prawo europejskie. Zagadnienia instytucjonalne* [European Law. Institutional Aspects], Proprium, Poznań: 2005, p. 143; A. Wyrozumska, *System ochrony prawnej* [Legal Protection System] in: J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe*, Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa: 2006, pp. 312–13.

²⁰ ICJ Rep. 1972, p. 46 onwards, text available on <<http://www.icj-cij.org/docket/files/54/5665.pdf>>

the ICAO Council were affected by procedural irregularities (with the consequences for its validity), stated that: “the Court however does not deem it necessary or even appropriate to go into this matter, particularly as the alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure”.²¹ The Court’s approach was criticized by one judge, who in his separate opinion (declaration appended to the opinion of Court) argued that although not all procedural irregularities influence the validity of a decision, some of them may have significant impact on rights and interests of states.²²

It appears from the above that solely “procedural irregularities” do not form a sufficient basis for challenging the validity of a resolution, especially if the adopted resolution is not affected by substantive defects.²³ In turn, what type of irregularities shall be deemed as infringement of essential procedural requirements will depend to a large extent, as it was mentioned earlier, on the specific case and specific organization.

To conclude, it seems that in the case of resolutions of any organization, the following may qualify as fulfilling the requirement of essential procedural infringements and hence as causes of nullity:

- adopting a resolution with less votes than required (e.g., simple majority instead of qualified majority);²⁴
- application of a procedure other than required or omission of obligatory phases of the procedure (e.g., without requesting an opinion of another body);
- no required quorum in the body adopting the resolution;²⁵
- improper composition of the body – that is a composition which conflicts with the requirements set forth in the act founding the organization; this may result from two types of situations: first (in case of bodies consisting of elective members) – the members have been elected in a way infringing the provisions of the statute thereby making the body non-competent,²⁶

²¹ *Ibidem*, p. 69.

²² See: Declaration of Judge Lachs, ICJ Rep. 1972, p. 75.

²³ After Osieke (The Legal Validity), *supra* note 1, p. 246, see also judgment in the Appeal Relating to the Jurisdiction of the ICAO Council case, in which the ICJ pointed out that “if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way” (ICJ Rep. 1972, p. 70).

²⁴ This cause is indicated by Lauterpacht, *supra* note 1, p. 89; Osieke (The Legal Validity) *supra* note 1, pp. 246–47; Skubiszewski, *supra* note 1, p. 113.

²⁵ Skubiszewski, *supra* note 1, p. 113.

²⁶ As an example, one may give a case of election of members of the Maritime Safety Committee in January 1959 – governing body of Inter-Governmental Maritime Consultative Organization (IMCO – currently International Maritime Organization). Art. 28 of the Convention provided the Committee should consist of 14 members, 8 of which should be the

second (this applies to all bodies) – the composition of the body has been incidentally infringed, e.g., instead of a minister a secretary of state participates in the voting of the Council of the European Communities.

3. PROCEDURE IN CASES OF NULLITY OF RESOLUTIONS IN INTERNATIONAL ORGANIZATIONS WHOSE STATUTES PROVIDE NO DETAILED SOLUTIONS

As in the case of nullity causes, acts constituting most of international organizations do not include detailed provisions specifying the procedure to be followed in case of nullity of resolutions. If such a procedure was established, it would need to specify the following:

- the entity competent to raise the issue of nullity;
- time limits within which the resolution's validity may be questioned;
- the body competent to examine a case of nullity; and
- the adequate course of action in the case.

If there are no such provisions, one has to refer to practice of organizations, doctrine and jurisprudence in order to make some general observations.

It is assumed that states – members of an organization – are always competent to question its resolutions. This results from consensual nature of statutes of international organizations, which are after all international agreements. Therefore each state – a party to such an agreement – enjoys the right to supervise implementation of its provisions, among others, in order to ensure that the resolutions of bodies of the organization are not contrary to the provisions of the agreement under which they operate.²⁷

The second general comment relates to the question whether international organizations as such have competence to investigate the issue of nullity of resolutions of their own bodies. The doctrine assumes that, if a statute of an international organization is silent on this issue, giving such competence to an organization would make the organization “a judge in its own matter”, which stands in contradiction

largest ship-owning nations. However, Liberia and Panama were not elected to the Committee although they were among the eight countries with the highest registered tonnage. The ICJ – in answering the question of the IMCO Meeting whether the Committee had been constituted in accordance with provisions of the IMCO Convention – issued an advisory opinion, in which it gave negative answer to the question (see: ICJ Rep. 1960, p. 150, text of the opinion is available on: <<http://www.icj-cij.org/docket/files/43/2419.pdf>>).

²⁷ Osieke (The Legal Validity), *supra* note 1, pp. 240-41.

to the general legal principle *nemo iudex in propria causa*.²⁸ This view, however, has not been generally accepted and some efforts have been made to find a justification for existence of competence of organizations to investigate the issue of nullity of their own resolutions. Under a pragmatic approach, it is assumed that the argument – if the statute does not indicate any specific body competent to investigate the nullity of resolutions, then the organization itself does not have any such competence at all – may lead to the emergence of grey area. In other words, there would be no entity (possibly except for member states) competent to investigate the issue of nullity. This would be also a very good way to cause a deadlock in works of an organization, as it would be enough for a member state to advance a plea of nullity of a resolution, which would result in a stalemate – the act has been questioned and as there is no competent body to resolve the question, the legal situation of the resolution remains unresolved. Therefore, it seems that it may be acknowledged – although it is not fully satisfactory – that if a statute of an organization does not indicate a competent body, the organization itself may take a stand in such situations.²⁹

4. PROCEDURE IN CASES OF NULLITY OF RESOLUTIONS IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION, THE WORLD METEOROLOGICAL ORGANIZATION AND THE WORLD HEALTH ORGANIZATION

There are no provisions directly relating to the issue of a resolution's nullity or any procedure for declaring its nullity in the statutes of the above-mentioned organizations. However, it seems that one may apply, by analogy, provisions governing the issue of application and interpretation of the statutory provisions. Since law-making resolutions are adopted on the basis of competence provided for in an organization's statute, their adoption in violation of the statute's provisions is essentially a violation of the statute of the organization itself.

The relevant regulations are included in the acts constituting the WHO and WMO. In both cases there is no special procedure of conduct if a plea of nullity is raised. However, both the WMO Convention and WHO Constitution include provisions regulating the procedure for resolving disputes on interpretation and application of the conventions. In the case of the WMO, the relevant provision is Art. 29 of the Convention (placed in part XVI of the Convention, entitled "Interpretation

²⁸ Such a view was presented by ICJ judge G. Fitzmaurice in a separate opinion to the judgment in the case of Namibia (*Ibidem*).

²⁹ *Ibidem*, pp. 242–43.

and disputes”), whereas in the WHO, Art. 75 or possibly Art. 76 of the Constitution (placed in chapter XVIII entitled “Interpretation”) appears to provide the relevant basis. Arguably, all of the issues relating to the adoption of law-making resolutions (i.e., competence of a body, material scope of a resolution, procedure, etc.) may actually fall within the scope of interpretation and application of the convention provisions. In such a situation, the above-indicated provisions can be applied to resolve a matter of nullity.

Under the WMO procedure established by Art. 29, the question of nullity should be settled in the first place by negotiation between states or by the Meteorological Congress. The Convention does not say anything about the choice between these two modes of settlement. It seems that in the case of nullity of a resolution, the Congress, rather than the states through negotiations, would resolve the dispute, as the plea of nullity would be addressed to the organization itself rather than to any other state. However, one may not exclude the possibility that one member state files a plea of nullity which is then questioned by other member states – thereby creating a dispute between them. If the matter is not resolved by negotiations or by the Congress, it should be referred to an independent arbitrator appointed by the President of the ICJ. Any other solution is also possible if the parties agree on another mode of settlement.

The procedure set forth in Art. 75 of the WHO Constitution, also requires resolving a case by negotiations or by a competent body – in this case, by the Health Assembly. Matters, which have not been resolved in such a way, should be referred to the ICJ in conformity with the Statute of the Court. Moreover, Art. 76 of the Constitution states that upon authorization by the General Assembly of the United Nations, the Organization may request the ICJ for an advisory opinion “on any legal question arising within the competence of the Organization”. It seems that this provision may also be applied in case there are any doubts concerning nullity of a resolution adopted by the Assembly.

More detailed provisions are included in Art. 84 and 85 of the Chicago Convention (Chapter XVIII – “Disputes and default”), but they also refer to disputes rather than cases of nullity. Art. 84 states that any “disagreement”³⁰ between the members of the organization relating to the interpretation or application of the Convention or its Annexes (i.e., law-making resolutions) should be first settled by negotiation. If this solution is not possible, the disagreement can be submitted by any concerned state to the ICAO Council for settlement. A member of the Council that is a party to the disagreement does not have a right to vote. The decision of the

³⁰ This term was used in the Chicago Convention.

Council may be appealed to an *ad hoc* arbitral tribunal or to the ICJ and the ICAO Council should be notified about the appeal against the decision within sixty days from the receipt of notification of the decision. Art. 85 describes in detail the principles for appointing members of the arbitral tribunal (each state names its arbitrator, and the latter names an umpire).

The procedure prescribed by Art. 84 was used in the *Appeal Relating to the Jurisdiction of the ICAO Council* case. However, Judge Manfred Lachs, in his declaration to the judgment, pointed out that the Court had made a mistake by not going deeper into the matter with regard to procedural irregularities alleged by one of the parties with reference to the ICAO Council decision. In Judge Lachs's opinion, the ICJ decision would be of great importance for future practice of the ICAO Council.³¹

5. PROCEDURE IN THE EUROPEAN COMMUNITY³²

The TEC is the only treaty discussed here that contains detailed provisions on the procedure applied to nullity of legal acts. This is fully understandable since law-making powers of the EC are much wider as compared to the scope of these powers enjoyed by the ICAO, WHO or WMO.

As it was already pointed out, Art. 230 TEC enumerates the following conditions of invalidity of the Community acts: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Cases for declaration of nullity are decided by the Court of Justice or to the Court of First Instance. Jurisdiction of the Court of Justice is reserved for cases brought by the European Parliament, the Council, the Commission, the Court of Auditors and the European Central Bank³³ against acts of the European Parliament, the Council, the Commission and the European Central Bank.³⁴ In other cases, i.e., those instituted by natural and legal persons, the Court of First Instance is competent.³⁵

³¹ See ICJ Rep. 1972, p. 75.

³² When the Treaty of Lisbon enters into force the European Community will be renamed to the European Union, which is connected with acquiring legal personality by the Union and "absorption" of the Community by the Union.

³³ Cases submitted by the Court of Auditors and ECB are limited in nature in comparison with ones provided for in Art. 230(2) as they aim only at protecting the prerogatives of these bodies. The TFEU grants such powers to the Committee of the Regions as well.

³⁴ The TFEU in Art. 263 adds to this list legislative acts of the European Council.

³⁵ See Art. 225 TEC (Art. 256 TFEU).

The entities authorized to bring actions are categorized into three groups with regard to their scope of competence. Member States, the European Parliament, the Council and the Commission, i.e., so-called privileged entities, are competent to institute proceedings in full scope; they may appeal against acts adopted jointly by the Council and the European Parliament, or individually by the Council, the Commission or the European Central Bank.³⁶ In this type of proceedings, only binding legal acts are subject to appeal - i.e. regulations, directives and decisions (the Treaty *expressis verbis* excludes recommendations and opinions from this procedure). This principle is preserved in the TFEU, but the scope of acts subject to appeal is extended to acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

The second group of entities includes: the European Central Bank and the Court of Auditors. The TFEU adds also the Committee for the Regions to this group. These are so-called partly authorized entities (or less privileged) because they may institute the procedure provided for in Art. 230 only for the purpose of protecting their own competences.

The third group consists of natural and legal persons (so-called non-privileged entities), who may institute proceedings in a limited scope: only against decisions addressed to these persons or against regulations which are of direct and individual concern to them or against decisions addressed to another person which is of direct and individual concern to the person bringing an action.³⁷ The TFEU³⁸ provides that any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. Moreover, the Treaty provides that acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.³⁹

According to the provisions of Art. 230(5) TEC, a nullity suit must be filed within two months of its publication⁴⁰. However, once this time limit has elapsed, it is possible to apply the procedure provided for in Art. 241 TEC.⁴¹ This article

³⁶ Cf fn 34.

³⁷ See Art. 230(4) TEC.

³⁸ See Art. 263(4) and 263(5) TFEU.

³⁹ For further details on actions brought by private entities, see, e.g. Wyrozumska, *supra* note 19, pp. 315–25.

⁴⁰ In the Treaty of Lisbon this time limit is preserved.

⁴¹ Art. 277 TFEU.

provides that, after the expiry of the period laid down in Art. 230, any party may raise an objection of nullity in proceedings in which an act of general application was adopted jointly by the European Parliament and the Council or individually by the Council, Commission and the European Central Bank. This is the so-called, plea of illegality. Art. 241 is accessory in nature and does not form independent grounds for instituting the proceedings.⁴²

If the action is well founded, the Court shall declare the whole act concerned to be void. In the case of a regulation, if it considers necessary, the Court of Justice may state which of the effects of the regulation remain in force; however, in practice, the ECJ has applied this rule only to directives and decisions.⁴³ In the academic literature, it is pointed out that nullity is declared with an *ex tunc* and *erga omnes* effects, and the ruling of the Court is constitutive in nature such that nullity is relative in character and combined with the presumption of validity of an act.⁴⁴ The *erga omnes* effect is not present in the case of rulings resulting from the procedure provided for in Art. 241 TEC, since such rulings are effective only in relation to a given dispute and specific parties.

As an effect of declaration of nullity, all acts adopted on the basis of the void act become invalid. This applies also to acts adopted by the Member States in the course of implementation of the Community law.⁴⁵ Institutions whose acts have been declared void are obliged to take adequate measures aimed at carrying out the decision of the court (e.g., adopting new legal acts).⁴⁶ Moreover, if a legal act is declared void, the Community is obliged to remedy the damages caused by such an act.⁴⁷

⁴² Kenig-Witkowska, Łazowski & Ostrihansky, *supra* note 19, pp. 320–23.

⁴³ *Ibidem*, pp. 319–20.

⁴⁴ Tyranowski, *supra* note 19, p. 142; Kenig-Witkowska, Łazowski & Ostrihansky, *supra* note 19, pp. 318–19; Wyrozumska, *supra* note 19, pp. 325–326; in the two latter publications it is pointed out that the act is considered as “non-existing”. In view of the discussion presented in this article (distinguishing three types of nullity: non-existing acts, relatively invalid and absolutely invalid acts), this wording seems unfortunate.

⁴⁵ After A. Wyrozumska, *supra* note 19, p. 325; R. Ostrihansky is of different opinion: “[...] it should be assumed that implementing acts do not automatically become invalid [...]”, see Kenig-Witkowska, Łazowski & Ostrihansky, *supra* note 19, p. 318.

⁴⁶ Such obligation does not arise in case a legal act is declared unfeasible in the legality proceedings, as in this case the act retains its binding force.

⁴⁷ Article 233 TEC clearly states that, in this case the procedure provided for in Art. 288 TEC will be applicable. In the amended Treaty these will be Art. 266 and 340.

CONCLUSIONS

Concluding the above analysis, one needs to stress that international law is acquainted with both absolute and relative nullity. The first one automatically comes up along with the appearance of the cause of nullity, and the decision of the court or other competent body is declaratory in character. The other one does not arise automatically but is declared with an *ex tunc* effect in a decision of constitutive nature.

In the analysis concerning the causes of nullity, due to the lack of any regulations concerning this issue in the statutes of most universal organizations, it is necessary to refer to some general principles. One of them is a rule according to which an international organization, as an entity established by states on the basis of an international agreement, derives all its competence, including law-making competence, from the agreement constituting this organization. Therefore, one may conclude that if the validity of a resolution is conditioned by the existence of treaty rules specifying a competent body, scope of law-making competence, applicable procedure and possibly the type of legal acts, then any infringement of these rules may become a cause declaring the agreement void. Thus, the causes of nullity of a resolution of an international organization will include cases in which the adopting entity does not have competence, goes beyond its competence, or infringes any essential procedural requirements.

With reference to nullity proceedings, in organizations in which the statute does not include any detailed solutions, each member state is competent to question the validity of a resolution whereas bodies of a specified organization are competent to investigate the matter, in case no other bodies are indicated.

In the case of the ICAO, WMO and WHO, considering the lack of any provisions concerning nullity, one may employ the procedure applied to interpretation of the particular organization's statute. Since a law-making resolution is adopted on the grounds of authorization granted under the organization's statute, adopting a resolution that infringes the provisions of the statute is in fact the same as infringing the statute of the organization itself.

The TEC, as the only one among the acts discussed above, contains detailed provisions concerning nullity proceedings referring to legal acts. By virtue of its provisions, an extensive and formalized procedure for declaring void legal acts adopted by any body of the Community has been developed, which is absolutely necessary, considering the law-making competence of this organization.

*Piotr Milik** ■

THE LAUNCH OF THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT INITIATED BY THE UN SECURITY COUNCIL

1. TRIGGERING MECHANISMS

In order to launch the jurisdiction of the International Criminal Court two necessary prerequisites must exist – one of substantial and one of legal character. Firstly, there must be a crime within the jurisdiction of the ICC, i.e., there must exist those facts of a case, which disturbed the juridical order preserved by the regulations of the ICC's Statute. Secondly, there must be a triggering mechanism, which will initiate a criminal procedure before the Court.

The ICC's Statute includes three triggering mechanisms that initiate preparatory proceedings before the Court. Firstly, a criminal procedure can be launched by the ICC Prosecutor at the referral of a State party (article 13(a) of the ICC's Statute). The State party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, and request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with such crimes. As far as possible, a referral shall specify relevant circumstances and be accompanied by such supporting documentation as available to the state referring the situation (article 14).

Secondly, the situation in which one or more crimes described in the ICC's Statute appear to have been committed is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the Charter of the United Nations (article 13(b)).

* **Piotr Milik, Ph.D.**, assistant professor, Warsaw University.

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Thirdly, the Prosecutor may act on his own initiative (*proprio motu*) on the basis of information on crimes within the jurisdiction of the Court, received from any sources. The Prosecutor shall analyze the seriousness of the information he had received. For this purpose, he may seek additional information from states, UN organs, intergovernmental or non – governmental organizations, or other reliable sources that he deems appropriate. The Prosecutor may also receive written or oral testimony at the seat of the Court (article 15).

The problem of the triggering mechanisms was discussed by the creators of the ICC's Statute together with other problems relative to the ICC's jurisdictions on every stage of work on the Statute of the ICC, beginning from the project authored by the UN International Law Commission (ILC) and ending with the Rome founding conference.

The Draft Statute made by the UN International Law Commission reveals a restrained, and steeped in the realities of international relations, approach to the problem of triggering mechanisms for the launch of ICC jurisdiction. The members of the UN International Law Commission, without knowing the level of acceptance by the international community of the idea of international criminal jurisdiction, concluded that the best solution of construction of the triggering mechanisms would be to condition the launch of criminal proceedings on the decision of the main actors of the international community – the states and the UN Security Council. In its Draft Statute, the UN International Law Commission granted the Security Council the leading position in the maintenance of international peace and security. The key decisions regarding estimation of crisis situations in any part of the globe stay in the hands of the UN Security Council. The ICC has only a secondary or peripheral role in this process, depending on the political will of the permanent members of the Security Council. In this model of framework relations between the ICC and the UN Security Council, the launch of ICC jurisdiction is directly dependent on unanimity of the permanent members of the UN SC. This kind of solution was criticized by a few members of the UN International Law Commission (*cf.* its report¹), because of too close a dependence of the judicial body on political structure.²

In article 25(1) of the ILC's Draft Statute, there is a provision precisely describing the situation when the UN Security Council can initiate the launch of the jurisdiction of the ICC according to article 23(1). In such a situation, there is no

¹ *Yearbook of the International Law Commission* 1994, volume II, part II, p. 45.

² See also: S. H. Yee, *A Proposal to Reorganize Article 23 of the ILC Draft Statute for an International Criminal Court*, 19 *Hastings International and Comparative Law Review* 1996, p. 529.

necessity to accept that decision by the states. The powers of the UN Security Council described in the ILC's Draft Statute were much wider than the powers ultimately allowed in the final Rome Statute. In the ILC's Draft Statute, no application regarding the crime of aggression can be addressed to the Court without the appropriate resolution of the UN SC. Besides, no investigation can be initiated without the UN SC acceptance, when a situation indicates threats to peace, breaches of peace or acts of aggression. This provision clearly intends to suggest to the UN SC not to establish *ad hoc* tribunals (such as in the case of Yugoslavia or Rwanda *ad hoc* tribunals) but to delegate its competence to the permanent ICC.

Some members of the UN ILC declared the intention to extend the UN SC competence to the UN General Assembly (GA), arguing that the UN GA is not bound by the restrictive procedure that preserves the interests of the five permanent members of UN SC. Ultimately, the UN ILC decided not to allow in its Draft Statute the General Assembly to initiate ICC jurisdiction because of a lack of competence, as opposed to the UN SC, to enact a resolution binding the states.³

The first thorough analysis of the UN ILC's Draft Statute provisions regarding the triggering mechanisms was provided by the Ad Hoc Committee created by the UN General Assembly in 1995. In the course of the work of that Committee many questions and suggestions arose.⁴

The Ad Hoc Committee made its own version of the ICC's Statute, which was the ground for the discussion in the Rome Diplomatic Conference in 1998. This Draft Statute included article 6, which defined the triggering mechanisms. Firstly, the launch of ICC jurisdiction can be realized when the situation is referred by the UN Security Council acting under Chapter VII of the UN Charter; secondly, by a state party; and thirdly, by the Prosecutor *proprio motu*. The provisions presented in this Draft Statute were much more expanded than the proposals of the UN ILC and there were a few different variants.

The problem of the relationships between the ICC and the UN Security Council was also described in article 10 of the Ad Hoc Committee's draft Statute. There were seven points, two of which (point 4 and 7) were projected in two versions. Though the Ad Hoc Committee's Draft Statute was much more detailed than the UN ILC's project, it did not make any progress. The dominant position of the UN Security Council as a main body in the world's common safety system was not disturbed. The ability to decide on the existence of an act of aggression was still within the exclusive competence of the UN SC. Moreover, there was the provision,

³ *Yearbook of the International Law Commission* 1994, volume II, part II, p. 43 and next.

⁴ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No 22, UN Doc. A/50/22, para. 112–18.

declaring that even the launch of ICC jurisdiction does not defeat the ability of the UN SC to act under Chapter VII of the UN Charter.

At the Rome Diplomatic Conference in 1998, the matter of triggering mechanisms was discussed in the first two weeks of the Conference on the General Committee forum. From the very beginning the concept that the state parties should have the competence to refer to the Prosecutor the situation in which one or more crimes within the jurisdiction of the Court appear to have been committed was commonly accepted. In the further work over the Statute, state delegates discussed mainly two remaining concepts of the triggering mechanisms: the role and the position of the UN Security Council and the Prosecutor in the launching of the criminal procedure. The solutions proposed by the UN ILC and the Ad Hoc Committee appeared to be not sufficient and not possible to maintain. At the Rome Diplomatic Conference three concepts were presented on the subject of relationships between the ICC and the UN SC. The first option was to accept the proposal of the UN ILC. The second, the so-called “Singapore compromise”⁵, would grant the UN SC the right to stop ICC proceedings by adopting a resolution under Chapter VII of the UN Charter. The third approach was to completely deprive the UN SC of any possibility to influence ICC activity.

Eventually the compromise between the strong position of the UN SC toward the ICC and the absolute lack of that kind of possibility won. The “Singapore compromise” was additionally supplemented by the Canadian delegation proposal to limit the period of suspending ICC activity to twelve months. During that time, the UN SC could renew the resolution preventing ICC activity. However, this solution constrains the UN Security Council to renew its resolution every twelve months and the five permanent members of the UN SC have to be unanimous every time.

In the final version of the ICC’s Statute, the powers of the UN Security Council with regard to the ICC look relatively modest as compared to the Draft Statute of the UN ILC or the Ad Hoc Committee. The final shape of the relationship between the ICC and the UN SC was constructed in the last stage of negotiations at the Rome Diplomatic Conference.⁶

⁵ “Singapore compromise” was a proposal recommended by the Singapore delegation in the course of work of the Ad Hoc Committee in August 1996, regarding relationship between the ICC and the UN SC, intended to allow the UN SC to prevent and brake an activity of the ICC by use of the instrument of resolution adopted under Chapter VII of the UN Charter.

⁶ M. Bergsmo & J. Pejić, *Article 16, Deferral of investigation or prosecution*, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers, Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden–Baden: 1999, p. 373.

The substantial relation between the ICC and the UN SC is the ability of the UN SC, acting under Chapter VII of the UN Charter, to refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the ICC appear to have been committed (article 13(b)). That kind of referral can initiate the activity of the ICC but is not a *sine qua non* condition to activate the Court. The Prosecutor can on his own motion, without waiting for a UN SC statement, undertake the investigation in case of alleged crimes within the jurisdiction of the Court.

The ICC's Statute has taken into account a particular role of the UN SC on the international scene and admitted its ability to initiate preparatory proceedings. But it is not the only authorization of the UN SC in the early stage of proceeding. In article 16 of the ICC's Statute, there is the provision that no investigation or prosecution may be commenced or proceeded with under the Statute for a period of twelve months after the UN SC, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to suspend proceedings. That request may be renewed by the UN SC under the same conditions. Consequently, the UN SC is entitled to defer an investigation or prosecution for a period of twelve months.

In the Polish official translation of article 16 of the ICC's Statute one may find a *passus*, which provides that "no preparatory proceedings may be commenced or proceeded (...)". The English original version states that "no investigation or prosecution may be commenced or proceeded (...)". The two terms: investigation and prosecution are not precisely defined in the ICC's Statute, but we can assume that the term investigation means some activity in a case without the indictment of an individual suspect and the term prosecution means activity against an individual person – a suspect. The term – preparatory proceeding includes the two terms: investigation and prosecution. Both activities are in the exclusive competence of the ICC's Prosecutor (with a proper role of the Pre-Trial Chamber). One may ask in which moment the prosecution as a consequence of foregoing investigation starts. As a clear border between an investigation stage and a prosecution stage we can accept a moment of issuing an arrest warrant by the Pre-Trial Chamber.

There is no important conclusion derived from the fact of variety of the two terms described above. The UN Security Council has the same competence to defer for a period of twelve months an investigation or a prosecution.

We can also notice that the ability of the UN SC to defer an investigation or prosecution begins with a formal initiation of proceedings (more specifically, it starts with an official acceptance of the Pre Trial-Chamber – article 15(4)). But, all the activity undertaken by the Prosecutor before an official initiation of proceedings (collecting information from sources, analyzing the seriousness of the information, and seeking additional information from states, organs of the United Nations,

intergovernmental or non-governmental organizations, or other reliable sources – article 15 point 2) lie outside the competence of the UN SC.⁷

There is another connection between the ICC and the UN Security Council in the ICC's Statute. In article 87(7), we can read that: "[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." This provision means the return to the starting point and the return to the Security Council in situation when the Court cannot achieve any progress in investigation because of lack of cooperation from the states engaged.

The above connection between the ICC and the UN SC has, however, no important influence on the relationships between the two international bodies and does not give any additional instrument into the hands of the UN SC to interfere the work of the ICC. This provision has rather a formal – order character.

2. THE INTERNATIONAL CRIMINAL COURT AS AN INSTRUMENT OF MAINTENANCE OF AN INTERNATIONAL PEACE AND SECURITY

The creators of the ICC believed that the Court would be able to contribute to the maintenance of an international peace and security. That conviction is reflected in the preamble of the ICC's Statute: "[r]ecognizing that such grave crimes threaten the peace, security and well – being of the world (...)".

The conviction that the international crimes threaten the global peace and security has crystallized in the international opinion in the time of conflict in the former Yugoslavia in the 1990s. During this conflict, the UN SC became convinced that further inactivity of the international community in the situation when fundamental human rights were being brutally broken in the heart of Europe might lead to the threat of a breakdown in international peace and security. The UN SC expressed its concerns in several resolutions preceding

⁷ See also: M. Bergsmo, *The Jurisdictional Regime of the International Criminal Court*, part II, art. 1–19, 6 *European Journal of Crime, Criminal Law and Criminal Justice* 1998, p. 29; D. D. N. Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 *Criminal Law Forum* 1999, p. 87; Ch. L. Blaesley, *Jurisdiction, Definition of Crimes and Triggering Mechanisms*, 28 *Denver Journal of International Law and Policy* 1997, p. 177.

the creation of an *ad hoc* tribunal for the former Yugoslavia in 1993.⁸ Resolution No. 827/1993 states:

“(...) The Security Council, (...) Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory, Determining that this situation continues to constitute a threat to international peace and security, Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of the former Yugoslavia the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace, Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above – mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed, (...) Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace (...)”.

The UN SC, thus, recognized the grave breaches of international humanitarian law made in an internal conflict, as a threat to global peace and security. At the same time, the UN SC expressed the belief that the international criminal court can be an effective instrument supporting the peace restoring process. In the opinion of the organ that is charged with the task of maintaining international peace and security, the establishment of an international criminal court can constitute substantial support for the construction, after the end of the Cold War, of a new international order.⁹

The arrangements made by the UN SC were related to the specific situation in the former Yugoslavia, what was emphasized by the UN SC in its resolution, but it is obvious that the steps taken by the Security Council in that situation have a universal dimension. We can find the confirmation of this thesis in the ICC's Statute, where the intention to support an international security system was clearly expressed.

The position of the ICC in the system of organs responsible for maintaining international peace and security depends on its *stricte* judicial character. The ICC

⁸ S/RES/827 (1993).

⁹ See also: S. M. Schwebel, *The Role of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 *International Law and Politics* 1995, p. 731.

in opposition to the UN SC is not a political body. In its activity, directly leading to ensuring respect for international criminal law and which indirectly can influence the condition of international security, the ICC realizes only an interest of justice. That means that international law is on the first place in its value hierarchy. This is an unusual situation in international relations, where the main position is absolutely occupied by “the queen of international relations” – the balance of power, which is resultant of particular interests of states such that international law is only the instrument of creating multilateral relations among states. This also means that international law can be shaped flexibly depending on the actual political situation in the world.

The aspiration of the creators of the ICC to assure the Court the most possible independent position on the international scene contributed to the above-described structure of the relationship between the ICC and the UN SC. As a consequence, a new entity with competitive abilities in regard to the UN SC appeared on the international scene. Those competitive abilities obviously do not mean that the ICC can make decisions under Chapter VII of the UN Charter, nor can it use force to pacify conflicts. But the list of international crimes within ICC jurisdiction indicates the crimes, which by their nature can be committed in the context of war. War crimes like forcing war prisoners to serve in a hostile army or bombing undefended cities and killing mostly civilians cannot be committed in the circumstances of peace. Similarly, other crimes like genocide or crimes against humanity are potentially connected with war circumstances. Although initiating ICC jurisdiction over those crimes does not depend on a previous determination of the existence of war, we can expect that future cases under the jurisdiction of the ICC will be associated with war conflicts.

The particular problem in the context of the ICC’s jurisdiction in the circumstances of international conflicts is the crime of aggression mentioned in article 5 of the Statute. The crime of aggression is mentioned in the Statute next to war crimes, crimes against humanity and genocide but there is no definition of this crime because of a lack of consensus between state delegates at the Rome Diplomatic Conference. For this reason, effective jurisdiction over the crime of aggression cannot be exercised. In article 5(2), we can clearly read: “(...) The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with article 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Articles 121 and 123 describe provisions regarding amendments and reviews of the Statute. Any amendments shall enter into force for all state parties after instruments of ratification or acceptance have been deposited

with the Secretary General of the United Nations by seven-eighths of them. But any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those state parties which have accepted the amendment. In respect of a state party, which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that state party's nationals or on its territory (article 121(5)). This means that for the acceptance of definition of the crime of aggression and following submission of this crime to the real jurisdiction of the Court, it needs to go through the classical, complicated procedure of the law of treaty.

The provision regarding the necessity of consensus on the definition of the crime of aggression with the relevant provisions of the UN Charter is very important. Its wording clearly highlights the role and position of the UN Security Council as the primary international body responsible for maintaining peace and security in the world and as the only body which can adopt resolution indicating an aggressor state and other resolutions in circumstances of threats to the peace, breaches of the peace, and acts of aggression.

For that matter, it is clearly understood that the last word in the discussion about relationship between the ICC and the UN Security Council cannot be pronounced yet. The position of the ICC in the international security system cannot be definitely described until the definition of crime of aggression and conditions of exercising this crime by the Court are expressed in the ICC's Statute.¹⁰

3. DARFUR AND SUDANESE PROVINCE – THE FIRST CASE OF LAUNCHING ICC JURISDICTION AT THE REQUEST OF THE UN SECURITY COUNCIL

Darfur is a province of Sudan (similar in size to France) located in the southwest part of the country and is inhabited mainly by the black tribes of *Fur*, *Zaghawa* and *Messalit*. This is the province situated on the border of two conflicted areas of Sudan: Arabic north and Negro south. Sudan is regarded as an Islamic country (e.g., it is a member of the League of Arab States) because of the dominant position of Arab Muslims in the state pushing the black people to the margin of social, political and economic life. In 1955, before the Sudanese declaration of independence

¹⁰ See more about relationships between the ICC and the UN SC in: L. Yee, *The International Criminal Court and the Security Council*, in: Lee R. S., (ed.), *The International Criminal Court, The Making of The Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, Hague – London – Boston: 2002, p. 143 and et seq.

(1956.01.01), that antagonism resulted in the rebellion of the Negro tribes from the south against Arab domination. The rebels demanded participation in the exercise of rule over the country, equal access to the natural resources and profits from its exploitation, and equality of rights alongside Islam for animistic and Christian religions. There appeared also demands of political and economic autonomy for the south and even the secession of that region to become a sovereign country.

For almost twenty years, Sudan was a scene of conflict between government forces and rebels from the south. That long-lasting home war ended in 1972 with an agreement that admitted a kind of autonomy for the south. Peace persisted for eleven years until 1983 when oil deposits were found in the south, which became the impulse for the Khartoum government to annul the autonomy of the region. The government took over all benefits from the exploration of newly discovered oil deposits. This decision caused the renewal of the conflict - the rebellion exploded again and goes on until today.

The first serious attempt to achieve an agreement leading to an end of the conflict between the north and south was made in 1997 when a *Declaration of Principles* was signed. That document determined to maintain a unity of Sudan as a democratic and secular state and declared a fair distribution of profits from the exploitation of natural resources of the south. But the declaration did not end the conflict, as both sides did not observe its provisions. In 2002, under the pressure of the international community, the belligerents (the government of Sudan and the *Sudan People's Liberation Army* – the forces created in 1983 by the fusion of *Anyaya Forces* fighting from 1955 to 1972 and the rebels from the Bor region who inspired an uprising in 1983) undertook negotiations. The negotiations with participation of diplomats from the USA, Great Britain and Norway led to the *Machakos Protocol*. That agreement contained provisions regarding the future government's structure and announced a transitional stage in which the black people from the south of Sudan should decide about their political future. As a consequence of the *Machakos Protocol*, belligerents stopped fighting and agreed to continue the peace talks.

The next step toward peace was the signing of several protocols at peace conferences in Naivasha Kenya in 2003 and 2004. The crucial protocol ending negotiations in Naivasha (signed on 31 December 2004) enforced an open-ended cease-fire.

On 9 January 2005 in Nairobi, after many decades of war and a few years of peace negotiations, the fighting parties at last signed a peace agreement. That document brought into force a transitional stage in which the people from the south of Sudan should decide in a referendum their political future in or out of Sudan.¹¹

¹¹ Information from the UN Information Center in Warsaw – www.un.org.pl/sudan/

The peace agreement from Nairobi did not result in peace on the whole territory of the state because of non-participation in peace talks by representatives from Darfur. From February 2003, Darfur region was a scene of conflict between the rebels and the Khartoum government as both sides wanted to annex this territory in light of the foreseeable secession of the south region in the near future. As was mentioned above, since Darfur is mainly inhabited by black tribes, the Arab-dominated government decided to change the ethnic structure of the region through mass displacement and ethnic cleansing. For that purpose, the government called up Arab militia forces – the *Janjaweed*. The Khartoum regime called up, armored and financed *Janjaweed* with the aim to terrorize and exterminate the black people of Darfur. Actions taken by the *Janjaweed*, with support by air strikes of the government forces, caused the destruction of many villages, devastation of drinking water and food reserves, ruthless killing, looting, rape and mass displacement. The government willfully destroyed food reserves of the province and blocked the humanitarian supplies from the outside.¹²

In the Darfur conflict until today, tens thousands of people lost their lives and about two million were forcefully displaced. As the UNICEF has reported, there are over million people (and a half of this number are children) in the 153 refugee camps on the territory of Sudan and Chad. The refugees live in terrible conditions, suffering from starvation and diseases. Two-thirds of the refugees have no access to drinking water and over half of them have no access to elementary medical care.

The refugee camps in Sudan are administrated by *Janjaweed* militia who intimidate and exploit refugees. Women are frequently raped while men looking for food around the camp are killed on a regular basis.

As the UNICEF stresses, the Darfur conflict may extend to the other provinces of Sudan or even to neighboring Chad. The conflict poses a threat not only for the internal stability but also for international peace.¹³

The United Nations has called the international community for help by naming the current situation in Sudan a humanitarian disaster.

In the answer to that crisis, the United Nation's Security Council adopted in 2005 a few resolutions regarding the situation in Sudan. Twice, the UN SC extended the mandate of the UN peace forces in the Sudan (UNAMIS¹⁴) and then created

¹² See in that mater Human Rights Watch Report – www.hrw.org/english/docs/2004/05/07/darfur8549.htm. This 77 pages report describes in which manner the government forces inspired, directed and committed in massacres, mass killing of civilians, burning towns and villages and forced displacement of the black population from Darfur.

¹³ See in that mater UNICEF Report: www.unicef.pl/525_1082.htm.

¹⁴ United Nations Advance Mission in Sudan created by UN S.C. in 2004.11.19 – S/RES/1574 (2004).

a new mission – the UNMIS.¹⁵ In five days after the UNMIS creation, the UN SC adopted another resolution regarding the Sudan situation (S/RES/1591/2005), and emphasized one more time that the remaining situation threatens international security. The UN SC in hard words condemned both sides of the conflict for non-observance of peace agreements and threatened to adopt sanctions under article 41 of the UN Charter. One of the provisions of the resolution established a Special Committee composed of delegates from every state member of the UN SC. The Special Committee has been charged with many precise duties but generally it should realize the main obligation to monitor permanently the situation in Darfur and report on it every three months to the UN Security Council.

On 31 March 2005, the UN Security Council, impatient with the persisting crisis situation in Darfur, decided at last to engage the ICC in the peace restoring process. That decision of the UN SC was really surprising for observers because it is known that for the adoption of any resolution under Chapter VII of UN Charter the majority of nine of fifteen is needed and simultaneously there must be unanimity of the five permanent members of the UN SC. But among the five permanent members of the UN SC only the Great Britain and France are State parties to the ICC Statute. The others – China, Russia and the United States – from the very beginning presented a skeptical attitude to the Court. Besides, the United States has openly fought against the ICC on the international forum. In such circumstances, the UN SC has, nevertheless, adopted the resolution (S/RES/1593/2005) referring to the ICC Prosecutor a situation in the Sudan and authorized the Prosecutor to take measures in regard to the crimes committed on the territory of Sudan after 1 July 2002, when the ICC's Statute came into force. The resolution was adopted by eleven votes in favour (Argentina, Benin, Denmark, Philippines, France, Greece, Japan, Russia, Romania, Tanzania and Great Britain) and four votes abstained (Algeria, Brazil, China and the United States). No country voted against the resolution.

The United States traditionally manifested its lack of trust in the ICC, proposing to construct for Sudan a hybrid court following the example of existing hybrid courts for Sierra Leone, East Timor or Kosovo. The US proposition did not, however, receive wide acceptance from the other UN SC members, as they argued that the process of construction of that kind of tribunal is time-consuming, complicated and expensive, while there was already the International Criminal Court prepared to work and waiting for this kind of situation.

¹⁵ United Nations Mission in Sudan created by UN S.C. in 2005.03.24 – S/RES/1590 (2005).

Brazil abstained from voting because it protested against the resolution's provision, which stated that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the ICC shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State. This provision was clearly introduced in response to a request from the United States as a condition for not using a veto against resolution.

Algeria abstained from voting to manifest its criticism of the Security Council, which ignored the appeal expressed in the name of the African Union by the president of Nigeria Olusegun Obasanjo to leave a solution of Sudanese crisis to the Union.

China also abstained from voting and, by doing so, did not support an idea of international criminal jurisdiction exemplified by the ICC (China has formulated objections to the ICC from the very beginning). Moreover, China indicated that it could not accept the decision of the UN SC referring the situation in Sudan to the ICC Prosecutor because of an explicit objection of the Sudanese government.

The objection of Sudan to the UN SC resolution was expressed by the delegate of Khartoum government Elfatih Mohamed Ahmed Erwa, who was invited to the UN SC debate. He criticized the UN SC for the application of a double standard – one standard for superpower states and another for developing countries. He also reproached the UN SC for ignoring the facts that the Sudanese courts initiated proceedings related to crimes committed in the conflict between north and south Sudan, especially in the Darfur province. Furthermore, he noted that Sudan is not a state party to the ICC's Statute, which clearly indicated the lack of acceptance for the idea of international criminal jurisdiction.

In the five days after adoption of the UN SC resolution, the Prosecutor of the ICC received from the UN Secretary General Kofi Annan materials collected by the International Investigation Commission created by the UN for the purpose of investigating the situation in Darfur. The materials received by the Prosecutor contained a list of mass murders of civilians, systematic rapes of women, burned villages and towns, and the list of fifty-one names of persons suspected to have conducted these crimes. In addition to these materials, the Prosecutor also received many documents and information from international non-governmental organizations, autonomous experts, the African Union, the Sudanese government, the United Nations organs and local and international mass media. After the careful consideration of the received materials and signals, the Prosecutor took the decision to start the investigation regarding to the crimes within the jurisdiction of the ICC allegedly committed on the territory of Darfur.

Paweł Grzegorzczak ■

THE EFFECT OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE DOMESTIC LEGAL ORDER¹

I. INTRODUCTION

1. The Convention for the Protection of Human Rights and Fundamental Freedoms² considering other acts of international law concerning protection of human rights is distinguished by the structure and efficiency of the mechanism used to control the performance of obligations resulting from the Convention³. After

¹ This treatise is a supplemented version of the article entitled “The Effect of the Judgments of the European Court of Human Rights in the Domestic Legal Order”, published in *Przegląd Sądowy* (PS) 2006, no. 6, p. 3 and further. As regards the necessity for the re-examination in a civil case as an effect of the ruling of the ECtHR allowing the complaint, the author wants to underline that he upholds his comments concerning advantages and disadvantages of this solution, however, it hardly possible not to notice that recent jurisprudence of the ECtHR increasingly points to re-examination of a case as the most effective way to comply with the judgment not only in criminal but in civil cases as well.

² The Convention for the Protection of Human Rights and Fundamental Freedoms, executed in Rome on 4th November 1950 (Polish Journal of Laws 1993, no. 61, item 284 as amended) thereafter referred to as the Convention or ECHR. After it had entered into force the Convention was amended and supplemented a few times. The last protocol (Protocol no. 14) concerning the organization of the control system of the Convention was signed by Poland on 10th November 2004 and ratified on 12th October 2006 but it has not entered into force yet due to the continuing ratification procedure in the Russian Federation. For more information see M. Eaton, J. Schokkenbroek, *Reforming The Human Rights Protection System Established by The European Convention of Human Rights*, *Human Rights Law Journal* (HRLJ) 2005, no. 1-4, p. 1 and further.

³ The ECHR was followed also by other more recent acts of international law implementing the idea of the protection of human right at the regional and universal level. As far as the

changes made along with the entry into force of the Protocol no. 11 of 11th May 1994⁴, from the institutional perspective, this system includes two bodies. These are the European Court of Human Rights in Strasbourg (“ECtHR” or Court”) and the Committee of Ministers of the Council of Europe⁵.

The Court is an international one competent to examine inter-state (art. 33 of the Convention) and individual complaints (art. 34 of the Convention). Individual complaints which are the subject of the following comments are filed by individuals, non-governmental organizations or groups of individuals affected by a breach of freedoms or rights referred to in the content of the Convention and Protocols thereto⁶ and which the contracting parties have undertaken to ensure as stipulated in art. 1 of the Convention. The Convention then, unlike typical international agreements, does not create obligations exclusively in inter-state area but also sets up positive and negative obligations for the contracting parties towards individuals remaining under their jurisdiction⁷. The performance of these obligations is subject to judicial control of the Court⁸.

Originally the recognition of the ECtHR’s jurisdiction was an expression of good will of the contracting parties. Since the Protocol no 11 has entered into force the Court’s competence to control is compulsory in nature, which means that it is accepted by any state acceding to the Convention. Compulsory character of the ECtHR’s jurisdiction is in opposition to optional competence of other

latter is concerned, the Optional Protocol to the International Covenant on Civil and Political Rights from 1966 (Polish Journal of Laws, no. 23, item 80) provides for the possibility to submit communication to the UN Human Rights Committee in Geneva.

⁴ In this respect compare M. A. Nowicki *Reforma Europejskiego Trybunału Praw Człowieka*, Biuletyn Biura Informacji Rady Europy (BBIRE) 1998, no. 3–4, p. 200 and further.

⁵ For information on the role of the Committee of Ministers of the Council of Europe see the content of the Statute of the Council of Europe adopted in London on 5th May 1949 (Polish Journal of Laws 1994, no. 118, item 565).

⁶ More on the right to bring an individual action see B. Gronowska, *Pozycja jednostki w systemie procedury kontrolnej Europejskiej Konwencji Praw Człowieka* from 1950 [in:] Jubilee Book in honour of professor Tadeusz Jasudowicz, Toruń 2004, p. 166.

⁷ Positive and negative character of obligations resulting from the Convention – C. Mik, *Teoria obowiązków pozytywnych państw – stron traktatów w dziedzinie praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka* [in:] Jubilee Book..., p. 258 and further. On specific nature of the ECHR in general compare A. Drzemczewski, *The sui generis nature of the European Convention on Human Rights*, International & Comparative Law Review, 1980, vol. 54, p. 54 and further, C. Mik, *Koncepcja normatywna europejskiego prawa praw człowieka*, Toruń 1994, p. 186, P. Hofmański, *Konwencja Europejska a prawo karne*, Toruń 1995, p. 39.

⁸ Compare art. 25 and 46 of the Convention from before the Protocol no. 11 came into force.

existing international tribunals, as for example: the International Court of Justice. At present 47 states inhabited by approx. 800 million people come within the ECtHR's jurisdiction.

2. Since the Court started to operate on a permanent basis that is from the beginning of 1998, it has issued a few thousand judgements and each year the number of complaints is increasing. In 2007 it amounted to almost 42 000⁹. A judgement (*Urteil*), unlike a decision (*Entscheidung*) – in view of the provisions of the Convention – is a ruling substantive in nature. The Court decides by it as to the legitimacy of the claim. If the Court accepts the claim by the same or by a separate judgement it may award just satisfaction (*gerechte Entschädigung*) (art. 41 of the Convention)¹⁰.

3. Since any individual complaint is admissible only after all domestic measures have been exhausted (art. 35 of the Convention) it often happens that the Court delivers a judgment when the proceedings before a court or other domestic body have already been closed. By declaring that the Convention was not violated, the judgment of the Court additionally mandates the domestic settlement by sanctioning the state's behaviour in view of the values guaranteed in the Convention. Whereas if the judgment of the Court is in favour of an applicant, a question arises how it affects already completed judicial proceedings, or to be more precise, what are its effects in the domestic legal order of the states parties to the Convention.

The Convention is a piece of international law and therefore the answers to the above question should be sought in norms of this legal system and in particular in the Convention itself. The creators of the Convention have not paid much attention to this issue. In compliance with art. 46 of the Convention, which is crucial from this point of view, the contracting states take an obligation to abide (*zu befolgen*) by the final judgment of the Court in any case to which they are parties and the Committee of Ministers monitors the manner of its execution. Such general formulation gives rise to controversy on the issue of the effects of the ECtHR's judgments in the domestic arena and the manner of their execution. At one time the judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 14 October 2004, 2 BvR 1481/04 – in which this question was handled from the perspective of German courts¹¹ – provided

⁹ *Annual Report 2007 of the European Court of Human Rights, Council of Europe, Strasbourg* 2008, p. 13. This is an increase of 6% as compared to year 2006.

¹⁰ Rule 75 of the Rules of Court (published along with the Convention – Polish Journal of Laws 1993, no. 61, item 284/1 as amended, thereafter referred to as the "Rules").

¹¹ *Neue Juristische Wochenschrift (NJW)* 2004, no. 47, p. 3407. This ruling has been presented in Polish language by A. Jasińska – A. Jasińska, *Europejska Konwencja Praw Człowieka a prawo krajowe: niemiecki Federalny Sąd Konstytucyjny o zakresie związania orzeczeniami Europejskiego Trybunału Praw Człowieka*, *Radca Prawny* 2005, no. 1, p. 6 and further.

a strong impetus for a discussion on this matter. The Polish Constitutional Tribunal¹² also has already faced this dilemma, the same about the Supreme Court¹³. This situation does not come as a surprise considering the popularity of the Convention in Poland evidenced by a considerable number of cases submitted to the Court from our country¹⁴.

These doubts prompt to investigate closer the position of the ECtHR's judgments and the manner they take their effect in the internal legal order. Considering the number of emerging issues it is necessary to limit the research to problems crucial in nature and to conduct it with the assumption that along with the development of domestic practice they will become a starting point for further discussion. In particular, taking into account aspects pertaining to civil proceedings to which further comments apply, the issue in question is still new and it would be hardly possible to find close references in current research studies or jurisprudence.

However at the beginning, before considering judgments of the Court it seems worthy to briefly characterize the position of the Convention itself in the Polish domestic order.

II. POSITION OF THE ECHR IN THE POLISH LEGAL ORDER

Only a few states which are the parties to the Convention today have not decided yet to incorporate it fully into the internal legal order¹⁵. However, the provisions of the Convention are differently ranked in the sources of law in particular

¹² Compare judgment of the Polish Constitutional Tribunal of 18 October 2004, P 8/04, *Orzecznictwo Trybunału Konstytucyjnego – Zbiór Urzędowy Seria A (OTK-A) 2004, no. 9, item. 92.*

¹³ See the decision of the Polish Supreme Court of 19 October 2005, V CO 16/05, unpublished and the decision of the Polish Supreme Court of 17 April 2007, I PZ 5/07, *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych (OSNP) 2008, no. 13–14, item 196.*

¹⁴ Statistical data of the Court (*Annual Report 2007...*, pp. 138–139) show that in 2007 Poland was the third state after Russia and Ukraine in the Council of Europe considering the number of allocated applications. The Court awarded 341 judgments altogether in cases in which Poland was a participant and in 318 of them the Court stated that the Convention had been violated (data from statistics of the Information Office of the Council of Europe – <http://www.coe.org.pl> – as of the end of 2006).

¹⁵ In this respect Ireland is mentioned as an example – *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, *Texas International Law Journal* 2004–2005, vol. 40, p. 378.

states parties to the Convention¹⁶. In Polish legal order this position should not create any doubts.

Although the Convention has not been ratified upon prior consent expressed in an act of parliament, art. 241 paragraph 1 of the Polish Constitution – according to which international agreements ratified by Poland on the basis of provisions applicable at the time of their ratification and published in the Journal of Laws (*Dziennik Ustaw*) are acknowledged as international agreements ratified upon prior consent expressed in an act of parliament and to which art. 91 of the Constitution is applicable – applies if it follows from the content of the international agreement that it concerns issues enumerated in art. 89, paragraph 1 of the Constitution. This allows to draw a few conclusions. First, as an international agreement ratified and published in the Journal of Laws this convention is a part of Polish legal order¹⁷. Secondly, by virtue of the nature of its stipulations it is directly applicable (art. 91 paragraph 1 of the Constitution). Apart from serving as interpretative guidance in taking decisions on the grounds of internal law regulations, it may itself constitute grounds for judgments delivered by domestic bodies¹⁸. Thirdly, the Convention – as ranked on the same level as international agreements ratified upon prior consent expressed in an act of parliament – takes precedence over an act of parliament in case the latter cannot be reconciled with the former. The implementation of this precedence lies both with public courts and the Supreme Court which adjudicate

¹⁶ Three different solutions are encountered here. First, this is the most rarely applied: the provisions of the Convention have a status almost equivalent to the provisions of a Constitution (Austria, the Netherlands). Second, the Convention is ranked at the same level as regular acts of parliament (as it is for example in Finland, Iceland, the Principality of Lichtenstein, Germany, Turkey, Italy). The most common option includes giving precedence to the provisions of the Convention over regular acts of parliament excluding the constitution and this solution results from either explicit regulations or the primacy of the ECHR over acts of parliament following from the interpretation of the law. More on this issue see K. Chrysogonos, *Zur Inkorporation der Europäischen Menschenrechtskonvention in den nationalen Rechtsordnungen der Mitgliedstaaten*, *Europarecht* (EuR) 2001, no. 1, pp. 55–57.

¹⁷ See the resolution of the Supreme Court of 12 July 2001, III CZP 22/01, *Orzecznictwo Sądu Najwyższego – Izba Cywilna* (OSNC) 2001, no. 11, item 158.

¹⁸ A. Garlicki, *Obowiązywanie Europejskiej Konwencji Praw Człowieka w porządku prawnym Rzeczypospolitej Polskiej*, *BBIRE* 2003, no. 3, p. 18, C. Mik, *Koncepcja...*, pp. 188–189, M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*, *Zakamycze* 2003, p. 269; compare. P. Hofmański, *Konwencja...*, p. 92. The Supreme Court also supported the possibility of direct applicability of the ECHR's provisions – decision of the Supreme Court of 26 August 1998, IV KKN 330/98, *Prokuratura i Prawo* 1999, no. 5, item 14 (insert) and the decision of 29 July 1997, II KKN 313/97, *Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa* (OSNKW) 1997, no. 9–10, item. 85.

particular cases and Constitutional Tribunal (CT) deciding pursuant to art. 188 subparagraph 2 or art. 188 subparagraph 5 of the Constitution¹⁹.

III. LEGAL NATURE AND BINDING FORCE OF THE ECtHR'S JUDGMENTS

1. In order to explain thoroughly the effects of judgments of the ECtHR in the domestic legal order it is necessary to describe precisely their legal nature. As far as judgments allowing a claim are concerned, according to the prevailing view, they are in nature similar to or are declaratory judgments²⁰. This opinion is correct and its justification lies in the fact that by finding that there has been a violation of the Convention the Court only establishes *ex post* that some act or omission on the part of state authorities turned out to be noncompliant with the Convention's norms reconstructed in the course of the adjudication process initiated by submission of an application. This effect corresponds to the claim of the application which, in procedural terms, may be treated as a demand to establish that certain freedom or law resulting from the Convention has been breached²¹. Such judgment does not create any new rights for the applicant but emanates rights already enjoyed by the applicant. The attention of the Court is focused on the evaluation of conformity of particular conduct of a state with the Convention, whereas possible obligations stem-

¹⁹ Towards the same direction also A. Garlicki, *Obowiązanie...*, p. 26; compare also A. Wróbel, *Stosowanie prawa międzynarodowego i prawa Unii Europejskiej przez sądy RP* (in:) K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, Warszawa 2006, pp. 216–217.

²⁰ This opinion is unanimously shared both in literature and in jurisprudence of the states parties to the Convention. Compare G. Ress, *Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane*, Europäische Grundrechte Zeitschrift (EuGRZ) 1996, p. 350, W. Okresek, *Die Umsetzung der EGMR-Urteile und ihre Überwachung. Probleme der Vollstreckung und der Behandlung von Wiederholungsfällen*, EuGRZ 2003, no. 4–6, p. 169, R. Ryssdal, *The Coming Age of The European Convention on Human Rights*, European Human Rights Law Review 1996, no. 1, p. 19. Such standpoint was also adopted by German Federal Constitutional Court in the judgement mentioned above of 14 October 2004, 2 BvR 1481/04, p. 3409 (footnote 11) and Swiss Federal Court (*Bundesgericht – BGE*); compare the judgments of 29 April 2002, 2A 526/2001 (<http://www.bger.ch/>), of 31 October 2001, 2A 93/2001sch (<http://www.bger.ch/>) and of 2 March 2001, 2A 232/2000/bol (<http://www.bger.ch/>).

²¹ W. J. Habscheid, *Streitgegenstand, Rechtskraft und Vollstreckbarkeit von Urteilen des Europäischen Gerichtshofes* (in:) *Festschrift für Kostas E. Beys – Dem Rechtsdenker in attischer Dialektik*, Athens 2003, p. 479.

ming from negative result of this control are left aside and are not included in the conclusions of the judgment.

The situation is different only when the Court in its judgment awards pecuniary compensation to the applicant on the grounds of art. 41 of the Convention. By obliging the state to pay compensation, this judgment corresponds to the structure of a judgment awarding benefits²². It is worthy to add that when refusing to award pecuniary compensation the Court often uses the expression that the finding in itself constitutes sufficient satisfaction for the applicant. This means that in this case the satisfaction is exhausted in moral satisfaction resulting from winning the case before an international authority for the protection of human rights.

2. The right to a fair trial as safeguarded by art. 6 of the Convention assumes that a judicial decision should be effective and binding upon the entities to which it is addressed. This proposition is reflected in the title of the editorial unit containing art. 46 of the Convention according to which final judgments of the ECtHR have binding force (*scil. Verbindlichkeit*)²³. It should be acknowledged that this binding force manifests itself in two aspects. First, within the limits within which the judgments of the Court carry the binding force, no state may contest that the Convention has been violated. Secondly, a state is legally bound to take certain measures to satisfy the judgment allowing the claim²⁴. Following this reasoning, binding force of the ECtHR's judgment may be equated with substantive force of law of domestic judgments delivered in civil proceedings. A state is bound by the judgment and must act in a specific way, on the other hand the force of law mentioned above excludes re-examination of an application in the same matter (*ne bis in idem* – art. 35 paragraph 2 point b of the Convention)²⁵.

²² The same view prevailing in the science (compare e.g. H. A. Stöcker, *Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik*, NJW 1982, no. 35, p. 1908).

²³ The same ECtHR in the reasons for its decision of 4 February 2005 *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I K. E. Beys points out that standards resulting from art. 6 of the Convention apply also to judgments of the Court itself as well. – K. E. Beys, *Zur Verbindlichkeit der Entscheidung des Europäischen Gerichtshofs für Menschenrechte* (in:) *Festschrift für Hans Friedhelm Gaul zum 70. Geburtstag*, Bielefeld 1997, p. 56.

²⁴ This opinion was shared by the Polish Supreme Court in its decision of 17 April 2007 I PZ 5/07 (footnote 13); the same also A. Szklanna, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka – ogólny zarys problematyki oraz jej specyfika w odniesieniu do spraw polskich*, BBIRE 2008, no. 2, p. 6.

²⁵ W. J. Habscheid, *Streitgegenstand...*, p. 480, G. Ress, *Wirkung...*, p. 350, J. Meier-Ladewig, H. Petzold, *Die Bindung...*, p. 16, M. Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, German Law Journal (GLJ) 2005, no. 5, p. 880, A. Heldrich, *Persönlichkeitsschutz und Pressefreiheit nach der Europäische Menschenrechtskonvention*, NJW 2004, no. 37, p. 2636.

It should be added that judgments issued by the Chamber – when the conditions set up in art. 44 paragraph 2 of the Convention have been fulfilled, and by the Grand Chamber – at the time they are delivered become final. As a result – subject to extraordinary revision procedure based on new facts provided for in rule 80 of the Rules – such judgment cannot be challenged. Irrespective of substantive force of law, the provisions of the Convention also form the grounds for applying the concept of formal force of law with reference to judgments of the ECtHR²⁶.

3. The assertion that a state bound by a judgment cannot still hold that its conduct does not violate the Convention is justified by the essence of the mechanism of judicial control over compliance with its provisions. The sense of this mechanism would be put under a question mark if it were assumed that the final word on the conformity of a state's conduct with the Convention anyway belonged to domestic courts²⁷. This view is supported in the jurisprudence of the German Federal Constitutional Court²⁸ and the Austrian Supreme Court²⁹, no opinion to the contrary has been presented in analyzed literature³⁰.

The obligation of a respondent state to take up certain steps aiming at satisfying the judgment allowing the claim is rather clear as far as judgments requiring to pay compensation are concerned. It includes the demand to pay awarded compensation. In the case of judgments finding violation of the Convention, doubts arise since sole declaration of the Convention violation does not give rise to any specific content of an obligation, and also, to be more precise, any obligation to take positive actions. However such obligation can be inferred from the content of article 41 of the Convention. On the grounds of this provision, the Court may award just satisfaction to the applicant if domestic law allows to redress the effects of the Convention violation only partially. However this provision does not require to create any specific means in the internal legal system for implementing ECtHR's judgments but still on the grounds of this provision it can be claimed that if at least

²⁶ K. E. Beys, *Zur Verbindlichkeit...*, p. 57.

²⁷ E. Klein, *Glosa do orzeczenia Federalnego Sądu Konstytucyjnego z 14 października 2004 r.*, 2 BvR 1481/04, *Juristische Zeitung* 2004, no. 23, p. 1178.

²⁸ Judgment of 14 October 2004, 2 BvR 1481/04, p. 3409 (footnote 11).

²⁹ Decision of 25 November 1997, 1Ob190/97s (<http://www.ris.bka.gv.at/>). This view has been repeated in many further decisions – see eg. decision of 22 October 2001, 1Ob260/01v (<http://www.ris.bka.gv.at/>).

³⁰ E. Klein, *Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?* [in:] *Protection des droits de l'homme: la perspective européenne; mélanges à la mémoire de Rolv Ryssdal*, Köln, Berlin, Bonn, München 2000, p. 707, J. Meyer-Ladewig, H. Petzold, *Die Bindung deutscher Gerichte an Urteile des EGMR*, NJW 2005, no. 1, p. 17, H.-J. Cremer, *Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004*, EuGRZ 2004, no. 22, p. 690.

domestic law allows for removing violation effects, in other words, for an action positive in its essence then this action should be taken. This standpoint corresponds to unquestioned by states and thereby binding – as it is assumed in connection with art. 31 paragraph 3 point b of the Vienna Convention on the Law of Treaties (Vienna Convention)³¹ – supervision practice of the Committee of Ministers within which it controls if a state affected by a judgment finding a violation of the Convention draws adequate consequences from it³². This practice is clearly grounded in the content of art. 46 paragraph 2 of the Convention. Moreover in some situations obligation for positive action of a state appears natural considering that, if the violation includes creating a legal situation which is inconsistent with the content of the Convention, then passive behaviour of the state would be nothing but further evading the performance of conventional obligations in view of an authoritative and unquestionable statement of the Court. By virtue of the finding of the violation of human rights safeguarded by the Convention the Court confirms that a state has breached its legal international obligations to observe them for which it should be held responsible. As an example: if a violation includes statutory discrimination of illegitimate children with regard to succession it is hardly possible to imagine that the respondent state confines to losing the case in the Court and abstains from taking any actions aiming at making domestic law conform to the Convention³³. Its guarantee function would then be only illusory.

If the two above mentioned arguments are complemented by the opinion of the science of international law according to which responsibility of a state for breaching international obligations generally is expressed in its duty to take up certain measures in order to erase the effects of an international delict³⁴, the opinion presented in the science strongly approving of positive obligations of contracting parties³⁵ may only be of complementary significance.

³¹ Vienna Convention on the Law of Treaties, executed in Vienna on 23rd May 1969 (Polish Journal of Laws 1990, no. 74, item 439 – thereafter “CLT”).

³² H.-J. Cremer, *Zur Bindungswirkung...*, p. 690.

³³ Compare in this respect cases: *Marckx v. Belgium*, Series A no. 31 (6833/74) and *Vermeire v. Belgium*, Series A no. 214-C (B 12849/87) which ended in judgments of 13 June 1979 and 29 November 1991 respectively.

³⁴ This way H. de Fumel, *W sprawie odpowiedzialności państwa we współczesnym prawie międzynarodowym*, *Państwo i Prawo* (PiP) 1976, no. 3, p. 49 and p. 41. Whereas J. Symonides in this context writes on reparation (including redress of damage and satisfaction) and sanctions which in the case of ECHR cannot come into play (J. Symonides, *Odpowiedzialność państwa w prawie międzynarodowym*, *Studia Prawnicze* 1971, no. 30, p. 56); compare also C. Mik, *Koncepcja...*, p. 190, and also p. 253 and further.

³⁵ L. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 16, E. Klein, *Should...*, p. 707, W. J. Habscheid, *Streitgegenstand...*, p. 480, G. Ress, *The Effect...*, p. 371, H.-J. Cremer, *Zur*

4. Binding force of the Court's judgments is framed within certain subjective and objective boundaries. *Ratione personae* includes the parties which participated in proceedings before the Court. These are the plaintiff and the respondent state. This view – confirmed in the jurisprudence of the German Federal Constitutional Court³⁶ – prevails in literature³⁷. It is based on the content of art. 46 paragraph 1 of the Convention according to which the contracting parties are obliged to abide by judgments of the Court in cases to which they are parties³⁸. From the objective standpoint (*ratione materiae*), binding force of the Court's judgment applies to the case which was the subject matter of the ECtHR's decision. In order to set precisely the frames of "the case" it is necessary to refer to the subject matter of the proceedings before the Court. This subject matter is determined by the demand included in the application to declare that certain freedom or right or certain freedoms or rights enacted in the Convention and by the facts of the case presented in it³⁹.

Subjective limitation of the binding force of the ECtHR's judgement is reflected in practice mainly in the fact that supervision over execution of a judgment – performed in accordance with art. 46 paragraph 2 of the Convention by the Committee of Ministers – applies only to the state against which the judgment has been declared and only against the state to which sanction may apply for failure to perform it⁴⁰. In literature there is a discussion on the possibility to extend the subjective limits of the binding force of the ECtHR's judgments to include all contracting states. It is expected that the advantage of this solution would lie in better efficiency of the mechanism of the Convention and more uniform interpretation of its provisions⁴¹. This would require amending the wording of the Convention, which

\ *Bindungswirkung...*, p. 690, W. Okressek, *Die Umsetzung...*, p. 170, E. Pache, *Europäische Menschenrechtskonvention und deutsche Rechtsordnung*, EuR 2004, no. 3, p. 402, H. A. Stöcker, *Wirkungen...*, p. 1908.

³⁶ Judgment of 14 October 2004, 2 BvR 1481/04, p. 3409 (footnote 11).

³⁷ E. Klein, *Should...*, p. 706, J. Meyer-Ladewig, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Handkommentar*, Baden-Baden 2003, p. 305, H. D. Jarmul, *The Effects of Decisions of Regional Human Rights Tribunals on National Courts*, New York University Journal of International Law & Politics 1995–1996, vol. 28, p. 333, G. Ress, *The Effect...*, p. 378, M. Hartwig, *Much Ado...*, p. 880, E. Pache, *Europäische...*, p. 403, H.-J. Cremer, *Zur Bindungswirkung...*, p. 690 and literature referred to therein.

³⁸ S. Zabłocki and P. Hofmański, *Glosa do wyroku Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 25 marca 1998 r., sygn. 45/1997/829/1035, w sprawie Belziuk przeciwko Polsce*, Paestra (Pal.) 1998, no 7–8, p. 11, soundly point out to unfortunate wording of art. 46 paragraph 1 in Polish language but a similar problem applies to original versions of the Convention.

³⁹ H.-J. Cremer, *Zur Bindungswirkung...*, p. 690, similarly M. Hartwig, *Much Ado...*, p. 887.

⁴⁰ W. Okressek, *Umsetzung...*, p. 169, E. Pache, *Europäische...*, p. 406.

⁴¹ E. Klein, *Should...*, *passim*, and especially p. 711 and further.

is generally accepted by advocates of this solution⁴². Despite such proposal⁴³ presented in the above mentioned Protocol 14 – which has not come into force yet, and which modifies the control system of the Convention – the wording of art. 46 paragraph 1 and 2 has remained unchanged. Moreover the idea of limiting the binding force of judgments to relations between the parties to the proceedings before the Court received by it additional normative justification⁴⁴.

5. As a consequence of the view that the binding force of the Court's judgments is contained within subjective and objective limits of the case, the interpretation of the Convention provisions performed by the Court in the course of formulating the decision becomes operative in character⁴⁵ and does not acquire inherent force⁴⁶. As part of the reasons for a final decision it may become significant and becomes significant by virtue of the conclusion itself but does not carry any binding force exceeding the limits of the case within which the judgment was issued⁴⁷. This view corresponds to the need for dynamic interpretation of the Convention and to the position of the Court with reference to domestic courts which will be discussed further. It would be difficult to harmonize with this position as well as with the subsidiarity principle of judicial control performed by the ECtHR granting competence to the ECtHR to make self-contained interpretation in form of directives addressed to domestic courts as to how and in what way the Convention should be interpreted if they are treated as legally binding to the same extent as the decision itself⁴⁸. The same comments, *mutatis mutandis*, apply to establishment of facts made by the Court.

⁴² Differently however, R. García Macho, *Wirkung und Grenzen der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im spanischen Recht* (in:) *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat*, Kehl 2006, p. 185, who referring to art. 1 of the Convention claims that the ECtHR's judgment is effective *erga omnes* also in current legal situation.

⁴³ Compare W. Okreszek, *Umsetzung...*, p. 169, footnote 16.

⁴⁴ Since new paragraphs of art. 46 of the Convention – which entitle the Committee of Ministers to refer to the Court the question whether a state respects its obligations resulting from a judgment – clearly apply to a state party to the proceedings before the Court against which the judgment has been delivered.

⁴⁵ S. Włodyka, *Wiążąca wykładnia sądowa*, Warszawa 1971, p. 11.

⁴⁶ E. Klein, *Should...*, p. 708.

⁴⁷ H.-J. Cremer rightly notices that neither establishment of facts nor reasons of the judgment „as such” (*als solche*) are binding for domestic courts but the conclusion of the Court must be understood in light of its reasons and facts of the case. – H.-J. Cremer, *Zur Bindungswirkung...*, p. 690. The standpoint that the binding force of the ECtHR is limited to the case in which the judgment is issued is not unanimously shared – compare K. E. Beys, *Zur Verbindlichkeit...*, p. 57, H.A. Stöcker, *Wirkungen...*, p. 1909 and W. J. Habscheid, *Streitgegenstand...*, p. 481.

⁴⁸ Since formulating directives of this type belongs to the domain of the courts of appeal (compare S. Włodyka, *Wiążąca...*, p. 13 and further, and also p. 182 and further).

Though it is not necessary to give more significance to establishment of facts made by domestic courts, there are reasons why such solution would be improper⁴⁹.

6. However it should be clearly underlined that interpretation of the Convention provisions assumed in the ECtHR's judgments and also guidance for interpretation of the Convention, if formulated *in casu*, present the way the Convention is understood by the Court, and this cannot be ignored by domestic authorities of the contracting parties. As stipulated in art. 32 paragraph 1 of the Convention, the Court is competent to make authoritative interpretation of its provisions. It is obvious that limited binding force of a judgment finding the Convention violation does not preclude respecting the position presented by the Court as to the adequate interpretation of the Convention by the remaining contracting states. In Poland such behaviour should be perceived as one of the natural elements of the process of law application by all public authorities including courts. Anticipating further comments, on the one hand, what may matter here is considering the opinion of the Court in the course of judicial interpretation of the Convention provisions, and on the other hand Convention- friendly interpretation, as assumed by the Court, of domestic legal regulations. Although judgments of the Court are not binding beyond the boundaries of the case, it should be remembered that this jurisprudence – treating the Conventions as a “living instrument” (*living instrument which must be interpreted in the light of present day conditions*) – is the interpretation of its content; it construes and thereby more exactly specifies the scope of obligations resulting from it for the contracting parties⁵⁰. The Convention is therefore – according to art. 91 paragraph 1 of the Constitution – a part of Polish legal order in the form given to it by the Court and in this form it should be directly applied. It is rightly emphasized that any attempts to contrast the content of the Convention with the way the Court puts it are highly risky⁵¹. The necessity to respect the standpoint of

⁴⁹ Compare G. Ress, *Die Europäische Menschenrechtskonvention und die Vertragstaaten: Die Wirkungen der Urteile des Europäischen Gerichtshofes für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten* [in:] I. Maier (ed.), *Europäischer Menschenrechtsschutz. Schranken und Wirkungen; Verhandlungen des 5. Internationalen Kolloquiums über die Europäische Menschenrechtskonvention in Frankfurt (Main)*, Heidelberg 1982, p. 251 and further.

⁵⁰ More on the role of the Court in construing the Convention see A. Wiśniewski, *Wykładnia ewolucyjna Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności z 1950 roku*, Gdańskie Studia Prawnicze (GSP) 2005, vol. XIV, p. 541 and further, W. Gołgoza, *Interpretacja międzynarodowego prawa praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka* [in:] L. Leszczyński, *Wykładnia prawa. Odrębności w wybranych gałęziach prawa*, Lublin 2006, p. 109 and further.

⁵¹ L. Garlicki, *Obowiązki...*, p. 19, quite similarly J. Meyer-Ladewig, *Konvention...*, p. 305.

the Court is in this view a simple reflection of the obligation expressed in art. 1 of the Convention to ensure the protection of human rights whose content is finally determined exactly by the jurisprudence of the Court.

Convention-friendly interpretation of the domestic law provisions should be treated as an element of a larger more general category that is a category of interpretation compatible with international law. The grounds for such interpretation can be found in art. 9 of the Constitution *de lege lata* confirming the obligation of Poland to respect international law⁵². By declaring that Poland is devoted to respecting the norms of international law binding upon it, this provision imposes a specific obligation on state authorities including courts. In this context, the necessity to include Convention-friendly interpretation – on an equal level with the Constitution-friendly interpretation – into everyday set of tools used to construct a judicial decision today, should not come as a surprise to anybody. This idea is reflected in the standpoint of the Polish Supreme Court expressed shortly after the Convention came into force in Poland, in which it has noticed that from the moment at which Poland entered the Council of Europe the jurisprudence of the ECtHR may and should be taken into account in construing the provisions of Polish law as it is not in the interest of Poland that judgments of its courts are negatively evaluated by the Court⁵³. Due to far-reaching axiological consistency of both legal acts⁵⁴, as a matter of fact, Constitution- and Convention-friendly interpretation cannot be strictly separated.

The behaviour at issue should manifest itself not only at the level of law application. It may appear justified also to make statutory changes if the legislation in force in a state which is not a party to the proceedings is parallel or similar to legislation questioned by the Court. Taking such measures in advance will prove advantageous for the whole Strasbourg system and for the contracting parties as well. From the Convention point of view it enhances effective functioning of the Convention as a result of a decrease in number of applications concerning the same issue. From a state's perspective it eliminates the risk of filing successful claims in the future; since cases in which the Court abandons its earlier standpoint are rather rare.

The advantages resulting from the application of the ECtHR's judgments beyond the limits of their binding force have been underlined in the Recommendation

⁵² A. Wasilkowski, *Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji RP)* (in:) *Otwarcie Konstytucji...*, p. 12.

⁵³ Decision of the Polish Supreme Court of 11 January 1995, III ARN 75/94, OSNP 1995, no. 9, item 106.

⁵⁴ L. Garlicki writes about specific symmetry between provisions of the ECHR and of the Constitution; compare L. Garlicki, *Obowiązywanie...*, p. 21.

1477(2000) of 28 September 2000 addressed to the Committee of Ministers on execution of the judgments of the European Court of Human Rights. In this Recommendation the Parliamentary Assembly of the Council of Europe proposed that the Committee should invite governments of the contracting states to participate more widely in proceedings before the Court in order to reach in this manner the effect of *de facto* that is not *de iure* commonly binding force of the judgments of the Court⁵⁵.

7. In the summary of the analysis of the legal nature and scope of influence of the ECtHR's judgments a conclusion emerges that these judgments are not commonly binding as it is in the case of judgments of the Polish Constitutional Tribunal (art. 190, paragraph 1). Their force extends over states and persons which are parties to specific proceedings. Apart from the limits of the binding force it is necessary to point to specific, directional (instructional) influence, the final result of which in principle should not depart from the effect that the judgment will produce in the state bound by it⁵⁶. Judgments of the Court generally applicable only to a particular case may then have legal effect with regard to other, similar legal situations. From juridical point of view this situation has nothing in common with *stare decisis* principle, characteristic for the common law system but it corresponds to the way in which the jurisprudence, especially of the highest instances influences the process of law application in the continental model⁵⁷. If the jurisprudence of the Supreme Court is

⁵⁵ Compare subparagraph iii of the Recommendation (<http://www.coe.int/>).

⁵⁶ The same, as it seems to C. Mik, *Koncepcja...*, p. 284; compare also the viewpoint of L. Garlicki who assumes that only if there are procedural means for reopening of cases of persons who are in a situation parallel to the applicants' then such cases should be reopened although the fact that these persons have not executed their right to submit a claim to the Court may work to their detriment (L. Garlicki, *Obowiązywanie...*, p. 20).

⁵⁷ J. Meyer-Ladewig, *Konvention...*, p. 305, G. Ress, *Die Europäische...*, p. 250 *in fine*, and also p. 336; differently towards inherent and commonly binding force of the Court interpretation. K. E. Beys, *Zur Verbindlichkeit...*, p. 57 and H. A. Stöcker, *Wirkungen...*, p. 1909. Studies of criminal proceedings treat the case in which a court is bound by the opinion of the ECtHR as an exception to the rule of jurisdictional independence of criminal courts (compare art. 8 § 2 of the Polish Code of Penal Proceedings (k.p.k.), however not going beyond the frames of the case decided by the Court – see A. Bojańczyk, *Podważanie prawomocnego wyroku sądu karnego przez Europejski Trybunał Praw Człowieka w Strasburgu (ETPCz). Próba zarysu zagadnienia*, Pal. 2001, no. 5–6, p. 152 and further (part I) and Pal. 2001, no. 7–8, p. 124 and further. (part II) – p. 132 (part II), S. Zabłocki [in:] Z. Gostyński (ed.), *Kodeks postępowania karnego. Komentarz, tom III*, Warszawa 2004, pp. 671–677, P. Hofmański [in:] P. Hofmański, E. Sadzik, K. Zgryzek, *Komentarz do kodeksu postępowania karnego, tom III*, Warszawa 2004, p. 235. Whereas in C. Mik's opinion: „[...] when a judgment has been delivered a state is bound not only by the conclusion but by its interpretation as well.” (C. Mik, *Koncepcja...*, p. 285). This view is not totally unequivocal but it seems that what in fact matters is only the interpretation made by the Court in the conclusion of the judgment according to rule 79 of the Rules.

examined, a conclusion can be drawn that this effect – by including the evaluations of the Court into the process of interpretation – is not omitted⁵⁸. Whereas in the legislation field, one of the most clear examples of respecting the position of the Court with regard to the directional effect, for the time being, is the implementation of the judgment delivered in the *Kuda v. Poland* case⁵⁹ concerning the violation of art. 13 of the Convention⁶⁰ in the member states of the Council of Europe.

IV. DUTIES ARISING OUT OF THE JUDGMENT OF THE COURT ON THE PART OF A STATE BOUND BY IT

1. Introductory notes

1. In the previous paragraph it has been established that under the *ratione personae* criterion the ECtHR's judgment is binding upon a state which was a party to the proceedings resulting in this judgment. Before proceeding to discussion of the content of the duties of a state resulting from the fact of being bound by the ECtHR's judgment, first it is necessary to answer the question if this judgment creates only a legal international obligation for this state, which would be in line with generally accepted principles of international law, or if it reaches further by permeating into internal legal order and binding its authorities and specifically its courts.

The Convention does not resolve this issue and in literature it is also disputable. The latter solution is supported by a considerable part of the literature⁶¹,

⁵⁸ See decision of the Polish Supreme Court referred to above of 11 January 1995, III ARN 75/94, OSNP 1995, no. 9, item 106; in literature: K. Machowicz, *Europejska Konwencja Praw Człowieka w decyzjach Sądu Najwyższego (ujęcie teoretycznoprawne)*, Studia Iuridica Lublinensia 2003, vol. I, p. 111 and further and L. Leszczyński, *Konwencja Europejska w argumentacjach interpretacyjnych polskiej praktyki sądowej*, BBIRE 2003, no. 3, p. 63 and further.

⁵⁹ *Kudla v. Poland* [GC], no. 30210/96, ECHR 2000-XI, BBIRE 2001, no. 4–5, p. 136.

⁶⁰ On this issue, see L. Garlicki, *Implementacja orzecznictwa Europejskiego Trybunału Praw Człowieka w ustawodawstwie krajowym (problemy przewlekłości postępowania)*, BBIRE 2002, no. 2, p. 5 and further.

⁶¹ J. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 17, E. Klein, *Glosa...*, p. 1176 and further., H.-J. Cremer, *Zur Bindungswirkung...*, p. 692, H. Sauer, *Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur. Zur Bindung deutscher Gerichte an die Entscheidungen des Europäischen Gerichtshofs für Menschenrechte*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 2005, vol. 65, p. 49 and further, J. A. Frowein, *Anmerkung zur Pakelli-Entscheidung des Bundesverfassungsgerichts*, ZaöRV 1986, vol. 46, p. 289, H. A. Stöcker, *Wirkungen...*, p. 1907; clearly this way also E. Łętowska, „Multicentryczność” systemu prawa i wykładnia jej przyjazna [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Zakamycze 2005, p. 1134; compare also W. Okresek, *Die Umsetzung...*, p. 169.

although voices to the contrary can also be found⁶². Although any generalizations may appear risky, it may be noticed that even the jurisprudence of particular states does not avoid accepting the other solution. It becomes visible when the two judgments of the Austrian Supreme Court (*Oberster Gerichtshof*) issued far apart in time are considered. In the first one, the court, guided by the traditional approach, presented a view that the ECtHR's judgments had direct effects only in public international law sphere and did not affect decisions of domestic courts⁶³. In later statements this opinion has been clearly acknowledged as out of date⁶⁴. In jurisprudence it is now accepted that the ECtHR's judgments do not enjoy the feature of the binding force in the sense that any procedural effects – resulting from the binding force and provided for in domestic orders of particular states – apply to them in full scope, but it does not mean that these judgments do not have any consequences in internal sphere. Contrary to general principles of international law, a person whose right resulting from the Convention has been violated is a direct beneficiary of obligations undertaken by the contracting states. Therefore finding of a violation of the Convention asserted in the ECtHR's judgment, in all its aspects, is binding upon legislative, executive and judicial authorities⁶⁵. The opinion that the ECtHR's judgments have direct effects in internal legal orders has been shared by the Spanish Constitutional Court⁶⁶ with respect to Spanish law. Similar views have also been expressed by the German Federal Constitutional Court by concluding that judgments of the ECtHR in principle (*grundsätzlich*) are binding upon all entities of public authorities. In the opinion of the Federal Constitutional Court performance of the obligation to ensure effective application of the Convention provisions (art. 52 of the Convention) in a democratic state ruled by law is possible only if all entities of public authorities are bound by guarantees provided for in the Convention. Therefore the obligation

⁶² G. Ress, *The Effect...*, p. 374, E. Pache, *Europäische...*, p. 402; slightly differently H. D. Jarmul, *The Effects...*, p. 330 ("The ECHR's judgments do not necessarily have the force of law in the legal systems of the member states.") and Ch. Grabenwarter, *Das mehrpolige Grundrechtsverhältnis im Spannungsfeld zwischen europäischem Menschenrechtsschutz und Verfassungsgerichtsbarkeit* (in:) *Völkerrecht und Wertordnung...*, p. 196; in Polish literature this way also C. Mił, *Koncepcja...*, p. 284 and P. Hofmański, *Konwencja...*, p. 92.

⁶³ Judgment of 25 August 1993 1Ob10/93 (<http://www.ris.bka.gv.at/>).

⁶⁴ Judgment of 12 April 2005, 1Ob302/04z (<http://www.ris.bka.gv.at/>).

⁶⁵ Judgment of 25 November 1997, 1Ob190/97s (<http://www.ris.bka.gv.at/>). This view has been repeated in many other later decisions, e.g. in the judgment of 22 October 2001, 1Ob260/01v (<http://www.ris.bka.gv.at/>).

⁶⁶ R. García Macho, *Wirkung und Grenzen...*, p. 191.

to take into account (*die Pflicht zur Berücksichtigung*) the ECtHR's judgments lies also with courts⁶⁷.

The last standpoint seems adequate also with respect to Polish law. It is out of question that in the first place the state *in toto* is bound by the ECtHR's judgment. This judgment considering the principle of powers division, yet takes its effect and must be respected by all entities of public authorities including courts. As it has already been mentioned, art. 9 of the Polish Constitution not only declares the openness of Polish legal order towards international law but also carries certain implications in internal sphere. The nature of obligations concerning human rights is such that their proper performance requires close cooperation of legislative, executive and judicial entities depending upon the scope of competence awarded to them in a constitution⁶⁸. It is also important that if a judgment of the ECtHR were binding only upon a state as a subject of international law then a person would be deprived of a real possibility to enforce compliance with the judgment favourable to him or her. This result would diverge from strongly individualistic axiological assumptions of the Convention. The Court has frequently emphasized that it is not aimed at guaranteeing theoretical or illusory rights but real and effective ones⁶⁹ and moreover – going further – already protected at domestic level (art. 13 of the Convention). This standpoint is substantiated by the observation that judicial control performed by the Court is subsidiary in nature and any verification of possible violations of freedoms and rights covered by the Convention lies, first of all, with internal bodies or offices of each contracting state. Considering Polish legal system, this reasoning may be supported by additional argument. Since the Convention and hence also the provisions which create the control competence of the Court and the force of law of its judgments are a part of this system, then there is no reason why the ECtHR's judgments which are the embodiment of the Convention provisions should not be taken into account by all entities of public authorities within the scope of tasks awarded to them⁷⁰.

⁶⁷ Judgment of 15 October 2004, 2 BvR 1481/04, p. 3409 (footnote 11). The Federal Constitutional Court thereby verified clearly different standpoint of the Higher Regional Court in Naumburg (EuGRZ 2004, no. 22, p. 749). The same viewpoint was presented by the Federal Constitutional Court in the later judgment of 5 April 2005, 1 BvR 1664/04 (<http://www.bundesverfassungsgericht.de>).

⁶⁸ J. Polakiewicz, *Die innerstaatliche Durchsetzung der Urteile des Europäischen Gerichtshofs für Menschenrechte*, ZaöRV 1992, vol. 52, p. 165, confirming A. Szklanna, *Wykonywanie...*, p. 7.

⁶⁹ See e.g. judgment in the *Airey v. Ireland* case, 9 October 1979, Series A no. 32. This standpoint has been frequently repeated many times repeated.

⁷⁰ J. Ladewig-Meyer, H. Petzold, *Die Bindung...*, p. 17, E. Klein, *Glosa...*, p. 1177. This opinion seems to be shared by the Supreme Court – see decision of the Supreme Court of 17 April 2007, IPZ 5/07 (footnote 13) and the decision of the Supreme Court of 24 October 2007, IPZ 21/07, unpublished.

Setting this proposition together with comments on subjective scope of the binding force of the ECtHR's judgments when answering the question – having considered the facts of the case presented in the application – if the Polish state has violated the Convention or not, Polish court being bound by the ECtHR's judgments cannot give an answer different than the answer of Court itself⁷¹.

The issue of the force of law of the ECtHR's judgments should be distinguished from the problem of their, *verba conventionis* "execution" in domestic sphere, although these issues are strictly connected with each other. While regulating the issue of "execution" of the ECtHR's judgments, the Convention applies collective formula including a set of steps which a contracting state is obliged to take as a result of the judgment of the Court finding a violence of the Convention. This issue is referred to in the final part of art. 46 paragraph 2 of the Convention entrusting the Committee of Ministers with supervision in this respect. As only a part of the ECtHR's judgments are suitable for execution (*wykonanie*) in the meaning assigned to this word in Polish legal language, it may be added that it seems more accurate to speak about "performance" (*realizowanie*) or "implementation" (*urzeczywistnianie*) of the ECtHR's decisions. In this more accurate way this issue is expressed in German text of the Convention⁷².

It appears from the comments made in the above paragraph that, as far as the judgments finding a violation of the Convention are concerned, the issue of "execution" (performance) of the ECtHR's judgments understood as described above is not framed within the procedural system of the Court – the plaintiff – the respondent state. The ECtHR's judgment, in particular if it directly questions specific legislative solutions it will or rather it should also influence – within earlier mentioned directional effect – other contracting states. In turn, the necessity to accept Convention-friendly interpretation requires to respect the jurisprudence of the Court which embodies obligations resulting from it, similarly as consideration of the jurisprudence of courts of higher instances is a necessary component of the interpretation process within internal system of substantive or formal law. The difference lies in the nature of the influence of the Court's judgment and in the admissibility of performing the supervision by the Committee of Ministers provided for in art. 46 paragraph 2 of the Convention. While in the case of a judgment delivered against a state, the necessity to satisfy the judgment is a reflection of its binding

⁷¹ K. E. Beys, *Zur Verbindlichkeit...*, p. 59.

⁷² In art. 46 paragraph 2 the word other than „*Vollstreckung*” but similar to it, that is „*Durchführung*” is used, which means “implementation” rather than execution as understood in the science of civil proceedings. In order to keep it consistent with the Convention wording in further comments the terms employed in the Convention will be used.

force and is subject to control of the Committee, with regard to other states it is supported by the authority of the Court and pragmatism justifying the willingness to eliminate the risk of future applications.

Since the question of directional influence of the ECtHR's judgments have already been described further analysis will focus on duties of a state which are directly related to the judgment. These obligations require separate explanation with regard to judgments awarding payment of satisfaction and to judgments finding a violation of the Convention.

2. Judgments awarding payment of satisfaction

In this case, from the viewpoint of conventional obligation to execute judgments of the ECtHR which have the formal force of law, it is only important that the plaintiff receives a pecuniary value awarded to him or her⁷³. It is of no importance if the Court awarded satisfaction in a judgment declaring a violation of the Convention or in a separate judgment including only the question of satisfaction⁷⁴. Also the way leading to the effect assumed in the Convention is insignificant. The essence of the obligation lying with the contracting parties includes creating a proper, that is efficient and effective mechanism of paying the satisfaction in the internal sphere. The Convention does not provide for a solution similar to the one envisaged in art. 256 in connection with art. 249 of the TEC⁷⁵, developed having in mind execution of judgments of the European Court of Justice⁷⁶ awarding satisfaction, or in art. 39 of the Statute of the International Tribunal for the Law of the Sea⁷⁷, or in the content of art. 68 of the Inter-American Convention of Human Rights⁷⁸.

In Poland no specific procedure for paying satisfaction awarded by the Court has been developed. In practice the payment is made by the Minister of Finances from

⁷³ The same L. Garlicki, *Obowiązanie...*, p. 27; similarly K. E. Beys, *Zur Verbindlichkeit...*, p. 59.

⁷⁴ Compare Rule 75 paragraph 2 of the Rules.

⁷⁵ The Treaty establishing the European Community of 25 March 1957. (Polish Journal of Laws 2004, no 90, item 864/2).

⁷⁶ To make it general, under these provisions the ECJ judgments constitute enforceable titles within the meaning of domestic law. For more on this subject see W. Postulski [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Zakamycze 2005, p. 459.

⁷⁷ Compare art. 39 of the Annex no. VI to the United Nations Convention on the Law of the Sea executed on 10th December 1982 in Montego Bay (Polish Journal of Laws 2002, no. 59, item 543).

⁷⁸ In conformity with this provision, in part stipulating damages, the judgment of the Inter-American Court of Human Rights is enforceable in accordance with domestic procedural provisions governing the execution of judgments awarded against a state, compare more on this issue H.-D. Jarmul, *The Effects...*, p. 317 and further.

resources from the budget reserves⁷⁹. Leaving aside only theoretical up till now, which is undoubtedly nice, the question if and under what conditions in case the payment is withheld or delayed it is possible to initiate executive proceedings against the State Treasury under art. 1060 of the Code of Civil Proceedings⁸⁰, it is worthy to notice that the Convention itself does not require that such solution be implemented but it is satisfied with supervision over the performance of judgments⁸¹ entrusted to the Committee of Ministers. It is also acknowledged that a state by denying to pay awarded satisfaction exposes itself to the risk of being again found to violate the Convention⁸².

⁷⁹ B. Gronowska, *Odpowiedzialność odszkodowawcza państwa w systemie Europejskiej Konwencji Praw Człowieka z 1950 r.* [in:] *Współczesne problemy procesu karnego i jego efektywności. Księga pamiątkowa Profesora Andrzeja Bulsiewicza*, Toruń 2004, p. 100. Information on the requirement to make a payment will usually be handed over by the plenipotentiary of the Minister of Foreign Affairs for proceedings before the European Court for Human Rights (Polish Journal of Laws MS no. 4, item 53).

⁸⁰ The issue of execution of judgments of international courts is not codified in Polish law straightforwardly. According to § 86a of the Austrian Execution Law of 27 May 1896 (RGBL. No. 79/1896) acts and documents from courts and international organizations – for the need to declare their enforceability – are treated as acts and documents from foreign state courts. In Germany, since there are no such regulations, there is a tendency to apply the provisions on enforceability of foreign judgments adequately (E. Klein, *Glosa...*, p. 1177, G. Ress, *Wirkung...*, p. 351; see also R. Geimer, *Internationales Zivilverfahrensrecht*, Köln 2005, p. 897 i 974); in Greek law the same solution is accepted by K. M. Beys, *Zur Verbindlichkeit...*, p. 60. Theoretically some other proposals may also be put into consideration, as an example, the necessity to bring a separate action in law against a state obliged to make a payment and a binding judgment of the ECtHR would then form the grounds for its decision (W. J. Habscheid, *Streitgegenstand...*, p. 484; compare also P. Hofmański, *Konwencja...*, p. 106) or awarding the ECtHR's judgments the status of enforceable title in domestic law (J. M. Scheib, *Enforcing Judgments of The European Court of Human Rights: The Conduit Theory*, New York International Law Review 1997, vol. 10, p. 115, who makes a general assumption that if the Convention is an element of internal law, then the judgments of the ECtHR should be subject to execution in the same manner as judgments of domestic courts. In G. Ress's opinion as there are no conventional provisions in this respect it may be concluded that the contracting parties did not intend to award the ECtHR's judgments the status of enforceable title in domestic legal order. (G. Ress, *Die Europäische...*, p. 254; finally the same way A. Bojańczyk, *Podważanie (I)...*, p. 158, although with different reasoning). In the science of civil proceedings, the possibility to apply art. 1150 and further of the Polish Code of Civil Proceedings to the ECtHR's judgments have been mentioned by K. Piasecki [in:] K. Piasecki (ed.) *Kodeks postępowania cywilnego. Konwencja z Lugano. Komentarz*, vol. III, Warszawa 2002, p. 637. In draft amendments to the provisions of the Polish Code of Civil Proceedings concerning international procedural civil law currently being reviewed by the parliament the term "Enforceability of judgments of courts of foreign states" is used instead of the existing term "Enforceability of judgments of foreign courts", which makes it even more difficult to allow this interpretation.

⁸¹ Compare e.g. G. Ress, *The Effect...*, p. 374.

⁸² Compare G. Ress, *The Effect...*, p. 380.

Judgments finding a violation of the Convention

1. The question of duties resulting from the Court's judgments for the states parties to the Convention gives rise to considerably more difficulties. Referring to the aforementioned assumptions concerning the nature of the manner in which the ECtHR's judgments bind upon the states, all national entities of public authorities and particularly courts need to face this question. At the beginning it should be emphasized that searching adequate solutions in this respect requires much caution.

2. The starting point for the examination of what duties come into play must be the standpoint of the Court. The Court itself, especially at the beginning of its functioning, was rather reserved in specifying the duties for the respondent state resulting from its judgments. The Court manifested its conservative attitude in its consistently presented view according to which the Convention gave no authority to the Court to set any specific duties connected with the execution of its judgments; and the contracting states enjoyed discretion in this respect provided measures taken by them satisfied the awarded judgment⁸³. The Court upheld this opinion also in cases in which plaintiffs demanded that the Court order the state to make statutory changes to avoid such violations in the future or required that the state present what measures it would take for this purpose⁸⁴.

However recently a revision of this attitude may be observed⁸⁵. This happens through including in reasons for a judgment more or less precise guidelines as to how a state should execute a judgment issued against it. In the *Papamichalopoulos v. Greece*⁸⁶ case the Court for the first time used the formula, which it still often applies, obliging the state that lost the case first, to put an end to the breach, and secondly, to restore as far as possible the situation existing before the breach. As a rule, member states are free to choose the mode of satisfaction. If the nature of a breach is such that restoration of the previous situation is possible, a state should restore it; the Court neither has the right nor practical possibilities to restore it itself⁸⁷. This wording has been embodied in later decisions of the Court. In the *Scozzari and Giunta v. Italy* case⁸⁸ it has been stated that "a judgment in which the

⁸³ *Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Belilos v. Switzerland*, 29 April 1988, Series A no. 132; *Pauwels v. Belgium*, 26 May 1988, Series A no. 135.

⁸⁴ *Lundevall v. Sweden*, no. 38629/97, 12 November 2002; *Salomonsson v. Sweden*, no. 38978/97, 12 November 2002; *Stockholms Försäkrings- och Skadeståndsjuridik AB v. Sweden*, no. 38993/97, 16 September 2003.

⁸⁵ L. G. Loucaides, *Reparation for Violations of Human Rights under the Convention and «Restitutio in Integrum»*, European Human Rights Law Review 2008, no. 2, p. 186 and further.

⁸⁶ *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B.

⁸⁷ Clearly the same way in the case *Qufaj Co. Sh.p.k. v. Albania* (dec.), no. 54268/00, ECHR 2003-XI.

Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects”⁸⁹. Confirming this standpoint in one of subsequent cases⁹⁰ the Court has complemented it by the insight that “it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant’s situation from being adequately redressed”⁹¹.

When it specifies the measures that have to be taken by a state to satisfy the judgment, the Court sometimes goes even further. In the *Iatridis v. Greece* it noticed that “Nothing short of returning the use of the cinema to the applicant would put him, as far as possible, in a situation equivalent to the one in which he would have found himself had there not been a breach (...)”.⁹² In one of the earlier awards the Court imposed upon Greece an obligation to return to the applicant the property in dispute or to pay adequate damages.⁹³ In the *Assanidze v. Georgia* case it noted that although in fact a state had the freedom to choose means of satisfying the judgment, the circumstances of a case might be such that actually the scope of measures available for the state was strongly limited. Following this the Court unequivocally indicated that “(...) that the respondent State must secure the applicant’s release at the earliest possible time”⁹⁴. Clear guidance as to the execution of judg-

⁸⁸ *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII.

⁸⁹ In the same fashion, however from different perspective the ECtHR expresses its view in the *Pisano v. Italy* case [GC] (striking out), no. 36732/97, 24 October 2002 and in the *Mentes and Others v. Turkey* case (Article 50), 24 July 1998, *Reports of Judgments and Decisions* 1998-IV; see also judgments in the following cases: *Stoichkov v. Bulgaria*, no. 9808/02, 24 March 2005; *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V; *Haase v. Germany*, no. 11057/02, ECHR 2004-III (extracts) i *Xenides-Arestis v. Turkey*, no. 46347/99, 22 December 2005.

⁹⁰ *Maestri v. Italy* [GC], no. 39748/98, ECHR 2004-I.

⁹¹ This argument was repeated in the aforementioned decision in the *Qufaj Co. Sh.p.k. v. Albania* case (dec.), no. 54268/00, ECHR 2003-XI.

⁹² *Iatridis v. Greece* [GC], no. 31107/96, ECHR 1999-II; *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, ECHR 2000-XI.

⁹³ *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B.

⁹⁴ *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II; the Court presented identical opinion in the *Ilaşcu and Others v. Moldova and Russia* case [GC], no. 48787/99, ECHR 2004-VII pointing out that continuing imprisonment of the applicants would amount to a serious breach of article 5 and of obligations following from art. 46 of the Convention.

ments the Court has also been presented in *Görgülü v. FRG*⁹⁵ by emphasizing that “(...)subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment (...). In the case at hand this means making it possible for the applicant to at least have access to his child.” In a series of judgments in cases against Turkey the Court stated that “Where the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal”.⁹⁶ This view has also been accepted with regard to civil matters⁹⁷. In recent judgments in the cases *Yanakeiev v. Bulgaria*⁹⁸ and *Paykar Yev Haghtanak Ltd v. Armenia*⁹⁹ (civil cases), the Court has acknowledged that “in the case of a violation of Article 6 of the Convention, the applicant should as far as possible be put in the position he would have been in had the requirements of this provision not been disregarded. (...) The Court is in any event of the view that the most appropriate form of redress in cases where it finds that an applicant has not had access to a tribunal in breach of Article 6 § 1 of the Convention would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial”. On the other hand in the latest jurisprudence of the ECtHR and in literature it is pointed out

⁹⁵ *Görgülü v. Germany*, no. 74969/01, 26 February 2004. This case has later formed the grounds for the judgment of the German Federal Constitutional Court of 14 October 2004, 2 BvR 1481/04 (footnote 11).

⁹⁶ *Gençel v. Turkey*, no. 53431/99, 23 October 2003; *Alfatli and Others v. Turkey*, no. 32984/96, 30 October 2003; *Leşker Acar v. Turkey*, no. 39678/98, 22 June 2004; *Aksaç v. Turkey*, no. 41956/98, 15 July 2004; *Çaplik v. Turkey*, no. 57019/00, 15 July 2005; *Kepeneklioglu and Canpolat v. Turkey*, no. 35363/02, 6 September 2005; *Kilinç v. Turkey*, no. 48083/99, 15 March 2005. The same way *Somogyi v. Italy*, no. 67972/01, ECHR 2004-IV, and recently *Abbasov v. Azerbaijan*, no. 24271/05, 17 January 2008 i *Shulepov v. Russia*, no. 15435/03, 26 June 2008 (request for referral to the Grand Chamber pending). These judgments reflect the evolution of the approach of the Court well, particularly if it is considered that in the *Hauschildt v. Denmark* case in which it was found that the court had not been impartial within the meaning of art. 6 of the Convention and the plaintiff argued that in his opinion his conviction should be quashed, the Court only stated that it was not empowered to overrule any domestic judgment or to give any directives to a domestic court in this respect (*Hauschildt v. Denmark*, 24 May 1989, Series A no. 154).

⁹⁷ *San Leonard Band Club v. Malta*, no. 77562/01, ECHR 2004-IX.

⁹⁸ *Yanakeiev v. Bulgaria*, no. 40476/98, 10 August 2006.

⁹⁹ *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, 20 December 2007.

that “The specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court’s judgment in that case” and any departure from the principle – by virtue of which a state has the freedom as to the means of satisfying the judgment allowing the claim – is admissible only exceptionally¹⁰⁰.

3. The analysis of the jurisprudence of the ECtHR shows that it is easy to agree that the main obligation following from the judgment delivered in favour of the applicant is the order to put an end to the violation. In connection with art. 1 of the Convention this order is a simple reflection of the finding that the Convention has been violated¹⁰¹. Moreover each time a state is obliged to redress the effects of the Convention violation¹⁰². Redressing the effects of the violation in the first place, includes restoring the previous situation as far as it is possible (*restitutio in integrum*) or otherwise payment of satisfaction. This formula corresponds to the manner in which international responsibility is conceived in international law. In the *Factory of Chorzów* case Permanent the Court of International Justice noticed that “...reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”¹⁰³.

As a rule a choice of means aiming at achieving a desired result remains with a respondent state¹⁰⁴. Regardless of the fact that the Convention provisions do not allow for inferring any more specific guidelines from them in this respect, this view may be interpreted as an expression of reticence of the Court in shaping judicial decisions that are one of the basic prerequisites for effective functioning of interna-

¹⁰⁰ *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, no. 32772/02, ECHR 2007 (case was referred to the Grand Chamber); in literature L. Wildhaber, *The Execution of Judgments of the European Court of Human Rights. Recent Developments* (in:) *Völkerrecht als Wertordnung*..., p. 679.

¹⁰¹ Ch. Grabenwarter, *Europäische Menschenrechtskonvention*, München 2005, p. 94, E. Klein, *Should*..., p. 707.

¹⁰² C. Mik, *Koncepcja*..., p. 285.

¹⁰³ Permanent Court of International Justice, 13 September 1928, *The Factory of Chorzów* (P.C.I.J. 1928, Series A. No 17, p. 47).

¹⁰⁴ W. Ress, *The Effect*..., p. 379, footnote 126, W. Okresek, *Die Umsetzung*..., p. 170.

tional of justice¹⁰⁵. This evaluation does not surprise if the degree of diversity of legal systems and distinct legal and cultural tradition of the contracting parties and also natural tension rising between domestic deciding bodies and international courts are considered. This situation demands just far-reaching prudence of judges and necessity to remain flexible in assessing whether a state conforms to its obligations resulting from the Convention and takes measures indispensable to satisfy the judgment delivered by the Court¹⁰⁶.

However, the freedom to select means necessary to ensure situation complying with the Convention should not be identified with discretion to decide if judgments are to be executed. Already in the *Vermeire v. Belgium* case¹⁰⁷ the Court emphasized that the freedom to choose measures to be taken in order to enforce the judgment cannot lead to temporary suspension of the application of the Convention provisions. The choice of these means is then always limited by the result that should be achieved. No doubt that what matters here is the necessity to eliminate situations incompatible with the violation of the Convention found by the Court, irrespective of whether the respondent state “agrees” that the Convention has been violated or not. From practical point of view this restriction is confined to the situation in which the facts of the case are such that they *de facto* do not leave any freedom of action as far as the way of executing conditions compliant with the Convention is concerned.¹⁰⁸

4. Assuming the above, it may be said that the nature of actions to be taken by a state in connection with the ECtHR’s judgment unfavourable for it will, in the first place, depend upon the type of the Convention violation. Although the control held by the Court is not usually abstract in nature,¹⁰⁹ the Court – when evaluating the behaviour of a state the main element of which may be an act of law application – indirectly examines also the conformity of the legislation in force with the Convention¹¹⁰. Therefore a violation may stem from legislation departing from the content

¹⁰⁵ L. R. Helfer, A.-M. Slaughter, *Toward A Theory of Effective Supranational Adjudication*, Yale Law Journal 1997, vol. 107, p. 314 and further, they write about incrementalism (that is – making it simple – a concept of small steps) on the part of international courts.

¹⁰⁶ See H. Ch. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Connecticut Journal of International Law 1987–1988, vol. 111, p. 111, and in particular p. 118 and further.

¹⁰⁷ *Vermeire v. Belgium*, Series A no. 214-C (B 12849/87).

¹⁰⁸ *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II; L. Wildhaber, *The Execution...*, p. 676.

¹⁰⁹ Although there are some cases in which the Court has performed such control – *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

¹¹⁰ Compare pertinent comments in the reasons for the judgment of the Polish Constitutional Tribunal of 18 October 2004, P 8/04, OTK-A 2004, no. 9, item 92 and the opinions

of conventional obligations. If it appears that the effect of the control is unfavourable for a state party to the Convention then the obligation of the state cannot be limited only to removing damage in the individual interest of the plaintiff. In this situation, the state is obliged to bring its legislation into line with the requirements of the Convention.¹¹¹ From the perspective of international law the duty under discussion is unlimited. It may then also include revision of constitutional provisions¹¹². Taking into account consistency between constitutional norms and the provisions of the Convention emphasized above such situations will be rather rare. In literature it is noticed that if the practice of domestic legislators is investigated, in the case of some ECtHR's judgments, in particular demanding system changes in codification such demand was accepted by the contracting parties very reluctantly; in course of time and sometimes as judgments condemning a specific state have been repeated, the changes forced by the ECtHR jurisprudence have finally been implemented¹¹³. With regard to Poland, a situation examined by the Court in the *Werner v. Poland* case is a model example in this respect¹¹⁴.

The violation may also lie in some facts of the state themselves found by the Court to be in conflict with the Convention. Similarly as in the previous case the execution of the judgment depends, in this situation to considerable extent, on determination of domestic authorities and intensity of supervision of the Committee of Ministers¹¹⁵. From juridical point of view this issue, similarly as the one discussed above is rather simple.

therein cited and developed by E. Łętowska, „Multicentryczność”..., p. 1134–1135. See also F. Gölcüklü, *Exécution des décisions des organes de contrôle de la Convention européenne des Droits de l'Homme* [in:] *Protection...*, p. 567.

¹¹¹ *Norris v. Ireland*, 26 October 1988, Series A no. 142; in literature: J. Polakiewicz, *Innerstaatliche...*, p. 167, J. A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention*, Kehl, Strassburg, Arlington 1996, p. 728 and further.

¹¹² Compare art. 27 k.w.t.; M. Masternak-Kubiak, *Umowa międzynarodowa w prawie konstytucyjnym*, Warszawa 1997, p. 79 and further, J. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 19. The latter authors emphasize that the states parties to the Convention cannot hide behind the curtain of their constitutional provisions in order to evade their obligation to comply with the ECHR.

¹¹³ G. Ress, *The Effect...*, p. 374. More on Austrian experience see W. H. Rechberger, *Der Zugang zu den Höchstgerichten und der Schutz der Menschenrechte in Österreich* [in:] *Symbolae Vitoldo Broniewicz dedicatae*, Łódź 1998, p. 308 and further.

¹¹⁴ *Werner v. Poland*, no. 26760/95, 15 November 2001, BBIRE 2002, no. 3, p. 48.

¹¹⁵ *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II (forcing local authorities to release from prison a plaintiff detained despite a sentence of acquittal); *Velikova v. Bulgaria*, no. 41488/98, ECHR 2000-VI (repeated investigation concerning death during imprisonment); *Dybeku v. Albania*, no. 41153/06, 18 December 2007 (necessary measures should be taken as a matter of urgency in order to secure appropriate conditions of detention and adequate medical treatment).

5. Situation is different if a violation of the Convention is connected with the award of a judgment. This case is generally treated as the most controversial one.¹¹⁶ Indeed once doubtful issue – of whether general principles of international responsibility of states are applicable if a judicial award is a source of international law tort – may now be treated as resolved positively¹¹⁷ but it does not change the fact that if a violation stems from a final and binding judgment then a conflict arises between this aspect of procedural law in general which manifests itself in safeguarding legal order by the *res judicata* rule with the evaluation of the circumstances of a specific case and individual-oriented axiology of the Convention coming to the fore.

Already at this point, it should be emphasized that giving answer to the question if the source of violation really lies with a judgment and in case a few adjudications have been issued – then in which one, requires cautious and meticulous analysis of the ECtHR's judgment. Although such judgment, even due to the necessity to exhaust domestic measures, will quite often be a part of the facts of the case presented in the application one must keep in mind that the Court does not control judgments of domestic courts as to their compliance with the Convention¹¹⁸ but it declares whether the behaviour of the state *in toto*, reflected in the facts of the case presented in the application falls within the obligations resulting from the Convention or not. Naturally sometimes the reasons for the judgment will clearly imply that the problem lies in the interpretation of the Convention or domestic right assumed by a court¹¹⁹, but it will not always be the case. On the other hand, the circumstances that the violation of the Convention by an act of law application results from a conflict between the domestic internal order and provisions of the Convention do not shift the issue to the area of necessary changes in legislation entirely. The question of the influence of the ECtHR's judgment on a domestic decision each time requires separate consideration although the conflict between the Convention provisions and a normative act behind the judgment may have impact on what happens further with it depending on the mechanism provided for in domestic law and the position of the Convention in the internal legal order.

¹¹⁶ J. A. Frowein, W. Peukert, *Europäische...*, p. 726, J. Meyer-Ladewig, H. Petzold, *Die Bindung*,¹¹⁷ p. 17, C. Mik, *Koncepcja...*, p. 285.

J. Symonides, *Odpowiedzialność...*, p. 53–55, R. Sonnenfeld, *Podstawowe zasady odpowiedzialności międzynarodowej państwa* [in:] *Odpowiedzialność państwa w prawie międzynarodowym*, Warszawa 1980, pp. 52 and 55, C. Mik, *Koncepcja...*, p. 261, R. Geimer, *Internationales...*, p. 69; this opinion is directly confirmed also by the ECtHR – *Moreira de Azevedo v. Portugal*, 23 October 1990, Series A no. 189.

¹¹⁸ This way also E. Łętowska, „*Multicentryczność*” ..., p. 1193.

¹¹⁹ See e.g., judgment in the *Xheraj v. Albania*, no. 37959/02, 29 July 2008.

While approaching this issue one should begin from rather obvious thing. The ECtHR's judgment finding even a fundamental violation of the Convention does not affect the binding force of a judicial award. This thesis is a simple corollary of a declaratory nature of the ECtHR's judgments. This situation may be illustrated by the judgment of the Austrian Supreme Court which had to face the question of whether the finding that Austria violated art. 6 of the Convention by the operation of the court in judicial administrative proceedings, makes the award issued in this proceedings lose its force binding upon the civil court in the lawsuit concerning the responsibility for damages caused by public officers. The Court answered this question negatively underlining that until the award of the administrative court is reversed a civil court adjudicating in a civil suit is bound by it irrespective of the standpoint of the ECtHR¹²⁰.

However this observation does not explain everything. If a general formula determining the content of the obligation of a state affected by the ECtHR's judgment assumed in the jurisprudence is applied to the situation under discussion, a question arises what measures should be taken in case restoration of the previous situation from before the violation is not possible due to the binding force of the domestic judicial award. In other words, this issue leads to a question if norms of international law oblige states parties to the Convention to include in their domestic orders a possibility to disable final and binding judgments if it appears that either in substantive or in procedural layer they have been delivered in violation of the Convention. In Polish law this issue has been regulated directly only in penal proceedings. According to art. 540 § 3 of the Polish Code of Penal Proceedings the proceedings are instituted *de novo* in favour of the accused if such need results from a decision of an international body operating by virtue of an international agreement ratified by the Republic of Poland. The ECtHR is also an international body in the meaning of this provision. However there is no analogous provision in the Polish Code of Civil Proceeding.

In Polish literature on this subject a standpoint in favour of the possibility to reopen civil proceedings as a result of a judgment of the ECtHR finding a violation of the Convention prevails.¹²¹ In some opinions such duty is treated

¹²⁰ Judgment of 18 November 2003, 1Ob236/03t (<http://www.ris.bka.gv.at/>).

¹²¹ In the opinion of C. Mik *Koncepcja...*, p. 300, *de lege ferenda* it would be advisable to include in procedural regulations a possibility to question rulings of domestic courts in consequence of their incompatibility with judgments of international courts binding upon Poland. The situation in which the Polish Code of Civil Proceedings does not allow for opening a new trial in connection with a judgment of the ECtHR is also deemed unsatisfactory by R. Hliwa (R. Hliwa, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka* [in:] *Prawa człowieka*,

as natural¹²². In this spirit – in connection with a recent judgment mentioned above in the introduction, issued by the Supreme Court denying to reopen the proceedings in the case in which according to the Court Poland violated the Convention¹²³ – a doubt was expressed as to the compliance of the provisions determining the causes for reopening in civil proceedings with the Constitution if they could prevent instituting proceedings *de novo* in case a violation of the Convention is found by the ECtHR.

This issue is treated more cautiously in foreign literature on this subject and by the jurisprudence of foreign courts. Summing up the views presented on this issue, in literature more strongly expressed is the opinion according to which the Convention does not impose any obligation upon the parties thereto to allow for re-adjudicating the case that has been validly decided when it appears that the judgment has been delivered in violation of the Convention¹²⁴. However this prevalence

Prawa rodziny. 30 lat Poznańskiego Zakładu Instytutu Nauk Prawnych PAN, Poznań 2003, p. 60). According to P. Hofmański in practice setting the binding force aside is the only way to satisfy the international legal obligation (P. Hofmański, *Konwencja...*, p. 95). More cautious opinion is presented by L. Garlicki *Obowiązki...*, p. 27. According to A. Zieliński this issue requires further consideration although the author himself seems to support this possibility (A. Zieliński, *Ochrona przed szkodami wyrządzonymi przez organy władzy publicznej wadliwą wykładnią prawa cywilnego* [in:] *Rozprawy prawnicze...*, p. 1552). M. A. Nowicki noticed that if a valid judgment is behind the violation, restoration of the previous situation requires reopening of proceedings but the Convention does not impose such obligation clearly. (M. A. Nowicki, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka*, Zakamycze 2002, p. 70). Such obligation seems to be also negated by M. Manowska, *Wznowienie postępowania w procesie cywilnym*, Warszawa 2008, p. 135 and further.

¹²² E. Łętowska, *Glosa do postanowienia SN z dnia 19 października 2005 r., V CO 16/05*, EPS 2006, no. 1, p. 46, similarly also: „Multicentryczność”..., p. 1135, M. Balcerzak, S. Sykuna, *Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na praktykę polskiego wymiaru sprawiedliwości* (in:) T. Bąkowski, K. Grajewski, J. Warylewski, *Orzecznictwo w systemie prawa. II Konferencja Naukowa Wydziału Prawa i Administracji Uniwersytetu Gdańskiego i Wolters Kluwer Polska. Gdańsk, 17-18 September 2007*, Warszawa 2008, p. 47. See also journalistic articles critical towards the one commented by E. Łętowska: E. Siedlecka, *Strasburg sobie, a nasz sąd sobie*, *Gazeta Wyborcza* of 4 January 2006, Ż. Semprich, *Wygrał w Strasburgu, stracił w Polsce*, *Rzeczpospolita* of 2 December 2005 and views heading in a different direction of P. Gontarski – P. Gontarski, *Ile władzy sądu tyle odpowiedzialności*, *Rzeczpospolita* of 20 January 2005.

¹²³ This order has been issued in connection with the *Podbielski and PPU Polpure v. Poland* case no. 39199/98, 26 July 2005, BBIRE 2006, no. 2, p. 75. However it should be noted that in a recent order of 17 April 2007, I PZ 5/07 (footnote 13), the Polish Supreme Court adopted a different standpoint.

¹²⁴ This way Ch. Grabenwarter, *Europäische...*, p. 95, H.-J. Cremer, *Zur Bindungswirkung...*, p. 691, J. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 17, J. Meyer-Ladewig, *Konvention...*, p. 307, E. Pache, *Europäische...*, p. 404, J. Frowein, *Anmerkung...*, p. 288 and further, J. Polakiewicz,

– if at all – is rather small and views allowing for instituting proceeding *de novo* by virtue of analogous application of the existing causes for reopening of proceedings or in favour of implementation of separate regulations for this purpose are not rare also in the science of civil proceedings¹²⁵. Far more remarkable is the opinion of foreign judicature which in principle unequivocally negates a Convention-based obligation to reopen proceedings or to set aside a final and binding judgment in any other manner.¹²⁶

Die innerstaatliche..., p. 168, the same: *Die Aufhebung...*, p. 822 and literature given there; compare also M. Hartwig, *Much Ado...*, p. 880 (and also p. 894) and literature referred to in the Swiss BGE judgment of 31 October 2001, 2A.93/2001/sch. (<http://www.bger.ch>)

¹²⁵ Opinion in favour of this possibility was presented especially by E. Schumann, *Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen*, Berlin 1963, p. 324 and further, suggesting that provision § 580 paragraph 7 b of the German Code of Civil Proceedings should be treated in analogous way, admitting reopening of a trial in case a party discovers or will be able to use a document which could lead to a judgment more favourable for it. The same opinion has been presented by P. Schlosser, *Das völkerrechtswidrige Urteil nach deutschem Prozeßrecht*, Zeitschrift für Zivilprozessrecht 1966, no. 1, p. 189, W. Grunsky [in:] F. Stein, M. Jonas, *Kommentar zur Zivilprozeßordnung*, vol. 5, part 1, Tübingen 1994, p. 540, R. Geimer [in:] R. Zöller, *Zivilprozessordnung, mit Gerichtsverfassungsgesetz und den Einföhrungsgesetzen, mit Internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen; Kommentar*, Köln 2005, p. 26 and H. Sauer, *Die neue Schlagkraft...*, pp. 56–60 (with different justification and on condition that interests of the parties are balanced in each case). Excluding the admissibility of reopening of a trial *de lege lata*, implementation of such possibility has been supported by G. Ress, *Wirkung...*, p. 351, E. Klein, *Glosa...*, p. 1177, J. Polakiewicz, *Die Aufhebung...*, p. 824; see also J. Meyer-Ladewig, *Konvention...*, p. 307.

¹²⁶ In Germany unequivocal standpoint in this respect was presented by the Federal Constitutional Court in the judgment of 11 October 1985, 2 BvR 336/85, ZaöRV 1986, vol. 46, p. 289. In the reasons for the ruling, the court maintains that the opinion presented in the ruling appealed by a constitutional complaint – according to which the existing causes for reopening of a trial as being exceptional could not be applied in the case at issue by extended interpretation – is absolutely right. In the opinion of the Federal Constitutional Court neither constitution nor principle of a state ruled by law nor international law require reviewing this standpoint. In fact German courts are obliged to respect the substantive force of law of the ECtHR's judgments but the appealed judgment does not question that the German state has violated the Convention and therefore does not violate this force of law. This standpoint has been indirectly accepted in the judgment of 14 October 2004 2 BvR 1481/04 (footnote 11) and is generally shared in the jurisprudence of German courts. Also the jurisprudence of the Swiss BGE indicates lack of the necessity for reopening of a trial (the judgments of 2 March 2001 2A 232/2000/bol (<http://www.bger.ch/>)). This viewpoint has also been shared by the Spanish Constitutional Court in the judgment of 16 December 1991 STC 245/91 issued in connection with the case *Barberà, Messegue and Jabardo v. Spain* case, 6 December 1988, Series A no. 146. However, finally this court has allowed a constitutional claim filed in this case. It came to the conclusion that violation of art. 6 of the Convention declared by the ECtHR results in further violation of constitutional right to civil liberty. Therefore further serving the sentence – in the Court's opinion – would be in conflict with the constitution

It is worthy to remind that the Court itself emphasizes that in some cases in principle the best means of satisfying the judgment is to re-adjudicate the case and it is this tendency that is getting stronger in more recent jurisprudence. In line with this view is the content of the Recommendation of the Committee of Ministers of the Council of Europe No. R (2000)2 of 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights¹²⁷. At the same time several times unequivocally it pointed out that it is not competent to order the contracting states to overrule a judgment issued by a domestic court¹²⁸, to suspend its execution¹²⁹ or to reopen the proceedings.¹³⁰ Applications filed till now pointing to lack of possibility to require a domestic court to re-adjudicate a case, despite a violation of art. 6 of the Convention found earlier by the Court, have been treated as inadmissible with focus on the fact that among rights guaranteed by the Convention there is no right to demand the court to re-adjudicate the case. According to the Court if by virtue of the Convention it is not entrusted with jurisdiction to direct a State to open a new trial or to quash a conviction “(...) it follows that the Court cannot find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments”¹³¹. However, the circumstance that the Convention does not require to re-examine the case if a violation of its provisions have been found does not mean that “(...) measures taken by a respondent State in the post-judgment phase to afford redress to an applicant for the violation or violations found fall outside the jurisdiction of the Court”¹³².

(more on this problem J. Polakiewicz, *Die Aufhebung...*, p. 805 and further., and especially p. 811; R. García Macho, *Wirkung und Grenzen...*, pp. 191–192). The French Counsel of State expressed its opinion against reopening of proceedings as automatic consequence of the Convention violation (*Conseil d'Etat*, sygn. 257682, *Actualités juridique du droit administrative*, 11 February 2004, p. 439, after M. Hartwig, *Much Ado...*, p. 882, footnote 69). Also English Court of Appeal denied to reopen the criminal trial conducted in violation of art. 6 of the Convention, later the Chamber of Lords supported it; compare rulings of 21 December 2001, *R. v. Isidore Jack Lyons*, Anthony Keith Parnes, Gerald Maurice Ronson i Ernest Walter Saunders, [2001] EWCA Crim 2860 and of 14 November 2002 respectively. [2002] 4 All E.R. 1028.

¹²⁷ HRLR 2005, no 1–4, pp. 109–110.

¹²⁸ *Le Compte, Van Leuven and De Meyere v. Belgium* (Article 50), 18 October 1982, Series A no. 54; *Belilos v. Switzerland*, 29 April 1988, Series A no. 132.

¹²⁹ *Pelladoah v. the Netherlands*, 22 September 1994, Series A no. 297-B.

¹³⁰ *Lyons v. the United Kingdom*, (dec.), no. 15227/03, ECHR 2003-IX, EuGRZ 2004, no. 23, p. 777 (M. Breuer); *Sad'di v. France*, 20 September 1993, Series A no. 261-C.

¹³¹ *Lyons v. the United Kingdom*, (dec.), no. 15227/03, ECHR 2003-IX, EuGRZ 2004, no. 23, p. 777.

¹³² *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, no. 32772/02, ECHR 2007 (case was referred to the Grand Chamber).

6. While analyzing arguments in favour of one or the other standpoint one may defend the opinion that the Convention – considering specific character of the situation under discussion – allows for a departure from international legal principle of priority of restitution over other forms of a state responsibility. This concession may be drawn from the content of art. 41 of the Convention¹³³. If this provision is scrutinized it appears that it clearly assumes a situation in which full redressing of the effects caused by the violation is not possible not only because of factual circumstances, which is rather clear, but also just because of provisions of the domestic law connecting it with the competence of the Court to award just satisfaction to a winning applicant¹³⁴. Therefore it may be claimed that, at least in principle, as regards the answer to the question on further existence of acts of law application which are in conflict with its content, the Convention instructs to search for it in internal orders of the contracting parties¹³⁵.

This reasoning may be supported by an insight into the origin of art. 41 of the Convention which according to art. 32 of the Convention on the Law of the Treaties should be treated as supplementary means of interpretation of international agreements. Its current form it owes to the lack of assent to the proposal - suggested in the course of preparatory work - to entrust the Court with the authority to overrule the judgments of domestic courts which are incompatible with the Convention¹³⁶. The key for explaining this solution is undoubtedly the willingness to respect, among others, such values as stability of a final and binding judgment.

¹³³ H.-J. Cremer, *Zur Bindungswirkung...*, p. 691, E. Pache, *Europäische...*, p. 403, J. Polakiewicz, *Die innerstaatliche...*, p. 165; in the jurisprudence of the Spanish Constitutional Court in the judgment referred to above (see J. Polakiewicz, *Die Aufhebung...*, p. 811). However, differently G. Ress, *Wirkung...*, p. 350. The author points out that the wording of art. 41 of the Convention does not necessarily mean that a respondent state whose domestic law does not allow for full redressing the effects caused by a violation is relieved from an obligation to take such measures in the future which will allow for full restitution even if the violation stems from a judgment of a court. The author classifies the mechanism of art. 41 as an episodic solution. It must be admitted that the standpoint of the Court expressed in the aforementioned case of *Maestri v. Italy* – according to which each state is obliged to eliminate any solutions that may hinder restoration of the previous situation from before the violation (footnote 90) seems similar to the above concept. It is visible that the Court shows its concern that the contracting parties may behave passively resorting to awarding satisfaction by the Court (this is emphasized by L. G. Loucaides, *Reparation...*, p. 192, H.-J. Cremer, *Zur Bindungswirkung...*, p. 692).

¹³⁴ Such solution is not unknown in international law; compare P. Schlosser, *Der Völkerrechtswidrige Urteil...*, p. 168.

¹³⁵ Compare Ch. Grabenwarter, *Das mehrpolige...*, p. 194.

¹³⁶ M. Balcerzak, *Odszkodowania za szkody z tytułu naruszenia Europejskiej Konwencji Praw Człowieka (art. 41) – z uwzględnieniem spraw polskich* [in:] T. Jasudowicz (ed.), *Polska wobec europejskich standardów praw człowieka*, Toruń 2001, p. 329.

Being aware of the role of the aforementioned value for the realization of the function of the system of justice this solution in particular in civil cases, receives strong axiological justification. It should be emphasized that the need for clear and straightforward procedural regulations – behind which the obvious thesis must be that each of the proceedings must have their definite ending and legal situations shaped in their course are subject to final petrification – may be additionally supported by art. 45 of the Polish Constitution and also, which is worthy to underline – by art. 6 of the Convention. This is confirmed by the viewpoint of the Court itself which emphasizes that the right to a fair trial guaranteed in art. 6 of the Convention should be interpreted with regard to the Preamble to the Convention from which it follows that the rule of law is an element of common heritage of the contracting states. Whereas one of the fundamental aspects of the rule of law is its legal certainty requiring that final awards should not be questioned¹³⁷.

Accepting the necessity to notice specific conflicting problems¹³⁸ it should be reminded that supranational law application centres such as specifically ECtHR and European Court of Justice (ECJ) have not been founded as inherently higher than national ones in the hierarchy and called into existence in order to verify the correctness of the jurisprudence of national courts¹³⁹. Naturally there is no reason why the Court while evaluating the behaviour of a state should not be able or even be obliged to declare *en passant* – while executing its competence reliably – that the result of law application by a national centre is in conflict with the Convention¹⁴⁰. As far as the jurisprudence of the ECJ is concerned this issue is solved in a similar way. The ECJ judgments in which answers to legal questions submitted pursuant to art. 234 of the TEC notwithstanding the retroactive effect of the interpretation

¹³⁷ *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-IX; *Agrotehservis v. Ukraine*, no. 62608/00, 5 July 2005; *Androsov v. Russia*, no. 63973/00, 6 October 2005; *Pravednaya v. Russia*, no. 69529/01, 18 November 2004; *Marckx v. Belgium*, § 58, Series A no. 31 (6833/74). See also R. Stürner, *Rechtskraft in Europa* [in:] *Wege zur Globalisierung des Rechts. Festschrift für Rolf A. Schütze zum 65. Geburtstag*, München 1999, p. 913.

¹³⁸ Compare sound comments of E. Łętowska, „Multicentryczność”..., p. 1134

¹³⁹ G. C. R. I. Iglesias, *Der EuGH und die Gerichte der Mitgliedstaaten – Komponenten der richterlichen Gewalt der Europäischen Union*, NJW 2004, no. 27, p. 1890. This has also been strongly emphasized by the Spanish Supreme Court in the Barberé case (quotation after J. Polakiewicz, *Die Aufhebung*..., p. 809). Also the President of the German Federal Constitutional Court H.-J. Papier has underlined, referring to the *Görgülü v. Germany* case (footnote 95) that the ECtHR should not allow to be treated as a court of appeal for judgments of domestic courts (Frankfurter Allgemeine Zeitung of 9 December 2004, p. 5).

¹⁴⁰ Compare soundly J. Łętowska, *Sędzia krajowy wobec prawa europejskiego*, BBIRE 1998, no. 3–4, p. 14.

given therein¹⁴¹, do not force to set aside legally binding judgments of domestic courts in which different interpretation has been assumed. Following the ECJ jurisprudence, in literature it is emphasized that limiting the principle of retrospective operation of interpretative decisions of the ECJ in favour of their *ex nunc* effect may become a contribution of just the domestic law norms and a state is not obliged to challenge final decisions or to extend the time limit so that any legal means to fully effective implementation of the handed-down interpretation can be taken¹⁴². In the case of so called abstract questions asked by the Council, the Commission or a Member State pursuant to art. 68 paragraph 3 of the TEC – this circumstance unequivocally results from the content of this provision. The same principles apply to the ECJ rulings declaring a violation of the Community law provisions¹⁴³ (art. 226 and 227 of the TEC), in the case of which due to their similarity, as far as their legal nature is concerned, with rulings of the ECtHR finding a violation of the Convention – the analogy under discussion is clearly visible.

It is also important that the binding nature of the Court's judgment would, in a new trial, unfavourably affect the legal situation of the adversary who does not participate in the proceeding before it. This danger has been strongly emphasized by the German Federal Constitutional Court which stated that in the area of private law it is usually necessary to subtly balance divergent interests and the situation in which an entity to the dispute in favour of which the ECtHR's judgment has been awarded, and afterwards a domestic court performs it to the effect that, which cannot be excluded, a party not participating in the proceedings before the ECtHR would in fact be deprived of the status of an entity to the proceedings – may lead to a conflict at the constitutional level¹⁴⁴. This thesis cannot be rejected by virtue of either a possibility opened up in art. 36, paragraph 2 of the Convention or the fact that naturally the respondent state is representing the interests of the adversary¹⁴⁵ although it must be admitted that if the Court takes advantage of the option provided for in art. 36 paragraph 2 of the Convention, the risk mentioned above becomes less serious.

The discussed argument is useful also due to another reason. It allows for distinguishing between cases civil or criminal in nature. In Poland, already in the middle of the XIX century different role of the stability of judgments in civil and

¹⁴¹ P. Dąbrowska, *Skutki orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości*, Warszawa 2004, p. 101 and further.

¹⁴² P. Dąbrowska, *Skutki...*, p. 106, D. Miąsik [in:] A. Wróbel (ed.), *Stosowanie...*, p. 847 and the ECJ jurisprudence cited by the authors.

¹⁴³ D. Miąsik [in:] A. Wróbel (ed.), *Stosowanie...*, p. 867.

¹⁴⁴ Judgment of 14 October 2004, 2 BvR 1481/04, p. 3410 (footnote 11). This aspect is soundly emphasized by L. Garlicki, *Obowiązywanie...*, p. 27.

¹⁴⁵ J. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 17.

criminal matters was pointed out¹⁴⁶. While in the former cases there is a one-layer relationship – a state violating the Convention – an applicant and therefore admitting reopening of a trial may raise less objections but in the other cases usually also other entities are involved in the proceedings that do not participate in the proceedings before the ECtHR. These entities may have already shaped their situation in confidence to the final and binding judgment clearly requiring legal protection. If it is added that in case the application to institute proceeding *de novo* is allowed in civil proceedings, the burden of restitution falls not on the state but on the adversary (art. 415 of the Polish Code of Civil Proceedings), the distinction made here could form grounds for some relativism of the power of influence of the ECtHR's judgments depending on whether a private entity or a body of public authority was an adversary of the applicant.

The thesis presented above is reflected in the way domestic regulations of the states parties to the Convention are formulated. It is not an incident that whereas instituting penal proceedings *de novo* has been in fact generally accepted¹⁴⁷ also by the Polish legislator, the way to readjudication in civil cases have been opened in minority of states of the Council of Europe¹⁴⁸. Regulations aiming at broadly defined setting aside decisions issued in civil cases in a manner incompatible with the Convention yet can be found in Swiss¹⁴⁹, Norwegian¹⁵⁰, Lithua-

¹⁴⁶ Compare comments of S. Budziński, *O powadze rzeczy osądzonej w procesie cywilnym i kryminalnym oraz o wzajemnym wpływie na siebie*, Petersburg 1861, p. 56 (after Z. Resichem [in:] Z. Resich (ed.), *System prawa procesowego cywilnego. Vol. II. Postępowanie rozpoznawcze przed sądami pierwszej instancji*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1987, p. 392).

¹⁴⁷ G. Ress, *The Effect...*, p. 381.

¹⁴⁸ A. Szklanna, *Wykonywanie...*, p. 14.

¹⁴⁹ Widely on this subject, see H. Keller, *Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland*, ZäoRV 2005, vol. 65, p. 331 and further. The arguments of the author in general remain up to date also even after the new Act on Federal Courts of 17 June 2005 entered into force on 1 January 2007. In view of the new act (and the former one as well) the institution of a review is applied to set a valid judgment aside in the wake of a judgment of the ECtHR. Pursuant to art. 122 of the Act from 2005: „1. A decision of the Federal Court or of a lower court may be reviewed if the European Court of Human Rights or the Committee of Ministers of the Council of Europe has granted an individual application on account of a breach of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and redress is possible only by such review. 2. If the Federal Court determines that a review is called for, but a lower court has jurisdiction, it shall refer the case to the lower court to reopen proceedings in the matter. 3. The cantonal court shall then also decide on the request for a review if cantonal law does not envisage such ground for the reopening of proceedings.”.

¹⁵⁰ Compare § 407 Civil Procedure Code (<http://www.lovdata.no/info/uenga.html>); translation after: M. Hartwig, *Much Ado...*, p. 883.

nian¹⁵¹, Bulgarian¹⁵², Moldovan¹⁵³ and as it seems in Maltese¹⁵⁴ and Danish¹⁵⁵ law. From the beginning of 2007 such provisions were also introduced in the German Code of Civil Proceedings (§ 580 No. 8 of the German *CPC*), however in the reasons for the amendments it was noticed that a possibility of reopening of proceedings in effect of a final judgment of the ECtHR finding a violation of the Convention is not required by the Convention¹⁵⁶.

7. Assenting to such view does not clarify all doubts. This is so because art. 41 of the Convention may be treated as a remedy only in case of a need to redress the effects of the violation. It does not relieve from an obligation to put an end to it. The obligation of a state affected by the judgment is absolute in this case which simply follows from the *pacta servanda sunt* principle. It would be difficult to reconcile this obligation and the inability to set a judgment aside in cases in which it was a source of specific, permanent situation qualified by the ECtHR as incompatible with the Convention and hence violating legal international obligation of the respondent state¹⁵⁷. Distinguishing this group of situations is related to the concept of so called “continuing violation”¹⁵⁸ present in the science of international law.

¹⁵¹ Art. 366 (1) 1 Civil Procedure Code – [Grounds for starting fresh proceedings] 1. Fresh proceedings can be started if the following grounds exist: 1) if the European Court of Human Rights recognises that the judgments, rulings, or decisions of the courts of the Republic of Lithuania in civil cases contradict the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or its additional protocols, in which the Republic of Lithuania is a participant. (...)”.

¹⁵² Art. 231 § 1 (h) Civil Procedure Code from 1997 – see also reasons for the judgment in the *Yanakiev v. Bulgaria* case, no. 40476/98 (footnote 98).

¹⁵³ Art. 449 (j) Civil Procedure Code from 2003 – see also reasons for the judgment in the *Rosca v. Moldova* case, no. 6267/02, 22 March 2005.

¹⁵⁴ This way M. Hartwig, *Much Ado...*, p. 883, footnote 72. More widely on this issue see J. J. Cremona, *The European Convention on Human Rights as The Part of Maltese Law* [in:] F. Carpi, *Judicial Protection of Human Rights at The National and International Level. International Congress on Procedural Law for The Ninth Centenary of The University of Bologna*, Milano 1991, vol. 2, p. 565 and further.

¹⁵⁵ M. A. Nowicki, *Wokół...*, p. 72.

¹⁵⁶ BT-Drucks 16/3038, p. 39; expressing criticism on the manner in which the amendments were made – J. Braun, *Restitutionsklage wegen Verletzung der Europäischen Menschenrechtskonvention*, NJW 2007, no. 23, p. 1620.

¹⁵⁷ Compare J. Polakiewicz, *Die innerstaatliche...*, p. 124, E. Klein, *Should...*, p. 708.

¹⁵⁸ More widely on this issue L. G. Loucaides, *The concept of „continuing” violations of human rights* [in:] *Protection...*, p. 803 and further. The author as continuing violations mentions among others making impossible the execution of the right provided for in the Convention to have contact with a child, lack of possibility to execute a judgment (art. 6 of the Convention) or imprisonment incompatible with the Convention. The last viewpoint is controversial, which is admitted by the author himself.

In civil cases such cases will be rather rare, however they are not impossible. As an example one may quote cases in family law or situations in which a ban on publication of certain information in the wording accepted by a domestic court is found by the Court to be in conflict with art. 10 of the Convention and the plaintiff still shows interest in its publication¹⁵⁹.

As regards the domestic legal order, the right to submit an application demanding to declare a final and valid judgment incompatible with law (art 424¹ k.p.c.) and in case it is allowed, an attempt to obtain compensation from the State Treasury are not sufficient remedies in this state of affairs¹⁶⁰. At the same time some subtlety comes to the fore at this point. In the circumstances at issue the necessity to revise the situation shaped by the judgment is not a self-contained effect of the operation of the binding force of the ECtHR's judgment. In fact it stems from art. 1 of the Convention and an international obligation expressed in it and embodied in the ECtHR's judgment in connection with the content of art. 9 of the Constitution. Thereby the thesis – that the Court's judgment is not retroactive in the sense that it does not order to re-evaluate the state of affairs ended in the force of law – cannot be overturned. What matters is a revision significant for the future only, allowing to avoid the allegation that despite the authoritative statement of the Court, the Contracting State does not comply with conventional obligations¹⁶¹.

These circumstances may prompt softening the stance on the necessity to ensure paths that would lead to a review of domestic judgments. From the point of view of the science of legal proceedings this need could be further supported by

¹⁵⁹ Compare J. Meyer-Ladewig, *Konvention...*, p. 307. Among recent judgments see facts of the case in the following cases: *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, ECHR 2000-I; *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, ECHR 2002-I; *Hertel v. Switzerland*, 25 August 1998, *Reports of Judgments and Decisions* 1998-VI.

¹⁶⁰ M. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK) unter besonderer Berücksichtigung der schweizerischen Rechtslage*, Zürich 1999, p. 157 points out that the critique of a similar mode of reasoning gave an incentive for introducing a possibility to put aside domestic judgments in conflict with the Convention provisions. Another issue is that such view would be in conflict with the jurisprudence of the Court, see in particular *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII.

¹⁶¹ This problem arose in the *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* case, no. 32772/02, ECHR 2007-... . After a denial to review an earlier domestic award banning distribution of certain information which had been earlier declared by the ECtHR as incompatible with art. 10 of the Convention (*Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI), the Court deemed following application admissible and by majority of voices it expressed the opinion that by refusing to review previous judgment Switzerland violated art. 10 of the Convention again. The case has been referred to the Grand Chamber of the Court and its final result will be significant for the issue of effects of the ECtHR's judgments in domestic law.

recent voices of German science of legal proceedings, where the idea of a need for more flexible views, than in other cases, on the validity of judgments containing future rights and obligations of parties is pushing forward¹⁶².

When considering remedies that may appear adequate in this situation all instruments already available in civil proceedings leading to adjudication in a case already decided by a final and binding judgment should be taken into account¹⁶³. Without laying any claims as to the overall solution of this issue, one may look for a compromise between the trend to respect the validity of domestic judgments and willingness to satisfy a judgment of the Court in the inability to use state authority in order to enforce a domestic judgment¹⁶⁴. However this would require that the Court's judgment – from which it follows that the judgment of a domestic court in substance violates the Convention – be treated as an event by which the obligation included in the domestic judgment may not be executed (art. 840 § 1 paragraph 2 k.p.c.)¹⁶⁵. Additional difficulty lies in the fact that the wording of art. 840 k.p.c. requires that the counterclaim be directed only against an enforceable title¹⁶⁶. With regard to judgments imposing an obligation to put an end to a violation, rigorous interpretation of this provision may lead to a conclusion that the plaintiff in order to open the way to institute an action would have to persuade the adversary to obtain the enforceability clause¹⁶⁷. While not giving up the usefulness of the analyzed solution entirely, it is rather difficult to deem it satisfactory.

¹⁶² Compare W. Grunsky [in:] F. Stein, M. Jonas, *Kommentar...*, p. 560; see also H. J. Musielak [in:] H. J. Musielak, *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz*, München 2005, p. 1475 and further.

¹⁶³ Compare M. Sawczuk, *Ponowne orzekanie w sprawie cywilnej prawomocnie osądzonej*, Warszawa 1975, *passim*, the same: [in:] W. Siedlecki (ed.), *System prawa procesowego cywilnego, tom III, Zaskarżanie orzeczeń sądowych*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1986, p. 88 and further.

¹⁶⁴ Compare G. Ress, *Die Europäische...*, p. 240.

¹⁶⁵ Compare § 79 of the German act of 12 March 1951 on the Federal Constitutional Court (BGBl. I 1951 p. 243), which prohibits implementation of judgments issued on the grounds of provisions declared incompatible with the constitution. At the same time the same provision in such cases orders to apply respectively the provisions of the German Code of Civil Proceedings corresponding to a counterclaim referred to in art. 840 k.p.c. (§ 767 of the German CPC).

¹⁶⁶ E. Wengerek, *Przeciwegzekucyjne powództwa dłużnika*, Warszawa 1967, p. 25, W. Siedlecki [in:] W. Siedlecki, Z. Resich (ed.), *Komentarz do kodeksu postępowania cywilnego, vol. II*, Warszawa 1969, p. 1151. Differently in German science compare e.g. K. Schmidt [in:] G. Lücke, P. Wax (ed.), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. Band 3. §§ 803 – 1066; EGZPO - GVG - EGGVG – internationales Zivilprozessrecht*, München 2001, p. 1981.

¹⁶⁷ But compare the judgment of the Supreme Court of 6 November 1981, III CRN 224/81, unpublished.

A remedy for this situation could be reopening of proceedings but *de lege lata* the Code of Civil Proceedings does not envisage such possibility. As a result it may be considered whether – having made a step forward to assign the feature of *causae superveniens* to the Court’s judgment – a better solution would not be to go beyond the construction of a counterclaim and to permit bringing a declaratory action by the plaintiff to determine that in view of the ECtHR’s judgment in favour of the applicant he is no longer obliged to continue performance¹⁶⁸. Domestic award obtained as a result of bringing a declaratory action would as an effect of the previously awarded obligation to performance becoming out of date lead to a state of affairs compatible with the Convention and thus satisfy the ECtHR’s judgment, naturally if the content of this judgment is sufficiently justified by the domestic award.

The problem is less complicated in cases settled in non-trial proceedings. Instead of stability of final and binding judicial awards the necessity to ensure continuous legal protection comes to the fore¹⁶⁹. This may apply in particular to the aforementioned family cases, in which judgments of domestic courts define legal relationship which may be subject to evaluation pursuant to art. 8 of the Convention. While deciding a case again based on art. 577 k.p.c. a court will take into account the standpoint expressed by the ECtHR and will consider in what way its interpretation of the Convention influences the earlier adjudication. This corresponds to a viewpoint presented by the German Federal Constitutional Court which in the analysis of the effects of the ECtHR’s judgments in civil proceedings emphasized, *nota bene* exactly with regard to proceedings concerning guardianship and contact with a child that “There may be facts and circumstances in which German courts may make a new decision, not about the *res judicata*, but about the matter on which the ECHR has established that there has been a violation of the Convention” and pointed out that “In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR”¹⁷⁰.

¹⁶⁸ E. Wengerek permitted such action in situations in which – due to lack of an enforceability clause – the debtor cannot contest the enforceable title under art. 840 k.p.c. (E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz do części drugiej Kodeksu postępowania cywilnego*, Warszawa 1998, p. 290; following him M. Sawczuk, *Ponownie...*, p. 117 and pp. 125–126). Whereas W. Siedlecki notices that the action at issue may serve to reverse a valid and final judgment (W. Siedlecki, *Zasady wyrokowania w procesie cywilnym*, Warszawa 1957, p. 172).

¹⁶⁹ Compare A. Międzyński, *Ochrona praw jednostki w postępowaniu nieprocesowym*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze, 1979, vol. 85, p. 60.

¹⁷⁰ Judgment of 14 October 2004., 2 BvR 1481/04, p. 3410, paragraph I.3b) bb) (footnote 11).

These comments should be adequately applied to the situation in which a violation of the Convention stems from a charging order, which may in particular be related to the example of the ban on publication quoted above¹⁷¹.

8. The assumption that in other cases – including the situation in which violation of art. 6 of the Convention is found¹⁷² – it is not necessary under the Convention to set aside a valid and final domestic judgment does not mean that final finding by the Court that the judgment of a domestic court has been issued in proceedings incompatible with conventional standards of a fair trial will remain without any response on domestic level. In fact, article 41 of the Convention does not rule out the obligation of restoration in total allowing for a departure from it only if having considered all instruments present in the legal system of the respondent state, construed with regard to the obligation to apply Convention-friendly interpretation it appears impossible. While emphasizing the obligation to interpret domestic regulations in compliance with the Convention it must be kept in mind that the Convention does not express procedural norms *sensu stricto* therefore its interpretation should not lead to assigning to them content which is totally different from the content implied by their wording and the objective of a domestic legislator. The provision of art. 6 of the Convention should be treated rather as synthesis of the catalogue of values which may and should influence the interpretation process in the phase of application of axiological interpretation guidelines and the Convention should find its rightful position in the judicial law system just in this manner.

Facing the suggestions of the Court concerning the effects of an adjudication of a case by an authority not fulfilling the criterion of impartiality against the background of Polish law, one should refer to the proposal to apply art. 401 paragraph 1 k.p.c. in this respect. Such interpretation would go beyond the limits of Convention-friendly interpretation because the code traditionally already excludes the possibility to reopen a trial in case a judge is suspected of partiality (*iudex suspectus*) thus opening the way for instituting proceedings *de novo* only if the grounds for disqualification by virtue of law (*iudex inhabilis*) have been

¹⁷¹ Art. 742 k.p.c.; in literature: A. Jakubecki, *Postępowanie zabezpieczające w sprawach z zakresu prawa własności intelektualnej*, Zakamycze 2000, p. 408.

¹⁷² The same way H. A. Stöcker, *Wirkungen...*, p. 1908. The Committee of Human Rights ascertained that violations of art. 6 of the Convention do not create situations incompatible with its content (*continuing violation*) but „come to an end” as the judgment is delivered by assuming at the beginning, when the Convention started to function that claims connected with domestic adjudications which had been issued or had become valid and final before the Convention came into force were inadmissible despite the continuation of their execution or other effects caused by them. See also J. Polakiewicz, *Die Aufhebung...*, p. 818.

met¹⁷³. A violation of impartiality, in the external meaning, usually is a result of specific legislative solutions therefore a Court's judgment would in this case give impulse for legislative authority. Another thing is that this effect corresponds to the function of external aspect of impartiality which is focused not so much on protection of an individual interest as on ensuring the image of impartial judicature in the eyes of the society¹⁷⁴.

Wider interpretation possibilities are offered by art. 401 paragraph 2 k.p.c. *in fine*. This provision uses flexible formula of "being deprived of a capability to act as a result of the violation of the provisions of law"¹⁷⁵. The "provisions of law" at issue refer not only to provisions of statutory acts but also to art. 6 of the Convention. Considering that in the opinion of the Court violation of the judge's obligation of impartiality must be proved¹⁷⁶, it should be expected that it will be somehow demonstrated. It cannot be excluded then that part of these situations could fall within the scope of application of not so much the provision of art. 401 paragraph 1 k.p.c. as exactly art. 401 paragraph 2 k.p.c. As far as further examples of referring to this cause for reopening of proceedings it is necessary to resort to model reasoning performed by the Austrian Supreme Court in the aforementioned judgment concerning the issue of the court's being bound by a judgment awarded in proceedings incompatible with the Convention. Admitting that the court continues to be bound even at the time the ECtHR's judgment is delivered, the Austrian Supreme Court also notices that the binding force may be annulled in consequence of reopening of proceedings and suggests that since in the Court's opinion a violation of the Convention stems from adjudicating the case at a sitting in camera, in this respect it is possible to apply the provision according to which the proceedings are to be reopened if the provisions on the right to be heard (*Parteiengehör*) are violated. Incompatible with the Convention failure to set the proceedings in open court falls within the limits of this cause for instituting the proceedings *de novo*¹⁷⁷.

¹⁷³ Compare S. Gołąb, *Wznowienie postępowania* [in:] *Polska procedura cywilna. Projekty referentów z uzasadnieniami*, Kraków 1923, p. 88.

¹⁷⁴ The distinction between subjective and objective aspect of impartiality is consistently assumed in the ECtHR jurisprudence. Also the Polish Constitutional Tribunal approves of it, compare judgment of 27 January 1999, K 1/98, OTK 1999, no 1, item. 3, and of 27 July 2004, SK 19/02, OTK-A 2004, no. 7, item 67.

¹⁷⁵ This flexibility has been noticed by M. Sawczuk – M. Sawczuk, *Wznowienie postępowania cywilnego*, Warszawa 1970, p. 155.

¹⁷⁶ As an example *Tartak v. Poland (dec.)*, no. 46015/99, 23 April 2002. This standpoint is generally accepted in the jurisprudence of the Court.

¹⁷⁷ 1Ob236/03t (<http://www.ris.bka.gv.at/>).

It may also happen that one of the causes for reopening of proceedings provided for in the code of civil proceedings is revealed in the course of the proceedings before the ECtHR or the Court draws attention to it in the reasons for the judgment. This eventuality has already been observed in literature¹⁷⁸. Then the way to reopen the proceedings always remains open but the cause for reopening will be any of the ones included in the code and not the incompatibility of the domestic judgment with the Convention. Satisfaction of the Court's judgment will somehow take place in the background. Incidentally, the content itself of the Court's decision in these circumstances would be of no significance for the admissibility of reopening.

9. In a situation in which in accordance with the provisions of internal procedural law a domestic court obtains a chance to re-adjudicate the case in which a final and binding judgment has been delivered, discretionary powers, enjoyed by this court in adapting the conclusion of the Court's judgment to actual circumstances of the case go as far as its result is not in conflict with it¹⁷⁹. To this extent only, a domestic court cannot assume different interpretation of the Convention. Therefore a domestic court is not always obliged to review its adjudication. As far as procedural faults are concerned this question is obvious. However even then if the violation stems from the merits of the judgment, following change of the factual circumstances may justify leaving it unchanged¹⁸⁰. Since with a change of facts of the case the binding force of the Court's judgment comes no longer into consideration. However irrespectively of whether a domestic court is bound by the ECtHR's judgment or intends to take it into account within a directional effect (paragraph III.6) it should be realized that reaching a state which is compatible with the Convention is not always possible without interference of the legislator. Such situation may happen in particular if the Court points out not exactly inconsistency of a domestic provision with the Convention but lack of regulations which are necessary from the point of view of the Convention. By reason of their generality the provisions of the Convention may turn out insufficient to compensate for previous omissions on the part of the legislator¹⁸¹. If on the other hand, a positive provision of domestic law stands on the way to implementing the ECtHR's judgment –

¹⁷⁸ R. Hliwa, *Wykonywanie...*, p. 60, C. Mik, *Koncepcja...*, p. 299, P. Hofmański, *Konwencja...*, p. 102.

¹⁷⁹ M. Hartwig, *Much Ado...*, p. 886 – „They must not repeat the violation [...]”.

¹⁸⁰ This circumstance is generally acknowledged in the science: compare J. Meyer-Ladewig, H. Petzold, *Die Bindung...*, p. 17, H.-J. Cremer, *Zur Bindung...*, p. 699, M. Hartwig, *Much Ado...*, p. 887.

¹⁸¹ J. Polakiewicz, *Die innerstaatliche...*, p. 177.

a Polish court may always refer to the Constitutional Tribunal for adjudication (art. 188 paragraph 2 of the Polish Constitution).

V. SUMMARY

As far as the openness with which Polish judicial law system should response to the judgments of the ECtHR is considered, there is no reason for any far-reaching anxiety because the influence and contribution of the Tribunal also to the development of safeguards in civil proceedings are unquestionable¹⁸². The Convention itself is perceived as codification of present standards in this field, which is clearly visible in particular in the international civil procedure law¹⁸³. In the discussion over the influence of the Court's awards on final and binding domestic judgments one cannot forget – and the Tribunal itself also bears it in mind – that as awarding a sound judgment in civil proceedings is a task that is not always achieved – one of the fundamental elements of the right to court is a right to obtain a judicial decision specific in nature – not temporary but binding¹⁸⁴ and permanent and thereby allowing the parties to regulate their legal situation with full confidence in its content.

¹⁸² W. Peukert, *Verfahrensgarantien und Zivilprozeß (Art. 6 EMRK)*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1999, vol. 63, p. 600 and further, M. Wolff, *Zivilprozessuale Verfahrensgarantien in Art. 6 I EMRK als Grundlage eines europäischen Zivilprozessrechts* [in:] *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends. Festschrift für Alfred Söllner zum 70. Geburtstag*, München 2000, p. 1279 and further, F. Matscher, *Der Einfluß der EMRK auf den Zivilprozeß*, [in:] *Festschrift für Wolfram Henckel zum 70. Geburtstag*, Berlin, New York 1995, p. 593 and further. Compare also comments of J. Łętowski, *Sędzia krajowy...*, p. 14.

¹⁸³ See W. J. Habscheid, *Schiedsgerichtsbarkeit und Europäische Menschenrechtskonvention* [in:] *Festschrift für Wolfram Henckel...*, p. 348, B. Hess, *EMRK, Grundrechte-Charta und europäisches Zivilverfahrensrecht* [in:] *Festschrift für Erik Jayme*, München 2004, p. 338 and further, F. Matscher, *Die indirekte Wirkung des Art. 6 EMRK bei der Anerkennung und Vollstreckung ausländischer Entscheidungen* [in:] *Recht und Risiko, Festschrift für Helmut Köllhosser zum 70. Geburtstag, Bd. 2*, Karlsruhe 2004, p. 427 and further.

¹⁸⁴ Compare the judgments of the Polish Constitutional Tribunal of 12 March 2002, P 9/01, OTK-A 2002, no. 2, item 14, of 9 June 1998, K 28/97, OTK 1998, no. 4, item. 50, and recently – of 11 January 2005, SK 60/03, OTK-A 2005, no. 1, item 2.

Karolina Wierczyńska* ■

THE EVOLUTION OF THE NOTION OF GENOCIDE IN THE CONTEXT OF THE JURISDICTION OF THE NATIONAL COURTS

1. DEFINITION OF THE CRIME OF GENOCIDE

The author of the word genocide was Rafael Lemkin, a Polish Jew who coined this word of two words – *genos* – which means race or tribe in ancient Greek and *cide-* (from *cidere*) which means to kill in Latin.¹ By genocide, Lemkin meant the destruction of a nation or an ethnic group. He used the word to describe broadly the exterminatory politics of Nazis against Jews, Poles and Gypsies. For Lemkin, genocide was committed in various ways – from killing, preventing births, discrimination in feeding, forbidding to use the language, to depriving of the elemental means of existence.

The Convention on the Prevention and Punishment of the Crime of Genocide was signed in 1948 and entered into force in 1951. At the moment, 136 nations are state parties to the Convention. The Convention's definition of genocide differs from Lemkin's definition, mostly because it only includes biological and physical destruction as the crime of genocide, excluding for example cultural genocide. However, according to Article II of the Convention:²

* **Karolina Wierczyńska, Ph.D.**, assistant professor at the Polish Academy of Science. The electronic version of this article may differ from its hard copy version with regards to the formatting of the text, but the substantive content of both versions is the same.

¹ R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Carnegie Endowment for International Peace, Washington D.C.: 1944, pp. 79–95.

² Text of the Convention available online at: http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. killing members of the group;
- b. causing serious bodily or mental harm to members of the group;
deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- c. imposing measures intended to prevent births within the group;
- d. forcibly transferring children of the group to another group.”

Article III mentions acts, which should be punishable, as:

- a. genocide;
- b. conspiracy to commit genocide;
- c. direct and public incitement to commit genocide;
- d. attempt to commit genocide;
- e. complicity in genocide.

What is important in context of this review is the fact that the Convention did not describe or define any of the elements of the definition of genocide – neither what the word “group” means in this context, nor how to understand phrases such as “racial”, “ethnic” “religious”, “national group”, or “intent”, or what it means to “destroy in whole” and destroy the group “in part”.

After the Convention entered into force, there was no necessity to define those phrases, as the definition in the Convention was not used to punish any of the criminals. It was not used to prosecute the Nazis because as we know the Convention with the definition of genocide was signed after the war.

2. IMPLEMENTATION OF THE CONVENTION BY STATE PARTIES

The Convention is not self-executing; according to Article V, the contracting parties to the treaty were obliged to enact the necessary legislation to give effect to the provisions of the Convention and particularly to provide effective penalties for persons guilty of genocide.

States were not obliged to implement verbatim the Convention’s definition of genocide in the domestic legislations. Nevertheless, the majority of the domestic criminal codes reproduce the concept of genocide from the Convention, although sometimes in domestic legislation this definition is broadened, mainly with respect

to protected groups. For example some countries (such as France and Poland) extended the number of the groups protected by the Convention.³

It is very important to add that the crime of genocide has a very special position in public international law. According to judgments and opinions of the International Court of Justice, “principles arising from the Convention are the principles recognized as binding on states without conventional obligation”. This means that a state has to prevent and punish the crime of genocide even if it is not a party to the Convention. Secondly, the ICJ considered that “the Convention is universal in scope”.⁴ In further considerations, the ICJ added that “the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*.”⁵

3. THE NOTION OF GENOCIDE IN THE JURISPRUDENCE OF *AD HOC* CRIMINAL TRIBUNALS

Article VI of the Convention proclaims that criminals responsible for genocide should be tried by the competent tribunal of the State in the territory of which the act was committed, or by such international criminal tribunal as may have jurisdiction with respect to those Contracting Parties, which shall have accepted its jurisdiction.

The problem is that the Convention, after it entered into force in 1951, was neither effectively used to prosecute criminals nor was any international tribunal created. The situation has changed during last two decades, when two international criminals tribunals *ad hoc* were established, and a few national courts started to exercise their universal jurisdiction with respect to genocide.

It is worth noting that *ad hoc* tribunals, namely the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have their special impact on the interpretation of the notion of genocide. As was highlighted before, the definition of genocide is not precise enough to be used directly, without any additional interpretations. Judges of the tribunals had to analyze particular provisions and interpret them in the light of the object

³ Texts of national regulations available online at: <http://preventgenocide.org/law/convention/>.

⁴ Reservations to the Genocide Convention, Advisory opinion, I.C.J. Reports 1951, p. 23.

⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 616, § 31.

and purpose of the Convention. For example, the ICTR in the case of *Akayeshu*, defined elements of genocide as protected groups, intent, and acts of genocide. As far as groups are concerned, the tribunal presented definitions of the protected groups,⁶ but added that the scope of this term should not be limited to only four groups but should also include any group which is stable and permanent like the said four groups. This interpretation can broaden the scope of protected groups. With regard to the definition of intent, the tribunal stated that an offender is culpable when he has committed the offence with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a protected group.⁷ According to the ICTY, the genocidal intent can extend to a limited geographic area.⁸ In a few other judgments, the tribunals regulated the way of inferring the intent when there is no direct proof that the offender acted with genocidal intent.⁹

Considerations of the ICTY concerning the question of forcible transfer, which can amount to the ethnic cleansing, are also quite interesting. The ICTY stated: “the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population conducted in such a way that the group can no longer reconstitute itself,”¹⁰ and added: “forcible transfer could be an additional means by which to ensure the physical destruction of the group.”¹¹ The ICTY assessed

⁶ According to the judgment, national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an ethnic group is generally defined as a group whose members share a common language or culture; racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; religious group is one whose members share the same religion, denomination or mode of worship. *Prosecutor v. Akayeshu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, §§ 512–515.

⁷ *Prosecutor v. Akayeshu*, § 520.

⁸ *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, § 703.

⁹ “The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing”. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, § 93.

¹⁰ *Prosecutor v. Vidoje Blagojevic, Dragan Jokic*, Case No. IT-02-60-T, In Trial Chamber I, Section A, Judgment, 17 January 2005, § 666.

¹¹ *Prosecutor v. Radislav Krstic*, Case No: IT-98-33-A, In the Appeals Chamber, Judgment, 19 April 2004, §31.

that the genocidal intent can be inferred from the acts of ethnic cleansing.¹² Although genocide is a different notion than the ethnic cleansing, the latter can be used to prove the existence of the perpetrator's genocidal intent.

Those few examples show how the international tribunals have effectively interpreted the definition of genocide.

4. THE PRACTICE OF NATIONAL COURTS WITH RESPECT TO GENOCIDE – USE OF UNIVERSAL JURISDICTION

The record of national courts in prosecuting the crime of genocide is not very impressive. The most successful is Rwanda, which left jurisdiction over genocide to the so-called *Gacaca courts*,¹³ which are courts based on tribal mechanisms of justice and are directed the community leaders or elders. *Gacaca courts* can adjudicate a few thousand of cases a year. In a country where 100,000 people still await in prisons for a trial, that is not an impressive figure, but it is necessary to note that *ad hoc* international criminal tribunals adjudicated only a few hundred people in 15 years. This comparison evidently indicates the relative advantage connected with the existence of *Gacaca courts* insofar as it serves the speedy administration of justice.

Apart from this specific form of jurisdiction, it is also worthy to point to the jurisdiction of the Court of Bosnia and Herzegovina,¹⁴ which is a so-called *hybrid court* (as it differs from the national courts and the *ad hoc* tribunals). For example, the panel of judges consists of Bosnian judges and judges from the other countries, does not have a time-limited mandate, and delivers judgments in accordance with the Bosnian Criminal Code and Bosnian Procedure.

On 29 July 2008, the Court delivered its judgment in the case of Kravice.¹⁵ It is one of the most important verdicts issued in the context of the crime of genocide,

¹² Prosecutor v. Dragan Nikolić a/k/a „Jenki”, Case No. IT-94-2-R61, Review of the Indictment Pursuant to the Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, § 34.

¹³ W. A. Schabas, *Genocide trials and Gacaca Courts*, 3(4) Journal of International Criminal Justice (2005), pp. 879–95.

¹⁴ About the Court and its proceedings: <http://www.sudbih.gov.ba>

¹⁵ Prosecutor's Office of Bosnia And Herzegovina v. Miloš Stupar, Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Velibor Maksimović, Dragiša Živanović, Branislav Medan and Milovan Matić, First Instance verdict, Case No.: X-KR-05/24, 29 July 2008, (Kravice case), available online at: http://www.sudbih.gov.ba/files/docs/presude/2008/Milos_Stupar_i_dr_-_1st_instance_verdict.pdf

not only because the court convicted very few men for that crime until that time, but also because it interpreted the elements of the crime. It also confirmed that “it is indisputable that genocide is recognized as a crime under customary international law.”¹⁶

The ICTY decided that the intention to destroy a group “in part” requires that the intention to destroy must target at least “substantial part of that group”.¹⁷ The Court of Bosnia and Herzegovina concurred with the view of the ICTY, adding that in the final analysis the Court must be satisfied that the identified part is *objectively* a “substantial part of that group”.¹⁸ Further considerations of the Court were focused on the notion of the perpetrators intent. The Court held that “it is never necessary that an accused have the ability to define the legal qualifications of his crime, only that he have notice that his actions and intentions are criminal”. It is the role of the Court to determine whether the intent of the perpetrator was criminal and further if the intent was genocidal. What was highlighted in the verdict is the fact that the intent is a state of mind, and that a particular state of mind is always part of the offence.

The verdict in the case of Kravice concurs with the verdicts of national courts concerning the crime of genocide. In further considerations, I will focus on those cases to present differences and similarities of the approach to the crime, namely in the case of Jorgić in Germany and Van Anraat in the Netherlands, as well as decisions of Spanish courts in cases of Rigoberta Menchu and Augusto Pinochet.

4.1. Case of van Anraat

Frans van Anraat was a businessman who sold the chemical substance Thiodyglycol (TDG) and Phosphoroxychlorid (POCL₃) to Iraq. Saddam Hussein’s regime used those TDG and POCL₃ to produce chemical weapons, which were later deployed against the Kurds in Iraq and during the war with Iran.

The responsibility of van Anraat was indirect, because he did not commit the crime himself. The courts (first, the District Court of Hague, and then, the Court of Appeal of the Netherlands) were to answer whether he was responsible for the complicity to genocide and war crimes. Although the courts took different approaches to the case (for example the District Court assessed that

¹⁶ Kravice case, p. 53.

¹⁷ Prosecutor v Radislav Krstic, Case No: IT-98-33-A, In the Appeals Chamber, Judgment, 19 April 2004, §§ 8–23.

¹⁸ Kravice case, p. 57.

genocide was committed by the regime of Saddam Hussein against Kurdish population, whereas the Court of Appeal was more cautious, or one may say conservative, by saying that genocide might have been committed¹⁹) the final assessments of both were similar.

The courts held that van Anraat lacked the requisite intent (*mens rea*) to commit the crime and to be found guilty for complicity in genocide.

The Court of Appeal put the question whether the accessory must have “known” that the perpetrator acted with a genocidal intention or that a lesser degree of intention is sufficient. The lesser degree of intention is a standard of Dutch criminal law, and in light of that standard it is enough to prove that the accessory willingly and knowingly accepted the reasonable chance that a certain consequence or a certain circumstance will occur. This standard is not strongly based on the practice of the international law and except for a few cases of international criminal tribunal of Rwanda,²⁰ it does not provide an unambiguous answer for this matter.

In the opinion of the Court of Appeal, using this lesser standard (which can be called *dolus eventualis* standard) might be possible, but it was not established with a sufficient degree of certainty that van Anraat could have known that he was assisting the perpetrators in the fulfillment of their genocidal plan or that he willingly or knowingly took the risk that genocide might appear in the course of his actions.

At the final result, van Anraat was announced guilty of war crimes as he knew that TDG that he had supplied to Saddam Hussein’s regime might have been used to produce weapons of mass destruction and he was aware that this weapon would have been used. This interpretation of van Anraat’s guilt was strengthened by the fact that he had monopoly in the trade of TDG.

¹⁹ “In view of the said facts and circumstances, the Court believes that the actions taken by the perpetrators, in any case even the ones that have not been included in the charges, as outlined in the above, as to their nature **at least produce strong indications** that the leaders of the Iraqi regime, also regarding the actions that have been put down in the charges, let themselves be guided by a genocidal intention with regards to at least a substantial part of the Kurdish population group in (Northern) Iraq”, Court of Appeal, The Hague, 9 May 2007; Public Prosecutor v. Van Anraat, LJN: BA4676, ILDC (International Law in Domestic Courts) 753 (NL 2007).

²⁰ E.g.: “As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”, The Prosecutor v. J.P. Akayeshu, Case No. ICTR-96-4-T, 2 September 1998, § 540.

4.2. Case of Jorgić

Nicola Jorgić was a Serb from Bosnia and Hercegovina. He lived for many years in Germany, but when the war started in the former Yugoslavia he went there. He was arrested in Germany in 1995 and was suspected of committing the crime of genocide. After trial before the Higher Regional Court in Düsseldorf, he was sentenced for life imprisonment.²¹ The court found Jorgić guilty of genocide for setting up a paramilitary group with which he participated in ethnic cleansing in Doboj region. The court stated that Jorgić had the intent to commit genocide, namely to destroy the group.

The “destruction of a group”, in the interpretation of the court, meant destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together. The court stated that a biological-physical destruction was not necessary. Jorgić acted with intent to destroy Muslims in the North of Bosnia, or at least in the Doboj region. As we can assume, the court confirmed that genocide could be committed on a geographically limited area.

On 30 April 1999, the Federal Court of Justice confirmed those findings that genocide did not necessitate an intent to destroy a group physically, but that it was sufficient to intend its destruction as a social unit.²² Moreover, it added that Jorgić could be prosecuted in accordance with the rule of universal jurisdiction, because no rule of international law prohibited the conviction of Jorgić in Germany.

The Federal Constitutional Court²³ rejected Jorgić’s final appeal against the judgment on 12 December 2000. It confirmed that both judgments clearly had concluded that systematic expulsions could be a means of carrying out the intent to destroy a group and could serve as an indication of this intent, but that expulsions alone did not establish the intent to destroy a group. In the question of universal jurisdiction, the Constitutional Court asserted that Article VI of the Genocide Convention in no case contained a ban on the application of the German criminal jurisdiction in case of genocide.

As we can assume, the German courts did not qualify ethnic cleansing in general as a crime of genocide, but assessed that Jorgić, in the circumstances of the

²¹ The judgment available on-line: http://www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_26-9-1997.pdf.

²² The judgement available on-line at: http://www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_30-4-1999.pdf.

²³ The judgment available on-line at: http://www.bverfg.de/entscheidungen/rk20001212_2bvr129099.html.

case, was guilty of genocide, as he had intended to destroy a group as a social unit and not merely to get rid of them from a geographically limited area.

4.3. Judgments of Spanish Courts

In addition to the above-mentioned judgments of the German and Dutch courts, Spanish courts have also adjudicated the crime of genocide, relying on the principle of universal jurisdiction. The Spanish National Court (*Audiencia Nacional*), in its judgment of 5 November 1998 announcing its competence to examine the question of genocide in Chile in the *Augusto Pinochet* case, held that Spanish courts had jurisdiction over the case. In the question of the scope of the Genocide Convention, the Court stated that:

“Article 6 of the Convention does not preclude the existence of judicial bodies with jurisdiction apart from those in the territory where the crime was committed or international tribunals. The fact that the Contracting Parties have not agreed on universal jurisdiction over the crime for their respective national jurisdictions does not preclude the establishment, by a State which is a party to the Convention, of such jurisdiction over a crime which involves the whole world and affects the international community and indeed all of humanity directly, as stated in the Convention itself”.

This position of the court, which was also reproduced in the judgment of the National Court announcing its competence in the case of genocide in Argentina, allows adjudging the case on the basis of universal jurisdiction. This universal jurisdiction was exercised providing that there was a link between the act of genocide and Spanish territory, Spanish citizens or Spanish national interest, or the presence of the accused on Spanish territory. Such a solution was consequently repeated in further judgments.

This changed after the ruling of Spanish Constitutional Court issued in September 2005 in case of Rigoberta Menchu and others.²⁴ In this judgment, the Court affirmed that Spanish courts could try genocide cases even if they did not involve Spanish nationals. It criticized prior rulings of the Supreme Court and the national court, as they violated the right of access to the court by refusing to exercise its jurisdiction with reference to foreigners, where there was no link with Spanish territory, citizenship, etc. Restrictions based on nationality of the victims, or requirements that acts of genocide must be directed against Spaniards as a group, or finally

²⁴ Case of Rigoberta Menchu, Constitutional Court Judgement 237/2005, of September 26, 2005, available online at: http://www.tribunalconstitucional.es/jurisprudencia/Stc_ing/STC2007-237-2005.html.

the criterion of national interest are limitations to effective prosecution of the crime of genocide. Such requirements contradict the very nature of the crime and finally such interpretation is incompatible with the objective of the Genocide Convention. This interpretation of the Constitutional Court gave rise to some other cases concerning the crime of genocide. On 11 January 2006, the Spanish Supreme Court announced it would start investigating the crime of genocide in Tibet.

On the subject of interpretations made by the Spanish courts in the question of the elements of the notion of genocide, it is worth noting that Spanish courts mostly focused on the practice of *ad hoc* tribunals, or interpreted the elements in accordance with the interpretations of those tribunals.

In 1998, when the National Court issued its judgment in case of Pinochet, it defined the national group. This interpretation was quite broad. According to the court, the national group could not be understood as group of people belonging to the same nation, as the word nation should be interpreted as the part of the broad concept of the society, a part which can be distinguished from the rest of society, a part with some unique features.

This concept broadened the scope of protected groups, as the national group in this situation can include political groups or social groups.

5. SIMILAR OR DIFFERENT INTERPRETATION OF THE NOTION OF GENOCIDE (DOMESTIC COURTS AND INTERNATIONAL TRIBUNALS)

Summing up, it must be underscored that national courts are not willing to deliver interpretations of the elements of the crime of genocide. On this question, the judgments are rather superficial as compared to international rulings concerning the genocide. With a few exceptions, national courts based them on the practice of international courts. The few exceptions which can be mentioned are: the question of “destruction of the group” in the case of Jorgić, and the broader definition of the national group elaborated by the Spanish courts. Prosecutions for genocide by national courts are only a few, and this practice had little to contribute to the elements of the crime of genocide. The courts neither interpret the notion in new terms nor even add some new interpretations to the practice of tribunals *ad hoc*. It is surprising that international tribunals developed the law of genocide, even though domestic courts should be the courts of first resort – which naturally means also the first “source” of interpretation.

Another fact, which is worthy of note, is that national courts prosecute genocide on the basis of universal jurisdiction. In particular, Spanish and German courts stated that Art. VI of the Convention does not prevent the exercise of such jurisdiction.

Almost 50 years ago in the case of Eichmann, the District Court of Jerusalem stated that²⁵ determination of territorial jurisdiction is a compulsory minimum. According to the court, universal jurisdiction derives from the basic nature of the crime of genocide as a crime of utmost gravity under international law. In my opinion, national courts should follow this standard.

CONCLUSION

Probably the most important development of international law is connected in general with the prosecution of the crime of genocide in national and international courts and also with the dynamic interpretation of the said Convention. 60 years after the death of its author, Rafael Lemkin, the Convention turned out to be a lively mechanism with timeless value, which can be implemented to the situations created by modern history.

²⁵The Attorney General v Adolf Eichmann, Criminal Case 40/61, In the District Court of Jerusalem, Judgement, § 25, available online at: <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-001.html>.

Daniel Šmihula* ■

RIGHTS OF PERSONS BELONGING TO NATIONAL MINORITIES IN INTERNATIONAL LAW

1. PROBLEM OF NATIONAL MINORITIES IN INTERNATIONAL LAW

Historically, the problem of national minorities is an “additional product” of the modern nationalism of the 19th–20th centuries. As soon as states started to be identified with some individual ethnic cultures and languages,¹ it became obvious that almost in any state groups could be found which could not be (or just did not want to be) included in such a culture. In some cases, such a situation was solved by assimilation or expulsion (French Huguenots, for example), but in most European countries some minorities survived even after the great integrationist effort of nation-building in the 19th century.²

The first wave of tolerance to “others” was the tolerance of religious dissident groups in the 17th and 18th centuries.³ Probably the first agreement on a peaceful co-existence of two Christian branches was the Agreement of Jihlava (1436) between the Czech and Moravian Hussite estates and Emperor Sigismund at the eve of the reformation on mutual tolerance of Calixtines and Catholics in one country.⁴

* Daniel Šmihula, Ph.D., Institute of Political Science, Slovak Academy of Sciences.

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¹ This process was perfectly explained by Ernst Gellner. See: A. Gellner, *Národy a nacionalizmus* [Nations and nationalism], Hříbal, Praha: 1993.

² See, for example: Ch. Pan, B. Pfeil, *National Minorities in Europe*, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien: 2003, pp. 4–10 and A. Gellner, *Národy a nacionalizmus, op.cit.*

³ M. Krugmann, *Das Recht der Minderheiten*, Duncker and Humblot, Berlin: 2004, p. 25.

⁴ P. Čornej, *Lipanská křižovatka* [Crossroads of Lipany], Panorama, Praha: 1992, p. 214.

In Germany, a similar process had undergone in the 16th–17th centuries in the cases of the Peace of Augsburg in 1555 for Catholics and Lutherans and the Peace of Westphalia in 1648 for Catholics, Lutherans and Calvinists.⁵ However, the more tolerant attitude to non-recognised religious groups in Central Europe (Germany, Habsburg monarchy) or the recognition of religion as a private matter, beyond the state authority and its coercive methods, is a product of the enlightenment reforms by the end at the 18th century and the constitutional reforms after 1848.⁶

During this historic development, the stress put in international law on protection of national minorities was strengthened or weakened depending upon the momentary interest of states. Probably the first document of international law dealing with what was later called a human rights agenda was the Declaration of European States against the Slave Trade, adopted at the Congress of Vienna in 1815.⁷ Beyond this measure, the situation in the 19th century was not favourable for the recognition of rights of national minorities. They were seen as an internal matter of every state.⁸ That changed only after WWI.

In (general) international law up to now, the term of “national minority” has not been legally defined. The reason is obvious: to create a generally acceptable official (and legally binding) definition of national minorities is a demanding task.⁹ Maybe it is impossible because of cultural differences.¹⁰ Even basic terminology has varied over time. Although interwar-documents had referred to “racial, religious or linguistic minorities”¹¹ and Article 27 of the International Covenant on Civil and Political Rights referred to “ethnic, religious and linguistic minorities”, modern documents speak more about “national minorities”¹². The General Assembly on

⁵ M. Krugmann, *Das Recht der Minderheiten*, *op.cit.*, p. 26.

⁶ *Ibidem*, p. 27.

⁷ H. F. Köck, *Rechtsfragen an der Jahrtausendwende, Akten des 22. Österreichischen Völkerrechtstages*, Linde Verlag, Wien: 1998.

⁸ P. Lang, *Minderheitenschutz in Mittel – und Osteuropa*, (collection of papers), in: Gerrit Manssen, Boguslaw Banaszak (eds), *Minderheitenschutz in Mittel- und Osteuropa*, Wien: 2001; R. Uerpmann, *Völkerrechtliche Grundlagen des Minderheitenschutzes* (*Ibidem*), p. 9.

⁹ Krugmann: *Das Recht der Minderheiten*, *op.cit.*, p. 58.

¹⁰ Unlike the situation in general international law, where there is no legal definition of the term “national minority”, in the European regional system one may find it in the Recommendation 1201 (1993) adopted by the Parliamentary Assembly of the Council of Europe (1 February 1993). However, an attempt to introduce a similar definition to the Framework Convention on National Minorities (1993) failed.

¹¹ See: article 8 and 9 of the Treaty of Versailles (1919).

¹² E.g.: Article 21 of the Charter of Fundamental Rights of the European Union.

18 December 1992 passed the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹³ The literature in the German language frequently uses terms “Volksgruppe” or “Volksstamm” which is not easy to translate into other languages;¹⁴ probably, it could mean an “ethnic group” or “people” in English.

The term “ethnic minorities” would probably be the broadest category but in Europe the term “national minorities” seems to be most frequent and therefore it is used in this paper. The problems with terminology and translation emerged, for example, when a member of the European Parliament, Graf Stauffenberg, in 1988 produced a draft of the Charter of Rights of Ethnic Groups in the Member States of the European Communities. At that time, the EC had only 7 official languages, but there were considerable problems having this draft translated into all of them.¹⁵ After all, in any language the meaning of words depends on attitudes or policy to national minorities which has a historic and philosophic background.

A more detailed approach would reveal other problems with the definition of “minority”:¹⁶ should one insist on a numerical criterion or rather on the non-dominant position of the group? Does the term “national” mean “objective” characteristics of language, culture, race, religion or the “subjective” element of minority consciousness?¹⁷ Shall we distinguish between “old” or “traditional” minorities and “new”, “non-traditional” minorities? If yes, what period of time is sufficient to qualify a certain minority as traditional? What, in fact, is the reason for such qualification? Why should members of some “traditional” minority have a higher level of protection than new immigrants? Can we use the term “minority” if a “majority” is not clearly defined in the given society?¹⁸

During the last two decades problems concerning the beneficiaries of the right of national minorities also emerged. Are they individual persons belonging to a certain national minority or the minority as whole?¹⁹ This is the so-called problem of

¹³ Resolution 47/135 of the General Assembly.

¹⁴ F. Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien: 1999, p. 12.

¹⁵ *Ibidem*, p. 103.

¹⁶ F. Matscher, *Wiener Internationale Begegnung zu aktuellen Fragen nationaler Minderheiten*, N. P. Engel Verlag, Kehl, Strassburg: 1997, p. 8.

¹⁷ *Ibidem*.

¹⁸ Krugmann, *Das Recht der Minderheiten*, *op.cit.*, p. 57.

¹⁹ Matscher, *Wiener Internationale Begegnung zu aktuellen Fragen nationaler Minderheiten*, *op.cit.*, p. 10.

“collective” versus “individual” rights, which has still not been solved. But protection of human and minority rights is based more on the individualistic approach.²⁰

Some theorists tried to create a definition of national minorities, but their definition was never generally accepted.²¹ During work on the Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Austrian delegation suggested such a definition, according to which “(...) a minority is a group of persons traditionally living in the state in a non-dominating position, members of which, being nationals of this state, have ethnic, religious or language particularities different from the rest of the population and who have a will to preserve their culture, tradition, religion or language.”²²

This definition was not accepted, but it could serve as a good definition of modern ethnic or national minorities worldwide. It does not cover (and this is very important) recent immigrants to any country although they may be rather numerous. For example, the number of Turks or Kurds in Germany is higher than members of “traditional” minorities: Danish, Friesians, Serbs of Luzitz.

Of course, it evokes the question of how long some minority must live in the country to become “a group of persons traditionally living in the state in a non-dominating position”. In the year 2150 will Turks in Germany be treated as “immigrants” or as a “traditional minority”?

As a provisional definition of “traditional minority”, we may say that: a “traditional” minority is a minority whose members lived in significant numbers in a particular state or territory before the population changes and migration caused by the modernization and industrialization of the 19th and 20th centuries. This means that Germans or Slovaks in Vojvodina – a product of agrarian colonization after the wars against the Turks – should be seen as “traditional minorities”, but Polish workers in the Ruhrgebiet who came there about 1900 and Turks in Germany who came there about 1960 will be defined as modern immigrants (non-traditional minority). Of course, a practical policy may operate with different approaches. But in Europe, most states recognise the “full standard” of protection only in case of “traditional” minorities.

²⁰ See further: Lang, *Minderheitenschutz in Mittel – und Osteuropa*, op.cit.; A. Reiner, *Europäische Union und Minderheitenschutz*, op.cit., p. 237.

²¹ V. Strážnická, Š. Šebesta, *Človek a jeho práva* [Man and his rights], Juga, Bratislava: 1994, p. 82.

²² *Ibidem*, p. 85.

2. DEFINITION OF NATIONAL MINORITIES

In the theory of international law, a group can be classified as a national minority if:²³

- 1) it is numerically smaller than the rest of population of the state or a part of the state;
- 2) it is not in a dominant position;
- 3) its culture, language, religion, race, etc is distinct from that of the rest of the population;
- 4) its members have a will to preserve their specificity;
- 5) its members are citizens of the state where they have the status of a minority.

A specific condition frequently added is that such a minority should have a long-term presence on the territory where it has lived. It must not be a group of fresh immigrants. But in this case only “traditional minorities” could demand the full-rights of minority status.

The condition of a different culture and language seems to be essential,²⁴ although we can discuss whether there are not minorities which do not have a really specific culture and language (Moravians in the Czech Republic?). But for such a group of people, we have the category of “regional” or “social” groups.

Foreigners do not enjoy national minority rights and rights of citizens. But of course they should enjoy all human rights – including basic rights for cultural development and use of their language (at least in the family or in privacy). But after three or four generations of residence with maintenance of their own culture, when they have proved their “will to preserve their specificity”, it is not easy to label them as “immigrants” or “foreigners” even if they do not have citizenship of a hosting state.²⁵

Although we have no clear definition of minority and ethnic minority at all, we know that in democratic conditions the existence of minorities is unavoidable.

²³ Krugmann, *Das Recht der Minderheiten*, *op.cit.*, pp. 57–60 and F. Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung*, *op.cit.*, p. 13.

²⁴ Lang, *Minderheitenschutz in Mittel – und Osteuropa*, *op.cit.*, p. 12.

²⁵ See further: *Ibidem*, p. 15. Maybe we should change our traditional picture of national minorities, which is a result of the situation after WWI and did not take account of new migrants. In practice some specific situations cause the international community not to persist on the condition of citizenship: especially in the case when a state has denied its citizenship to members of national minorities (Estonia, Latvia).

Multiculturalism and the existence of some people with different behaviour, manners, language, religion etc. (various types of minorities or “dissidents”) in any country are a matter of course – not a free choice (when we can say “yes” or “no” to multiculturalism). Homogeneity can be reached and secured only by the intentional activity of some strong state regime for which uniformity is a wished goal (for many rational and irrational reasons). And many states – not such a long time ago- did it or tried to do it: France, Germany and Spain etc.

This understanding became common in the 1990s. Therefore, in most democratic states the discussion had shifted from thinking about methods of assimilating minorities or stopping “non-white immigration” to methods of coping with the fact of existing multi-cultural and multi-racial society.²⁶ However, maybe the situation after 11 September 2001 and the “Karikaturenstreit” will change it in favour of anti-immigration political measures.

On the other hand, any attempt to present multiculturalism or support for different kinds of minorities as a “morally positive goal or idea” which any society must achieve is absurd and only produces reactions rejecting these phenomena. Multiculturalism is a fact which has resulted from social and political development. It should not be built by methods of social engineering. The aim of official policy should not be to create multinationalism but to prepare inhabitants for this as an almost unavoidable fact.²⁷

However, even in such states as Germany, Spain, France, and Italy, where in the past the effort at homogenization was high, as soon as they liberalized social and political situation and started a process of decentralization, old questions re-emerged: the questions of “old” minorities and ethnic and regional groups supposed to have been assimilated a long time ago (Provencales, Galicians, Bretons, etc.).

Some authors believe that the protection of rights of members of national minorities is a part of the protection of human rights. Others say that it is an independent branch of international law, although closely related to the human rights agenda.²⁸ The question of national minorities’ rights is also inseparable from the

²⁶ See: A. Geddes, A. Favell, *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, Ashgate, Hants: 1999 (collection of papers); S Saggar, *Immigration and minority policy debate in Britain: Multicultural political narratives contested*, p. 42.

²⁷ *Ibidem*: E. Bleich: *Re-imagined communities? Education policies and national belonging in Britain and France*.

²⁸ Čepelka, Čestmír, Šturma, Pavel: *Mezinárodní právo veřejné (International public law)*, Eurolex Bohemia, Praha, 2003, p. 422.

question of democratic standards.²⁹ But it is obvious that protection of human rights is a part of modern international law.³⁰

As regards national minorities, traditionally two basic attitudes can be found. The first one prefers assimilation of minorities and the right of minorities means in this case a non-discriminating opportunity for members of minorities or immigrants to join a majority. This approach is typical of the states of both Americas.³¹ But it did not prevail. The second (now prevailing) approach results from the idea that the differences of minorities constitute a specific value, which must be preserved. The protection of minorities may be seen also as a compensation for ethnic groups which were not able to get their own state.³²

This international protection of national minorities is composed of two or three elements:

- 1) the effort to ensure civic and politic equality for members of national minorities with members of the majority population;
- 2) to ensure their participation in political, social and economic life (non – or antidiscrimination measures);
- 3) some form of specific rights (Sonderrechte), mostly in the cultural and language areas.³³

The states may adopt also measures of “a positive discrimination” to reach material equality with members of the majority population (level of education and an access to work opportunities, etc., but this is not generally accepted.)

Special attention is given to members of “original populations” – (populations living in the pre-industrial way of life, “indigenous people”). In this case even their original way of life is protected.³⁴ Although in this form of protection, one may ask whether this it does not have also negative sides: it prevents some population from utilizing the advantages of modern civilization and keeps them in isolation in some protected areas like animals.

²⁹ Pan & Pfeil, *National Minorities in Europe*, *op.cit.*, p. 186.

³⁰ P. R. Baehr, *The Role of Human Rights in Foreign Policy*, Macmillan Press Ltd, London: 1996, p. 3.

³¹ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 87.

³² H. Neuhold, W. Hummer, Ch. Schreuer, *Österreichisches Handbuch des Völkerrechts*, Manz'sche Verlags – und Universitätsbuchhandlung, Wien: 1991, p. 269.

³³ *Ibidem*.

³⁴ *Ibidem*, p. 270.

3. NATIONAL MINORITIES IN INTERNATIONAL LAW IN THE PAST

International law started to deal with the rights of national minorities in an indirect form in the 17th and 18th centuries. The first such groups inside of states, which became objects of the protection of international agreements, were religious minorities – mainly in the Ottoman Empire. But historically, provisions of international treaties paid attention also to Protestants in Catholic countries and Catholics in Protestant ones. In this way the idea of protection of national minorities slowly entered international law. The Conclusions of the Congress in Vienna (1815) ordered Austria, Prussia and Russia to guarantee the existence of Polish national institutions on their territories. The Berlin Agreement (1878) imposed a duty on Bulgaria, Serbia, Romania and Montenegro to secure minority rights for minorities living on their territory.³⁵ But the idea of international protection of national or religious minorities was frequently misused by stronger states to intervene in the internal affairs of weaker ones.³⁶

After WWI the minority question was tackled in individual agreements with small new states in Central and Eastern Europe. In the years 1919–1922, states such as Czechoslovakia, Austria, Bulgaria, Greece, Yugoslavia, Hungary, Poland, Romania, Armenia and Turkey, under pressure from the victors, had to sign agreements on protection of minorities on their territory. It was the condition of the international acceptance of those states. Czechoslovakia had to sign the so-called Small Saint-Germain Convention in 1921. It is obvious that those agreements were not really fair, because only small and weak European states were obliged to preserve minority rights (on an international level). Great powers made them accept international obligations, which they themselves did not want to tolerate in their own case. Those big powers refused to adopt minority clauses with a general validity. The most determined refusal came from the British delegates (mainly Balfour).³⁷

The great powers used to see the minority problems and minority question as a transitory problem. The long-time prospective solution was an assimilation and integration into existing national states and their state nations.

³⁵ J. Tomko, *Medzinárodné verejné právo* [International public law], Obzor, Bratislava: 1988, p. 250.

³⁶ N. Tsagourias, *Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception or Self-Consciousness*, 1 Leiden Journal of International Law (2000), p. 13.

³⁷ *Ibidem*, p. 19.

³⁸ *Ibidem*, p. 20.

The 10 treaties with small Central and Eastern European states ensured for members of national minorities the right to life, freedom and religion. They had the right to equal citizenship, use of their language, and a right to establish religious, educational and supporting organisations. In administrative areas where their proportion was more than 20%, education in the minority language was to be guaranteed, and official letters could be written in the language of the national minority.³⁸

The League of Nations established in 1919³⁹ had its system of solving minorities' questions in the 10 named small states, although it never really worked.⁴⁰ The minorities had the right to complain, but only if a violated right was provided for in an international peace treaty. The petition of members of national minorities was to be investigated by a commission for administrative and minority questions, the opinion of which was subsequently reviewed by the Council of the League of Nations.

From hundreds of petitions, only 3 were accepted as legitimate. Some non-governmental organizations were also active in this field (Office des Nationalities, Central Organization for a Durable Peace).⁴¹

During WWII, the Allies did not pay high attention to national minorities. The problem of protection of national minorities was in the shadow of another question - the right of nations to self-determination. Only the Jewish question was frequently presented on the international level. The reason is obvious: the Jews were a minority everywhere and could not hope that national self-determination would solve their problems.⁴²

After the WWII, the idea of the international protection of minority rights was not very popular, because there was experience of their abuse by Nazi Germany. At the same time, the number of members of national minorities in Europe (outside the USSR) dropped from 30 million in 1939 to 10 million in 1945/46.⁴³ The minority question lost for some time its importance.⁴⁴

³⁹ P. Fischer, H. F. Köck, *Völkerrecht*, Linde Verlag, Wien: 2004, pp. 211–214.

⁴⁰ M. N. Shaw, *International Law*, Cambridge University Press, Cambridge: 1997, p. 219.

⁴¹ Z. Poláčková, *Inštitucionalizácia menšinových práv po Isvetovej vojne a Spoločnosť národov* [Institutionalisation of minorities' rights after WWI and the League of Nations], Slovenská spoločnosť pre medzinárodné právo, Bratislava: 2003, p. 14.

⁴² Poláčková, *Inštitucionalizácia menšinových práv po Isvetovej vojne a Spoločnosť národov*, op.cit., p. 10.

⁴³ F. Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, op.cit., p. 82 – but all these numbers are rather speculative. They depend even on definition of national minorities.

⁴⁴ *Ibidem*, p. 82.

The problem of the protection of national minorities was addressed in the framework of the general protection of human rights, by transfer of inhabitants after WWII (in the case of Germans in Central Europe and exchange of population between Poland and Soviet Ukraine etc.⁴⁵), by proposed assimilation, or in bilateral treaties (as in the case of Italian-Austrian Treaty on Southern Tyrol (1946)).⁴⁶

This approach had also a theoretical justification – more general protection (orientation towards human rights, not towards rights of national minorities) offers protection to everybody, not only to members of national minorities.⁴⁷ The general law of human rights protects members of national minorities in their otherness (including the right to religious freedom, privacy, freedom of speech etc.).

Of course, the effort to constitute some protection for national minorities was more characteristic for the European regional system of international law than for the universal system, most probably because of the longer tradition of political independence of European states.

The international community may create standards for rights of national minorities in five ways:⁴⁸

- 1) in treaties;
- 2) by power of international custom;
- 3) by decisions of courts and tribunals (for example, the European Court for Human Rights);
- 4) in declarations of political importance (“soft law”), which are not legally binding;
- 5) by making examples of some states and their standards exemplary.⁴⁹

In any case, the Charter of the United Nations Organizations does not have any special provisions on national minorities. Only Articles 1, 55, 56, and 76 have some relations to this agenda.

Article 1(2) provides that one of the UN’s purposes is “(...) to develop friendly relations among the nations, based on respect for the principle of equal rights and self-determination of peoples (...).”

Articles 55 and 56 (dealing with the Economic and Social Council) and Article 76 (on the Trustee Council) prohibit discrimination in approach to human

⁴⁵ Neuhold, Hummer & Schreuer, *Österreichisches Handbuch des Völkerrechts*, Manzsche Verlags – und Universitätsbuchhandlung, op.cit., p. 270.

⁴⁶ Čepelka & Šturma, *Mezinárodní právo veřejné*, op.cit., p. 423.

⁴⁷ Lang, *Minderheitenschutz in Mittel – und Osteuropa*, op.cit., p. 10.

⁴⁸ *Ibidem*, p. 24.

⁴⁹ Therefore we talk about “Finnish model”, “French model“, “South Tyrolean“ model, etc.

rights on the basis of race, gender, language and religion. Probably after 1945, the authors of the Charter believed that the problem of national minorities would be solved by assimilation or deportations. And if not, it would be up to national states to solve it. Thus, the UN system connected the protection of national minorities with the general protection of human rights.⁵⁰ In this sense, protection is based more on protection against discrimination than on specific provisions granting some special extra rights to members of national minorities.

Before the 1990s the UN entered into the area of protection of national minorities only in a rather indirect or modest way. For example, in 1948 in Resolution 217 (III) of 10 December 1946, the General Assembly declared that it would not “remain indifferent to the fate of minorities”, even though the protection of minority rights was not included in the Universal Declaration.⁵¹ This approach was based on general respect for human rights and humanity.

Of course, even the Convention on Prevention and Punishing of the Crime of Genocide (1948) in the general meaning has a relation to protection of national minorities.⁵² But this Convention did not do anything against measures, which undermine or tend to be destructive for a minority’s language or cultural heritage.

The UN later had to deal with national minorities, as the problems were not solved by assimilations and transfers while the UN partially (for practical reasons) has abandoned the principle of self-determination (in the sense of the right to secession).

The International Convention on Economic, Social and Cultural Rights (signed in 1966 and entering into force in 1976) in Article 1 also stipulates the right of nations to self-determination, but its incorporation is not organic, because it represents not individual but collective rights.⁵³ In international law, this right is disputed and rather problematic.

4. PRINCIPLE OF SELF-DETERMINATION

The principle of self-determination after 1945 has developed from a political concept into a legal right accepted by international courts and tribunals. It has been

⁵⁰ Strážnická, &, Šebesta, *Člověk a jeho práva, op.cit.*, p. 80.

⁵¹ Musgrave, *Self-Determination and National Minorities, op.cit.*, p. 136.

⁵² Strážnická & Šebesta, *Člověk a jeho práva, op.cit.*, p. 64.

⁵³ Čepelka & Šturma, *Mezinárodní právo veřejné, op.cit.*, p. 395.

incorporated into the most fundamental instruments of modern international law.⁵⁴ It is officially regarded as one of the most important principles of international law.⁵⁵ But it has remained rather vague.⁵⁶

The principle has been interpreted in at least three different ways:⁵⁷

- 1) as a right of decolonization for non-self governing territories (outside of Europe, colonial or trusteeship countries);
- 2) as a right of the population of a state to elect the government of its choice (right to political participation in power);
- 3) as a right of distinctive ethnic groups to determine their own political status (including a right to secession or autonomy).

Generally speaking, this principle in the sense of the right to secession should be applied to colonial nations⁵⁸ – but not to ethnic groups in Europe (or better: in present day Europe only on rare occasions).

Also, the UN and its General Assembly associated self-determination with decolonization.⁵⁹ Therefore, in Europe another rule, the rule on respecting existing borders and integrity of states, is a “stronger” principle than the principle of self-determination. In 1975, the principles of inviolability of frontiers and territorial integrity of States as defined in the Final Act of the Conference on Security and Co-operation in Europe became an integral part of the regional system of international law in the European area.⁶⁰

The right to self-determination (Principle VIII) was conditioned by conformity “(...) with the relevant norms of international law, including those relating to the territorial integrity of States.”

In Europe, it is widely believed that European states are sufficiently democratic and respectful of human rights to secure good living conditions for any ethnic group without the necessity to establish its own new ethnic state or to change the borders of existing states.

Even some Third World countries restricted the application of self-determination to a colonial situation, not to minorities within the borders of existing states.

⁵⁴ *Ibidem*, p. 90.

⁵⁵ Fischer & Köck, *Völkerrecht*, *op.cit.*, p. 39.

⁵⁶ Lang, *Minderheitenschutz in Mittel – und Osteuropa*, *op.cit.*, p. 13.

⁵⁷ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 4.

⁵⁸ *Ibidem*, p. 67.

⁵⁹ *Ibidem*, pp. 71–76.

⁶⁰ Principles III and IV of the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975).

⁶¹ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 93.

India, for example, in its declaration to Article 1 of the International Human Rights Covenant declared that “(...) the words ‘the right to self-determination’ appearing in this article apply only to the peoples under foreign domination and these words do not apply to sovereign independent states or to a section of a people or a nation – which is the essence of national integrity.”⁶¹

What is more, there is no mechanism in international law to ensure protection of this right. Cynically, we might say that an ethnic group has a right to obtain its own statehood, only when it is strong enough to fight successfully for it. The international community, the UN, the ICJ may declare a right of some group to its own state, as it happened in case of Eastern Timor in 1999⁶², but this group may actualise this right only in favourable conditions. We know only one case when international intervention was organized to “liberate” some ethnic group or nation from the power of the state, which exercised effective control over the territory where this group or nation lived – this was the case of the military action against Yugoslavia in 1999. But the future legal position of this region is still not clear.

It was not possible to grant to every ethnic group a right to have its own State. Some groups are too small and scattered, or it is not possible because of political and power reasons. The “return” to the minorities issue is therefore a some kind of compensation for such groups. If there are some ethnic groups, which cannot have their own state, their situation must be solved in the framework of existing political structures, which requires to grant them space for their social, cultural and political life at a level guaranteeing them an adequate dignity of life. The principles of self-determination of nations and protection of national minorities are not antagonistic. What is more, there are not even clear definitions of the notions “people” and “nation”.⁶³

Both refer to the right of some ethnic group to live in dignity, to enjoy a freedom to develop its social, cultural, political life. If it is not possible to fulfil

⁶² *Ibidem*, p. 4. Following a UN-sponsored agreement between Indonesia, Portugal and the United States and a surprise decision by the Indonesian President B. J. Habibie, a UN-supervised popular referendum was held on August 30, 1999. The East Timorese voted for full independence from Indonesia, but violent clashes, instigated primarily by the Indonesian military broke out soon afterwards. A peacekeeping force (INTERFET, led by Australia) intervened to restore order (see: http://en.wikipedia.org/wiki/East_timor#Indonesian_occupation).

⁶³ For example the Supreme Court in Canada tried to do it in the case of Quebec and its right to potential secession. The people may be even inhabitants of some province. But they a right to secession only if they are oppressed or denied access to government. To pursue their social, economic, political development. This right therefore the Court admitted in a case of Kosovo, but not in the case of Quebec. See further: Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 5.

this right in the independent state of this ethnic group due to the principle of territorial integrity, this aim must be achieved within the borders of the existing state.⁶⁴

And vice versa: only if this aim cannot be reached within the borders of this existing state, the ethnic group has a right to create its own state. But if some ethnic groups have all necessary rights in an existing state guaranteed, they should not insist on their right to self-determination in the form of an independent state or by adhesion to some other state.⁶⁵

The Committee for the Elimination of Racial Discrimination of the UN expressed this very plainly in its Recommendation XXI on self-determination adopted at 1147th meeting on 8 March 1996 (See Appendix VIII): “In the view of the Committee international law has not recognized a general right of peoples to unilaterally declare secession from a state” (para. 6).

The right of self-determination does not mean an automatic right to secession: “The International Covenant on Civil and Political Rights provides for the rights of peoples to self-determination besides, the right of ethnic, religious, or linguistic minorities to enjoy their own culture, to profess and practice their own religion or to use their own language” (para. 2). Secession is only one of many ways by means of which any ethnic or national group can satisfy its needs and rights. The most important matter is whether “(...) all peoples can pursue freely their economic, social and cultural development without outside interference” (para. 4) and whether governments represent “(...) the whole population without distinction as to race, colour, descent, national, or ethnic origins” (para. 4). Secession should be regarded as the solution of last resort with regards to the problems of life of any people of ethnic or national group. Even in this case, the principle of self-determination should be (although by now this is largely history) applied to colonial nations – not to the minorities of stabilized European or American states (para. 4).

The principle of self-determination (in the sense of the right of an ethnic group to secession) served as a tool for the disintegration of Central and East European multinational states (Russian Empire, Austro-Hungary in 1918–1919) and colonial empires in 1945–1975.

But post-socialist states in 1991–93 obtained their independent status pursuant to another interpretation of the principle of self-determination. They did not declare their independence as ethnic groups living in some territory, but as

⁶⁴ D. Blumenwitz, G. Gornog, *Der Schutz von Minderheiten und Volksgruppenrechten durch die Europäischen Union*, Verlag Wissenschaft und Politik, Bonn: 1996, p. 67.

⁶⁵ *Ibidem*, p. 68.

states which were parts of federations (USSR, Yugoslavia, Czech and Slovak Federal Republic). The existing borders, including borders within the federation, were not changed. This process may be described more as dissolution of federal states, not as individual secession.⁶⁶ Provinces which did not have a character of parts of federal states and declared independence (Kosovo, Abkhazia, Chechnya, South Osetia, Trans-Dnestria) were not internationally recognized (although *de facto* they may be independent). The case of Kosovo is specific and recognition of its independence might be a breach of existing practice.

The potential right to autonomy as one of the forms of self-determination may be also an object of discussion.⁶⁷ This autonomy may be:

- 1) territorial;
- 2) cultural (sometime referred as “personal” or institutional);
- 3) local (local self-administration).

Territorial autonomy means that in a certain region in which the majority of inhabitants belongs to a national minority an administrative unit can be established, within the borders of which the power is in hands of institutions in which representatives of the minority prevail and the culture and language of the minority have the character of the official culture and language.

In the case of cultural autonomy, special status is granted not to a unit of area but to a group of persons which constitutes a form of union.⁶⁸ Cultural autonomy includes culture, an educational system, information systems, the right to establish education and cultural institution, mass media, etc.⁶⁹

Local autonomy is to be designed for small administrative units. Local administrative bodies regulate affairs of national minorities (culture, education, etc.).⁷⁰ Members of national minorities are included in local representatives bodies and may organize their own representative institutions (national minorities local councils in Hungary, for example, have regional “self-administration” since 1993).⁷¹

States are willing to accept some form of cultural autonomy or local self-administration, but are quite afraid of the idea of territorial autonomy, as a potential threat of future secession, and sometimes even of elements of institutional or

⁶⁶ Certainly in the cases of Czechoslovakia and USSR, although the case of Yugoslavia was more problematic.

⁶⁷ Pan & Pfeil, *National Minorities in Europe*, *op.cit.*, pp. 189–197.

⁶⁸ *Ibidem*, p. 194.

⁶⁹ *Ibidem*.

⁷⁰ *Ibidem*, p. 195.

⁷¹ *Ibidem*, p. 235.

“personal” autonomy, as a step back from a modern civic society to a pre-modern corporativistic or estate society.

Probably, only one international document expressly defines a right to territorial autonomy. This is Recommendation 1201 (1993), adopted by the Parliamentary Assembly of the Council of Europe.

5. RIGHT OF NATIONAL MINORITIES AFTER WWII

Despite the expectation that assimilation would have “solved” the minority problems (1945–65), the International Convention on Civil and Political Rights in 1966 in its Article 27 revived the question of national minorities as a topic of international law:

“(...) in those states in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

This provision was rather modest and adopted after long discussions.⁷² It still does not place governments under any positive duties to promote minority culture, language or religion. The obligation consists only in a duty not to interfere with a minority in its enjoyment of its rights.⁷³ If we read the Convention’s text thoroughly we will find also another weak and problematic point: The opening clause reads: “in those states in which ethnic, religious or linguistic minorities exist”. This opens the door for interpretation whereby states themselves may determine whether or not there is any minority group within their borders. For example, France has made a reservation declaring Art. 27 not to be applicable to France by virtue of Art. 2 of the French Constitution: “France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.”⁷⁴

However, Article 27 was a step forward in the recognition of rights of national minorities as a potential agenda of international law. It provided an opportunity to consider the issue in discussion in the Human Rights Committee and an opportunity to include national minorities rights in states’ reports, in individual petitions and

⁷² Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 136.

⁷³ *Ibidem*, p. 137.

⁷⁴ See: *Ibidem*, p. 138.

in the General Comment. In dealing with certain cases, this Committee expanded principles defined in Article 27. The Covenant as such came into force in 1976.

For example, in the *Kitok v. Sweden* case,⁷⁵ the Committee took the view with regard to a petition by the member of the Sami community in Sweden (Ivan Kitok) that where the regulation of economic activity (reindeer breeding) was an essential element in the culture of an economic community, its application to an individual could fall within Article 27.⁷⁶ The restriction placed upon an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the welfare of the minority as a whole. In the *Lubicon Lake Band v. Canada* case⁷⁷, the Committee upheld the complaint that the Canadian government in allowing the expropriation of the Band's territory for the benefit of private corporate interests violated Article 27. It held that the rights protected under Article 27 included the right of persons in community with others to engage in economic and social activities which were part of the culture of the community to which they belonged.⁷⁸

In 1994, the Committee adopted the General Comment on Article 27.⁷⁹ The Committee drew a distinction between the rights of persons belonging to minorities on the one hand, and the right to self-determination and the right to equality and non-discrimination on the other. Article 27 does not prejudice sovereignty, although certain rights (in particular of indigenous communities) may consist of a way of life closely associated with territory and the use of its resources (fishing, hunting, etc.).

The persons belonging to national minorities need not be nationals or permanent residents of the state concerned, so that migrant workers or even visitors may be protected under Article 27. (This is very important: most European states distinguish between original or traditional minorities and new immigrants.)

Even Articles 18 and 26 of the International Covenant on Civil and Political Rights have some relations to protection of national minorities, although they are more about elimination of discrimination than about positive protection of national minorities.

⁷⁵ *Kitok v. Sweden*, Communication No. 197/1985, 27 July 1988 http://www.law.nyu.edu/kingsburyb/spring04/indigenousPeoples/classmaterials/class5/5_D%20%20Kitok%20v_%20Sweden.htm

⁷⁶ Shaw, *International Law*, *op.cit.*, p. 220.

⁷⁷ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) http://www.law.nyu.edu/kingsburyb/spring04/indigenousPeoples/classmaterials/class4/4D_lubicon.htm.

⁷⁸ Shaw, *International Law*, *op.cit.*, p. 220; Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 139.

⁷⁹ Shaw, *International Law*, *op.cit.*, p. 220.

Article 18 declares the right to freedom of thought, conscience, and religion. The question of religious minorities is related to ethnic minorities because many minorities are defined at least partially by means of religion (Jews, Sikhs, Poles in Eastern Europe, Ukrainians and Ruthenians in Slovakia and Poland (as Greek-Catholics)). The General Assembly also adopted a special Declaration on the Elimination of All Forms of Religious Intolerance.⁸⁰

Article 26 prohibits:

“(...) any discrimination, and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Convention on Elimination of All Forms of Racial Discrimination (1966)⁸¹, although not a part of international law dealing with traditional minority issues, prohibits discrimination based on racial and ethnic differences.⁸² The Committee for Elimination of Racial Discrimination, established on the ground of an additional protocol to this Convention, may adopt recommendations and suggestions.⁸³ (One of them was quoted above.) Racial discrimination is defined very widely. It is not only discrimination based on classical anthropological types or colour of skin, but involves any discrimination based on different ethnic origin and therefore has some relation to the national minorities question.

States have the active duty to condemn and punish all propaganda and all organizations which are based “(...) on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred, and to take positive measures designed to eradicate all incitement to.”⁸⁴

Another important international document on national minorities in the period of 1945-70 was the Convention Against Discrimination in Education (1960), sponsored by UNESCO.⁸⁵ Article 5(c) provides: “[i]t is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language.”

This simply affirms the right of national minorities to maintain their culture and language. There is no duty of the state to support or run such schools or to

⁸⁰ A/RES/48/128, 20 December 1993.

⁸¹ See: Fischer & Köck, *Völkerrecht*, *op.cit.*, p. 251.

⁸² Strážnická & Šebesta, *Člověk a jeho práva*, *op.cit.*, p. 66.

⁸³ Čepelka & Šturma, *Mezinárodní právo veřejné op.cit.*, p. 403.

⁸⁴ CERD General Recommendation XIV, article 4 (1994).

accept a minority language as a language of education. States are simply obliged to tolerate such institutions.

Questions of various national minorities were, of course, even in the period of 1945–89, an object of several bilateral treaties.

The peace treaties concluded with Bulgaria, Hungary and Romania contained provisions intended to protect minority rights within these states.⁸⁶

6. NATIONAL MINORITIES IN INTERNATIONAL LAW AFTER 1989

In the 1990s, the changed global situation was favourable to the national minorities agenda. The protection of human rights was seen as one of the major goals of the international community. The importance of the national minorities agenda increased also as a result of disintegration processes in the USSR, Czechoslovakia and Yugoslavia.⁸⁷ The situation has dramatically changed.⁸⁸

1990 saw the publication of the Report from a conference of UNESCO, which took place in Paris in 1989 and was dedicated to the issue of “people” (Volksgruppe).⁸⁹ In December 1992, the UN General Assembly, after long discussions which had started in 1978, adopted the Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁹⁰ It was a result of the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Human Rights Committee.⁹¹

The declaration does not have the power of an international treaty, but it illustrates a shift in thinking and its moral validity is high. Legally, it comes from Article 27 of the International Covenant on Civil and Political Rights concerning

⁸⁵ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 133, and 1962/429 UNTS 93.

⁸⁶ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 135 and 1949/41 UNTS 21, 1949/41 UNTS 135, 1949/42 UNTS 3.

⁸⁷ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 110.

⁸⁸ See: Blumenwitz & Gornog, *Der Schutz von Minderheiten und Volksgruppenrechten durch die Europäischen Union*, *op.cit.*, p. 7.

⁸⁹ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 110.

⁹⁰ UN-Resolution 47/135 and Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 112.

⁹¹ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 112.

the rights of persons belonging to ethnic, religious or linguistic minorities, and stresses the role of the UN in protection of national and ethnic minorities. And from the title (“persons belonging to”), it is obvious that the Declaration came out of the principle of individual rights.⁹²

It defines several principles:

- 1) national minorities’ agenda can be solved only in the framework of general human rights (Preamble);
- 2) the UN has an important role in protection of national minorities – which means that this agenda is within the scope of the UN’s activities (Preamble);
- 3) states have the duty to protect and promote specific cultural, linguistic and other identities of national minorities within their specific territories (except where specific practices are in violation of national law and contrary to international standards) (Article 1 and 2(1) and 4(2));
- 4) this protection and promotion shall be regulated by law (Article 1(2));
- 5) any discrimination of minorities is forbidden (Article 2(1));
- 6) states are not qualified to determine whether a minority or minorities exist on their territories – unlike the Article 27 of the International Covenant on Human Rights. (Article 2(1));
- 7) no disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of his rights (Art. 3(2));
- 8) members of the national minority have a right to participate in political life equally with members of the majority population (Art. 2(2));
- 9) they have the right to decide in matters concerning their own situation (Art. 2(3));
- 10) they have the right to establish their own association (Art. 2(4));
- 11) they have the right to keep contacts across frontiers with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties (Art. 2(5));
- 12) rights may be exercised individually as well as in a community (Art. 3(1)).

Point 12 raises the possibility of understanding Art. 3(1) (“[p]ersons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of

⁹² *Ibidem*, p. 113.

their group, without any discrimination”) as a basis for collectivistic conception of minority rights, but this is probably too far-reaching an interpretation. It merely reflects only the fact that most minority rights can be exercised only in a group of people, in which a person belonging to a national minority may and can utilize his own language, attend a school with other pupils, etc.

The states are obliged to contribute actively to good conditions for their minorities to implement their rights. In particular, states shall:

- 1) ensure equality of persons belonging to a national minority before the law; states are probably encouraged even to take up active measures to ensure it (Art. 4(1));
- 2) secure the adequate participation of those persons in the social and economic life of the country (probably even by means of positive discrimination?) (Art. 4(5));
- 3) create favourable conditions for development of national minorities’ specific cultural features, including language and learning of this language (Art. 4(2) and Art. 4(3));
- 4) policy and programs of a state (including international cooperation) should be planned with due regard for the legitimate interests of persons belonging to minorities (Art. 5);
- 5) states should cooperate on questions related to persons belonging to national minorities (Art. 6 and 7).

The Declaration also envisages so-called positive discrimination (Art. 8(3)):

“Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.”

This document is truly revolutionary and represents a radical change of attitude of the global international community to the problem of national minorities (although it has only the form of a declaration, not an international treaty, and *de iure* is not legally binding). It does not simply impose negative duties on states to permit minorities to enjoy their own culture, language, etc., but obliges states to actively promote the welfare of minorities within their territories (positive duties).⁹³

The World Conference on Human Rights (June 1993) adopted the Vienna Declaration Confirming the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁹⁴ The text of the Vienna Dec-

⁹³ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 144.

⁹⁴ R. Wallace, *International Human Rights*, Sweet and Maxwell, London: 1997, p. 138.

laration stressed the importance of “(...) the promotion and protection of the rights of persons belonging to minorities and the contribution of such promotion and protection to the political and social stability of the States in which such persons live.” This means that respecting minorities’ rights is beneficial even for the state as a whole.

Unlike the General Assembly’s Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Vienna Declaration pays attention also to indigenous people and their right to their culture, development and participation in public life. States should (*nota bene*) “(...) recognize the value and diversity of their distinct identities, cultures and social organization” - which means adopting a specific regime in dealing with them.

Very important is Article 254 of the Declaration. According to this Article, states should pay attention even to the human rights, social and economic conditions of persons belonging to groups, which have been rendered vulnerable, including migrant workers.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994 agreed to establish a five-person, inter-seasonal working group to examine peaceful and constructive solutions to situations involving minorities, to provide recommendations for the Sub-Commission and the UN High Commissioner for Human Rights to protect minorities where there is a risk of violence, and to promote dialogue between minority groups in the society and between those groups and governments.⁹⁵

The UN Human Rights Committee has also pointed to the special position of indigenous peoples and minorities with a particular relationship to their traditional territories. In 1982, the Sub-Commission established a Working Group on Indigenous Populations and a Draft Declaration on the Rights of Indigenous People was adopted in 1992. This Declaration notes that those populations have the right to self-determination, their own political structures, the collective right to live in freedom and security as a distinct people etc.

In 1957, the International Labour Organization adopted a similar Convention No. 107 on Indigenous and Tribal Populations later revised by Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries in 1989.⁹⁶

In a general sense, even treaties and institutions, which deal with the prohibition of genocide and the elimination of discrimination, are related to the ethnic minorities’ issue.

⁹⁵ Shaw, *International Law, op.cit.*, p. 221 and F. Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung, op.cit.*, p. 112.

⁹⁶ Shaw, *International Law, op.cit.*, p. 222.

For example, the International Convention on the Elimination of All Forms of Racial Discrimination from 1965 (which entered into force in 1969) prohibits:

“(...) all discrimination, distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁹⁷

The same prohibition is also provided in Article 2(1) of the International Covenant on Civil and Political Rights (“(...) without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin”).

The UN Human Rights committee has noted in its General Comment 18 on Non-Discrimination that the term “discrimination”, as used in Racial Discrimination and Women’s Discrimination Conventions, shall be understood to imply any distinction, exclusion, restriction preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Racial discrimination is therefore defined more widely – it covers also discrimination based on clearly ethnic and cultural differences, not only on the basis of colour of complexion (as some less informed individuals declare).

There is an obligation to make no distinction between citizens in their political, civic, economic and social rights. This is the so-called “prohibition of negative discrimination”. It requires the establishment of equality in law and as well as in fact.

Generally speaking, this civil equality, at least legally, is not the main problem of minority issues in most European and American countries. However, there are differences in the definition of the term “national minority”, and also in the definition of the key issue, the key problem related to them.

These may be integration into society (France and the problems of immigrants from former colonies), the rights of an original indigenous population and protection of its way of life (Sama-people (Laplanders) in Scandinavian countries), language and education in the mother language (the Magyar people in Slovakia), political activism of national minorities (Serbia, Albanians), constitutional problems with an autonomous province (Italy, Tyrol), sometime even open violence (Northern Ireland, Corsica etc.), struggle for a “share of power” etc.

⁹⁷ *Ibidem*, p. 212.

7. NATIONAL MINORITIES IN THE EUROPEAN REGIONAL SYSTEM OF INTERNATIONAL LAW

Modern international law emerged in Europe and expanded arm in arm with the expansion of the European (originally only regional) system of international relations in the 17th-19th centuries. But since 1945, European countries in the area of protection of human rights have developed systems of legal norms, which were stricter than norms of universal (general) international law. Therefore, the protections of human and minorities' rights in Europe is not based anymore only on (universal) international law, the UN-system and the intrastate constitutional protection in any individual state.

This regional system of protection of rights of persons belonging to national minorities deserves a special approach and includes:

- 1) the regional system of international law (the system of the Council of the Europe and the system of the Organization for Security and Cooperation in Europe);
- 2) the specific legal system of the European Union as a new system.

The direct role of the European Union is still very limited (as was mentioned above). But the EU has adopted all norms of general international law and a European regional system of international law in the area of protection of human rights (including national minorities).⁹⁸

8. COUNCIL OF EUROPE

The Council of Europe was founded in 1949 as a European regional organization to encourage and develop intergovernmental and interparliamentary co-operation. Its fundamental document is the Statute of the Council of Europe. The condition of membership is a capacity to meet requirements of this Statute.⁹⁹

⁹⁸ From this point of view the most important was the Article 6/2 of the Treaty on the EU (...2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law:“), See further: Lang, 2001, Reiner, Arnold, *Europäische Union und Minderheitenschutz*, op.cit. p. 243.

⁹⁹ Strážnická & Šebesta, *Člověk a jeho práva*, op.cit., p. 95.

Its principles as laid down in Article 3 include pluralist democracy, respect for human rights and the rule of law. All those principles also promote the protection of rights of national minorities.¹⁰⁰ They are even more strongly expressed in the Convention for the Protection of Human Rights and Fundamental Freedoms (known more as the European Convention on Human Rights) signed on 4 November 1950 and which entered into force in September 1953.¹⁰¹ Together with its Protocols, it covers a wide variety of primarily civic and political rights.¹⁰² The European Union, according to Article 6(2) of the Treaty on the EU (Maastricht Treaty, 1992), accepted the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms as the general principles of Community law. This convention is therefore part of the law of the EU/EC too.

Parts of the Convention for the Protection of Human Rights and Fundamental Freedoms, which have some importance for protection of national minorities' rights, include Articles 6 (fair trial), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association), and 14 (non-discrimination provision regarding the enjoyment of rights and freedoms under the Convention) and several additional protocols.¹⁰³ The last article prohibits any discrimination against individual persons including grounds based on nationality and associated with nationality:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a *national minority*, property, birth or other status."

Article 6(3e) (right to a fair trial) has relations to minority rights too. Everyone charged with a criminal offence has the following minimum right "(...) to have the free assistance of an interpreter if he cannot understand or speak the language used in court." We see that not even the minimal standards of general human rights can be achieved without at least minimal respect for national minority rights, and *vice versa* national minority rights are not so significant without a respect for general human rights. The isolated attempt to implement minority rights outside of general human rights and freedom is a dead-end.

¹⁰⁰ Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung*, *op.cit.*, p. 93.

¹⁰¹ Shaw *International Law*, *op.cit.*, p. 257; Fischer, Köck & Karollus, *Europarecht*, *op.cit.*, p. 104.

¹⁰² Fischer & Köck, *Völkerrecht*, *op.cit.*, p. 252.

¹⁰³ 1 Protocol to the Convention (1952), 2. Protocol to the Convention (1962), 12. Protocol to the Convention (2000).

Freedom of thought, conscience, and religion – and the right to manifest it – is guaranteed in Article 9, which in this way has relevance to the position of national minorities. Many of them (as was already mentioned) define themselves as religious minorities.¹⁰⁴

Freedom of expression defined in Article 10 facilitates national minorities' effort to develop their own literature, culture and media.

It is obvious that national minorities can organize their own association only on conditions applicable to general freedom of assembly and association (Article 11).

Article 2 of the Additional Protocol to the Convention No. 1 (Right to education, 1952) should be seen as the obligation of the state to secure the education of its minorities in conformity with their own wishes (more or less).

Additional Protocol No. 2 and its Article 3 (Prohibition of expulsion of nationals, 1962) should be understood as one form of prohibition of ethnical cleansing. The state cannot solve its ethnic problem by deportation or transfer of its citizens belonging to any national minority.

Protocol No. 12 (General prohibition of discrimination, 2000), signed in 2005, again repeats prohibition on discrimination based on various differences including racial, linguistic and religious. Every state shall for its national minorities secure all rights which are important for their survival (use of a mother language, schools, political representation and parties).¹⁰⁵

The system based on the European Convention on Human Rights provides a solid protection of traditional minority rights seen in the areas of cultural and language rights. A brief analysis proves that an effective use of these minority rights is inseparable from the respect of more general civic and political rights.

But the protection of national minorities in the first decades of activity of the Council of Europe was only a marginal matter for it. Some activity was founded on individual steps of members of the Parliamentary (at that time Advisory) Assembly (PA)¹⁰⁶ and concerned mainly the problem of discrimination. Only in 1957, did the PA adopt Resolution No. 133, demanding information on the situation of national minorities in Europe.¹⁰⁷ But in 1959, this request was refused by the Council of Ministers as an issue, which could cause "more harm than good".¹⁰⁸

¹⁰⁴ For details see: Fischer, Köck & Karollus, *Europarecht*, *op.cit.*, pp. 170–177.

¹⁰⁵ *Ibidem*, p. 109.

¹⁰⁶ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 97.

¹⁰⁷ *Ibidem*.

¹⁰⁸ *Ibidem*.

The situation was not favourable for discussion on the rights of minorities. Therefore, in 1961 the PA on its own initiative authorized its Law Committee to investigate the legal position of national minorities. The result of this investigation was the Report of representative P. Struye.¹⁰⁹ This report offered an analysis of the position of minorities in Austria, Denmark, Federal Republic of Germany and Italy. On the basis of this report, the PA adopted Recommendations No. 213/1959 and No. 285/1961 for the Council of Ministers, in which it recommended to solve any minority conflicts by the method of peaceful settlement of disputes and to add some provision on minority right to the Additional Protocol No. 2.¹¹⁰

In 1969 and 1976, the PA persistently suggested a draft of a new additional protocol on the protection of national minorities but the Council of Ministers refused it.¹¹¹

The European Convention of Human Rights does not contain economic and social rights. Those are set out in the European Social Charter (1961), in its Additional Protocol (1988) and in the Protocol Modifying the Charter (1991). Individual persons can defend their rights stipulated by the Convention before the European Court for Human Rights in Strasbourg, which is a regional mechanism for the protection of human rights.¹¹²

This document and the rights stipulated in European Convention of Human Rights have sometimes been a basis for claims related to more traditional national minorities' rights. For example, in 1968 in the *Belgian linguistic* case, French-speaking parents challenged the Belgian school system, because as parents living in the Dutch-speaking region they could not ensure for their children a proper education in the French language. This allegedly violated their right to respect for private and family life (Article 8 of the Convention and the Article 2 of the Protocol no. 2).¹¹³ However, the European Court for Human Rights stated that the case did not involve any breach of Article 8. This provision in no way guarantees the right to be educated in the language of parents by the public institutions. But parents have right to educate their children in the chosen language by their own means, for example, in a private school. The applicants were not successful but cases like this motivated a discussion on minority rights in the Council of the Europe.

¹⁰⁹ *Ibidem.*

¹¹⁰ *Ibidem*, p. 98.

¹¹¹ *Ibidem.*

¹¹² Fischer & Köck, *Völkerrecht*, *op.cit.*, p. 253.

¹¹³ M. Janis, R. Kay, A. Bradley, *European Human Rights Law*, Oxford University Press, New York: 2000, p. 256; Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 131.

In 1989, the Austrian Delegation in the PA suggested editing a catalogue of basic minority rights in a special additional protocol or a special convention. The result of this activity was Recommendation No. 1134/1990 from 1 October 1990.¹¹⁴ It included also a draft of a convention for the protection of national minorities and a declaration that respecting minority rights is a principal factor for securing peace, justice, democracy and stability.¹¹⁵

A new impulse for forming basic conditions for the protection of national minorities was given in the period when, after the revolutions of 1989-91, new democratic states asked for membership in the Council of Europe. These states had also to guarantee basic protection of members of national minorities in their territory in order to join the Council.¹¹⁶

In the area of protection of national minorities after 1990 the Parliamentary Assembly usually has played the role of initiator and the Committee of Ministers the role of a decision-making body.¹¹⁷ In 1990 in Venice, the European Commission for Democracy through Law was established as a body adjunct to the Council of Europe.¹¹⁸

9. THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES

On 22 June 1992, the Committee of Ministers adopted the European Charter for Regional or Minority Languages.¹¹⁹ The Charter has been in force since 1 March 1998 after the fifth ratification.¹²⁰ This Charter does not directly constitute individual or collective rights, but it suggests a list of potential claims in the area of use or protection of non-dominating languages.

The roots of the idea of this Charter go back to 1983 when the Council of Europe sent a questionnaires to its member states on the situation of national minorities.¹²¹ After certain preparatory work, the text of the Charter was drafted

¹¹⁴ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, op.cit., p. 99 and p. 124

¹¹⁵ *Ibidem*, p. 124.

¹¹⁶ *Ibidem*, p. 99.

¹¹⁷ *Ibidem*, p. 123.

¹¹⁸ *Ibidem*, p. 125.

¹¹⁹ Shaw, *International Law*, op.cit., p. 278.

¹²⁰ Blumenwitz & Gornog, *Der Schutz von Minderheiten und Volksgruppenrechten durch die Europäischen Union*, op.cit., p. 24.

¹²¹ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, op.cit., p. 98.

by the Parliamentary Assembly on 17 March 1988.¹²² This Charter regards regional, historic and minority languages as a specific value of history and cultural heritage, which should be preserved (Preamble and Article 7). In the value that is put on preservation of those regional, minority and historical languages, we should see an important shift in thinking. The objective is not only the human rights, dignity and equality (legal and material) of persons belonging to national minorities or the opportunity for their well-being in society, but also that their cultural particularities represent a special value, maybe a special value for all mankind.

In Article 1 of the European Charter for Regional or Minority Languages¹²³, one may even find an indirect definition of national minority. Only traditionally used languages used within territory of the state (different from the official language), and not dialects and languages of migrants, are within the scope of protection of this document.

Therefore, probably only languages of “traditional” minorities are referred to here, which should be distinguished from languages of later “migrants”. This approach is not very correct or just. It is a measure to prevent the recognition of “uncomfortable” minorities, which came to Europe “later” from culturally different areas (Moslems, Africans) and as such are regarded as a phenomenon which should be assimilated. There is no adequate definition of a border between traditional minorities and new immigrants. Probably we should see it in that “traditional minorities” lived in their territory or were present in the state in the pre-industrial period and consisted mainly of settled agrarian populations – at least originally – the only exceptions were Jews, Gypsies and maybe northern nomads (Sami people, Komi people, Karelians, etc.).

Article 1/b and c defines also the notions of “non-territorial languages” and in an indirect way “territorial languages”. The second is closely related to some “territory in which the regional or minority language is used.” This means that the said language is traditionally used in some geographic areas within a state by a number of people justifying the adoption of the various protective and promotional measures (some kind of a special regime). “Non-territorial languages” are languages whose users do not constitute a really important group in any territory. Everywhere, they are a “diaspora”, they are scattered – for example, generally Jews or Gypsies in Europe or Czechs, Moravians or Russians in Slovakia.

¹²² *Ibidem*, p. 99.

¹²³ CETS No.: 148, <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=148&CM=1&CL=ENG>

According to Article 2 (Undertakings), obligations in Part II, are compulsory for every participating state. From the list of obligations in Part III, every state shall select only a defined number and specify for any individual language specific paragraphs that will be applicable. This Charter defines only the “minimal European standard”. If in some state the rights of national minorities are on a higher level then the regime prescribed by the Charter, the existing rights of national minorities should not be “reduced”: “[p]rovisions of this Charter shall not affect any more favourable provisions concerning the status of regional or minority languages, or the legal regime of persons belonging to minorities which may exist in a Party or are provided for by relevant bilateral or multilateral international agreements” (Art. 4(2)). On the other hand, “(...) nothing in this Charter may be interpreted as implying a right to put in question the principle of territorial integrity and sovereignty of the state” (Art. 5).

Various measures to promote the use of religion or minority languages are suggested under this Charter: in the fields of education, court proceedings, public services, media, cultural facilities, economic and social life and trans-frontier exchanges. As new elements (in addition to traditional duties) we can find:

- 1) recognition of minority languages as a specific value (Art. 7(1a));
- 2) respect for the geographical area in which the minority language is used (Art. 7(1b)) (this means that the administrative division should not endanger the use of minority languages);
- 3) obligation of a state to facilitate non-speakers of minority languages to learn the minority language (Art. 7(1g));
- 4) obligation of states to promote the research and study of minority and regional languages at university level (Art. 7(1h));
- 5) the state may adopt even some form of positive discrimination toward the use of the minority language (Art. 7(2));
- 6) states are obliged to promote “mutual understanding” between communities using different languages (Art. 7(3)), this means some form of education towards “multiculturalism”;
- 7) the most important criterion in policies toward minority languages is “the needs and wishes expressed by the groups which use such languages” (Art. 7(5));
- 8) obligation to make available pre-school and university education in the language of the national minority (Art. 8(1a) and (1e));
- 9) obligation to “ensure the teaching of the history and the culture which is reflected by the regional or minority language” (Art. 8(1g)) (it means

- that the way in which history is presented in schools should not reflect views of a nationalistic and statist ideology of the dominant group);
- 10) obligation not to deny the validity of legal documents solely because they are drafted in a regional or minority language (Art. 9(2));
 - 11) obligation to ensure the use or adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in regional or minority languages (Art. 10(2g));
 - 12) to ensure or encourage the existence of at least one radio and TV station and newspapers in a minority language (Art. 11);
 - 13) widely-defined support for culture of the national minority (Art. 12);
 - 14) obligation to support the use of minority languages in economic life including in documents used in economic life (Art. 13(1));
 - 15) obligation to ensure the use of minority language in hospitals, houses of social care, etc. (Art. 13(2));
 - 16) obligation to support trans-frontier contact (Art. 14);
 - 17) establishment of a control mechanism on a European level (Art. 15–17).

This document imposed wide-ranging duties on states to support national minorities and their culture and language actively. Its implementation is to be reported to the Secretary – General of the Council of Europe. Such reports will be examined by a committee of experts composed of one member per contracting party.¹²⁴ This committee will itself report to the Committee of Ministers. This report can be accompanied by the comments of parties. The Secretary–General shall prepare a twice a year a detailed report to the PA on application of the Charter.

10. TWO RECOMMENDATIONS OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights was adopted by the Parliamentary Assembly of the Council of Europe (4 February 1993) and reaffirmed in Recommendation 1255 (1995).¹²⁵ This recommendation is based on the work of the Committee for legal matters.¹²⁶ It was probably the first international

¹²⁴ Shaw, *International Law*, *op.cit.*, p. 278; see also Council of Europe webpage, www.coe.int.

¹²⁵ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 130.

¹²⁶ *Ibidem*, p. 131.

document defining the notion of a “national minority”. It suggests that the notion “national minority” refers to persons who reside on the territory of the state concerned and are citizens of it (Article 1 of the Rec. 1201). They maintain long-standing, firm and lasting ties with that state, but display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of the state; and wish to preserve their culture, religion, traditions or language. This definition of a “national minority” can be regarded as appropriate and balanced. However, the formulation of “firm and lasting ties with that state” should be replaced by a request for firm and lasting ties with a region where a certain minority lives. In Europe, we now can find a few states, which are relatively new and therefore it is not possible to talk of some “firm and lasting ties with that state.” Of course, because of the regional character of the Council of Europe, this definition is not accepted worldwide in general international law.

This Recommendation also asked member states to adopt a special Protocol to the European Convention on Human Rights to enable members of national minorities to appeal to the European Court for Human Rights¹²⁷ (Introduction Art 1(ii) and 8). Since recommendations of the Parliamentary Assembly of the Council of Europe are not legally binding (although their moral authority is high), the ratification of member states was needed.¹²⁸

The first Recommendation (1201/1993) tried to define the following new principles and rights for national minorities:

- 1) it declared the protection of the right of persons belonging to national minorities both within the state and on the international level (Preamble 3);
- 2) the protection of national minorities was declared as part of the international protection of human rights (Preamble 5);
- 3) an attempt was made to define national minority (Article 1);
- 4) membership of a national minority shall be a matter of free personal choice (Art. 2) (in many countries, it is still not a case – e.g., Kurds are called “Mountain Turks” and France is a state without minorities because everybody is considered to be French);
- 5) according to Article 3, every person belonging to a national minority shall have the right to express, preserve and develop in complete free-

¹²⁷ Čepelka & Šturma, *Mezinárodní právo veřejné, op.cit.*, p. 424.

¹²⁸ Blumenwitz & Gornog, *Der Schutz von Minderheiten und Volksgruppenrechten durch die Europäischen Union, op.cit.*, p. 23.

dom his/her religious, ethnic, linguistic and/or cultural identity, without being subjected to any attempt at assimilation against his/her will; this is not only a prohibition of forced assimilation, but also an obligation to respect all differences which the minority may have; it involves more than merely a respect for language differences;

- 6) deliberate changes to the demographic composition of the region in which a national minority is settled shall be prohibited (Article 5);
- 7) in previous documents, in the case of self-organisation of national minorities only cultural, social, educational organizations were mentioned; the recommendation also includes political parties of national minorities (Art. 6);
- 8) every person belonging to a national minority shall have the right to use his/her surname and first names in his/her mother tongue for official purposes (Art. 7(2));
- 9) in regions in which substantial numbers of the national minority are settled, local names, signs, etc. can be displayed also in the language of the minority (Art. 7(4));
- 10) persons belonging to the national minority have a right to have free contact with citizens of another country with whom they share a common ethnic identity (Art. 10);
- 11) minorities have some right to some form of territorial and institutional autonomy (Article 11);
- 12) the protocol cannot be used to reduce the rights of national minorities if in some states they enjoy a higher standard of protection (Art. 12(1));
- 13) the document accepts some form of "positive discrimination" (Art. 12(2));
- 14) the document defines even some form of "reverse protection"; it supposes a situation when persons belonging to the majority (in a state as a whole) are in the situation of a minority in some region; in such cases, they enjoy full rights belonging to minorities! (Art. 13); real life has demonstrated that members of a minority can be rather intolerant and aggressive if they are in a majority in some area (Magyars in south Slovakia, Germans in South Tyrol, etc.) – belonging to a minority does not mean that such an individual is automatically more tolerant, or that he/she must be always in a position of a "victim";
- 15) Article 14 confirms the duty of persons belonging to the ethnic minority to be loyal to the state of which they are citizens, regardless of their ethnic origin.

In the Preamble, the Parliamentary Assembly referred to cultural diversity as one of the main sources of the richness and vitality of European civilization.¹²⁹

The second Recommendation did not bring new declared rights. It expressed only the disappointment of the Assembly with regard to the unwillingness of member states to ratify an additional protocol on cultural rights to the Convention for the Protection of Human Rights and Fundamental Freedoms and European Charter for Regional or Minority Languages.

11. THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

At the Vienna Meeting of Heads of State and Government of the Council of Europe in October 1993, the main agenda was precisely the protection of national minorities.¹³⁰ The meeting also decided to work on a Framework Convention on National Minorities and a draft Protocol on Cultural Rights complementing the European Convention on Human Rights.¹³¹ This decision was adopted after difficult discussions and a compromise formula was found at the last minute on the eve of the summit.¹³²

The Framework Convention for the Protection of National Minorities was adopted by the Committee of Ministers on 10 November 1994 and came into force on 1 February 1998 after the twelfth ratification.¹³³ It is open also for states that are not members of the Council of Europe. This Convention represents a new milestone in protection of national minorities within Europe.¹³⁴ It stated in unambiguous terms that protection of national minorities is an integral part of the general protection of human rights.¹³⁵ The Convention¹³⁶ contains the Preamble and five sections.¹³⁷

¹²⁹ A slightly bombastic statement, but it illustrates the importance placed on the protection of cultural diversity now.

¹³⁰ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, op.cit., p. 132.

¹³¹ Shaw, *International Law*, op.cit., p. 278.

¹³² Matscher, *Wiener Internationale Begegnung zu aktuellen Fragen nationaler Minderheiten*, op.cit., p. 6.

¹³³ Čepelka & Šturma, *Mezinárodní právo veřejné*, op.cit., p. 424; Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, op.cit., p. 134.

¹³⁴ Musgrave, *Self-Determination and National Minorities*, op.cit., p. 144.

¹³⁵ Lang, *Minderheitenschutz in Mittel – und Osteuropa*, op.cit., p. 9.

¹³⁶ Council of Europe, Human rights and minorities (<http://www.coe.int/t/e/human%5Frights/minorities/>)

¹³⁷ Fischer, Köck & Karollus, *Europarecht*, op.cit., p. 110.

Although the Convention does not define the term “national minority”¹³⁸, it underlines the right to equality before the law for persons belonging to national minorities and prohibits discrimination based on belonging to a national minority. Contracting parties are obliged to adopt, where necessary, adequate measures to promote in all areas of economic, social political and cultural life, full and effective equality between persons belonging to the national minority and majority. Their religion, language, traditions and cultural heritage should be preserved and protected. If members of a national minority inhabit some area traditionally or in substantial numbers, the parties of the Convention shall endeavour or ensure as far as possible the condition which would make it possible to use the minority language in relations between those persons and the administrative authorities. Similarly, with regard to display of traditional local names, street names and other topographical indications intended for the public in the minority language (Article 11(3)), and with regard to adequate opportunities to being teach the minority language or to receive instruction in that language (Article 14(2)). In Article 15 the parties agree to refrain from measures, which alter the geographic proportions of the population in areas inhabited by persons belonging to national minorities.

Other new elements are:

- 1) the Preamble’s statement that “the protection of national minorities is essential to stability, democratic security, peace in this continent”; the question of national minorities is, therefore, not a problem of the individual state as it is relevant for all members in the international system at their most sensitive point – the effort to keep peace and stability;
- 2) the Preamble stresses the importance of cross-border co-operation;
- 3) the confirmation of the position of protection of national minorities as a part of the general human rights agenda (Article 1);
- 4) Article 4 accepts the idea of positive discrimination. The Parties are obliged to adopt adequate measures to achieve “full and effective equality between persons belonging to a national minority and those belonging to the majority” and those measures “shall not be considered to be an act of discrimination”;

¹³⁸ Maybe it was a good decision. The exact definition might be the source of new forms of exclusion and discrimination. See further: Matscher, *Wiener Internationale Begegnung zu aktuellen Fragen nationaler Minderheiten*, *op.cit.*, p. 8.

- 5) Article 6 supports the conception of a multi-cultural society and its support by the state;
- 6) in Article 10, Parties committed to recognize the right to use the minority language freely and also to promote a right to use it in contacts with public authorities;
- 7) Article 11.1 ensures a right for persons belonging to a national minority to use their first names and surnames in the minority language; the situation is similar with local names - states should support the display of traditional local names also in the minority language (Art. 11.3);
- 8) states shall refrain from measures altering the proportions of the population in areas inhabited by persons belonging to national minorities (Art. 16).

The provisions of this Convention are not self-executing. The states are obliged to embody them in their national rules. It places positive duties on states to promote the development of national minorities.¹³⁹ The implementation of this Framework Convention is to be monitored by the Committee of Ministers of the Council of Europe, with the assistance of an advisory committee of experts and on the basis of periodic reports from contracting states.¹⁴⁰

Even this Convention does not contain a clear definition of national minority (as was mentioned above).¹⁴¹ This and several more “weak points” of this Convention were criticised in 1995 in a report by Rudolf Bindig, a chairman of the Minority Committee of the Parliamentary Assembly.¹⁴²

We can see from the above documents (Framework Convention and Charter of Regional and Minority Languages) that in the 1990s the stress started to be put not only on formal equality and language, cultural and political rights of persons belonging to a national minority, but also on material equality, which States should guarantee. But on the other hand, Article 21 declared that nothing in the Convention may be interpreted as granting any right or justifying any act which would be contrary to the sovereign equality, territorial integrity or political independence of states. This means that question of national minorities must be solved without any changes of political borders or secessions.

¹³⁹ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 145.

¹⁴⁰ Shaw, *International Law*, *op.cit.*, p. 279.

¹⁴¹ *Ibidem*, p. 279.

¹⁴² Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 134.

12. THE ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE

The OSCE is another organization, which as part of its activities took recently (in the 1990s) responsibility for the rights of national minorities (and for which in 1975–1989 national minorities were only a marginal agenda¹⁴³).

What was initially termed the Helsinki process, and more formally was referred to as the Conference on Security and Co-operation in Europe, developed in 1975 as the Final Act of the Helsinki meeting.

The number of provisions in the Final Act that may have some relevance for national minorities is limited, but in the 1970s they helped to return the national minorities agenda to international political discussion.

Such provisions are:

- 1) respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief without distinction as to race, sex, language or religion (Article VII of Principles);
- 2) equality of persons belonging to national minorities (Article VII of Principles. (Paragraph 4);
- 3) equal rights of peoples and their right to self-determination. (Article VIII of Principles) – but conditioned by the territorial integrity of States;
- 4) Trans-border co-operation and cultural exchange with participation of national minorities (part 3 of the Chapter: Co-operation in Humanitarian and Other Fields).

At a third “follow up” meeting at Vienna in January 1989, substantial progress regarding human rights occurred.¹⁴⁴ The rights of minorities were also mentioned in the final document.

Those rights were developed more in the Vienna Concluding Documents (Human dimension of the CSCE)¹⁴⁵ and in the Concluding Document of the Copenhagen meeting in 1990.¹⁴⁶ In 1989 in the Vienna Concluding Document, the states declared that they would refrain from any discrimination against members of

¹⁴³ *Ibidem*, p. 115.

¹⁴⁴ <http://en.wikipedia.org/wiki/OSCE>.

¹⁴⁵ The Vienna Concluding Documents, <http://www.fas.org/nuke/control/osce/text/VIENN89E.htm>.

¹⁴⁶ Concluding Document of the Copenhagen Meeting in 1990 of the Conference on Human dimension of the OSCE, http://www.osce.org/documents/odihr/2006/06/19392_en.pdf.

national minorities and would contribute to the realization of their legitimate interests in the field of human rights and fundamental freedoms and would protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory.¹⁴⁷

The Copenhagen documents from 1990 did not define national minorities, but declared basic important rights for members of national minorities.¹⁴⁸ Probably, it was the first international document in which the rights of national minorities were defined as part of general human rights.¹⁴⁹ Despite being only a document of political character (“soft law”), it was an important milestone, at least because since that moment respecting minority rights has become a condition for recognition of new states or admission of states to the CSCE/OSCE.¹⁵⁰

In 1990, the Charter of Paris for a New Europe¹⁵¹ provided a legal framework for the first standing institutions: Conflict Prevention Centre in Vienna, the Office for Free Elections in Warsaw (now the Office for Democratic Institutions and Human Rights,) and the Secretariat in Prague. The Paris Conference also established a system of consultation and decision-making bodies (meetings of Heads of State or Government, Council of Ministers, Committee of Senior Officials). In this way, it began a process of “institutionalisation” of the CSCE.¹⁵² In December 1992, the post of Secretary General was created and a strengthened Secretariat was moved to Vienna.¹⁵³ Since 1991, this organization has also had a Parliamentary Assembly.

The Charter of Paris for a New Europe defined the right to self-determination more precisely – as the right to democratic political participation.¹⁵⁴ It also confirmed a right to freedom of religion and a right to enjoy cultural rights. It affirmed the protection of ethnic, cultural, linguistic and religious minorities and respect for the identity of persons belonging to national minorities.¹⁵⁵

¹⁴⁷ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 140.

¹⁴⁸ Pan, *Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung*, *op.cit.*, p. 117.

¹⁴⁹ *Ibidem*, p. 122.

¹⁵⁰ *Ibidem*.

¹⁵¹ See: Charter of Paris for a New Europe http://www.osce.org/documents/mcs/1990/11/4045_en.pdf (in the Chapter “New Structures and Institutions of the CSCE Process”).

¹⁵² Fischer, Köck & Karollus, *Europarecht*, *op.cit.*, p. 273.

¹⁵³ Shaw, *International Law*, *op.cit.*, p. 903.

¹⁵⁴ Musgrave, *Self-Determination and National Minorities*, *op.cit.*, p. 100; Charter of Paris for a New Europe http://www.osce.org/documents/mcs/1990/11/4045_en.pdf (in the Chapter “Human Rights, Democracy and Rule of Law”).

¹⁵⁵ Charter of Paris for a New Europe http://www.osce.org/documents/mcs/1990/11/4045_en.pdf (in the Chapter “Human Rights, Democracy and Rule of Law”).

After 1991, the CSCE had to pay attention to the conflict in former Yugoslavia (which also had a minority dimension).¹⁵⁶ The importance of protection of rights of national minorities for new Europe was confirmed in the Geneva Report of Experts of the CSCE of 19 July 1991.¹⁵⁷

At the Budapest Summit in 1994, the transformation of this organization was completed. The CSCE was renamed as Organization for Security and Cooperation in Europe (from 1 January 1995). The Ministerial Council became the central decision-making body; the Senior Council, a discussion and policy drafting policy body; the Permanent Council (a former Parliamentary Assembly), a body for consultation and decision-making; and executive action was allocated to the Chairman-in-Office.

The organization also established a special representative post for the national minorities' agenda.¹⁵⁸ This is the High Commissioner for National Minorities, who was appointed in 1992 during the summit in Helsinki.¹⁵⁹ The first Commissioner was the former Dutch foreign minister Max van der Stoep.¹⁶⁰ He started his work on 1 January 1993.¹⁶¹

His task is to provide early warning and early action where appropriate, concerning tension relating to national minority issues that have the potential to develop into a conflict within the CSCE area affecting peace, stability or relations between participating states.¹⁶² The High Commissioner was also mandated to collect relevant information and make visits. Where the High Commissioner concludes that there is a risk of potential conflict in such a situation, an early warning is to be issued, which will be conveyed promptly by the Chairman-in-Office of the OSCE to the committee of senior officials (Senior Committee).

On 20-21 March 1995, the final Conference on the Pact on Stability in Europe adopted a Final Declaration, which contains a commitment to act against

¹⁵⁶ Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung*, *op.cit.*, p. 115.

¹⁵⁷ Fischer, Köck & Karollus, *Europarecht*, *op.cit.*, p. 275.

¹⁵⁸ Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung*, *op.cit.*, p. 120.

¹⁵⁹ Shaw, *International Law*, *op.cit.*, p. 903; Fischer, Köck & Karollus, *Europarecht*, *op.cit.*, p. 275.

¹⁶⁰ Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung*, *op.cit.*, p. 120.

¹⁶¹ *Ibidem*, p. 120.

¹⁶² Shaw, *International Law*, *op.cit.*, p. 285.

intolerance and discrimination. It consists of the Declaration and a list of 130 bilateral agreements, almost all of them already concluded before the signing of the Pact.¹⁶³ Additional agreements to this Declaration include those dealing with cross-border cooperation and minority protection issues. Its aim is to improve neighbourly relations by avoiding the issues of borders and by establishing minority rights.

The mechanisms of CSCE or OSCE to protect human rights seem to be somewhat ineffective – even perhaps superfluous as we now have the Council of Europe protection mechanism – but in the early 1990s, many states involved in CSCE were not members of the Council of Europe. What also seems to be important is the fact that the OSCE system remains politically based, while the essence of the Council of Europe system remains legally focused. On the other hand, the CSCE/OSCE defined several basic rights for national minorities which were based on the European democratic tradition of 20th century.

CONCLUSION AND INTERNATIONAL STANDARDS OF NATIONAL MINORITIES RIGHTS

There is no universal model of regulation of “the national minorities’ problem” in international law. We could speak only about minimal standards of protection of their basic rights. There is not even a “European model” or “European standard” of minorities’ rights.

We can define this international standard as civic equality of persons belonging to a national minority with the majority population, plus the specific right to a specific regime regarding language, education and culture. Persons belonging to a national minority have a special right to participate in decision-making procedures concerning their life and a right to establish their own cultural associations. Measures of the state to help members of national minorities to promote their social standards, if they as the minority are handicapped, can be regarded as acceptable on specific conditions.

International law does not even provide any universal definition of a “national minority.” Only in Europe, one may find definitions provided by the European Charter for Regional or Minority Languages and by the Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe.

¹⁶³ G. Toggenburg, *A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities*, European Integration online Papers 4(16)/2000 (available at <http://eiop.or.at/eiop/texte/2000-016a.htm>), p. 16.

After a brief survey of the situation in general international law and in the European regional system of international law, we may try to define basic requirements for an international standard of protection of national minorities rights:¹⁶⁴

- 1) the right to identity, existence and protection from threat;
- 2) the right to use one's native language in public life;
- 3) the right to establish separate organizations, including political parties;
- 4) the right to maintain unimpeded trans-border contacts with citizens of another country with whom they share a common ethnic identity;
- 5) the right to information, including access to mass media;
- 6) the right to political participation in general matters;
- 7) the right to representation in matters concerning the life of national minorities.

These requirements are based on the following basic documents:

From the UN system:

- 1) Convention on Civil and Political Rights (1966);
- 2) Convention on Elimination of All Forms of Racial Discrimination (1966);
- 3) Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992);
- 4) Vienna declaration confirming the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1993).

From the OSCE system (for Europe):

- 1) Final Act of the Conference on Security and Co-operation in Europe (1975);
- 2) Vienna Concluding Documents (1989);
- 3) Charter of Paris for a New Europe (1990);
- 4) Concluding document of the Copenhagen meeting (1990).

From the Council of Europe system:

- 1) European Charter for Regional or Minority Languages (1992, Council of Europe);

¹⁶⁴ Pan & Pfeil, *National Minorities in Europe*, *op.cit.*, pp. 186–189.

- 2) Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- 3) Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights (1993);
- 4) Framework Convention for the Protection of National Minorities (1994).

Pavel Svoboda* ■

ECONOMIC SUPPORT TO TERRORISM IN EU CASE LAW

INTRODUCTION

Several years ago, I discussed the lawfulness of EU anti-terrorism measures in relation to UN Security Council (“UNSC”) resolutions in light of fundamental rights.¹ The European Court of Justice (“ECJ”) has opened a fresh chapter in this domain of EU law. In its judgement in joined cases C-402/05 P and C- 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (“the Judgement”),² the ECJ delivered its decision concerning two appeals in the cases T-306/01 *Yusuf* and T-315/01 *Kadi* of September 25, 2005. The judgement was given on September 3, 2008, almost three years after the first instance rulings.

In this action for annulment pursuant to Article 234 of the EC Treaty, the ECJ not only set aside the judgment of the Court of First Instance (“CFI”) in both cases, but pronounced itself also on the substance of the case by annulling the contested Regulation No. 881/2002 (“the Regulation”), which implemented Common Position 2002/402/CFSP; the Common Position, in turn, implemented UNSC

* **Doc. JUDr. Pavel Svoboda**, Department of European Union Law, Charles University.

The electronic version of this article may differ from its hard copy version with regards to the formatting of the text, but the substantive content of both versions is the same.

¹ See, P. Svoboda, *Rozpor s mezinárodním právem jako důvod neplatnosti komunitárních aktů* [Incompatibility with international law as a ground for non-validity of Community legal acts], *Právní rozhledy* 23/2006, p. 855. This article is a follow-up of a previous reflection on the relationship between international (external) agreements of the EU and EC law – see P. Svoboda, *K přezkumu mezinárodních smluv Evropským soudním dvorem* [Review of international agreements by the European Court of Justice], *Právní rozhledy* 12/2002, p. 10.

² The name Yusuf does not appear in the ruling on the appeals because Ahmed Ali Yusuf, party to the first instance proceedings, abandoned his appeal, see paragraph 119 of the Judgement.

Resolution No 1390 (2002) imposing measures directed against Usama bin Laden, members of Al-Qaeda and Taliban and persons associated with them. These legal acts aim at freezing assets of persons related to terrorists in order to prevent terrorist operations. The Regulation was repealed only in so far as it concerns the appellants.

The judgement addresses three main grounds for appeal: (1) the legal basis of the Regulation, (2) the scope *ratione personae* of the Regulation, the annex of which comprises an exhaustive list of persons falling under its scope; and (3) violation of human – in ECJ terminology fundamental – rights.

The grounds for the Judgement of annulment lie in the issue of fundamental rights. The ECJ repealed the judgements of the Court of First Instance and claimed that the latter had not carried out a complete fundamental rights re-examination but only a review limited to the human rights *jus cogens*. The contested regulation was annulled since it failed to ensure the following rights of the appellants: the right to respect for property, the right to be heard, and the right to effective judicial review.

This article does not purport to be an exhaustive analysis of all legal issues arising from the Regulation since these are so numerous they cannot be covered in one single article.

1. LEGAL BASIS OF THE REGULATION

The Regulation has³ its legal basis in Article 60 of the EC Treaty (restriction of capital movement vis-à-vis third countries), Article 301 of the EC Treaty (restriction of economic and financial relations with third countries) and Article 308 of the EC Treaty (the flexibility clause). The ECJ confirmed in particular the ruling of the Court of First Instance, according to which articles 60 EC and 301 EC do not constitute in themselves a sufficient legal basis for the Regulation, since the Regulation concerns individuals without any link to a particular third country or its representatives [points 166 and 167 of the Judgement].⁴ The ECJ also confirmed the conclusion of the CFI that, due to the absence of a link to a third country, the legal basis of the Regulation would need to be completed with Article 308 of the EC Treaty. In this respect the ECJ faced two problems. First, the fulfilment of the conditions to which the applicability of Article 308 EC is subject; and second, the consequences of the fact that the conclusion of the CFI was correct although its reasoning was not.

³ We use the present tense since the Regulation has been annulled only as far as it concerns the appellants.

⁴ Square brackets stand in the text for [point of the Judgement].

1.1. Conditions of the applicability of Article 308 EC

The conditions to which the application of so-called flexibility clause is subject are – besides the absence of Community competence and several procedural requirements – (a) attaining one of the objectives of the EC and (b) the scope of the measures at issue falling within the EC common market.

Attaining one of the objectives of the Community. As far as this condition is concerned, the ECJ rejected the reasoning according to which the bridging of the TEC scope and TEU objectives via Articles 60 and 301 EC in order to implement a common position or an action within CFSP may be extended also to Article 308 TEC. It was rejected on four grounds:

- (i) the TEC does not identify the fight against terrorism as an EC objective [201];
- (ii) the above-mentioned bridging must be interpreted narrowly as applicable only to the two Articles, since it concerns two different legal orders, one governed by the TEC, the other by the TEU [202];
- (iii) an extensive interpretation cannot be justified by the necessity to ensure coherence of EU actions pursuant to Article 3 TEU [204];
- (iv) the principle of conferred powers to which Article 308 TEC is subject does not allow extending the scope of this provision beyond the TEC [203].

However, concerning the fulfilment of the condition of applicability of Article 308 TEC hereby, the ECJ takes over the opinion expressed by the Commission. According to it, the objective of the fight against terrorism is pursued by Common Position 2002/204, but the Regulation, which puts the latter into effect, “only” aims at cutting off terrorist economic resources; in the ECJ’s view, this can “fit” the condition of “Community objectives” [227].

This interpretation is, in our view, the first significant shortcoming of the Judgement. The ECJ had previously pointed out that “the choice of legal basis for a Community measure must rest on objective factors [...] in particular, the aim and the content of the measure” [182]. It had also observed that “the essential purpose and object of the contested regulation is to combat international terrorism, in particular to cut it off from its financial resources by freezing the economic funds and resources of persons or entities suspected of involvement in activities linked to terrorism” [169] and that “the contested regulation is intended to combat international terrorism” [184].

We do not intend to touch the issue of conscience of the ECJ, but the above-mentioned way to justify the fulfilment of the condition of “Community objectives”

seems rather formalistic and implausible, as if the ECJ did not want to trace down the real objective of the Regulation.

The scope of the measure at issue falling within the EC common market. The ECJ concludes that the measure affects the operation of the common market at least potentially: if the adoption of relevant restrictions fell within the competences of Member States, it could, according to the ECJ, “have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment”. It could also lead to the distortion of competition “because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage” [230].

1.2. Consequences of an incorrect reasoning of the CFI leading to a correct conclusion

Via its reasoning on the fulfilment of the Community objectives condition and on the effects on the common market pursuant to Article 308 EC, the ECJ concluded that even if the CFI made errors in its reasoning⁵ justifying the inclusion of Article 308 into the legal basis of the Regulation, its conclusion itself was not incorrect. The ECJ refers in this context to the principle according to which an incorrect ground is not a reason for repealing a judgement, if another – correct - reasoning can be put forward (C-167/04 P *JCB Service*, point 186) [233]. This principle may be applied to the present case for two reasons. First of all, the condition of applicability of Article 308 TEC, as stated beforehand, was satisfied, though not as ruled by the CFI. And second, “adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution” [235].

The author admits that he does not understand the second reason. Article 308 EC surely does provide for consultations with the European Parliament (EP). The tendency to eliminate the democratic deficit surely exists. But there exists no general legal requirement for the participation of the EP in all legal actions aiming at individuals. Moreover the involvement of the EP obstructs the decision-making process and makes the leak of information more likely, which is incompatible with

⁵ That is to say that a regulation having for legal basis Article 308 EC can pursue the objectives of the CFSP.

the required “surprise effect” of these *smart sanctions*, as it is by the way claimed by the ECJ itself, e.g. in paragraph 340 of the Judgement. The involvement of the EP in this process is therefore a handicap rather than an advantage. Moreover, the Judgement implies that the EP itself was not able to prevent violation of fundamental rights resulting from the Regulation. The satisfaction of the Judges that the EP took part in the revision of the Regulation seems therefore quite absurd.

In any event, the ECJ held that the first ground for appeal as a whole had not been justified; therefore it was insufficient to set aside the contested judgements or Regulation.

1.3. Obligations of the EC and the EU resulting from the UN Charter

The question of legal basis implies, in more general terms, another question, i.e. whether the EC or the EU were competent to issue the Regulation or the Common Position 2002/402/CFSP. We must bear in mind that the EC is not member of the UN, as stated expressly [305] and implicitly [298] in the Judgement itself. Unlike the ECJ, the CFI sorted out this issue in a fairly acceptable way in the repealed judgements. It linked the obligations incumbent on the Member States under the UN Charter and under the Regulation by stating that the competences in foreign trade (i.e. the common commercial policy under which the economic sanctions basically come) fall exclusively within the EC and that the Member States cannot take actions in this field without infringing Community law. It is therefore up to the EC to carry out the international obligations of the Member States – including the obligations resulting from the UN Charter – (see repealed judgements in T-306/01 *Yusuf*, paragraphs 240-259, namely 247, 250 and 257).⁶

However, the Judgement does not say why the EC or the EU should fulfil these obligations since neither of them is member of the UN. We believe that there is a difference between the obligation to respect international law [291] and the taking over of contractual obligations of the Member States, a conclusion paragraph 230 of the Judgement leads to. The first obligation seems indisputable whereas the second needs a thorough justification.

The conclusion of the ECJ is ambiguous. On the one hand, it would seem that it has transferred the issue from the 1st pillar to the 2nd, that is to say from the EC level to the EU level. Other paragraphs though imply the opposite. Neither of the solutions is fully satisfactory.

⁶ This was the case also for Brussels customs conventions (1950; cf. C-38/75 *Nederlandse Spoorwegen*) and for GATT 1947 (cf. Joined cases 21 to 24-72, *International Fruit Company*).

1.3.1. Transfer to the EU level

It seems to us that the ECJ transfers the issue of obligations stemming from the UN Charter from the 1st to the 2nd pillar, i.e., from the EC to the EU level: the obligation to issue the Regulation results, according to the ECJ, from the existence of the Common Position 2002/402/CFSP to be implemented [294-296]. The core problem is therefore the relationship between the CFSP and the UN Charter.

This leads us to the question of legal personality of the EU: The ECJ proceeded presumably from the assumption that the EU does not have legal personality; hence the acts under CFSP are acts of the Member States. By issuing the Common Position within the CFSP, the Member States satisfy collectively their obligations resulting from the Charter; therefore, the ECJ does not need to deal at all with the question why the EU should fulfil the obligations stemming from the Charter on behalf of its Member States.

Apart the regrettable fact that the ECJ does not expressly deal with the presumption of absence of EU legal personality, there are at least two issues resulting from this reasoning: (a) is the presumption that the EU does not have – even limited – legal personality correct? and (b) is the ECJ competent, howbeit implicitly, to claim that the EU does not possess legal personality?

Correctness of the claim that the EU does not possess international legal personality. Much paper was wasted on this subject however environmental unfriendly it might seem. Opinions in this area have evolved from a complete refusal at the very beginning to the acceptance of a partial international legal personality of the EU advocated nowadays. The whole range of opinions expressed in the doctrine being considered, it seems, for all that, indefensible to claim that the EU does not have the powers to carry out on its own account unilateral action at the CFSP level, within the scope of which it concludes international conventions⁷ that can beyond any doubt be implemented only on the EU level, not on the national one.⁸

Competence of the ECJ to claim that the EU does not possess legal personality. The competence of the ECJ to interpret a nonexistent provision on the EU legal personality is hardly conceivable because, first of all, one cannot possibly interpret a provision which does not exist, but also because the TEU does not contain any Article parallel to Article 220 TEC providing for the exclusive jurisdiction of the ECJ to interpret Community law. The CFSP is expressly removed from

⁷ Cf., e.g. the Council decisions 2000/911, 2002/1029, 2003/327, 2003/516, 2003/1007, 2003/927, 2003/505, 2003/719, 2003/410, 2004/123, 2004/117 and others.

⁸ Cf., Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information, *OJ L* 172, 5.7.2005, p. 84–86.

its powers (Article 49 EU)⁹ and EU-UN relations cannot, in our view, fall within the scope of the relationship of general rule to special rule between TEC and TEU pursuant to Article 47 EU¹⁰. Other areas coming under the jurisdiction of the Court in accordance to Article 46 EC (enhanced cooperation – Article 46(c) EU, respect of fundamental rights – Art. (6)(2) EU) also do not suffice to establish such competence.

Any other interpretation would imply the existence of the international legal personality of the EU. In that case, the Regulation could have been lawfully adopted only if the UN Charter was binding also for the EU as such; otherwise the EU would have exceeded its powers. If that is the case, then the ECJ did not deal with this issue at all in its argumentation since it did not justify why the EU – as a legal person – should carry out obligations of its Member States.

1.3.2. Keeping the issue on the EC level

One could argue that the ECJ did not shift the issue from the EC to the EU level, as we claim at the beginning of this article. The reasoning of the ECJ – that “observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations” [293] – would support such an assumption. The numerous references to “undertakings” or “obligations” [293, 3x in 296] have, once again, no backing in the argumentation.

We must, though, indulgently swing across this flaw in argumentation; otherwise – and if proceeding according to logic – we would never be able to get through to the core of the Judgement, i.e., the violation of fundamental rights. On the contrary, we would have to argue that since the ECJ did not hold that the obligations stemming from the UN Charter are binding for the EC and the EU, it should have annulled the Regulation on the grounds of insufficient legal basis and should not have therefore dealt at all with the issue of fundamental rights violation. Without establishing a correlation with the exclusivity of powers conferred on the EC as far as commercial operations are concerned – the way the CFI did in the repealed

⁹ Cf., T-228/02, *Organisation des Modjahedines du peuple d'Iran (People's Mujahidin of Iran)*, point 46

¹⁰ Cf., C-170/96, *Commission v Council „Airport transit visas“*; T-228/02 *Organisation des Modjahedines du peuple d'Iran (People's Mujahidin of Iran)*, point 56; C-354/04 *Gestoras Pro Amnistía*, point 34.

judgements as we have already mentioned – this argumentation is a dead-end anyway, and a pinch of logic should have lead the ECJ once again to annul the Regulation for lack of legal basis, as claimed beforehand.

2. PERSONAL SCOPE OF THE REGULATION

The second ground of appeal consists in claiming that the choice of legal form of a regulation to implement the UNSC Resolution was erroneous. The contested Regulation applies to concrete individuals listed in its annex; the requirement of general application of a regulation according to Article 249 EC, as opposed to the legal form of a decision, is therefore not satisfied.

The ECJ did not accept this ground, contrary to the Council and the Commission. It argued that the prohibition to provide economic assistance to terrorism is worded broadly vis-à-vis any person or entity [244] and may affect also individuals not appearing on the list. Here, the ECJ made reference to the case C-117/06 *Möllandorf*, in which it confirmed the rejection to register real property in a land register following the conclusion of a contract of sale even if only one of the purchasers was a person appearing in the list annexed to the Regulation [245-246].

Such a position is not that surprising in light of the arguments put forward by the ECJ. There exist a host of regulations not fully satisfying the requirements of Article 249 EC, for instance a “false regulation” pursuant to Article 230 EC or “concluding regulation” by means of which international agreements are incorporated into Community law pursuant to Article 300 EC. The normative character of the content of these acts is admittedly doubtful.

3. VIOLATION OF HUMAN RIGHTS

The most important part of the Judgement deals with the ground of appeal concerning the relationship between anti-terrorist measures of the Regulation and human rights.

3.1. Grounds

The ECJ rejected the following two arguments: (i) the CFI / ECJ are competent to indirectly review the lawfulness of the UNSC Resolution via the Regulation (ii) only as far as the respect of human right *jus cogens* is concerned. It held so on the basis of several concurrent reasons and grounds:

According to an established Judgement 294/83 *Les Verts*, the EC is a community of law, which implies *inter alia* the review of compatibility of all legal acts of the EC with the fundamental treaty, i.e., the TEC, according to which such a review falls within the exclusive jurisdiction of the ECJ [281].

No international agreement (in the present case obviously the UN Charter and the UNSC Resolution) can interfere with the autonomy of Community legal system (*vis-à-vis* the international legal order and national legislations) and with the allocation of powers conferred to the EC by the Member States (including the exclusive jurisdiction of the ECJ pursuant to Article 220 TEC) [282].

Safeguard of fundamental rights is one of the general legal principles constituting the source of Community law [283] and a prerequisite of the lawfulness of Community acts [279, 284]. This protection is guaranteed by the ECJ/CFI [285].

The present legal dispute concerns the contested Regulation, not the Resolution as such. Furthermore, under Article 220 EC, the CFI or ECJ does not have jurisdiction to review the lawfulness of an act such as the UNSC Resolution, the latter being an international legal act, not even its compatibility with *jus cogens* [287]. An annulment of a regulation within the Community legal system does not challenge the validity of a UNSC Resolution within the international legal system [288]. The ECJ did previously annul a similar act in the case C-122/95 *Germany v Council* [289].

The ECJ goes on to conclude that it was the CFI's duty to carry out a full examination of the Regulation – and not of the UNSC Resolution – as far as the respect of fundamental rights, not only the human rights *jus cogens*, is concerned [330].

3.2. Violation of human rights

After putting forward these arguments, the ECJ cosily leaves out the question whether the obligations under the UN Charter are binding also for the EC (see 1.3 above) and focuses directly on reviewing the alleged violation of fundamental rights.

The ECJ proceeds from the fact, that the UN Charter does not impose any particular way of implementing the UNSC resolutions [298], therefore an internal review of their lawfulness is not excluded [299]. After all, such a review within the EC cannot be excluded, since such immunity from jurisdiction does not have a basis in Community legal system [300]. Nor can it be justified by some special provisions, e.g., the regime of previous agreements pursuant to Article 307 EC [301], including the UN Charter [305-308], or restrictions of commercial operations for the purposes of international security as provided for by Article 297 EC [302]. Nor does the existence within the UN of a re-examination procedure before the

Sanction Committee guarantee the right of the defence and the right to effective judicial review [321 and following].

The subsequent paragraphs of the Judgment deal with individual rights – the right of the defence, the right to effective judicial review and the right to respect for property. The ECJ holds that all these rights have been violated. It is a pleasure to see to what extent this part of the Judgement is interconnected with the case law of the European Court of Human Rights (ECHR).

Right of the defence and right to effective judicial protection. In the light of the circumstances of the present case, the ECJ holds that both the right of the defence [334, 348] and the right to effective judicial protection [349, 351] have been infringed. It admits, on the one hand, that since the effectiveness of these restrictive measures necessitates a surprise effect, there is no obligation to hear the individuals to be included on the list annexed to the contested Regulation before actually listing them, nor to communicate all the information those individuals would wish to dispose of [339-342]. On the other hand though, the ECJ makes reference to ECHR case-law and holds that in such a case it is necessary to apply techniques to accommodate public security concerns and the procedural rights of the individuals in question [344]¹¹. The ECJ rules that the Regulation fails to provide for this.

Right to respect for property. Both the CFI and the ECJ distinguish between the existence of the right to property and the exercise of the right to property [355]. The ECJ furthermore holds that even a substantial restriction of the exercise of the right to property, as in the present case [363], is admissible if it is proportionate to the objectives of the measure [361], but only if the person in question is given opportunity to explain his or her situation [368]¹² as required by the European Convention for the Protection of Human Rights and Fundamental Freedoms¹³. Since the contested Regulation fails to satisfy this obligation [369], it is therefore incompatible with the protection of fundamental rights.

CONCLUSION

In general terms, the setting aside of the Judgements of the CFI in *Yusuf and Al Barakaat* is deplorable, since the CFI dealt for the first time in detail with various

¹¹ Cf. the ECHR judgement of November 15, 1996, *Chahal v. UK*, paragraph 131.

¹² The ECJ apparently means an explication *ex-post* according to [341] – see above.

¹³ Cf. Article 1 of the Additional Protocol No 1 to the European Convention on Human Rights, cf. also the judgement of May 21, 2002, *Jokela v. Finland*, points 45–55.

facets of the relationship between international and Community legal systems. The ECJ did not refute its conclusions in this matter, nor did it give its own opinion; it simply repealed the CFI Judgements.¹⁴ We particularly deplore the absence of justification by the ECJ why the EC is to take over the obligations of the Member States stemming from the UN Charter as far as the economic sanctions are concerned (see 1.3 above). On the other hand, we must appreciate the coherence with which the ECJ defends the autonomy of international and Community legal system, even if its argumentations sometimes seem to formalistic (see 1.1 above) – but law itself needs to be, to a certain extent, formalistic for it to be of general application.

With the fight against terrorism far from over, the EU keeps strengthening its international involvement and has become more successful in adopting common positions in times of crises¹⁵. Since there have already been several similar cases¹⁶, we can expect the core of the Judgement to be applied in future cases. We only wish for it to be better justified.

¹⁴ Cf. for example the reasons, considered in light of international law, which exclude the CFI's authority to review the UNSC resolution (incompatibility with Articles 25, 48 and 103 of the UN Charter, Article 27 of the the Vienna Convention on the Law of Treaties – repealed Judgement in T-306/01 Yusuf, point 270) or the global hierarchy of fundamental rights (repealed Judgement in T-306/01 Yusuf, point 277). We do admit however that this digression by the CFI beyond the boundaries of Community law is problematic with regard to its legitimacy, i.e., the competence to put forward such statements.

¹⁵ See the conclusions of the Council of September 1st, 2008 – EU position on the crisis in Georgia.

¹⁶ Cf. also cases 812/79 *Burgoa*, C-84/95 *Bosphorus*, C-177/95 *Ebony Maritime*, T-253/02 *Ayadi*, T-362/04 *Minin*, T-49/04 *Hassan*, C-117/06 *Möllendorfer*.

*Izabela Gawłowicz, Piotr Łaski** ■

RUSSIAN-GERMAN NORTH GAS PIPELINE IN VIEW OF PUBLIC INTERNATIONAL LAW

ABSTRACT

The authors analyze the issue of the North European Gas Pipeline construction running in the Baltic Sea from the perspective of public international law, Polish law and interests of the international community. Poland is a reliable and stable partner and it is in Russia's interest to build a cheaper gas pipeline running through the land territory of Poland. It is a diplomatic challenge for Poland to persuade the international community that actions connected with the construction of the North European Gas Pipeline are not based on economic grounds. Economic and political interests of Poland require facing this challenge, despite the fact that Russia does not have a rich tradition in soft diplomatic actions. Unfortunately, the Gas Pipeline problem does not remain only in the legal area – the sphere of politics and law are strongly connected with each other and the boundaries between them get blurred.

INTRODUCTION

On 8th September 2005 in Berlin: Russian Gazprom, German E.ON Ruhrgas and BAFS¹ signed a (basic) agreement on the construction of the North European Gas Pipeline through the Baltic Sea. The agreement was signed at the presence of Gerhard Schroeder – then the Chancellor of Germany – and President of Russia Vladimir Putin², which undoubtedly opened a new era in German-Russian

* **Izabela Gawłowicz, Ph.D.**, Faculty of Law and Administration, University of Szczecin; **Professor Piotr Łaski, Ph.D.**, Chair of International Law, Faculty of Law and Administration, University of Szczecin.

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¹ Jointly as Russian – German consortium Nord – Stream.

² http://www.portalmorski.pl/caly_artykul.php?ida=1113

relations and raised many concerns both in Poland and in other European countries. This event was widely commented by politicians, experts in politics and lawyers. And although an unambiguous evaluation of this situation is rather difficult, arguments of both parties may still be categorized.

In the case of the North European Gas Pipeline, the following issues need to be considered from the perspective of international law.

1. PERSPECTIVE

The twentieth century caused a dynamic evolution of international law³ and brought about the transformation of many of its essential and until now inviolable notions.⁴ When attempting to analyze any situation in view of international law, reference must be made to: customary and treaty rules – both currently and for-

³ On an unprecedented scale compared to before – at no time so many changes have taken place in international law as in the XXth century, especially in its second half. Contemporary international law doctrine clearly asks about further development of this important branch of law in view of the observed changes – this message gets through from many publications including: J. Kolasa & A. Kozłowski (eds.), *Prawo międzynarodowe publiczne a prawo europejskie* [Public international law and European law], Uniwersytet Wrocławski, Wrocław: 2003; W. Malendowski (ed.), *Wpływ globalizacji na procesy rozwojowe współczesnego świata. Istota – uwarunkowania – tendencje* [Impact of globalization on the development process of the contemporary world. Substance – determinants – tendencies], Wydaw. Naukowe INPiD UAM, Poznań: 2004; R. Kuźniar (ed.), *Porządek międzynarodowy u progu XXI wieku. Wizje – koncepcje – paradygmaty* [International order at the beginning of 21st century. Visions – concepts – paradigms], Uniwersytet Warszawski, Warszawa: 2005, and others.

⁴ For example, within the last few years, a few valuable publications on the issue of sovereignty have been added to the doctrine of international law – E. Haliżak, I. Popiuk-Rysińska (eds.), *Państwo we współczesnych stosunkach międzynarodowych* [The state in contemporary international relations], Warszawa 1995; J. Tyranowski, *Suwerenna równość, samostanowienie i interwencja w prawie międzynarodowym* [Sovereign equality, self-determination and intervention in international law], in: C. Mik (ed.), *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Gilasa*, Toruń 1997; A. Marszałek, *Suwerenność a integracja europejska w perspektywie historycznej. Spór o istotę suwerenności i integracji* [Sovereignty and European integration in historical perspective. Disagreement on the essence of sovereignty and integration], Łódź 2000; J. Symonides, *Unia Europejska – państwo – region, nowe pojmowanie subsydiarności i suwerenności* [European Union - the state – region, a new conception of subsidiarity and sovereignty] in: E. Haliżak, S. Parzymies (eds.) *Unia Europejska, nowy typ wspólnoty międzynarodowej*, Aspra, Warszawa: 2002; W. Anioł, *Państwo postsuwerenne? Rozproszenie władzy w środowisku międzynarodowym* [Post-sovereign state? Diffusion of power in the international environment], *Sprawy Międzynarodowe* 2/2002, pp. 5–26; I. Gawłowicz, I. Wierzchowiecka (eds.), *Koncepcje suwerenności. Zbiór studiów* [Concepts of sovereignty. Collected Studies], Warszawa: 2005.

merly in force; the geopolitical situation (as it is often the *ratio* of legal regulations, although hardly ever the only one and which also conditions the implementation of these regulations); and finally, the interests and arguments of all parties concerned. It seems that until now, the issue of the Gas Pipeline construction has been considered only fragmentarily⁵ and usually the analysis has been rather subjective in favour of one party of the disagreement. The authors of this article are aware of the importance of the issue and its complexity and diversity of arguments. Moreover, the authors acknowledge their own limitations resulting from the fact that, on the one hand, they aim to ensure reasonable skill and care in the analysis of facts and to be objective in their evaluation presented in this article, but on the other hand, they hold personal opinions on this matter. Therefore, the analysis below will be only one of the voices in the discussion on the legality and fairness of the construction of the Russian-German Gas Pipeline, which will bypass⁶ Poland and also on possible actions, which Poland may or should undertake in this respect.

2. INTERNATIONAL OBLIGATIONS OF STATES MUST BE EVALUATED AS A CONSISTENT WHOLE

Taking obligations out of context weakens the importance of international law and does not enhance the development of relations between states based on the *pacta sunt servanda* rule. It needs to be remembered that public international law has a specific feature, namely, obligations arise also (and quite often) beyond the area of the agreement,⁷ and moreover, each member of the international

⁵ Either in favour of the arguments of the gas pipeline project originators or omitted Baltic states, which are full of doubts and underline only either political or legal aspects.

⁶ Gazprom from the very beginning excluded Poland's participation in the construction of the North European Gas Pipeline—see e.g. <http://wiadomosci.onet.pl/1343625,12,1,1,,item,html>.

⁷ This matter still gets more complicated since customary law is somehow vague—lack of clear treaty definition, lack of guidance on the period after which a practice is acknowledged as law and the same as to the universality of application make some states misuse the freedom in this respect by evading uncomfortable obligations in cases in which the existence of a custom is difficult to prove. Furthermore, at the present stage of the development, above all, the development of the modes of communication, a phenomenon worked out over a long period of time just like custom, is usually trifled. Thus, despite the effort put into the development of customary international law, its power is rather modest. In turn, the subjects of international law often see their interests as not safeguarded well enough if they are protected only by custom, which in turn stimulates the development of treaty law (M. N. Shaw, *Prawo międzynarodowe* [International law], Książka i Wiedza, Warszawa: 2000, pp. 67–82).

society has permanent obligations towards this society.⁸ Thus, each relation in international law should be analyzed somehow from two sides: first as a relation of entities interested in a specified matter (e.g. entities in a dispute) and then as a relation between consequences of this dispute and the interest of the international society as a community. Overlooking the latter important aspect would seriously impoverish the final evaluation of the situation or it could even distort it. In other words, since any matter of a dispute between subjects of international law will always be of significant importance to the entirety of relations in international society, these disputes cannot be analyzed as if the entities of the dispute were not a part of international community.⁹ Although traditional international law imposes no obligation, *expressis verbis*, on states requiring from them to give up their own interests in favour of the (international) society or even to take this good into account in their own policy, there are many contemporary arguments¹⁰ suggesting that states in their conduct should always consider the effect of such a conduct in wider society. Without questioning in any way the key importance of the rules resulting from the Convention on the Law of the Sea, Montego Bay 10 December 1982¹¹ for resolving the question of legality of the Gas Pipeline construction and possible objections (or other responses) of the Baltic states, it should be underlined that these regulations cannot be the sole point of reference for this matter – neither with regard to law in force nor to the political evaluation of facts.

⁸ These permanent obligations result from the necessity to take care of the good of the whole international community and in any situation it should be taken into account. J. Kukułka, *Pojęcie i istota wspólnot międzynarodowych* [Concept and substance of international community], in: Halizak & Parzymies, *supra* note 1, pp. 13–24.

It seems that this notion is still too rarely used as an important argument in discussions concerning legal matters. It is not justified to set aside the fact that international law is created in order to regulate relations and operations in the international community, in order to ensure order and peace. This is a matter of well understood (whereas desirably – evoking positive connotations) solidarity which should guard safety of the human race. On the other hand, using the term of “international community” requires at least defining it, which has not been done in treaty law. This is necessary in order to avoid relativism of arguments, i.e. using methods leading to show that in a given situation the interest of “the whole international community” is equal to the interest of a “small” community – regional or including only a few entities concerned. Since international treaty law does not make this task easier, it is just necessary to refer to the underestimated principle of equitability. The problem of international society and community is discussed, among others, by R. Zenderowski, *Stosunki międzynarodowe* [International relations], Atla, Warszawa: 2005, pp. 13–17.

¹⁰ These arguments include, above all, dynamic and strongly institutionalized international cooperation, mainly regional – any action taken by any state induces remarkable effects as the relations between states are very complex and multilateral.

¹¹ UNTS, vol. 1833, p. 3.

3. INTERNATIONAL AND DOMESTIC ACTS OF LAW APPLICABLE TO THE QUESTION OF NORTH EUROPEAN GAS PIPELINE CONSTRUCTION

All Baltic states are parties to the Montego Bay Convention on the Law of the Sea. One needs to note that the Baltic Sea is specific in character due to its size and therefore it seems inadequate to treat it as a high sea. When the area of territorial seas of the coastal states is deducted from its area, there is not much left;¹² moreover, the area of exclusive economic zones¹³ of the coastal states should be taken into account. Thus, the question of legality of the North European Gas Pipeline is connected with the legality (and also feasibility, probability and equitability) of its construction within the area of Polish exclusive economic zone and not through the high seas¹⁴. Indeed, many rules for the high seas apply to exclusive economic zones but with limitations resulting directly from the Montego Bay Convention. In the Convention, among the freedoms of the high seas provided for in Art. 87, a general rule of freedom to lay submarine cables and pipelines is expressed.¹⁵ In view of this provision, it seems necessary to consider what possible constraints on this freedom may be applied in the area of exclusive economic zone and what are the conditions for these constraints, since the answer to this question will determine the final rights of Poland and other coastal states to take legal actions aimed at blocking the construction of the Pipeline. It must be acknowledged that although

¹² Consider the example of the Finnish Bay, which in its narrowest part has only 20 nautical miles. Estonia and Finland have not ever had the breadth of territorial sea of 12 nautical miles. Their territorial sea areas are adequately narrower so that an international navigation channel of the breadth 6 nautical miles can pass through the middle of the bay. If, however, the states concerned want to broaden their territorial sea in the Finnish Bay, the North European Gas Pipeline will have to run in the belt of their territorial seas. Therefore, the possibility of closure of Finnish Bay for the North European Gas Pipeline may not be excluded (which might occur given that the Estonian chief of the Ministry of Foreign Affairs was excluded from the territory of Russia in November 2005, when the Estonian Prime Minister clearly expressed his objections to the plans concerning construction of the pipeline). However, it seems more plausible that actions aimed at gaining profits from the pipeline will be undertaken, e.g., in form of gas transit fees. <http://serwis.gazeta.pl/swiat/1,34205,3010842.html>.

¹³ The Convention in Art. 57 defines this zone as an area beyond and adjacent to the territorial sea subject to the specific legal regime established in the Convention whereas the right and jurisdiction of the coastal state and the rights and freedoms of other states are also subject to this regime.

¹⁴ If it is routed this way, which has not been finally decided yet.

¹⁵ Whereas Art. 58 paragraph 1 of the Convention including reference to Art. 87 clearly states that all the states enjoy this freedom in exclusive economic zone provided it is compatible with the Convention.

the Convention in this respect does not give any clear answer, it uses wording that is not difficult to be explained based on principles of public international law. If, in conformity with the principles of treaty law, an international agreement is treated as a whole, then according to the provisions of the Montego Bay Convention, the rights belonging to the coastal state on a continental shelf are equivalent with the rights held by states in the exclusive economic zone, since in view of the rules of the Convention both the breadth of the shelf and the exclusive economic zone cannot exceed 200 nautical miles from the baseline. When referring to the part of the Convention that establishes the rights of a state on a continental shelf, one may identify those provisions which are relevant in the context of the North European Gas Pipeline:

- Art. 77(3), which provides that “the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation”;
- Art. 78(2), which provides that “the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention”;
- and above all, the provisions of Art. 79 concerning submarine cables and pipelines, and in particular its second paragraph, which provides that “subject to the rights of a coastal state to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines” (but at the same time paragraph 3 provides that “the delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State”).

The above provisions are subordinated to Art. 123 which states that “states bordering an enclosed or semi-enclosed sea¹⁶ should cooperate with each other in the exercise of their rights and in the performance of their duties”. Therefore, Art. 123 does not allow unilateral discretionary actions. It also imposes an obligation on states to work together (to operate jointly!) and to cooperate.

The content of the above regulations shows that, in substance, the Convention does not prohibit construction works in the area of the Polish exclusive economic zone. However, such works should be done upon previous consent from the relevant coastal states. Therefore, the norms of the Convention are addressed to states that are in special relations with each other in connection with a prospective gas pipeline construction: coastal states and states planning to build the pipeline.

¹⁶ The Baltic Sea is considered as such.

Thus, the coastal state is obliged to tolerate the performance of rights by other states.¹⁷ This general rule is, however, qualified in its application as it:

- depends on an agreement with the coastal states regarding the investment plans,
- may be excluded in situations provided for in the Convention, for example, if the construction or operation of the pipeline can cause serious ecological threat.¹⁸

In the relation described therein, as far as rights are concerned, “other” states are clearly emphasized. The position of both coastal states and these other states in this relation is characterized by both rights and obligations;¹⁹ however, in some cases a coastal state has a right that, simplifying the matter, may be referred to as a “veto right”. It means no more and no less that, in the view of the Convention on the Law of the Sea, coastal states may not hinder construction of a gas pipeline without reasonable and reliable justification.²⁰ However, they may protest against such construction or operation and take adequate legal actions if the prospective gas pipeline construction or its operation may present threat (to interests, natural environment, safety) for coastal states. Only justified concerns about these threats are meant here. On the other hand, the states planning the gas pipeline are obliged, at least, to obtain consent from the coastal states regarding the route of the pipeline and to ensure that neither the construction nor the operation of the gas pipeline causes danger to any state or natural environment.

¹⁷ This means: respect – that is acknowledgement and adequate safeguarding and observance of the right, not only passive respect but also its implementation in the area of law application and in administrative practice. Using the notion “to tolerate” (having rather negative connotations) does not imply only a negative character of the state obligation (to abstain from any actions against). A coastal state should not hinder other states in the performance of rights and also should perform its rights so that these do not conflict with the rights of other states.

¹⁸ Under this argument, it is highlighted that after World War II a stock of chemical weapons and munitions were dumped into the Baltic Sea bed and it is not possible to specify where exactly they are. Another argument of ecological type against the gas pipeline results from the fact that the Baltic Sea is a closed, small sea and its possible contamination is a serious threat for the whole ecological system and for biological variety: <http://www.krytykapolityczna.pl/index.php?option=content&task=view&id=696>. Additionally, it should be mentioned that considering Russia’s awareness and lack of tradition in environmental protection, one may not expect that this state will apply rigorous requirements concerning environmental protection – this may be evidenced by, for example, the problem of environmental degradation of areas of former Soviet military bases.

¹⁹ Thus, these situations are similar, in a way “equivalent” – and mutual relation is based on the balancing principle, weighing arguments and interests of both parties.

²⁰ For example, hindering without justification would include taking actions prompted only by political reasons.

The Convention refers frequently to the “principle of equitability.”²¹ This clause appears in provisions concerning the exclusive economic zone and continental shelf. It is of no use to search for a treaty definition of this principle, despite the fact that it is referred to in many different international agreements. There is a further argument in favour of individual treatment of each disputable case, to take into account the interests of all Baltic states²² (considering the common interest of the whole international society as a type of community), and in the case of a conflict of arguments of particular states for weighing these interests. Since international agreements should be treated as a consistent whole, the “principle of equitability” must not be ignored although it is not clearly defined in the Convention on the Law of the Sea. It also should be mentioned here that the Convention itself requires from the states to settle disputes resulting from the Convention by peaceful means. If the positions of the opposite sides differ too much, then it is always possible to institute legal (international) proceedings for settlement of disputes before a court. Incidentally, it is astonishing that this possibility, with its many advantages (e.g., the most important one being the definitive settlement of legal questions) is omitted in media discussions on the Gas Pipeline. Political discussion, although allowing for drawing an ace, does not solve the problem. Legal procedures before a court can ensure this effect. Thus, it is not right to leave the possibility of solving this problem by an international court beyond the mainstream debate. On the contrary, this legal possibility should be emphasized – surely this would also have an effect of relieving the atmosphere.

It is also necessary to refer to the structure of so-called sea contiguous zone, defined in the Convention on the Law of the Sea, but not present in Polish internal law.²³ This zone, rather than the exclusive economic zone, enables a coastal state to control the area of waters in order to ensure preventive protection in the application of its tariff, sanitary, immigration and fiscal law. Moreover, a coastal state on this area holds the right to penalize for infringements of its own regulations in the same scope as for offences committed on its territory or in its territorial sea. As Prof. Symonides concludes aptly “it would be worthy to have the own contiguous zone”,²⁴ since in cases such as the construction of

²¹ E.g., in Articles 59, 69, 70, 74.

²² For equitable and effective utilization of the resources. Very interesting comments on the “principle of equitability” in the Montego Bay Convention can be found in a paper by J. Gilas, *Sprawiedliwość międzynarodowa gospodarcza* [International economic justice], Toruń 1991, pp. 128–134.

²³ This is the Polish Sea Areas and Maritime Administration Act of 21 March 1991, Journal of Law no 32, item 131 as amended.

²⁴ J. Symonides, *Warto mieć morską strefę przyległą*, Rzeczpospolita of 28.1.2005.

the North European Gas Pipeline the scope of protection of Polish interests and Polish law would be greater.

Regulations of at least two other acts of international law may be applied to the construction of the Pipeline. These include in the first place the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992.²⁵

Article 3 of this Convention imposes on its parties general obligations to take individually or jointly all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution and to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance. Contracting states are obliged to take precautionary actions, “i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects.”²⁶ Rules of the Helsinki Convention provide Poland with legal basis to take preventive measures in view of information revealed by Helsinki Foundation²⁷ on chemical weapons dumped into the Baltic Sea after the Second World War. Thus, the lack of actions on the part of the initiators of the Gas Pipeline construction – aimed at neutralizing these weapons or ensuring that the weapons do not cause any harmful effects as a result of the construction of the Gas Pipeline – forms the grounds for Poland to take preventive measures within the meaning of the Helsinki Convention, including measures aimed at blocking the construction of the North European Gas Pipeline.²⁸ Unfortunately, arguments referring to ecological threats connected with the construction of this Pipeline have a serious disadvantage as they are “a double-edged sword”. Poland may exploit the opportunities offered by international law and use these arguments. However, it should be noted that Russia may use the same argument against Poland with reference to earlier plans of building a gas pipeline through the Baltic Sea from Norway to Poland. And –

²⁵ Journal of Law 2000, no 28, item 346

²⁶ That remain in clear relation with the environmental protection Policy of the Community.

²⁷ T. Kasperek, *Broń chemiczna zatopiona w Morzu Bałtyckim* [Chemical weapon dumped into the Baltic Sea], Wyd. Adam Marszałek, Toruń: 1999; R. Tarnogórski, *Gazociąg Północny. Aspekty prawne* [Northern Pipeline – Legal aspects], Polski Przegląd Dyplomatyczny 1/2006, pp. 71–84.

²⁸ Among other states also Poland requested consultation on the issue of proposed new route of the gas pipeline running near Polish exclusive economic zone.

we believe – these arguments concerning ecological threats may be employed in this case as well.

Poland, as a member of the European Union, is subject to rules resulting from the Treaty Establishing the European Community.²⁹ Members of the European Union and their citizens enjoy certain rights resulting from the Treaty. These include regulations³⁰ providing that the Community contributes to the development of trans-European networks in various areas – *inter alia*, in the area of energy – in order to ensure that the citizens of the European Union and other entities may derive full benefit from setting up an area without internal frontiers. Thus, if encouraging the development of trans-European networks is one of the priorities of Community policy, then it would be difficult to deny that the construction of a gas pipeline laid down in exclusive economic zones of EU states (without any arrangements with these states, without intention to take such actions, and bypassing several of these states to prevent them from collecting gas) is inconsistent with EU policy. The lack of a common energy policy does not prejudice anything in this respect (and certainly such lack of a common policy should not be interpreted as a lack of interest in the Pipeline construction). Thus, the Gas Pipeline is a unilateral (disloyal towards the Community and its members³¹) undertaking of actions that precludes these states and their citizens from deriving full benefit from EU membership and is in conflict with EU law. The initial lack of any actions on the part of the European Council, European Commission, or the European Parliament in this case was amazing. It seems that the bodies of the European Union should have clearly expressed their stand. In contrast, idleness weakens trust in Community institutions, demonstrates that they are subject to political influence, and reflects that they show little consideration for interests of some members of the EU. This idleness might have been also an expression of political will to survive at any cost.³²

²⁹ Journal of Law, no 90, item 864/2.

³⁰ Title XV TEC.

³¹ The principle of Community loyalty (solidarity) expressed in Art. 5 TEC is one of the most important structural principles of the Community system of law – on this subject, see e.g. M. Novak–Stief, *Instrumenty prawne i podstawowe zasady prawa WE* [Legal instruments and basic principles of Community law], in: P. Maro (ed.), *Integracja europejska – podstawy prawa wspólnotowego*, Instytut Europejski, Łódź: 2001, pp. 43–44. The subject of the North European Gas Pipeline with reference to “energy solidarity” was also discussed this year by Donald Tusk – the Prime Minister of the Republic of Poland http://gospodarka.gazeta.pl/gospodarka/1,33207,5672446,Premier___Gazociag_Polnocny_narusza_zasade_solidarnosci.html

³² That is to stay until the end of the term in office. A quite interesting view on this matter is presented by Z. Brodecki i T. Koncewicz, *Sztuka korzystania z prawnego wymiaru integracji*, Rzeczpospolita of 05.06.2006. The authors clearly indicate the obligations of the

Eventually, the European Commission, represented by the European Commissioner of Energy, found the North European Gas Pipeline to be responsive to the gas needs of the European Union, and even as an additional guarantee of gas supplies to the EU through their diversification.³³ On the other hand, the European Parliament, after a few months of silence, expressed its opinion on the issue of the construction of the Pipeline, and in particular on its influence on the Baltic ecological system. The Parliament, in contrary to the position held by the Commission, expressed its critical attitude towards the Pipeline.³⁴ Additionally, even if a lack of common energy policy is acknowledged, this should not be treated as a success. Concern about its energy safety should be one of the EU's goals.³⁵ A lack of clearly specified expectations and interests in this respect fosters Russia and its expansion (as one of the economic partners of the European Union and above all as one of its main suppliers of raw materials), and informally allows for formulating conditions and using instruments to exert political pressure on Member States of the Union.

The analysis of legal and international rules and regulations applicable to the issue of the Pipeline construction should be supported with a specification of the relevant provisions in Polish law, since the Convention on the Law of the Sea itself requires from states performing their rights in the exclusive economic zone of other states to obey the internal law of those states. In Polish law, reference should be made to the Polish Sea Areas and Maritime Administration Act, which clearly states the requirements for construction of pipelines in Polish exclusive economic zone. Art. 27 of this Act provides that such construction is allowed if it

Member States of the European Community – and in particular exactly the loyalty obligation and the obligation to consult their actions with the Commission on a current basis in order to avoid (preventive function!) violation of the Community law. Therefore, the competent bodies of the Community are given a possibility to state to what extent the matter intervenes into the Community law. The only drawback of this solution is the autonomy of the Commission in this respect – it acts on its own initiative, so a state cannot apply to the Commission to bring an action before the European Court of Justice against a state for breaching the Community law. It may, however, (although this should be treated as a last resort) bring an action against this state before the ECJ. Quite significant is the opinion of the authors of the above mentioned article, according to which “a state acting unilaterally ignores its Community obligations and violates the fundamental idea of integration interpreted as a community of interests and goals.”

³³ <http://www.rp.pl/artykul/88105.html>.

³⁴ http://gazownictwo.wnp.pl/gazociag-polnocny-grozny-dla-srodowiska,47369_1_0_0.html.

³⁵ In detail, this matter is discussed by: E. Wyciszkievicz, *Perspektywy wspólnej polityki bezpieczeństwa energetycznego Unii Europejskiej* [Perspectives of common policy in energy security], *Polski Przegląd Dyplomatyczny* 1/2006, pp. 49–70.

does not hinder the performance of rights by the Polish state and if the route and maintenance mode of the pipeline are agreed with Polish authorities. The Act specifies which minister is responsible for issuing the location permit and mode of operation of the pipeline, and grants this minister the right to cancel the issued permit should these arrangements be violated.

In view of various legal aspects concerning the issue discussed, which relate to public international law as well as Community law and internal (Polish) law, one may conclude that neither Russia nor Germany should have signed the basic agreement without making the necessary arrangements with Poland. This results both from public international law and Polish internal law, which in view of the Convention on the Law of the Sea must be respected. But this matter may be also viewed from another perspective and this perspective seems to be the most adequate in this case. In simple words, it is in the economic and political interest of Poland that the Gas Pipeline runs through its land territory so that Poland has relatively regular³⁶ access to this gas in order to, for example, collect transit fees, negotiate as an equal partner, and create employment possibilities for Polish companies. Therefore, it was the task for Polish authorities and in particular Polish diplomacy to persuade Russia and Germany to this solution. However, the issue of the North European Gas Pipeline showed serious weaknesses of Polish diplomacy – not because it did not manage to prevent carrying out the plan of building the Gas Pipeline and finally signing the agreement, but because, these plans, generally known for a long time, had been ignored. They were treated as a political provocation or a mere instrument for exerting pressure. Possibly, it was assumed that even if these plans were carried out this would not prevent the construction of another branch of the Jamal gas pipeline. Finally, maybe this threat was underestimated due to the belief that neither Russia nor Germany would decide to incur such huge costs. One of the tasks of the foreign service and the main tasks of diplomacy is to give regular and careful attention to the development of good neighbourly relations. Until now in fact, it is still unclear which of Poland's neighbours (closer or distant) is ready to support Polish protests in this matter.³⁷ Moreover, weakness

³⁶ Relative in the sense that Russia is politically unstable and unpredictable, so no matter if the gas pipeline is in Poland's area or Poland has access to some branch of the pipelines, this does not exclude the possibility of "closing the tap" with gas under any excuse and no international agreement may prevent it.

³⁷ At the beginning, it seemed that only Sweden might support us due to its devotion to strict standards for environmental protection and serious treatment of human rights (furthermore Swedes had been competing with Russia for years for influence over the Baltic Sea). Finally, it appeared that serious ecological concerns with reference to the gas pipeline construction were expressed by some other Baltic states: Finland (see, e.g.,

of Polish diplomacy may also be illustrated by the evident lack of recipe for conducting negotiations in this matter and even by perceiving possible negotiations in terms of dishonour.

SHORT CONCLUSIONS

The above comments serve as a basis to present short arguments concerning the prospective construction of the North European Gas Pipeline. Most of them, especially the legal ones have already been discussed in details above. The remaining part, especially concerning political rather than legal aspects of the issue, has only been signalled – not to ignore the political elements but to emphasize certain legal aspects of the discussed issue and as a result to ensure a more objective dimension of this study. We do not either omit or ignore political arguments in this matter, since it is specific for public international law “to overlap” with the sphere of politics, and therefore the sphere of law and politics cannot be fully separated. Political arguments, however, have a very special feature, that is, arguments “for” for one state will be an argument “against” for another state. Therefore, the authors chose to focus the discussion on the area of international law, without denying the political aspects of the construction of the North European Gas Pipeline.

Arguments in favour of the construction of the Gas Pipeline:

- right of Russia and Germany to enjoy freedoms of the high seas;
- economic interests (and implied political ones) of Russia and Germany;
- the question concerning construction of a gas pipeline branch for Poland may be also agreed later (at least an attempt can be made).

Arguments against the construction of the Gas Pipeline

- Poland will not use this gas since no branch for Poland is planned (at least now).
- The construction of a Gas Pipeline in the area of the Baltic Sea is considerably more expensive³⁸ than if it were routed through land territory of Poland (as it was planned earlier).

http://gospodarka.gazeta.pl/gospodarka/1,82554,5841436,Finscy_biznesmeni_moga_przeszkodzac_budowie_Gazociagu.html), Sweden (see, e.g., http://www.gazetaprawna.pl/wiadomosci/artykuly/91633,gazociag_polnocny_nadal_nie_spelnia_szwedzkich_wymagan.html), Estonia.

³⁸ It is currently estimated that the cost of construction of the pipeline will amount to approx. 8–9 billion dollars, that is twice as much as initially assumed http://gazownictwo.wnp.pl/superdrogi-gazociag-polnocny,38518_1_0_0.html

- There is a higher risk of a terrorist attack – submarine pipelines are more difficult to protect well than pipelines routed on land territory.
- The role of then German Chancellor Schröder in Gazprom management³⁹ and its promotion is at least controversial; additionally, negative implications are evoked by the fact that the issue of the Gas Pipeline was used to draw attention away from falling support for Schröder.
- Pejorative historical connotations – in the past, agreements between Russia and Germany brought dramatic effects for Poland.
- Energy safety of Poland is threatened – this argument is often distorted by the media because it is generally difficult to talk about any energy safety, if the gas supplier remained the same – unpredictable Russia.

Construction of the North European Gas Pipeline puts Poland in a difficult international situation, and depreciates its importance and negotiating capabilities. Moreover, this becomes or may become an excuse for further steps (ignoring Poland and treating it as an unpredictable partner and strengthening this picture in the conscience of international society). Therefore, for political and economic interests of Poland, Russia should be persuaded that Poland is a reliable and stable partner, that it is in the interest of Russia to build a cheaper gas pipeline routed on the land territory of Poland, and that it is possible to come to an agreement. Legal actions in this matter should be taken with utmost caution since they may bring negative economic and political effects for Poland. As from constructive argumentation to sensible legal actions, Poland should emphasize its standpoint in a moderate fashion but consequently.

³⁹ At present he is a member of a Supervisory Council of Nord – Stream.

*Grzegorz Domański, Marek Świątkowski** ■

PROTECTION OF INVESTOR'S CONTRACTUAL RIGHTS UNDER BILATERAL AND MULTILATERAL INVESTMENT TREATIES (PARTIAL AWARD IN *EUREKO V. POLAND*)

INTRODUCTORY NOTES

Poland is a party to over 60 bilateral and multilateral investment treaties (thereafter referred to as 'Treaty', 'BIT'). In such treaties the states undertake an obligation not to take any action resulting in expropriation or nationalization against investors from the state of the other contracting party who made investments in the state of the contracting party unless on conditions specified in a given treaty, in particular on payment of compensation. These treaties include also guarantees of fair and equitable treatment, non-discriminatory treatment and full protection and security.¹ These exemplary guaranties aim at ensuring foreign investors, generally speaking, protection on the grounds of international law against actions of states which deprive them of a part or whole of economic advantages from their investments. In case a state breaches treaty obligations, investors may claim for compensation of damages directly before the arbitral tribunal² set up under the provisions of a given treaty.

For a few years, there has been an intensive discussion whether on the grounds of international law a state may be held liable not only for breaching treaty material

* **Professor Grzegorz Domański**, University of Warsaw and a partner in the law firm Domański Zakrzewski Palinka Sp. k.; **Marek Świątkowski, Ph.D.**, a partner in the law firm Domański Zakrzewski Palinka Sp. k.

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¹ In further part of this article these provisions will be referred to as material provisions of the treaty.

² The terms "tribunal", "arbitral tribunal" or "treaty tribunal" in this study will apply to arbitral tribunal competent under the treaty unless otherwise indicated by the context.

provisions but also for failure to fulfil its obligations or improper fulfilment of obligations assumed under a contract towards the investor by agencies or offices for which the state is responsible under international law (even if the contract stipulates that it shall be governed by domestic law and that any dispute shall be settled by common courts or arbitral tribunals). Answering yes to this question means that in certain circumstances (discussed below) the investor could file a claim for compensation of damages against the state on the grounds of international law and the arbitral tribunal would be competent in this case. These issues were examined in the *Eureko v. the Republic of Poland* case³.

Admitting that an investor enjoys the above rights results in serious economic and legal consequences. These are connected with growing number of foreign direct investments in Poland (it is worthy to mention, for example, special economic areas) and with the fact that more and more investors condition their decisions concerning location of an investment on signing contracts, in which states represented by competent authorities undertake certain obligations. On legal ground, however, a lot of difficulties arise since various material and procedural rules and regulations interfere with each other. On the one hand, rights and obligations of the parties are specified in a contract, which is usually subject to domestic law. On the other hand, norms of international law would apply to it, in particular the ones emerging from a specified treaty. The same is true for procedural rules and regulations. Both domestic and international law include different solutions (which are, sometimes, in conflict) for resolving disputes. The phenomenon that elements of domestic law interweave with elements of international law and different authorities competent to solve the dispute may be pointed out is a source of practical problems. Namely, it may be suspected that investors will want to misuse these circumstances to ‘match’ adequate material and procedural law with the authority competent to solve the dispute for the needs of a given case (so called *forum shopping*). J. Rajski in his dissenting opinion to the award in the *Eureko v. the Republic of Poland*⁴ draws attention to this risk.

This paper aims at presenting the developments of the doctrine and jurisprudence of arbitral tribunals concerning the effects of failure to fulfil the obligations or improper fulfilment of obligations by a state⁵ emerging from a contract with

³ *Eureko B.V. v. the Republic of Poland*, partial award, 19 August 2005, www.msp.gov.pl.

⁴ *Eureko B.V. v. the Republic of Poland*, Jerzy Rajski’s Dissenting Opinion, 19 August 2005, www.msp.gov.pl, para. 11.

⁵ The question of “attributing” the effects of civil law actions performed by various offices and agencies would, of course, require a separate analysis. For simplicity, in further part of the discussion we use the notion of ‘contract concluded by the state’, ‘obligations unfulfilled by the state’, etc., for further details see: D. Bodansky, J. Crook, *Symposium: The ILC’s State*

an investor⁶ concluded on the grounds of a treaty on encouragement and reciprocal protection of investment between a host state and an investor's state of origin.

Decisions of international arbitral tribunals do not follow the same line of reasoning. Opinions presented by doctrine representatives also differ from one another in this respect.

At the beginning it should be mentioned that the issue of state's responsibility under treaties for breaching a contract requires reference to a few areas and in its analysis it is necessary to consider many factors. Therefore, one has to analyse particular types of provisions included in treaties as well as relation between them. In order to decide, if in certain circumstances an investor may enforce a claim against a state on the grounds of BIT for failure to fulfil its contractual obligations, the following questions require answering:

- first, is it enough if a given treaty contains a provision which broadly defines jurisdiction of the arbitral tribunal and states that all disputes between the state and the investor shall be settled according to rules included in the treaty;
- second, in case the answer to the first question is negative, the next one is if a provision contained in certain treaties under which the state takes responsibility to perform any obligations towards the investor results in conversion of contractual obligations into treaty obligations;

Responsibility Articles, 96(4) *American Journal of International Law*, (2002), p. 773; J. Crawford, *The Continuing Debate on UN Convention on State Responsibility*, 54 *International and Comparative Law Quarterly* (2005), p. 959; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne, zagadnienia systemowe* [Public International Law, Systemic Issues], CH Beck, Warszawa: 2004, p. 587; M. Frankowska, *Artykuły Komisji Prawa Międzynarodowego dotyczące odpowiedzialności państw – nowa forma kodyfikacji prawa międzynarodowego* [Articles of the International Law Commission on State Responsibility – New Form of Codification of International Law], in: J. Menkes (ed.), *Prawo międzynarodowe - problemy i wyzwania. Księga pamiątkowa profesor Renaty Sonnenfeld-Tomporek*, WSHiP, Warszawa: 2006, p. 167; K. Hober, *State Responsibility and Investment Arbitration*, www.ila-hq.com/pdf/Foreign%20Investment/ILA%20paper%20Hober.pdf, p. 2, 27; S. Rosenne, *State Responsibility: Festina Lente*, *British Yearbook of International Law* (2004), p. 363; R. Rosenstock, *The ILC and State Responsibility*, 96(4) *American Journal of International Law* (2002), p. 792; V. Vadapalas, *Codification of the Law of International Responsibility by the International Law Commissions: Breach of International Law and its Consequences*, 23 *Polish Yearbook of International Law*, 1997–1998, p. 37; B. Wierzbicki, *Prawo międzynarodowe publiczne* [Public International Law], Temida, Białystok: 2001, p. 68.

⁶ Contract here refers to a legal civil contract and also to a contract including administrative law elements concluded between “a state” and an investor from another state. Since this term entails any type of contracts accepted in the domestic system of law and the only feature distinguishing it is that an investor in the meaning of a particular treaty is a party to this contract, it is not necessary to create any special term distinguishing this category of contracts.

- third, in case the answer to the second question is negative, further question is if failure to perform a contract or improper performance of a contract attributed to the state may be acknowledged by a treaty tribunal as an infringement of material provisions of a treaty i.e. of guarantees included in a treaty, as to which, there is no doubt, that any breach of these guarantees in any other way will always result in the state's responsibility;
- forth, whether the answer to the third question depends on the content of the contractual provision specifying the mode of settlement of disputes;
- fifth, if the investor claiming damages from the state for breaching the contract on the grounds of a treaty which does not include detailed jurisdictional provisions (referred to as a basic treaty) may, by applying the most favoured nation clause, found its claim on a treaty concluded by the host state with another state other than the one of the investor's origin, which contains more favourable solutions than those resulting from the basic treaty.

Each of the enumerated five issues will be separately discussed in the above sequence.

1. SIGNIFICANCE OF THE TREATY PROVISION INDICATING THE COURT COMPETENT TO SETTLE DISPUTES

Treaty provisions specifying competent arbitral tribunal differ from one another in its wording. For example, article 8.1 of a Polish-Austrian treaty provides that '[a]ny dispute between one Contracting Party and an investor of the Other Contracting Party shall, to the extent possible, be settled amicably between by the parties concerned'. Item 2 of the same article further provides that: "[i]f such dispute cannot be settled in the manner set forth in item 1 within twelve months from the notification of the reasonably defined claim, upon request of the Contracting Party or investor of the Other Contracting Party, the dispute shall be submitted to mediation or arbitration (...)." ⁷ Similar provisions broadly specifying *ratione materiae* jurisdiction of an arbitral tribunal are included in treaties with e.g. the Netherlands, ⁸

⁷ Agreement between the People's Republic of Poland and the Republic of Austria on the Promotion and Protection of Investments made on 24 November 1988 (Journal of Laws 1989, no. 54, item 321).

⁸ Article 8.1 of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments made on 7 September 1992 (Journal of Laws 1994, no. 57, item 235): "[a]ny dispute between one Contracting Party and an investor of the Other Contracting Party relating to the effects of a measure taken

Finland,⁹ Spain,¹⁰ Israel¹¹ or the United States.¹² In literal meaning of the cited provision, it appears *prima facie*, that arbitral tribunal is competent to settle any dispute between the investor and the state provided they relate to the investment. It is not important whether the claim results from a breach of a treaty or only from a breach of the contract concluded between the investor and the state.

On the other side of the spectrum are the provisions, which narrowly define competence of the arbitral tribunal. For example, art. 8.1 of the treaty between

by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between by the parties concerned." Item 2 of the same Article further provides that: "[i]f such dispute cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal."

⁹ Article 8.1 of the Agreement between the Government of the Republic of Finland and the Government of the Republic of Poland on the Promotion and Protection of Investments made on 25 November 1996 (Journal of laws 1998, no. 54, item 343): "[a]ny dispute between the host Party and an investor of the other Contracting Party relating to an investment under this Agreement should be settled amicably." Item 2 of the same Article further provides that: "[i]f such dispute has not thus been settled within three months from the date at which either party to the dispute requested amicable settlement, the investor may submit the dispute to definitive settlement under the rules established by the Convention on Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March 1965."

¹⁰ Article 11.1 of the Agreement between the Republic of Poland and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments made on 30 July 1992 (Journal of Laws 1993, no. 12, item 563): "[a]ny dispute between one Contracting Party and an investor of the Other Contracting Party shall be submitted by the investors to the Party hosting the investment in the written form containing a detailed description. Contracting Parties shall, to the extend possible, attempt to amicably settle such disputes." Item 2 of the same article further provides that: "[i]f such dispute cannot be settled in such a manner within six months from the written notification referred to in item 1, the claim shall be submitted by the investor upon its discretion to (...)."

¹¹ Article 2 of the Agreement between the Government of the State of Israel and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments made on 22 May 1991 (Journal of Laws 1993, no. 124, item 561) provides that: "[u]ntil such time as the Republic of Poland becomes a member of the Centre, any dispute arising between one Contracting Party and an investor of the other Contracting Party which cannot be settled, amicably or otherwise, within three (3) months from written notification of a claim, shall be submitted, upon request, to an *ad hoc* arbitral tribunal."

¹² Article 9.1 of the Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations made on 21 March 1990 (Journal of Laws 1994, no. 97, item 467) provides that an arbitral tribunal set up according to the treaty settles disputes concerning "alleged breach of any right conferred or created by this Treaty with respect to an investment."

Poland and Great Britain provides that “[d]isputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Article 5 of this Agreement in relation to an investment of the former which have not been amicably settled shall after a period of three months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.”¹³ If jurisdiction is so narrowly defined there is no doubt that arbitral tribunal may settle only disputes resulting from breaches of specified provisions of the treaty.

Therefore, a question arises whether an arbitral tribunal constituted on the grounds of provisions of a treaty broadly defining *ratione materiae* jurisdiction will be competent to settle disputes arising from contracts or if its jurisdiction will entail exclusively cases of breaching material provisions of a treaty. Representatives of the doctrine present different opinions and the existing decisions of tribunals do not give clear answer.¹⁴

In the opinion of Ch. Schreuer if BIT assumes arbitration between an investor and a state for any disputes connected with investments and not only with respect to violations of the BIT, the tribunal is competent to settle also strictly contractual disputes.¹⁵ Ch. Schreuer emphasizes that dividing disputes into treaty and contractual to be settled by separate courts leads to a split of claims that usually result from the same factual state and may require to conduct two separate proceedings in parallel. This, in turn, would be in contradiction with the principle of economy and objective of proceedings requiring that the dispute is settled comprehensively and efficiently. Similar opinion is presented by S. Alexandrov,¹⁶ according

¹³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments made on 8 December 1987 (Journal of Laws 1998, no. 12, item 93).

¹⁴ Before commencing the presentation of arguments of representatives of both opinions, it should be emphasized that the discussion applies only to the circumstances in which, a treaty does not contain any provision on fulfilment of obligations. In case a treaty contains such a provision, the evaluation may be totally different, which shall be discussed in paragraph 3 of this article.

¹⁵ Ch. Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I case Considered*, in: T. Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, London: 2005, p. 296.

¹⁶ S. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breaches of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5(4) Journal of World Investment and Trade (2004), p. 573; similar views are presented by: J. Gaffney, J. Loftis, *The ‘Effective Ordinary Meaning’ of BITs and the Jurisdiction of*

to him ordinary meaning of broadly formulated jurisdictional provision should not raise any doubts that the expression "disputes with respect to investments" includes disputes between an investor and a host state connected with infringements of the investment contract. Article 31(1) of the Vienna Convention on the Law of Treaties states that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Having in mind the above interpretation directive and the fact that broadly formulated jurisdictional provisions do not clearly specify the subject of the dispute, but indicate that it must concern an investment (in other words, they do not distinguish between disputes connected with the investment resulting from a treaty breach or a contract breach), it seems that in the opinion of Alexandrov, there are no reasons for limiting the conceptual scope of this type of provisions.

This view is questioned by E. Gaillard, who claims that if treaties set up certain protection standards guaranteed by international law then provisions on the settlement of disputes included in treaties should, regardless of their literal interpretation, authorize arbitral tribunal to settle only infringements of these standards.¹⁷ Therefore, in case in a treaty there is no *pacta sunt servanda* provision, according to E. Gaillard, arbitral tribunal set up under the treaty should settle disputes concerning material provision of the treaty whereas disputes arising from contracts should be reserved for a court competent under this contract or under law governing it.¹⁸ Similar opinion is presented also by A. Crivellaro¹⁹, who claims that the greatest advantage of many treaties is that they create a possibility for investors to choose between different courts (including courts specified in the treaty), if, of course, the treaty includes broadly enough formulated jurisdictional provision. However, he adds that this right arises if this provision is accompanied by *pacta sunt servanda* clause. J. Crawford on the occasion of the debate on Responsibility of States for Internationally Wrongful Acts emphasizes that it is rather implausible that a state would agree to submit any disputes arising from international

Treaty-Based Tribunals to Hear Contract Claims, 8(1) *Journal of World Investment and Trade* (2007), p. 31; J. Savage, *Investment Treaty Arbitration and Asia: Survey and Comment*, 1(1) *Asian International Arbitration Journal* (2005), p. 40; G. Tawil, *The Distinction Between Contractual Claims and Treaty Claims: An Overview*, ICCA Congress 2006, Montreal, pp. 52, 53.

¹⁷ E. Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – SGS Cases Considered*, in: T. Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 2005, p. 334.

¹⁸ *Ibidem*, p. 336.

¹⁹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Dissenting Declaration, 29 January 2004, www.investmentclaims.com, item 6.

law to arbitration.²⁰ The more less plausible is that states as parties to the treaties would prefer to define the cognition of the arbitral tribunal so that it includes any claims of the investor against the state no matter what their source is.

The difference between opinions presented above resolves to a question of whether an investor enforcing his claims for contract breaches on the grounds of the treaty will have to prove that the state failed to keep to the provisions of the contract and also show that material provisions of the treaty are at the same time breached by these circumstances. Advocates of more liberal approach are of the opinion that differences in the content scope of arbitration provisions in particular treaties concluded by the same state (in some treaties they are narrowly and in others broadly defined) are made on purpose and that they ultimately express actual intention of the contracting parties. As a result one may not maintain that the interpretation of this provision will always be the same (as advocates of more conservative approach would prefer) regardless of its literal reading.

There is no doubt that it is much more difficult for the investor to prove that a state has infringed a treaty than that it has infringed a contract. Broad interpretation of the jurisdictional provision would enable to elevate the place of settling contractual disputes to the level of a treaty tribunal and also in cases in which no infringement of any material provisions of the treaty would happen.

One of the first decisions, in which the tribunal was analyzing the issues discussed above, was the decision in *Salini v. Morocco* case.²¹ Article 8 of the Italy-Morocco treaty on jurisdiction was broadly formulated and provided that arbitral tribunal settles “all disputes or differences (...) between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor (...).”²² The tribunal held that: “[a]rticle 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly.”²³ Due to the fact that the contract was concluded by the investor with an entity the acts of which could not be attributed to the state, the tribunal in this matter declared it was not competent for settling contractual claims arguing that: “[t]he jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party.”²⁴ Thus, it may be said that the tribunal was ready to accept broad

²⁰ J. Crawford, *The Continuing Debate on UN Convention on State Responsibility*, *op. cit.*, p. 970.

²¹ *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, decision on jurisdiction, 16 July 2001, www.investmentclaims.com.

²² *Ibidem*, para. 15.

²³ *Ibidem*, para. 61.

²⁴ *Ibidem*, para. 61.

interpretation of the treaty provision specifying the jurisdiction, despite the fact that due to other concerns it decided that the claim under article 8 was inadmissible.

In the *Vivendi*²⁵ case an *ad hoc* Committee²⁶ was expected to decide if a treaty tribunal was competent to analyse the content of a contract concluded by an investor and a state and particular domestic law in order to find whether material provisions of the treaty had been breached i.e. the expropriation prohibition and obligation to employ fair and equitable treatment. Although, settlement on the scope of this jurisdictional provision was irrelevant for the evaluation of the matter being a subject of the proceeding, the *ad hoc* Committee expressed its opinion on this matter.

Article 8 of the France – Argentina treaty provided that the tribunal had competence over disputes “relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.” In the opinion of the *ad hoc* Committee “Article 8 does not use a narrower formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.”²⁷

It should be emphasized that this view was also expressed in connection with the analysis of admissibility of selecting a tribunal by an investor before which he would like to enforce his claims and not in connection with the necessity to answer whether the content of a provision was sufficient for the treaty tribunal to acknowledge its competence.

Moreover, if it is confirmed that – as the *ad hoc* Committee admitted – a broadly formulated jurisdictional provision entitles the investor to enforce any

²⁵ *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, decision on annulment, 3 July 2002, www.investmentclaims.com; description of the factual situation was presented in point 4.

²⁶ *Ad hoc* Committee of three arbitrators held by the Secretary-General set up upon art. 52 of the Convention on the Settlement of Investment Disputes between States and National of Other States in order to settle if an application for annulment of the decision of an arbitral tribunal submitted by any of the parties is justified. The decision may be annulled only under five conditions enumerated in art. 52.1 of the said Convention. This possibility applies only to arbitral proceedings conducted in accordance with ICSID Rules and Regulations.

²⁷ *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, decision on annulment, 3 July 2002, *op. cit.*, paragraph 55. Some authors concluded that the Court thus had accepted broad interpretation of the jurisdictional provision, e.g.: E. Gaillard, *Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses*, 234(68) *New York Law Journal* (2005), p. 2; Ch. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf, p. 6; G.Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, *op. cit.*, p. 23, 24, fn. 94.

claim against a state provided it remains in connection with the investment, which is not difficult to show, then the sense of the whole judgement and the complex reasoning presented in it would be questioned. Namely, if a treaty tribunal were competent to settle all disputes between the investor and the state, then it would be needless for the *ad hoc* Committee to show that acts of a state breaching a contract may be subject to cognition of the treaty tribunal (which is the essence of this judgement) only if at the same time a treaty breach is found. If the *ad hoc* Committee had in fact believed that art. 8 had provided the treaty tribunal with a privilege to settle any disputes between the state and the investor on the investment, then it would not have stated that the court competence included such failure to perform the contract which was at the same time a breach of material provisions of the treaty.

Considering the above, the opinion of the *ad hoc* Committee will not help in defining the actual meaning of broadly formulated jurisdictional provisions.

The tribunal settling the dispute between *Impregilo and Pakistan*²⁸ has come to similar conclusions as the ones presented in *Salini* case. It has stated that a treaty provision broadly defining the jurisdiction of the arbitral tribunal gives it competence to settle disputes concerning contract breaches (even if the plaintiff does not allege any contract breach), but due to the fact that the contract concerned was concluded between an investor and a “state dependent entity” (and not any office or agency for which the state was responsible) it acknowledged itself as not competent. Article 9 of the Italy – Pakistan treaty provided that “[a]ny disputes arising between a Contracting Party and the investors of the other Party, including disputes relating to compensation for expropriation, nationalization, requisition or similar measures, and disputes relating to the amount of the relevant payments (...).”²⁹ In the matter concerned, the investor concluded a contract with Pakistan Water and Power Development Authority (“WAPDA”), that later made numerous violations as the investor claimed. Taking into account the finding that WAPDA was an entity of commercial law, separate from the state both in legal and in economic sense, the court came to the conclusion that: “[g]iven that the Contracts at issue were concluded between the Claimant and WAPDA, and not between the Claimant and Pakistan; (...) and given that Article 9 of the BIT does not cover breaches of contracts concluded by such an entity, it must follow that this Tribunal has no jurisdiction under the BIT to entertain Impregilo’s claims based on alleged breaches of the Contracts.”³⁰

²⁸ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, decision on jurisdiction, 22 April 2005, www.investmentclaims.com.

²⁹ *Ibidem*, para. 109.

³⁰ *Ibidem*, para. 216.

Therefore it may be supposed (although it is not sure) that the decision would be different (thus in line with broad interpretation of the provision concerned) if the contracts had been concluded by the investor with the entity (office or agency) for which the state is responsible under international law.

In the *SGS v. Philippines*³¹ case the investor was claiming the payment from the state under comprehensive import supervision services agreement (“CISS Agreement”). The treaty between Switzerland and Philippines chose the ICSID for arbitration of “disputes relating to investments”. According to E. Gaillard³² also in this case the tribunal accepted broad interpretation of the jurisdictional provision. Gaillard argues that, among others, the tribunal held that “[a] dispute about an alleged expropriation contrary to Article VI of the BIT would be a *dispute with respect to investments*; so too would a dispute arising from an investment contract such as the CISS Agreement (...)”³³ and in consequence it concluded that “[i]nterpreting the text of Article VIII in its context in the light of its objects and purpose, the Tribunal accordingly concludes that in principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII(2) of the BIT.”³⁴ In view of the entire reasons for the decision and the decision itself one may have doubts if the arbitral court did think that on the grounds of only the jurisdictional provision of the treaty it may consider itself competent to settle clearly contractual disputes, since (despite the fact that the treaty included *pacta sunt servanda* provisions) if it came to the conclusion that the court indicated in the CISS Agreement was competent.

Different viewpoint was presented in disputes between *SGS and Pakistan*³⁵ and *LESI-Dipena and Algeria*.³⁶ In the first case SGS claimed payment for services provided under pre-shipment inspection agreement (“PSI Agreement”). One of the arguments presented by the investor in order to justify the competence of the tribunal was broad scope of article 9 of the Switzerland – Pakistan treaty providing that the tribunal settles “disputes with respect to investments”. The arbitral court held that: “we do not see anything in Article 9 or in any other provision of the BIT

³¹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, decision of the tribunal on the objections to jurisdiction*, 24 January 2004, *op. cit.*

³² E. Gaillard, *Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses*, *op. cit.*, p. 2.

³³ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, decision of the tribunal on the objections to jurisdiction*, 24 January 2004, *op. cit.*, para. 135.

³⁴ *Ibidem*, par. 131.

³⁵ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, decision of the tribunal on objections to jurisdiction*, 6 August 2003, www.investmentclaims.com.

³⁶ *Consorzio Groupement L.E.S.I – DIPENTA v. People's Democratic Republic of Algeria*, award, 10 January 2005, www.investmentclaims.com.

that can be read as vesting this Tribunal with jurisdiction over claims resting ex hypothesis exclusively on contract. (...) We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.”³⁷ It is worth underlining that article 9 of the treaty was not the only reason why the arbitral tribunal acknowledged itself as not having competence. It concluded that *pacta sunt servanda* provision included in the treaty might not be interpreted as consent of a state to submit any contractual dispute to treaty provisions (which is discussed in paragraph 3 below).

In the latter case the tribunal also came to the conclusion that as long as the agreement breach did not amount to a treaty breach an arbitral tribunal set up on the grounds of treaty provisions was not competent to settle the existing dispute. Although article 8 of the Italy – Algeria treaty referred to “all disputes related to investment between the Contracting Party and investor from other Contracting Party” the arbitral tribunal held that “the consent [to submit the dispute to the arbitral tribunal] is not broad enough to include all rights and claims which may relate to the investment. The measures taken must breach the Bilateral Agreement, i.e. must be unfair or discriminatory in legal or factual terms. Therefore not every contract breach fulfils this requirement”.³⁸ The arbitral tribunal emphasized that as there was no *pacta sunt servanda* provision in the treaty, there are no proofs at all confirming that it was the intention of the parties to submit settlement of contract breaches to the treaty tribunal.

The above mentioned decisions in the cases of *Salini v. Morocco*, *Vivendi v. Argentina*, *Impregilo v. Pakistan* and *SGS v. Philippines* are often quoted in the literature as examples of cases in which arbitral tribunals were willing to accept broad interpretation of the jurisdictional provision included in the treaty, however, actually none of them acknowledged its competence on the grounds concerned (of course pointing out other formal objections). It seems then, that the standpoint that broadly formulated treaty jurisdictional provision forms sufficient legal basis to subject disputes between a states and an investor concerning contract breaches (which do not amount to breaches of material provisions of the treaty) to the arbitral tribunal constituted on the grounds of a treaty has not been explicitly confirmed in jurisprudence. Namely, up till now no tribunal has acknowledged its competence to settle disputes in this scope only on the grounds of a jurisdictional provision. However, if tribunals (which will be discussed later) acknowledged

³⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, decision of the tribunal on objections to jurisdiction, 6 August 2003, *op.cit.*, paras. 161, 162.

³⁸ *Consortio Groupement L.E.S.I – DIPENTA v. People's Democratic Republic of Algeria*, award, 10 January 2005, *op. cit.*, para. 25(i).

their competence to settle contractual disputes when a treaty contained a broad jurisdictional provision, then in any such case additional circumstances were recognized (e.g. existence of *pacta sunt servanda* provision in a treaty or simultaneous breach of other provisions of a treaty), that, in the opinion of the tribunals, obliged them to acknowledge their competence.

It is worth noting that finally such broad interpretation may originate in essential dangers for practical reasons, namely with reference to the possibility of the enforcement of a decision taken by an arbitral tribunal on the grounds of broad interpretation of the jurisdictional provision. Except for decisions taken on the grounds of the Convention on the Settlement of Investment Disputes between States and Nationals of other States,³⁹ execution of decisions of arbitral tribunals based on treaty provisions is conditioned by obtaining for it a declaration of enforceability issued by a competent national court.⁴⁰ According to art. 7.1 UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended), arbitration proceedings must be based on binding arbitration agreement stating “defined legal relationship” out of which the dispute has arisen or may arise. Provisions adopted in many states, including Poland, are based on this model law.⁴¹

However, according to article 2.1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: “[e]ach Contracting State shall recognize 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 (...).” The arbitration agreement to be acknowledged must specify precisely defined legal relationship. One may argue that a broadly formulated jurisdictional provision does not allow concluding that the above mentioned condition would be fulfilled with respect to disputes having nothing in common with the content of the treaty. However, according to art 5.1(c) of the Convention concerned: “[r]ecognition and enforcement of the award may be refused if (...) the award deals with differences not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on

³⁹ As provided by art. 54 of the Convention, it is not required that the national court declares enforceability of a decision issued by the arbitral tribunal proceeding on the basis of the Convention (this principle does not apply to decisions issued on the basis of ICSID Additional Facility Rules).

⁴⁰ K. Nathan, *The ICSID Convention. The Law of the International Centre for Settlement of Investment Disputes*, Juris Publishing, New York: 2000, p. 97; L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, Kluwer, The Hague: 2004, pp. 95, 96, 105, 106.

⁴¹ Pursuant to art. 1161 § 1 of the Polish Civil Procedure Code: “dispute may be submitted to arbitration on the basis of the agreement of the parties specifying the subject of the dispute and legal relationship out of which a dispute has arisen or may arise.”

matters beyond the scope of the submission to arbitration (...).” In view of the provisions cited above, the application of broad interpretation of the treaty jurisdictional provision may result in a situation in which the tribunal denies to declare enforceability of a decision of an arbitral tribunal due to lack of valid arbitration agreement (see also art. 1215 § 2 item 1 of the Polish Civil Procedure Code⁴²).

2. CONTRACT BREACH AND TREATY BREACH IN VIEW OF PACTA SUNT SERVANDA CLAUSE

Some of the treaties include provisions from the literal reading of which it appears that states commit themselves to fulfil any obligation assumed towards the investors. This kind of provisions in literature is referred to as *umbrella clauses*, *pacta sunt servanda*, *sanctity of contract*, *parallel effect* or *elevator clauses*. As an example, Poland – United States treaty provides that “[e]ach Party shall observe any obligation it may have entered into with regard to investments.”⁴³ Similarly provisions included in other treaties, e.g. with Great Britain,⁴⁴ the Netherlands⁴⁵ or Hungary.⁴⁶ It often happens that the scope of the said provision is narrowed to obligations assumed by the state in connection with investments made by the investors. Con-

⁴² Pursuant to art. 1215 § 2 item 1 of the Polish Civil Procedure Code: “irrespective of the grounds specified in art. 1214, the court may refuse to recognize or enforce arbitral award issued abroad (...) if a party furnishes a proof that there was no arbitration agreement.” In accordance with art. 34.2.a.(iii) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended): “[a]n arbitral award may be set aside (...) only if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (...).”

⁴³ Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations, *op. cit.*, art. 2.6.

⁴⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People’s Republic for the Promotion and Reciprocal Protection of Investments, *op. cit.*, article 2.2: “[e]ach Contracting Party shall observe any obligation it May have entered into with regard to investments of investors of the other Contracting Party.”

⁴⁵ Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, *op. cit.*, article 3.5: “[e]ach Contracting Party shall observe any obligations it May have entered into with regard to investments of investors of the other Contracting Party.”

⁴⁶ Agreement between the Republic of Hungary and the Republic of Poland on the Reciprocal Promotion and Protection of Investments made on 23 September 1992 (Journal of Laws 1995 no. 113 item 542), article 11: “[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.”

trary to appearances, this narrowing, in view of quite broad definitions of the term “investment” included in treaties and jurisprudence of arbitral tribunals broadly interpreting this notion, is not any essential limitation in the said subject matter, since it is generally assumed that rights resulting from a contract may be considered as an investment in the meaning of a treaty.

The viewpoints presented in literature regarding legal effects of a provision referring to the *pacta servanda sunt* rule included in the treaty are not the same. In the opinion of the most liberal representatives this provision “elevates” contract breaches to the level of treaty breaches. Others emphasize that it is necessary to assume interpretation which will take into account not only literal wording of the provision but its historical interpretation and the purpose and context of the treaty as well. As a consequence, they maintain that there are certain limitations requiring consideration while applying this provision.

According to Schreuer, provisions on the fulfilment of obligations “have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as umbrella clauses because they put contractual commitments under the BIT’s protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT’s substantive standards. In this way, a violation of such a contract becomes a violation of the BIT.”⁴⁷ Similar point of view is presented by Alexandrov who says that “it should hardly come as a surprise that States may wish to agree in an investment treaty to consider all contractual breaches, or breaches of other obligations undertaken by the State with respect to foreign investors, as treaty breaches. Typically, they do so in the form of an ‘umbrella clause’ or an ‘observance of undertakings clause’ providing that the host State must observe any commitments that it had undertaken with respect to the foreign investor. Thus, an umbrella clause in a treaty intends to achieve more than what is already the norm under customary international law.”⁴⁸ This view seems to be shared also by B. Cremades, who writes that: “[s]ome investment protection treaties arguably elevate contract claims to the category of treaty claims through an ‘umbrella clause’ in which the Host State undertakes, thorough the treaty, to respect its contractual commitments.”⁴⁹

⁴⁷ Ch. Schreuer, *Traveling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) Journal of World Investment and Trade (2004), p. 250.

⁴⁸ S. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breaches of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, *op. cit.*, pp. 565, 566.

⁴⁹ B. Cremades, *Investor Protection and Legal Security in International Arbitration*, Dispute Resolution Journal, May-July 2005, p. 1, www.findarticles.com/p/articles/mi_qa3923/is_200505/ai_n14717721; in other place this author writes that the effect of the *umbrella*

According to V. Zolia it is an undisputable that a contract breach by a state amounting, at the same time, to a breach of material treaty provisions results in international responsibility of the state even in lack of any *umbrella clause*. This author holds that if a provision on observing obligations appears in the treaty then it aims at ensuring investors additional protection also when the concluded contracts are breached no matter if this happens as a consequence of civil and commercial or administrative acts of the state.⁵⁰

Some representatives of the doctrine sharing liberal standpoint emphasize⁵¹ that this has been well established for many years and refer to the opinions of such notable scholars as P. Weil, F. Mann, R. Dolzer and M. Stevens, R. Jennings and A. Watts, I. Shihata, and I. Seidl-Hohenveldern.

Advocates of the broad interpretation of the *pacta sunt servanda* clause also argue⁵² that the concept of responsibility of a state under international rules and regulations for civil legal obligations has been in existence for many years and cite the following studies: draft Convention for the Mutual Protection of Private Property Rights in Foreign Countries (“Abs Draft”)⁵³, draft Convention on Foreign

clause “can be to replicate every contractual obligation in a concession contract between an investor and the Host State as a treat obligations”, which might suggest that only a breach of certain category of contracts will entitle the investor to submit claims under the treaty (Cremades B., Cairns D., *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes*, in: N. Horn (ed.), *Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects*, Kluwe, The Hague: 2004, p. 328).

⁵⁰ V. Zolia, *Effect and Purpose of ‘Umbrella Clauses’ in Bilateral Investment Treaties, Unresolved Issues*, 2(5) TDM (2005), pp. 34–35.

⁵¹ For example, the following authors: S. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breaches of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, *op. cit.*, s. 566–568; B. Kunoy, *Singing in the Rain, Developments in the Interpretation of Umbrella Clauses*, 7(2) *Journal of World Investment and Trade* (2006), p. 282; Ch. Schreuer, *Traveling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road*, *op. cit.*, pp. 250, 251.

⁵² For example S. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breaches of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, *op. cit.*, s. 566; A. Sinclair, *Contractual Claims, Courts, and Bilateral Investment Treaties*, in: F. Ortino, A. Sheppard, H. Warner (eds.), *Investment Treaty Law*, London 2006, pp. 202–207; A. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20(4) *Arbitration International* (2004), pp. 411–434; G. Tawil, *The Distinction Between Contractual Claims and Treaty Claims: An Overview*, *op. cit.*, p. 36, 37; J. Weber, P. Muchliński, *Investor-State Disputes Arising from Investment Treaties*, New York and Geneva: 2005, pp. 19, 20.

⁵³ In 1958 a group of German intellectuals led by Herman Absen prepared a draft Convention for the Mutual Protection of Private Property Rights in Foreign Countries. The authors aimed at showing capital exporting countries the necessity to adopt a uniform system of foreign investment protection, Abs’s draft did not include any provision on the performance of obligations of the content appearing in today’s treaties. It only prohibited limitation

Investments ("Shawcross Draft")⁵⁴, draft Convention on Investments Abroad ("Abs-Shawcross Draft")⁵⁵, draft Convention on the Protection of Foreign Property of 1968] ("OECD Draft")⁵⁶.

In literature also less liberal views are presented. According to S. Schwebel "there is more than doctrinal authority in support of the conclusions that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a 'non-commercial' act of a State contrary to such a contract may be. This is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law."⁵⁷

or cancellation by laws, regulations, administrative measures or in some other way of licenses under public law in the field of trade and industry which confer upon the licensee a long-term title (H. Abs, *Proposals for Improving of Private Foreign Investments*, Institut. International d'Etudes Bancaires, Rotterdam: 1958, pp. 34, 35).

⁵⁴ In 1958 Sir Hartley Shawcross along with English and continental lawyers presented a *Convention on Foreign Investments*. This was meant to be a further proposal to remedy the problems encountered by foreign investors due to, among others, failure to observe obligations by host states and lack of protection measures beyond domestic judicature. Shawcross Draft provided for application by the States of the rule *pacta sunt servanda* to their "specific engagements" with aliens howsoever arising (M. Brandon, *An International Investment Code: Current Plans*, 7 Journal of Business Law (1959), p. 20).

⁵⁵ Drafts prepared by Abs and Shawcross have been fused into one draft named draft Convention on Investments Abroad. Article II provided that: "[e]ach Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party." (G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 Journal of Public Law 1960, p. 154). It seems that Abs-Shawcross's draft is the first document (or rather critical analysis) in which this way formulated provision referring to observance of obligations were included.

⁵⁶ In 1959 RFN submitted to the Organization for European Economic Co-operation (transformed into the Organisation for Economic Cooperation and Development – "OECD" Abs-Shawcross's draft as a proposal for works over model convention on the protection of foreign investments. Draft Convention on the Protection of Foreign Property was finally accepted by the OECD Council in October 1967. Article 2 of the draft provided that "[e]ach Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party" (Organisation for Economic Cooperation and Development Publication' 1968, Nr 23081, p. 117). Many member states of the OECD expressed their objections to the said draft arguing that it excessively favours (article 2 in particular) capital exporting countries and as a result the works over the convention have been suspended.

⁵⁷ S. Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*, in: S. Schwebel (ed.), *Justice in International Law, Selected Writings of Stephen M. Schwebel Judge of International Court of Justice*, Cambridge University Press, Cambridge: 1994, pp. 431, 432.

This opinion is shared by C. Lamm, who claims that “[u]mbrella clauses in BITs prohibit States from exercising sovereign authority to avoid obligations they may have entered into with respect to investments. Umbrella clauses are not insurance policies against the State’s ordinary breaches of contract, and they do not convert breach of contract claims into international law claims.”⁵⁸

Similar in spirit are the opinions expressed in the Restatement of Foreign Relations Law of the United States, Third (“Restatement Third”). As provided by paragraph 712: “[a] state is responsible under international law for injury from (...) a repudiation or breach by the state of a contract with a national of another state where the repudiation or breach is (i) discriminatory; or (ii) motivated by non-commercial considerations, and compensatory damages are not paid (...)”.

Some authors criticise the argument that various types of conventions drafted in the past confirm the thesis of broad interpretation of the provision on observing obligations. According to T. Wälde, authors of the Abs Draft, Shawcross Draft, Abs-Shawcross Draft and OECD Draft, tacitly assumed that the *pacta servanda sunt* provision should apply only to situations in which a contract breach results as a consequence of performing by a state its rights within its sovereign capacity and not as a consequence of commercial actions.⁵⁹ These analyses prove that the attempts to codify the rules relating to protection of foreign investments finished in failure since the states did not want to accept guarantees proposed therein including those resulting from *pacta servanda sunt* rule. From this point of view, it is difficult to argue that the drafts referred to above confirm the consent of the states for broad interpretation of the provision on the observance of obligations. A. Fatouros, while making comments on contemporary attempts to prepare a multilateral convention on the protection of investments held that “the general adoption of an effective investment code appears unlikely for several reasons. (...) It seems certain that many states, including several capital-exporting ones, would not be prepared to undertake far-reaching commitments in this connection. Most of the proposed draft codes are one-sided in another way, too. They provide for the protection of the investor’s interests without attempting to safeguard the host state’s interests.”⁶⁰

Considering the above context it is worthy to draw attention to Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens

⁵⁸ C. Lamm, *The applicable rules of law to disputes between state entities and private companies – the interaction between contract arbitration and treaty arbitration*, 21st Joint Colloquium on International Arbitration, Paris, 19 November 2004, p. 7.

⁵⁹ T. Wälde, *The ‘Umbrella’ Clause in Investment Arbitration – A Comment on the Original Intentions and Recent Cases*, 6(2) *Journal of World Investment and Trade* (2005), pp. 202–205.

⁶⁰ A. Fatouros, *An International Code to Protect Private Investment – Proposals and Perspectives*, 14 *University of Toronto Law Journal* (1961), pp. 100–101.

published by L. Sohn and R. Baxter in 1961. According to the above publication, so called, simple failure to perform a contract may not result in international legal responsibility of a state.⁶¹

The attempts to codify the *pacta sunt servanda* rule illustrate that many states resisted and still resist accepting that any failure to fulfil its obligations may be acknowledged as a breach of international law by that state.⁶² This is still confirmed by works led by OECD over the draft on multilateral agreement on investment conducted between 1995 – 1997, which also ended in a fiasco.⁶³ The Report of the Drafting Group Concerning the Protection of Investor Rights Arising from Other Agreements⁶⁴ shows that the most serious doubts revolved around the subject matter of the *pacta sunt servanda* provision i.e. whether it should concern all rights arising from the contract between an investor and a state or only a part of them and if so what the distinguishing criteria would be.

In 1992 The World Bank Guidelines were published. According to art. 4.11 a state is responsible for and obliged to pay out compensation for failure to perform a contract concluded with an investor, on the same conditions as in the case of expropriation, “where the State acts as a sovereign and not as a contracting party. Compensation due to the investor in such cases will be determined in the light of the provisions of Sections 2 to 9 of this Guideline. Liability for repudiation of contract for commercial reasons, i.e. where the State acts as a contracting party, will be determined under the applicable law of the contract”.⁶⁵ Although this document

⁶¹ L. Sohn, R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55(3) American Journal of International Law (1961), pp. 566–575 (comment to art. 12).

⁶² Other unsuccessful attempts to codify the rules on protection of investments, see G. Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2007, pp. 18–23, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Georg Mason Law Review (2006), p. 140 and literature indicated by this author in fn 18; as an example two treaties on investment protection may be mentioned which have not come into force due to divergence of opinions, these are: *Charter of the International Trade Organization* signed in Havana on 24th March 1948 and *Economic Agreement of Bogota* signed on 2nd May 1949. As A. Fatouros notices, despite the fact that the attempt to agree the content of both agreements was successful, each provision included so many exceptions, restrictions and imprecise formulations (e.g. blanket clauses) that in practice the effectiveness of protection of foreign investments on the grounds of the said provisions would be rather doubtful. (A. Fatouros, *An International Code to Protect Private Investment – Proposals and Perspectives*, op. cit., pp. 79–82).

⁶³ Draft Multilateral Agreement on Investment, www.oecd.com.

⁶⁴ Report of the Drafting Group Concerning the Protection of Investor Rights Arising from Other Agreements, www1.oecd.com/daf/mai/pdf/dg1/dg1961r1e.pdf.

⁶⁵ The World Bank Guidelines, <http://ita.law.uvic.ca/documents/WorldBank.pdf>.

did not have any binding force, undoubtedly, it is an example how the issue concerned is understood by the World Bank.⁶⁶

As it has already been pointed above, in literature, in favour of broad interpretation of the protection clause, the opinions of the following authors are cited: F. Mann⁶⁷, R. Dolzer and M. Stevens⁶⁸, R. Jennings and A. Watts⁶⁹,

⁶⁶ From the Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment it appears that art. 4.11 aimed not exactly at protecting investors against acts of a state performed in its sovereign capacity resulting in failure to perform the contract and remaining in contrary to the domestic law as they are subject to appeal to a competent court or body but against acts that do not infringe domestic law but result in repudiation of contractual obligations by the state (Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment, in: I Shihata (ed.), *Legal Treatment of Foreign Investment The World Bank Guidelines*, Springer, Dordrecht: 1993, pp. 213, 214); more on the origin and the works on The World Bank Guidelines see: I Shihata, *The World Bank Group's New Guidelines on the Treatment of Foreign Direct Investment*, in: *The World Bank in a Changing World: Selected Essays and Lectures*, The Hague 1995 vol. 2, p. 587 and further.

⁶⁷ F. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *British Yearbook of International Law* (1981), p. 246: "[t]he treaties usually contain a further provision guaranteeing the success of the investment: each party shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment. This is a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act and independently of the question whether or not such interference amounts to expropriation. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of a local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities) – these and similar acts the treaties render wrongful."

⁶⁸ R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, Kluwer Law International, The Hague: 1995, pp. 81, 82: 'Umbrella Clauses. These provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of a contract or by administrative or legislative acts, and because it is not clear under general international law whether such measures constitute breaches of an international obligation'.

⁶⁹ R. Jennings and A. Watts, *Oppenheim's International Law*, Oxford University Press, London: 1992, vol. 1, p. 927: "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes per se a breach of international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility. However, either by virtue of a term in the contract itself or of an agreement between the state and the alien, or by virtue of an agreement between the state allegedly in breach of its contractual obligations and the state of which the alien is a national, disputes as to compliance with the terms of contracts may be referred to an internationally composed tribunal, applying, at least in part, international law."

I. Shihata⁷⁰, J. Karl⁷¹ and I. Seidl-Hohenveldern.⁷² T. Wälde referring to views presented by the most notable representatives of the doctrine comes to the conclusion that “[t]he question of whether an international arbitral tribunal had jurisdiction over contractual counter-claims was never fully examined (...)”⁷³ and “[t]here is no evidence that the fathers of this clause ever intended to create a treaty-based forum for adjudicating all contractual disputes between State entities and foreigners.”⁷⁴ It is worth noting that none of the authors cited by advocates of the broad interpretation of the provision on the observance of obligations has presented any full analysis of the meaning of this provision, e.g. what are the necessary conditions and restrictions on how to understand the notion of obligation and what is its subjective scope. Moreover, the fragments cited in this article (generally whole statements of particular authors on the analysed issue) do not settle if, when saying about equating a failure to perform a contract with a treaty breach, they meant all cases or only ones resulting from performance of rights in sovereign capacity.

Attempts to formulate a provision on observance of obligations should be viewed in a wider context of international relations. In the first half of the XXth century and in ‘60s and ‘70s of this century the standpoints of developed and

⁷⁰ I. F. I. Shihata, *Applicable Law In International Arbitration: Specific Aspects In Case of the Involvement of State Parties*, in: *The World Bank in a Changing World: Selected Essays and Lectures*, 1995, vol. 2, p. 601: “(...) treaties may furthermore elevate contractual undertakings into international law obligations, by stipulating that breach by one State of a contract with a private party from the other State will also constitute a breach of the treaty between the two States.”

⁷¹ J. Karl, *The Promotion and Protection of German Foreign Investment Abroad*, 11(1) ICSID Review (1996), p. 23. Making the analysis of a model treaty J. Karl says that umbrella clause “relates particularly to investment contracts between the investor and the host country which often contain very detailed rules.” He emphasizes that “sometimes, countries are reluctant to accept this provision which transforms responsibility incurred towards a private investor under a contract into international responsibility. They argue that there is no reason why an investor should have the privilege of being protected by international law.”

⁷² I. Seidl-Hohenveldern, *Collected Essays on International Investments and on International Organizations*, Kluwer Law International, The Hague: 1998, p. 199. In the opinion of this author: “[m]any Investment Protection Treaties contain a clause, whereby the host State concerned promises to the home State of the investor to abide by the promises made in such investment agreements. The Treaty thus fulfils the function of an ‘umbrella’. Should the host State fail to observe its commitments under such an agreement, without being entitled to do so in conformity with the rules of public international law, such action could amount to an international delinquency, even if we were to deny to ‘quasi-international’ contracts the rank in public international law, attributed to them by a part of the doctrine.”

⁷³ T. Wälde, *The ‘Umbrella’ Clause In Investment Arbitration – A comment on the Original Intentions and Recent Cases*, *op. cit.*, p. 208.

⁷⁴ *Ibidem*, p. 205; see also p. 191.

developing countries on the scope of protection of foreign investments were totally different even on very fundamental issues such as admissibility of expropriation and the amount of compensation for expropriation. As an example, numerical superiority of socialistic countries made it possible to adopt a few resolutions confirming the rights of states to conduct expropriations and to impose an obligation to pay “adequate” compensation pursuant to national law (and not international law) at the General Assembly of the UN.⁷⁵ The standpoints of both parties of the conflict invoking international customary law were clear. Developing countries referred to, so-called, Calvo doctrine, in which the fundamental assumption includes the rule of non-intervention of international law into internal system of a state. Thus according to this doctrine, foreigners had only such rights as those enjoyed by its citizens and any compensation for damages might be claimed only within domestic law. Capital exporting countries favoured, so called, Hull rule, according to which compensation for damages should be executed under international law. As there was no agreement with regard to fundamental issues, it would be difficult to say that there was a consensus on “internationalization” of contractual obligations.

C. Brower recapitulates this whole situation by saying that “[d]espite the apparent widespread acceptance in international legal doctrine of the principle of sanctity of contract in one form or another, the actual behaviour of states has not evidenced such widespread acceptance of the principle in practice.”⁷⁶

Jurisprudence of international arbitral tribunals also shows essential differences therefore it is not possible to say that uniform practice has been created in this respect.

It seems that the first decision in which the issue of the interpretation of *pacta sunt servanda* rule appeared was the decision in the *Fedax v. Venezuela* case⁷⁷. The dispute arose from the Venezuela – the Netherlands⁷⁸ treaty in connection with the denial to pay for promissory notes issued by the government of Venezuela.

⁷⁵ General Assembly Resolution on Permanent Sovereignty over Natural Resources of 14 December 1962, G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No. 17), p. 15; *Charter of Economic Rights and Duties of States* of 12 December 1974, G.A. Res. 3281 (XXIX), 29 UN GAOR, Supp. (No. 31), p. 50.

⁷⁶ C. Brower, *The Future for Foreign Investment - Recent Developments in the International Law of Expropriation and Compensation*, in: V. Cameron (ed.), *Private Investors Abroad - Problems and Solutions in International Business in 1975*, New York 1976, pp. 106, 107.

⁷⁷ *Fedax N.V. v the Republic of Venezuela*, Award of 9 March 1998, www.investmentclaims.com.

⁷⁸ Article 3(4) of the treaty provided that: “[e]ach Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.”

The tribunal acknowledged, without any detailed analysis of the issue⁷⁹ that the refusal to purchase promissory notes was a breach of an obligation laid down in article 3(4) of the treaty between Venezuela and the Netherlands.⁸⁰

Only in 2003, the tribunal in the *SGS v. Pakistan*⁸¹ case presented more detailed analysis of the *pacta sunt servanda* provision. SGS claimed unpaid amounts under PSI Agreement concluded with Pakistan, arguing that Pakistan breached the provision on the observance of commitments included in the treaty.⁸² On the other hand, Pakistan raised an objection as to the lack of competence on the part of the tribunal since the claims of SSG were contractual in nature. The Tribunal did not agree with SSG and held that: “[a]s a matter of textuality therefore, the scope of Article 11 of the BIT (...) appears susceptible of almost indefinite expansion. The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (...) are automatically ‘elevated’ to the level of breaches of international treaty law. Thus, it appears to us that while the Claimant has sought to spell out the consequences or interferences it would draw from Article 11, the Article itself does not set forth those consequences.”⁸³ In order to support this thesis, the tribunal argued that SSG had not presented unambiguous and clear evidence that it had been the intention of the parties to extend the scope of article 11 to contractual claims. It also emphasized that acknowledgement of the SGS interpretation would in consequence lead to a situation in which even minor failure to perform a contract concluded between a state and an investor or failure to perform any other obligation would amount to a breach of international law, which surely was not the intention of the parties to the treaty at the time they were signing and ratifying it and moreover other material provisions of the treaty in this case would become unnecessary.

⁷⁹ T. Wälde, *Energy Charter Treaty-based Investment Arbitration Controversial Issues*, 5(3) Journal of World Investment and Trade (2004), p. 392.

⁸⁰ The tribunal acknowledged that it “is fully satisfied that the purchase by Fedax N.V. of the promissory notes subject matter of the request for arbitration meets the requirements of an investment both under the Convention and the Agreement. It follows that the Republic of Venezuela is under the obligation to honour precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement (...)” (*Ibidem*, para. 29).

⁸¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, decision of the tribunal on objections to jurisdiction, 6 August 2003, *op.cit.*

⁸² Article 11 of the treaty between Switzerland and Pakistan stated that: “[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party” (*Ibidem*, para. 163).

⁸³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, decision of the tribunal on objections to jurisdiction, 6 August 2003, *op.cit.*, para. 166.

The tribunal also draw attention to the location of the *umbrella clause*, namely it pointed out that it was among final provisions and not provisions defining standards of protection guaranteed to the investors. Finally the tribunal noticed that art. 11 only obliged the states to provide institutional-and-legal measures, which would enable the party to enforce claims in a given state in case a dispute arose from a contract signed between an investor and a state. Additionally it is worth emphasizing that the tribunal supported the opinion presented in *Vivendi v. Argentine* (see paragraph 4 below) that there was a difference between treaty and contractual claims and if a treaty claim had its source in acts or omissions of the state in connection with the contract then the treaty tribunal would have been competent to adjudicate, which was not the case in the analysed factual state.⁸⁴

A few months later another tribunal was settling the case between *SGS and Philippines*⁸⁵ under Swiss – Philippines treaty.⁸⁶ The tribunal clearly dissented from the ruling in *SGS v. Pakistan* case holding that “[n]ot only are the reasons given by the Tribunal in *SGS v. Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the umbrella clause.”⁸⁷ According to the tribunal the *pacta sunt servanda* provision “makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investment.”⁸⁸ Moreover, the tribunal underlined that “*SGS v. Pakistan* Tribunal appears to have thought that the broad interpretation which it rejected would involve a full-scale internationalization of domestic contracts – in effect, that it would convert investment contracts into treaties by way of what the Tribunal termed ‘instant transubstantiation’. But this is not what Article X(2) of the Swiss-Philippines Treaty says. (...) It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained.”⁸⁹ Despite categorical opinions of the tribunal on the effects resulting

⁸⁴ *Ibidem*, paras. 146–155.

⁸⁵ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, decision of the tribunal on the objections to jurisdiction, 24 January 2004, *op. cit.*

⁸⁶ Article X(2) of the treaty between Switzerland and Philippines provided that : „[e]ach Contracting Party shall observe any obligations it has assumed with regard to specific investments in its territory by investors of the other Contracting Part” (*Ibidem*, para. 34).

⁸⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, decision of the tribunal on the objections to jurisdiction, 24 January 2004, *op. cit.*, para. 125.

⁸⁸ *Ibidem*, para. 128.

⁸⁹ *Ibidem*, para. 126.

from article X(2) of the Swiss – Philippines treaty, the content of the ruling is not unequivocal. Considering the provision on the settlement of disputes included in the CISS Agreement, the tribunal declared itself not competent and suspended the proceedings till legal measures were exhausted by SGS in Pakistan. It argued that SGS was not entitled to enforce claims connected with breaches of agreement concluded with Pakistan before a treaty tribunal on the grounds of the *pacta sunt servanda* provision contrary to the provision entailed in the CISS Agreement stipulating jurisdiction of common courts.⁹⁰ As a consequence, the tribunal came to the conclusion that this provision is a detailed norm with regard to jurisdictional provision of the treaty. Ambiguity of the said ruling is that on the one hand the court confirmed that the *pacta sunt servanda* provision “elevates” contractual claims to the level of treaty claims but on the other hand, in principle, it declared itself incompetent to rule on these claims (after all considering them as treaty claims) till domestic courts issued judicial decisions of legal validity concerning the dispute arising from the agreement. It is not clear as well, within what period and in what circumstances the plaintiff could demand to institute proceedings *de novo*.

A. Crivellaro in a separate opinion to the above ruling questioned this approach: “[a]s worded in the Decision (paras. 140 and 141), the question is whether the BIT dispute clause ‘overrides’ or ‘replaces’ the contract dispute clause. (...) In the reality, neither one of the two provisions ‘overrides’ or ‘replaces’ the other. They both survive and coexist. Article 12 of the CISS Agreement remains effective (...), except for the fact that the domestic forum ceases to be the ‘exclusive’ forum from the investor’s perspective. SGS could have brought the dispute to either the domestic courts or to the ICSID Tribunal.”⁹¹ He also added that “[c]onsequently, SGS’s claim seemed to me fully admissible before our Tribunal, without first being processed before the domestic court as to quantum matters. If our jurisdiction derives from (also) Article X(2), as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim, including quantum, after proper examination of either party’s future arguments and defences.”⁹²

The issue under discussion was also analysed by a tribunal in the dispute *Joy Mining v. Egypt*.⁹³ *Joy Mining* and state administration agency concluded a contract

⁹⁰ *Ibidem*, para. 155.

⁹¹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Dissenting Declaration, 29 January 2004, *op.cit.*, item 4.

⁹² *Ibidem*, point 11.

⁹³ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, award on jurisdiction, 6 August 2004, www.investmentclaims.com.

for sales and maintenance of mining equipment. Under this contract *Joy Mining* issued a performance bond. The dispute concerned the quality of supplied equipment and Egypt's refusal to return the bond. The court declared itself not competent due to lack of the fundamental prerequisite i.e. investment. Despite that with reference to article 2(2) of the treaty between Great Britain and Egypt obliging the parties to observe their commitments the court said 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".⁹⁴ The value of the above ruling for establishing the interpretation of the *pacta sunt servanda* provision is limited for two reasons. First, the court dismissed the claims of *Joy Mining*, second, it is not clear what circumstances would be necessary to take advantage of the protection stipulated in this provision. Thus, if the necessity to demonstrate the infringement of other material provisions of the treaty would make a 'link' then concerns may arise that, as V. Zolia notices, the *umbrella clause* may, in some sense, become a *superfluum*.⁹⁵

In the *Eureko v. the Republic of Poland*⁹⁶ case the tribunal came to another conclusion. In the concluded agreements the State Treasury committed to sell additional package of PZU shares (it must be noted that in this respect arbitrators were of different opinions: arbitral tribunal held that the State Treasury had accepted an obligation to achieve certain result whereas J. Rajski in his dissenting opinion to the said award held that the State Treasury had undertaken a duty of due care and diligence⁹⁷), which finally did not come into effect. As provided by article 3.5 of Poland – the Netherlands treaty: "[e]ach Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party."⁹⁸ The tribunal found that "[t]he immediate, operative effects of Article 3.5 are two. The first is that Eureko's contractual

⁹⁴ *Ibidem*, para. 81.

⁹⁵ V. Zolia, *Effect and Purpose of 'Umbrella Clauses' in Bilateral Investment Treaties Unresolved Issues*, *op.cit.*, p. 39.

⁹⁶ *Eureko B.V. v. Republic of Poland*, partial award, 19 August 2005, *op.cit.*

⁹⁷ *Eureko B.V. v. Republic of Poland*, Jerzy Rajski's Dissenting Opinion, 19 August 2005, *op.cit.*, para. 5.

⁹⁸ Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, *op. cit.*

arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal, a conclusion that reinforces the jurisdictional conclusions earlier reached in this Award. The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 and 5 of the Treaty nevertheless may be breaches of Article 3.5 of the Treaty, since they transgress Poland's Treaty commitment to 'observe any obligations it may have entered into' with regard to Eureko's investments."⁹⁹

From the fragment cited above it results first, that the tribunal is competent to settle a dispute arising from the agreements between *Eureko* and Poland, regardless of the fact that according to the said agreements common courts were the competent ones, second a breach of contracts is at the same time a breach of article 3.5 the treaty, third responsibility under article 3.5 does not require to prove that other material provisions of the treaty have been breached, forth, it seems that (although it has not been clearly stated by the tribunal) that under article 3.5 the responsibility of the state is not limited only to such breaches of and agreement which arise as a result of actions taken in its sovereign capacity (but they also include actions civil and commercial in character). The reasons for the award of the tribunal are rather limited and therefore it is hardly possible to present the motives behind this decision.

In particular, it is not clear why the tribunal citing fragments of the reasons for the judgement in the *SGS v. Philippines* case and acknowledging them as "cogent and convincing"¹⁰⁰ in its decision came to conclusions absolutely different from those presented in the judgement in the *SGS* case although both factual states in the analysed scope were almost identical.

It is also striking that one of the arbitrators, namely S. Schwebel who in literature clearly says (see above) that the infringements of an *umbrella clause* may occur only as a result of a failure of the state to perform a contract concluded with an investor arising from acts in its sovereign capacity, in the reasons for the judgement presented a dissenting opinion.

Refusal to sell a package of PZU shares was a consequence, at least in legal terms, of belief of Polish party (which directly appears from the content of the award justification¹⁰¹), that it had undertaken a duty of due care and diligence whereas *Eureko* argued that essentially it had been an obligation to achieve the envisaged result. The parties were in dispute as to the content of the legal relation between them (which extended also to the level of the composition of the arbitral tribunal).

⁹⁹ *Eureko B.V. v. Republic of Poland*, partial award, 19 August 2005, *op.cit.*, para. 250.

¹⁰⁰ *Ibidem*, para. 257.

¹⁰¹ *Ibidem*, para. 149.

In literature and jurisprudence it is emphasized that failure to perform a contract resulting from different interpretation of the contract by the parties may not be qualified as a treaty breach. S. Schwebel – a member of the tribunal presented such view in his earlier publications.¹⁰² According to F. Mann, a situation “in which a state that is a debtor presents specific interpretation of its obligations (...) and the state creditors question said interpretation (...)” is an example of no breach of international law. In this case there is a dispute which is assumed to be a real one and result from law in force at the date of signing the contract. If the interpretation of the state – debtor turns out to be wrong and a “contract breach” arises it is hardly possible that this case would form grounds for suing for a “contract breach” on the grounds of international law.¹⁰³ It should be reminded that F. Mann was cited in the justification in favour of broad interpretation of the *pacta sunt servanda* provision.¹⁰⁴ The tribunal made no mention of the issue that a dispute resulting from differences in interpretation of the contract’s provisions might not, as a rule, result in an acknowledgement that a state breached a treaty (even if this dispute would be settled against this state).

J. Rajski protested against such interpretation of the *pacta sunt servanda* provision in his dissenting opinion saying that “the majority of this Tribunal has created a potentially dangerous precedent” by allowing “foreign parties to commercial contract who may easily transform their contractual disputes with State-owned companies into BIT disputes.”¹⁰⁵

In the case of *Noble Ventures v. Romania*¹⁰⁶ the tribunal was analysing a provision on the observance of commitments on the grounds of the United States – Romania treaty.¹⁰⁷ The dispute arose in connection with a privatization agreement on purchase and maintenance of an enterprise in steel industry. Considering literal wording of article II(2)(c) of the treaty, the tribunal held that it was the intention of the parties to complement the treaty with an additional obligation, above

¹⁰² S. Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*, *op. cit.*, p. 429

¹⁰³ F. Mann, *State Contracts and State Responsibility*, 54(3) *American Journal of International Law* (1960), p. 574; see also comments to para. 712 *Restatement Third* (“Termination or failure to fulfil is not a breach of international law (...) if it is a result of the dispute *bona fide* with regard to obligations or performance”).

¹⁰⁴ *Eureko B.V. v. Republic of Poland*, partial award, 19 August 2005, *op. cit.*, para. 251

¹⁰⁵ *Eureko B.V. v. Republic of Poland*, Jerzy Rajski’s Dissenting Opinion, 19 August 2005, *op. cit.*, para. 11.

¹⁰⁶ *Noble Ventures v. Romania*, award, 12 October 2005, www.investmentclaims.com.

¹⁰⁷ Article II(2)(c) of the treaty between the United States and Romania stated that “[e]ach Party shall observe any obligation it may have entered into with regard to investments” (*Ibidem*, para. 32).

the ones resulting from other norm of the treaty and the content of the *pacta sunt servanda* provision indicated that it referred to contractual obligations and not to general assurances resulting e.g. from legal acts. In its opinion such provision “would be very much an empty base unless understood as referring to contracts.”¹⁰⁸ However, the tribunal drew attention to special character of the provision of this type which “introduces an exception to the general separation of States obligations under municipal and under international law.”¹⁰⁹ Considering this special feature, “the identification of a provision as an ‘umbrella clause’ can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms and, more generally, in accordance with the well know customary rules codified under Article 31 of the Vienna Convention on the Law of Treaties (1969),”¹¹⁰ as a consequence article II(2)(c) of the treaty is an obligation to observe commitments that assimilate contractual obligations with treaty obligations.¹¹¹ In the subject matter, the claims of *Noble Ventures* were dismissed because the tribunal found that there was no essential obligation on the part of Romania and besides the claimant did not present any evidence for breaching the contract. Considering the above and despite the arguments presented by Romania that the *pacta servanda sunt* provisions protect investors only against actions of a state within the *imperium* domain, the tribunal came to the conclusion that it does not have to declare whether the *umbrella clause* “perfectly assimilates to breach of the BIT any breach by the host State of any contractual obligation as determined by its municipal law or whether the expression ‘any obligation’, despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT.”¹¹²

An objection to equating contractual claims with treaty claims was expressed by a tribunal settling the dispute *El Paso v. Argentina*¹¹³ resulting from alleging Argentina to have breached a set of contracts (including royalty contracts). Article II.2.c of the United States – Argentina treaty provides that “[e]ach Party shall observe any obligation it May have entered into with regard to investments.”¹¹⁴ Presenting detailed analysis of the existing jurisprudence, the tribunal came to the conclusions that: “an umbrella clause cannot transform any contract claim into a treaty claim” and therefore ‘article II of the BIT (...) will not extend the Treaty

¹⁰⁸ *Noble Ventures v. Romania*, award, 12 October 2005, *op.cit.*, para. 51.

¹⁰⁹ *Ibidem*, para. 55.

¹¹⁰ *Ibidem*, para. 55.

¹¹¹ *Ibidem*, para. 60.

¹¹² *Ibidem*, para. 61.

¹¹³ *El Paso Energy International Company v. Argentine Republic*, decision on jurisdiction, 27 April 2006.

¹¹⁴ *Ibidem*, para. 70.

protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign – such as a stabilization clause – inserted in an investment agreement.”¹¹⁵ Thus the tribunal dissented from the ruling in the *SGS v. Philippines* case holding it as internally inconsistent¹¹⁶ and the ruling in the *Eureko* case citing with approbation a part of the dissenting opinion of J. Rajska severely criticizing the opinion of the tribunal on the effects of the provision on the observance of commitments.¹¹⁷ The tribunal emphasized that it shared the standpoint presented in the *SSG v. Pakistan* or *Joy Mining v. Egypt*¹¹⁸ cases. The settlement and the arguments of the tribunal analysing the claims of El Paso was repeated in the ruling concerning the jurisdiction in the *Pan American and BP v. Argentina* case (which is not surprising considering the identity of two from three arbitrators including the chairman in both cases).¹¹⁹

Summing up, in cases *SGS v. Pakistan*, *Pan American and BP v. Argentina* and *El Paso v. Argentina* the possibility to submit clearly contractual claims before a treaty tribunal was rejected. The tribunal settling the dispute between *SGS and Philippines* came to an adverse conclusion but admitted also that if a contract between a state and an investor included a clause for arbitration then the treaty tribunal would not be competent, which makes this ruling, from practical point of view, almost identical with the ruling in the *SGS v. Pakistan* case. On the other extremity there are rulings in *Fedax and Eureko* cases, in which the tribunals with one voice admitted that the *umbrella clause* “elevates” contractual claims to the level of treaty claims although they did not present any detailed analysis of the issue. On the other hand, on the grounds of rulings in *Joy Mining* and *Noble Ventures* cases it may be assumed that tribunals were willing to attribute certain results to this clause. However, as the claims of the investors were dismissed due to lack other prerequisites for state responsibility; the said tribunals concluded that they did not have to make any detailed analysis of conditions the fulfilment of which would allow for bringing the state to justice.

The decisions of arbitral tribunals presented above show that there are still substantial differences as for the results of the *pacta sunt servanda* provision included

¹¹⁵ *Ibidem*, paras. 81, 82.

¹¹⁶ *Ibidem*, para. 76.

¹¹⁷ *Ibidem*, para. 77.

¹¹⁸ *Ibidem*, paras. 71, 78.

¹¹⁹ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, decision on preliminary objections, 27 July 2006, www.investmentclaims.com, paras. 71–116.

in a treaty,¹²⁰ although in the paper of 2007 K. Hober claims that: “[t]he current view appears to lean towards the exclusion of purely, or predominantly, commercial and contract-based disputes from the ambit of treaty protection.”¹²¹

3. CONTRACT BREACH AND BREACH OF ANY TREATY PROVISION OTHER THAN PACTA SUNT SERVANDA CLAUSE

Further doubts arise from cases in which the arbitral tribunal acknowledges that it is not competent to settle disputes including only breaches of a contract between an investor and a host state. Namely, a question comes up whether considering the above the tribunal should analyse if the factual state, in principle exhausted in the contract breach may be at the same time considered as a breach of other material provisions of the treaty, as e.g. obligation to ensure equitable and fair treatment, non-discriminating treatment or obligation not to take actions resulting in expropriation and nationalization.¹²²

The issue of relation of a contract breach to a breach of material provisions of a treaty was a subject of the ruling in the *Compania de Aguas del Aconquija S.A. and Argentina* case. The dispute arose with regard to long-term concession agreement for providing water supply and sewage services in the Province of Tucuman. These services were provided by *Compania de Aguas del Aconquija S.A. („CAA”)* – a subsidiary of *Compagnie Générale des Eaux* (currently *Vivendi Universal*). Shortly after the agreement had been signed, local authorities took actions such as encouraging customers not to pay bills for provided services, imposing improper taxes and penalties and unilateral changes of the contract, which in consequence made it impossible for CAA to provide services. The contract provided that disputes between the parties concerning its interpretation and performance should be settled by contentious administrative courts of Tucuman. *Vivendi* instituted arbitral proceedings on the grounds of France – Argentina treaty alleging that actions and omissions of federal authorities of Argentina and local authorities of Tucuman, for which Argentina bore responsibility, constituted a breach of the obligation to ensure equitable and fair treatment and not to perform expropriation without compensation.

¹²⁰ See also D. Foster, *Umbrella Clauses – a retreat from the Philippines?*, 9(2) International Arbitration Law Review (2006), p. 108.

¹²¹ K. Hober, *Provisional Application and the Energy Charter Treaty: The Russian Doll Provision*, 10(3) International Arbitration Law Review (2007), p. 56.

¹²² More details on this issue, see e.g. G. Domański, M. Świątkowski, *Pojęcie wywłaszczenia w umowach międzynarodowych o ochronie inwestycji*, [The notion of expropriation in international investment protection agreements], 3 Przegląd Prawa Handlowego (2006), p. 12.

It is worthy to emphasise here that *Vivendi* did not take any legal action aiming at finding the breach of the concession contract concluded with the Province of Tucuman. Despite jurisdictional allegations invoked by Argentina, the tribunal declared itself competent.¹²³ Reaching the substantial part of the dispute the tribunal came to the conclusion that first, *Vivendi* did not prove any treaty breaches caused by federal authorities of Argentina and second, that it was not competent to rule in case of actions and omissions of the authorities of the Province of Tucuman. Considering the above Argentina could not be brought to justice on the grounds of the treaty for actions and omissions of the Province of Tucuman until it was not found that the authorities of the Province of Tucuman breached the contract by taking actions falling within the domain of *imperium*. In order to make such findings the tribunal in the first instance “would have to undertake a detailed interpretation and application of the Concession Contract.”¹²⁴ This, however, could not be done since the clause on settling the disputes included in the agreement stipulated for exclusive jurisdiction of contentious administrative courts of Tucuman. Considering the above the tribunal declared that there is no possibility of “separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract”¹²⁵ and thus it denied to issue a ruling in the case of Argentina’s treaty breaches (reflected in actions and omissions of the Province of Tucuman, for which Argentina was responsible on the grounds of the treaty).

As a result of an appeal for partial annulments of the ruling, the *ad hoc* Committee¹²⁶ arrived at contrary conclusions.¹²⁷ It stated that since the claims concerning treaty breaches might result in a necessity to evaluate contractual obligations then this fact should not limit the competence of an arbitral tribunal in settling a treaty dispute. In such cases a treaty tribunal was entitled to evaluate the dispute resulting from the agreement in order to settle if a treaty was breached. The *ad hoc* Committee

¹²³ *Compania de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic*, award, 21 November 2000, www.investmentclaims.com.

¹²⁴ *Ibidem*, para. 79.

¹²⁵ *Ibidem*, para. 81.

¹²⁶ On the grounds of art. 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, each party may submit an application to the Secretary General of the International Centre for Settlement of Investment Disputes („ICSID”) for annulment of a judgement invoking one of the five conditions laid down in art. 52 par. 1 of the Convention. In such situation the Secretary General in conformity with art. 52 par. 3 of the Convention appoints an *Ad hoc* Committee composed of three arbitrators. This possibility applies only to arbitral proceedings which are conducted under one of the ICSID Regulations and Rules.

¹²⁷ *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, decision on annulment, 3 July 2002, *op. cit.*

held that: “[a]s to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa. (...) whether there has been a breach of the BIT and whether there has been a breach of a contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucuman.”¹²⁸ The *ad hoc* Committee made a distinction between (i) contract breaches not resulting in treaty breaches, (ii) contract breaches resulting in treaty breaches and (iii) treaty breaches resulting in contract breaches.

The above argumentation of the Committee was, in principle, shared by other arbitral tribunals, in particular in cases instituted by PSEG Global,¹²⁹ AES Corporation,¹³⁰ Impregilio,¹³¹ Siemens,¹³² Sempra,¹³³ Bayindir,¹³⁴ IBM,¹³⁵ Jan de Nul¹³⁶ and Pan American and BP.¹³⁷ The doctrine seems also favourable in this respect.¹³⁸

¹²⁸ *Ibidem*, paras. 95 i 96.

¹²⁹ PSEG Global Inc., *The North American Coal Corporation, and Konya Algin Elektryk Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, decision on jurisdiction, 4 July 2004, www.investmentclaims.com; the tribunal held that: “contract based disputes are different from treaty based disputes and arise out of separate causes of action. Treaty based disputes can always be submitted to international arbitration from this point of view.” (*Ibidem*, para. 158).

¹³⁰ AES Corporation v. Argentine Republic, decision on jurisdiction, 26 April 2005, www.investmentclaims.com; the tribunal held that: “[i]n other terms, the present Tribunal has jurisdiction over an alleged breach by Argentine of its obligations under the US-Argentine BIT. As such, it has no jurisdiction over any breach of the concession contracts binding upon the companies controlled by AES and the Argentine public authorities under administrative Argentine law, unless such breach could at the same time result in a violation by the host State of its obligations towards the US private investors under the BIT” (*Ibidem*, para. 94).

¹³¹ Impregilo S.p.A. v. Islamic Republic of Pakistan, decision on jurisdiction, 22 April 2005, *op. cit.*; referring to the *ad hoc* Committee decision in the *Vivendi* case, the tribunal held that: “[t]he fact that Article 9 of the BIT does not endow the Tribunal with jurisdiction to consider Impregilo’s Contract Claims does not imply that the Tribunal has not jurisdiction to consider Treaty Claims against Pakistan which at the same time could constitute breaches of the Contracts” (*Ibidem*, para. 219).

¹³² Siemens A.G. v. Argentine Republic, decision on jurisdiction, 3 August 2004, www.investmentclaims.com; the tribunal held that: “Siemens qualifies as an investor and that the dispute arises directly from an investment for purposes of the jurisdiction of the Tribunal under the Treaty and the Convention. (...) Arbitral tribunals have found that a dispute arising out of a contract may give rise to a claim under a bilateral investment treaty. The dispute as formulated by the Claimant is a dispute under the Treaty” (*Ibidem*, para. 180).

¹³³ Sempra Energy International v. Argentine Republic, decision on objections to jurisdiction, 11 May 2005; www.investmentclaims.com; in the opinion of the tribunal: “[a] claim can have a purely contractual origin and refer to a right that does not qualify as an investment,

Assuming, for the needs of further reasoning, that a treaty tribunal is competent to settle disputes concerning breaches of material treaty provisions in situations in which factual state is limited to alleged failure to perform or improper performance of a contract concluded between a state and an investor, this does not prejudice the conditions of a state responsibility in such factual conditions. The assumption accepted in the previous sentence is only a *sine qua non* condition for substantive adjudication of the dispute. The problem boils down to the question how to determine the boundaries between failure to perform a contract at the same time amounting to a breach of material provisions of a treaty and failure to perform a contract which cannot be amounted to such a breach. In further part of this paper this question will be analysed with reference to the example of a provision providing for fair and equitable treatment and a provision on expropriation.

in which case there will be no jurisdiction, as was the case in *Joy*, but it can also originate solely in the violation of a provision of the treaty independently from domestic law or, as is more frequently the case, originate in a violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty" (*Ibidem*, para. 95).

¹³⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, decision on jurisdiction, 14 November 2005, www.investmentclaims.com, the tribunal emphasized that: "Pakistan accepts that 'treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts.' The Tribunal considers that this principle is not well established" (*Ibidem*, para. 148).

¹³⁵ *IBM World Trade Corporation v. Republic of Ecuador*, decision on jurisdiction and competence, 22 December 2003, www.investmentclaims.com; the tribunal held that: "IBM claim is based on an alleged violation of the BIT and not on an alleged violation of the contract and that therefore the proceedings provided for by the BIT (...) grants jurisdiction and competence to this Arbitral Tribunal to know and resolve upon the claim filed by IBM against the Republic of Ecuador" (*Ibidem*, para. 62).

¹³⁶ *Jan de Nul N.V. v. Arab Republic of Egypt*, decision on jurisdiction, 16 June 2006, www.investmentclaims.com; the tribunal held that: "the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims" (*Ibidem*, para. 79).

¹³⁷ *Pan American Energy LLC v. BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL v. Pan American Continental SRL v. Argentine Republic*, decision on preliminary objections, 27 July 2006, *op. cit.*, para. 112.

¹³⁸ As an example the following papers may be mentioned: T. Wälde, *Energy Charter Treaty-based Investment Arbitration Controversial Issues*, *op. cit.*, p. 398; B. Cremades, *Litigating Annulment Proceedings – The Vivendi Matter: Contract and Treaty Claims*, in: E. Gaillard (ed.), *Annulment of ICSID Awards*, Washington 2003, p. 95; S. Alexandrov, *The Vivendi Annulment Decision and the Lessons for Future ICSID Arbitrations – The Applicants' Perspective*, in: E. Gaillard (ed.), *Annulment of ICSID Awards*, Washington 2003, p. 121; M. Friedman, *Treaties as Agreements to Arbitrate, Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, ICCA Congress 2006, Montreal, p. 9.

Generally, it is assumed that there is no universal definition for fair and equitable treatment as in the meaning of international law. Analysis of particular situations shows that tribunals held that actions or omissions of a state contrary to justified expectations of an investor were inconsistent with the principle of fair and equitable treatment.¹³⁹ Relying on this assumption, one may ask a question if a failure to perform a contract concluded between an investor and a host state or one of its regional agencies is in conflict with justified expectations of an investor and in consequence is at the same time a breach of the standard of fair and equitable treatment. If commitments to ensure fair and equitable treatment aim at protecting justified expectations of an investor, the contracts are concluded in order to perform the obligations of the parties included therein; fulfilment of the contract by the state is an essential expectation of an investor then as a consequence a breach of an agreement might infringe the standard of fair and equitable treatment thus the treaty itself. According to G.S. Tawil,¹⁴⁰ it seems that more than an ordinary contract breach is necessary to acknowledge it is, at the same time, a breach of the obligation to ensure fair and equitable treatment. Otherwise the provision on fair and equitable treatment would be another *umbrella clause* included in the treaty, thus making the original one totally useless. Moreover, most probably the states would not include in the treaties a provision on meeting the commitments if this norm was entailed by the obligation to ensure fair and equitable treatment. It should be expected that in the near future there will be settlements of disputes connected with treaty breaches resulting from failure to perform a contract, in which tribunals have recently declared themselves as competent and that they will include guidelines on how to make the subject distinction.

According to Ch. Schreuer¹⁴¹ ordinary failure of a state to perform a contract is an element of risk accompanying business activity, which the investor should take into account and therefore it does not form grounds for filing a claim for treaty breaches. Similarly, a contract breach resulting from serious problems on the state side to perform its financial commitments may not be considered as a breach of obligation of fair and equitable treatment. On the other hand, intended failure to perform a contract, misuse of state powers in order to evade fulfilment of a contract, actions in bad faith may finally lead to a breach of the fair and equitable treatment standard.

¹³⁹ Ch. Schreuer, *Fair and Equitable Treatment In Arbitral Practice*, 6(3) Journal of World Investment and Trade (2005), p. 379.

¹⁴⁰ G. S. Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, *op. cit.*, p. 29.

¹⁴¹ Ch. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, *op. cit.*, p. 380.

It seems that making a closed list of circumstances allowing for making the above distinction is rather difficult and in each case the evaluation will depend on a particular factual state. In the jurisprudence it is emphasized that literal interpretation of the fair and equitable treatment provision in the context of breaching investors' expectations especially if the parties are linked with a contract may lead to irrational effects. And so, in the reasons for the decision in *Saluka v. Czech Republic* the tribunal drew attention to dangers caused by treating investors' expectations too literally since this might cause to "impose upon host States' obligations which would be inappropriate and unrealistic."¹⁴² The tribunals settling the disputes between *Waste Management and Mexico*,¹⁴³ *Mondev* and *The United States of America*,¹⁴⁴ *SGS and Philippines*¹⁴⁵ held that failure of the state to perform a contract might under certain conditions lead to a breach of the obligation of fair and equitable treatment (despite the fact that none of the mentioned tribunals found such breach in given cases). In the *Eureko* case, however, the tribunal declared that: "Eureko's investments, its contractual rights to an IPO, which would have led it to acquire majority control of PZU, have been (...) unfairly and inequitably treated (...). RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character. (...) In the opinion of the Tribunal, in the present case, the conduct of the RoP could even be characterized as 'outrageous' and 'shocking', even though, to constitute breach of treaty, actions and inactions need not be of that degree of extremity."¹⁴⁶ The tribunal did not explain in what way the fair and equitable treatment rule was breached and in particular what circumstances have made it assess the factual state in this way.

In favour of its thesis that Poland breached art. 3.1 of the treaty the Tribunal cited a part of the award in the *Tecmed* case,¹⁴⁷ from which it follows that the obligation of fair and equal treatment may be breached by failing basic expectations of the investor. As shown above this is absolutely clear. However, the essence of the issue lies in circumstances in which the basic expectations are not satisfied by

¹⁴² *Saluka Investments B.V. v. Czech Republic*, partial award, 17 May 2006, www.investmentclaims.com, para. 304.

¹⁴³ *Waste Management, Inc. v. United Mexican States*, award, 30 April 2004, para. 115, www.investmentclaims.com.

¹⁴⁴ *Mondev International Ltd. V. the United States of America*, award, 11 October 2002, par. 137, www.investmentclaims.com.

¹⁴⁵ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, decision of the tribunal on the objections to jurisdiction, 24 January 2004, para. 162.

¹⁴⁶ *Eureko B.V. v Republic of Poland*, partial award, 19 August 2005, *op. cit.*, paras. 232–234.

¹⁴⁷ *Ibidem*, para. 235.

failure to perform a contract. This problem was not explained by the tribunal, it also failed to specify circumstances which made it evaluate the factual state in that way.

Similar problems are encountered in distinguishing ordinary failure to perform a contract from the one that may result in expropriation or nationalization. The notion of expropriation on the grounds of international law¹⁴⁸ considerably differs from its meaning in domestic systems of law, including Polish law. According to article 21.2 of the Constitution of the Republic of Poland expropriation is admissible only if it is for public purposes and for equitable compensation.¹⁴⁹ At the level of statutory acts the issue of expropriation is regulated only with respect to real properties. As provided by article 112.2 of the Property Management Act "property expropriation includes taking out or restricting the ownership right, perpetual usufruct right or any other material right related to real property."¹⁵⁰

On the grounds of international law, limiting the notion of expropriation to the way it is defined in domestic law, would considerably deprive the investors of the possibility to take advantage of the treaty protection. Considering the above, international agreements ensure protection both against expropriation and nationalization (in the meaning of domestic law) and against actions of states which have the same effect as expropriation or nationalization i.e. generally speaking deprive the investment of its commercial value (intermediary expropriation).¹⁵¹

The distinction between failure to perform a contract and failure resulting in a treaty obligation breach concerning expropriation gives rise to a lot of controversy in literature. Despite divergences of opinions, there is a general consent that at least

¹⁴⁸ See e.g.: C. Brower, *The Future for Foreign Investment – Recent Developments in the International Law of Expropriation and Compensation*, *op. cit.*, p. 93; G. C. Christie, *What constitutes a taking of property under International Law*, 38 *British Yearbook of International Law* (1962), p. 307; R. Dolzer, *Indirect Expropriation: New Developments?*, 11 *New York University Environmental Law Journal* (2002), p. 64; G. Domański, M. Świątkowski, *Pojęcie wywłaszczenia w umowach międzynarodowych o ochronie inwestycji* [The notion of expropriation in international investment protection agreements], *op. cit.*, p. 12; M. Gutbrod, S. Hindelang, *Externalization of Effective Legal Protection against Indirect Expropriation*, 7(1) *Journal of World Investment and Trade* (2005), p. 59; E. Lauterpacht, *International Law and Private Foreign Investment*, 4 *Indiana Journal of Global Legal Studies* (1997), p. 259.

¹⁴⁹ Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] of 2 April 1997, Dz. U. 1997, nr 78, poz. 483 [Journal of Law 1997, no 78, item 483].

¹⁵⁰ Ustawa o gospodarce nieruchomościami [Property Management Act] of 21 August 1997, Dz. U. 2004, nr 261, poz. 2603 z późn. zm. [Journal of Law 2004, no 261, item. 2603 as amended]

¹⁵¹ G. Domański, M. Świątkowski, *Pojęcie wywłaszczenia w umowach międzynarodowych o ochronie inwestycji* [The notion of expropriation in international investment protection agreements], *op. cit.*, p. 12.

two conditions must be fulfilled. First, the action of the state must fall within the domain of *imperium*. Second, the action of the state should fully annihilate the rights of the investor. In further part, both elements will be analysed.

According to Ch. Schreuer “[t]he most important criterion for distinguishing between the simple breach of a contract and the expropriation of a contract is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.”¹⁵² The doctrine accepts unanimously this point of view.¹⁵³

This view has also been accepted in the jurisprudence. The *Consortium RFCC v. Morocco*¹⁵⁴ case concerned alleged failure to perform the agreement for road construction. The ordering party exercised its right provided for in the contract and charged the contractor with a contractual penalty for a delay in the performance of works by collecting an adequate amount from the performance bond. The tribunal held that, as a rule, it was possible to expropriate contract rights, but in the specified case nothing like that happened.¹⁵⁵ According to the tribunal, the ordering party only exercised the rights it was entitled to under the contract and did execute its governmental prerogatives. To confirm this, the tribunal pointed out that in the subject matter Morocco did not adopt any legislative act or regulation or undertake any action in order to get a favourable tribunal jurisdiction.¹⁵⁶

Identical conclusions were drawn by the tribunal in the *Waste Management v. Mexico* case: “[t]he mere non-performance of a contractual obligation is not to be equated with a taking of property, not (unless accompanied by other elements) is tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts (...). All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to a definitive denial of the right (...).”¹⁵⁷

¹⁵² Ch. Schreuer, *The Concept of Expropriation under ETC and other Investment Protection Treaties*, 2005, www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf, p. 25.

¹⁵³ e.g. C. Lamm, *The applicable rules of law to disputes between state entities and private companies - the interaction between contract arbitration and treaty arbitration*, *op. cit.*, p. 7, T. Wälde, *Energy Charter Treaty-based Investment Arbitration, Controversial Issues*, *op. cit.*, p. 402, article 4.11 of *The World Bank Guidelines on the Treatment of Foreign Direct Investment*, *op. cit.*

¹⁵⁴ *Consortium RFCC v. Kingdom of Morocco*, award, 22 December 2003, www.investmentclaims.com.

¹⁵⁵ *Ibidem*, paras. 60–65.

¹⁵⁶ *Ibidem*, paras. 65–66, 69, 85–89.

¹⁵⁷ *Waste Management, Inc. v. United Mexican States*, award, 30 April 2004, *op. cit.*, para. 174.

Waste Management brought an action at law on the grounds of North America Free Trade Agreement due to actions resulting, in its opinion, in expropriation of the concession agreement including, among others, no payment of debts by local authorities, breaching of exclusive rights and refusal to give a line of credit. According to the tribunal, refusal to pay debts or failure to perform contract obligations could not be treated as tantamount to expropriation.¹⁵⁸

In the case in which SGS claimed remuneration from Philippines for providing services of customs inspection, the court held that: “[a] mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable. (...) There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation.”¹⁵⁹

The arbitral tribunal settling the dispute between *Azurix and Argentina* held that: “contractual breaches by a State party or one of its instrumentalities could not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breach the contract in the exercise of its sovereign authority, or as a party to a contract. As already noted, a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, unless it will be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.”¹⁶⁰

In the *Eureko* case the tribunal came to the conclusion that failure to perform a contract by the state was, at the same time, a breach of art. 5 of Poland – the Netherlands treaty including obligation not to take actions resulting in expropriation without detailed presentation of legal conditions for state's responsibility in such circumstances.¹⁶¹

Only in one point the tribunal analysed the possibility of attributing certain actions to Poland and cited fragments of the comments made by J. Crawford to the draft of articles prepared by the United Nations Commission on International law concerning responsibility of a state for actions not compliant with international

¹⁵⁸ *Ibidem*, para. 160.

¹⁵⁹ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines, decision of the tribunal on the objections to jurisdiction*, 24 January 2004, *op. cit.*, para. 161.

¹⁶⁰ *Azurix Corp. v Argentine Republic*, award, 14 July 2006, www.investmentclaims.com, para. 315.

¹⁶¹ *Eureko B.V. v Republic of Poland*, partial award, 19 August 2005, *op. cit.*, paras. 238–243.

law, from which it appeared that: “[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as ‘*acta iure gestionis*’”.¹⁶² However, it omits a subsequent sentence of the comment: “[o]f course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting part.”¹⁶³ In other words, the fact that for attribution, both commercial and governmental actions will be treated as an action of a state does not mean that each breach of an international obligation (including the provision on non-expropriation) may be performed by virtue of commercial acts. As a consequence it is not clear if the tribunal admitted (as it did not explain that in any other part) that the actions of a state resulting in a failure to perform a contract were *actus iure imperii* and in consequence might result in expropriation or expropriation might come as a result of state actions also when it acted only as a civil and commercial party (*actus iure gestionis*). On the other hand, one may have an impression that the tribunal on purpose cited a fragment of the comment made by J. Crawford taken out of context, in order to avoid the necessity to give justification that breaching of a contract by Poland happened as a result of actions performed in its sovereign capacity (which would have created many difficulties).

Showing that a contract was breached as a result of actions performed in the state sovereign capacity is not enough to conclude that expropriation took place. In literature and jurisprudence it is assumed in unison that some “additional” circumstances are required. However, there is no consensus as for their objective scope.

It is worthy to start the discussion from a right observation presented in the *Waste Management v. Mexico* ruling, in which the tribunal stated that: “[s]ubsequent authorities have sought to make a distinction between mere failure or refusal to comply with a contract, on the one hand, and conduct which crosses the threshold of taking or expropriation, on the other hand. The Tribunal is sympatric to the view expressed in *Azinian* that such a distinction is not adequately made by the addition of adjectives (‘egregious’, ‘gross’, ‘flagrant’, or whatever). But some distinction must be made: if certain casus of contractual non-performance may amount

¹⁶² *Ibidem*, para. 130.

¹⁶³ *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* 2001, 2(2) Yearbook of the International Law Commission (2001), p. 87 (comment to art. 4); see also C. Lamm, *The applicable rules of law to disputes between state entities and private companies – the interaction between contract arbitration and treaty arbitration*, *op. cit.*, p. 4 (in the author’s opinion referring to the comment made by J. Crawford to art. 4, ordinary failure to fulfil the contract does not constitute a breach of international law).

to expropriation, it must be possible to say, in principle, which one, otherwise the distinction between contractual and treaty claims disappears.”¹⁶⁴ Similar view was presented by the tribunal in *Azinian v. Mexico* case: “[l]abelling is, however, no substitute for analysis. The words ‘confiscatory’, ‘destroy contractual rights as an asset’ or ‘repudiation’ may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder – and that is not satisfactory for present purposes.”¹⁶⁵

From both fragments cited above it appears that in order to settle whether expropriation takes place one may not refer only to the degree of failure to perform a contract or the way the state acts. Many arbitral proceedings concerned the issue of state’s interference into various types of rights enjoyed by investors. It seems that a prevailing view is that expropriation takes place when one entity is deprived of its right both in legal and commercial sense.¹⁶⁶ Actions of a state which infringe the investor’s rights but do not deprive it of its right in whole or leaves the investor with a possibility to submit its claims before court, in view of the decisions cited above do not amount to expropriation or actions tantamount to expropriation. Considering this perspective, it should be evaluated, in what circumstances it will be possible to talk about expropriation of contract rights and not about their breach.

In the *Waste Management* case the tribunal held that: “[i]t is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e. the effective taking of the chose in action) and the protection’ of the treaty ‘be called into play.”¹⁶⁷ “It is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually

¹⁶⁴ *Waste Management, Inc. v. United Mexican States*, award, 30 April 2004, *op. cit.*, para. 171.

¹⁶⁵ *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, award, 1 November 1999, www.investmentclaims.com, para. 90.

¹⁶⁶ *Np. Pope & Talbot Inc. v. Government of Canada*, interim award, 26 June 2000, www.investmentclaims.com, par. 96, 102; *Metalclad Corp. v. United Mexican States*, award, 30 August 2000, www.investmentclaims.com, par. 103; *Wena Hotels Ltd v. Arab Republic of Egypt*, award, 8 December 2000., www.investmentclaims.com, par. 98, 99, *CME v. Czech Republic*, partial award, 13 September 2001, www.investmentclaims.com, par. 608, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, award, 29 May 2003, www.investmentclaims.com, para. 115.

¹⁶⁷ *Waste Management, Inc. v. United Mexican States*, award, 30 April 2004, *op. cit.*, para. 174.

chosen forum.”¹⁶⁸ Whereas in the dispute instituted by *Azizan*, the tribunal concluded that no expropriation took place due to termination of the concession agreement since the plaintiff appealed to common courts, and these in all instances confirmed the effectiveness of the termination. In this case, according to the tribunal in order to prove expropriation it would be necessary to demonstrate that the plaintiff was denied his right to fair trial, which the plaintiff did not even try to do.¹⁶⁹

Further conclusion, which emerges from the rulings cited above, is that the decision that an expropriation took place should be based on effects brought about by particular action of a state to the investor's rights resulting from a contract.¹⁷⁰ It should be admitted that expropriation of a contractual right takes place only if one state acting in its sovereign capacity deprives the investor of a particular right or makes it useless. Refusal to perform a contract does not produce such an effect and the more, abstaining from the performance due to a dispute on the content of the obligation. In such a case then the investor is not deprived of its right, it still exists and may be claimed before a court competent to settle contractual disputes. Obligation rights enjoyed by the investor are expropriated if the investor cannot effectively claim his rights before courts due to a change in legal norm applicable to the contract because the court will apply these new regulations and as a consequence will not be able to declare a contract breach or limitation of the right for fair trial.

In the *CMS* case, the court came to the conclusion that Argentina breached provisions of United States – Argentina treaty but did not found any expropriation of obligation rights despite the fact that a contract was breached and all actions of Argentina questioned by *CMS* were, which was confirmed by the tribunal, within the *imperium* domain.¹⁷¹ The court settling the dispute between *Azurix and Argentina* held that “impact on the investment attributable to the Province's actions was not to the extent required to find that, in aggregate, these actions amounted to an expropriation.”¹⁷²

In the *Eureko* case although the tribunal found that the expropriation of obligation rights took place it did not present any justification of its position except

¹⁶⁸ *Ibidem*, para. 175.

¹⁶⁹ *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, award, 1 November 1999, *op. cit.*, paras. 95–105.

¹⁷⁰ R. Dolzer, *Indirect Expropriations: New Developments*, *op. cit.*: “(...) the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure affects a taking.” (*Ibidem*, p. 79); see also M. Gutbrod, S. Hindelang, *Externalization of Effective Legal Protection against Indirect Expropriation*, *op. cit.*, p. 63.

¹⁷¹ *CMS Gas Transmission Company v. Argentine Republic*, award, 12 May 2005, www.investmentclaims.com, paras. 263, 264, 301.

¹⁷² *Azurix Corp. v. Argentine Republic*, award, 14 July 2006, *op. cit.*, para. 322.

for a general statement that: “[t]here is an amplitude of authority for the proposition that when a State deprives an investor of the benefits of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the provision contained in Articles 5 of the Treaty.”¹⁷³ The conclusion of the tribunal, considering the jurisprudence and the doctrine, is surprising since Eureko was not either legally or factually deprived of a possibility to claim its contractual rights before the court indicated in the contract.

4. PROVISION ON THE SETTLEMENT OF DISPUTES IN A CONTRACT AND COMPETENCE OF A TREATY TRIBUNAL

In cases in which the investor claims that a state breached a treaty by failing to perform a contract, a doubt arises as to whether an arbitral court set up in accordance with the provisions of the treaty may declare itself as competent if the contract indicates an arbitral tribunal or common court as competent to settle disputes arising from it or if the competence of the common court results from domestic law governing the contract. There were some attempts to argue that any disputes concerning the contract should be settled in conformity with its provisions and only when the right of the investor to the court is breached he may claim for protection on the basis of the treaty (as e.g. in *Compania de Aguas del Aconquija S.A. v. Argentina*, *SGS v. Philippines*). It seems that present jurisprudence with one voice dissents from this opinion and attributes competence to a treaty tribunal in the cases in which the plaintiff claims compensation for breaching material provisions of a treaty.

Generally accepted conclusions were also drawn by the *ad hoc* Committee in the *Vivendi* case. As it was mentioned earlier the plaintiff initiated action for payment of compensation for Argentina's breach of equitable and fair treatment principle and expropriation by failure to fulfil the concession agreement. The tribunal held that in this situation: “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.”¹⁷⁴ According to the Committee, claims resulting from a contract breach and claims resulting from a treaty breach are different in nature even if both of them arise in consequence of a failure to perform a contract.

¹⁷³ *Eureko B.V. v. Republic of Poland*, partial award, 19 August 2005, *op. cit.*, para. 241.

¹⁷⁴ *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, decision on annulment, 3 July 2002, *op. cit.*, para. 101.

Thus a tribunal indicated in the agreement is competent to settle contractual disputes whereas a treaty tribunal is competent to settle disputes on breaching material provisions included in the treaty.

This opinion is not affected by the circumstance that a treaty tribunal will have to make an interpretation of the contract and possibly interpret law governing the agreement in order to find if the treaty was breached. Conclusions presented by the Committee have been accepted by other tribunals, e.g. in the following cases: *Eureko v. Poland*,¹⁷⁵ *Jan de Nul v. Egypt*,¹⁷⁶ *PSEG Global v. Turkey*,¹⁷⁷ *Sempra v. Argentina*¹⁷⁸ and *Siemens v. Argentina*.¹⁷⁹ Such point of view, as it seems, is a consequence of solutions presented in paragraph 4 above. Otherwise, the treaty tribunal due to procedural reasons (i.e. provisions included in the contract on the settlement of disputes) would not be able to settle disputes concerning treaty breaches if they arise from an action of a state constituting a contract breach.

Further questions may be asked whether in this situation, if a treaty claim is not submitted by an entity having its seat in a given state and being a party to the a contract with a state but by its shareholder coming from the other contracting state (in the meaning of the treaty the other one would be an investor) then does the provision on settlement of disputes included in this contract deprive the investor of the possibility to enforce claims grounded in a contract breach? Tribunals in *IBM v. Ecuador*,¹⁸⁰ *Suez v. Argentina*,¹⁸¹ *Impregilo v. Pakistan*,¹⁸² *AES v. Argentina*¹⁸³ held that in this situation the investor might also claim for treaty breach due to failure to perform a contract despite the fact that he was not a party to the contract

¹⁷⁵ *Eureko B.V. v. Republic of Poland*, partial award, 19 August 2005, *op. cit.*, para. 112.

¹⁷⁶ *Jan de Nul N.V. v. Arab Republic of Egypt*, decision on jurisdiction, 16 June 2006, *op. cit.*, para. 133.

¹⁷⁷ *PSEG Global Inc., The North American Coal Corporation, and Konya Algin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, decision on jurisdiction, 4 July 2004, *op. cit.*, para. 158.

¹⁷⁸ *Sempra Energy International v. Argentine Republic*, decision on objections to jurisdiction, 11 May 2005, *op. cit.*, para. 122.

¹⁷⁹ *Siemens A.G. v. Argentine Republic*, decision on jurisdiction, 3 August 2004, *op. cit.*, para. 180.

¹⁸⁰ *IBM Word Trade Corporation v. Republic of Ecuador*, decision on jurisdiction and competence, 22 December 2003, *op. cit.*, paras. 48, 62.

¹⁸¹ *Suez, Sociedad general de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.*, decision on jurisdiction, 16 May 2006, www.investmentclaims.com, para. 45.

¹⁸² *Impregilo S.p.A. v. Islamic Republic of Pakistan*, decision on jurisdiction, 22 April 2005, *op. cit.*, para. 289.

¹⁸³ *AES Corporation v. Argentine Republic*, decision on jurisdiction, 26 April 2005, *op. cit.*, para. 93.

the breach of which would be evaluated by the tribunal. In the *National Grid v. Argentina*¹⁸⁴ case the tribunal declared even that there was no need to decide what effect had the provision indicating arbitration in a contract between a state and a company with its seat in this state if the claim grounded in the treaty provisions was submitted by a shareholder of this company who was not a party to the contract.

5. DOES MOST FAVORED NATION CLAUSE APPLY TO JURISDICTION PROVISIONS?

Overwhelming majority of treaties on supporting investments (if not all of them) include the most favoured nation treatment clause.¹⁸⁵ On the grounds of this clause a host state undertakes to treat investments of entities originating from the other contracting state not less favourably than investments originating from other states.

If investors from another state would be provided with more favourable standard of protection of their investments then on the grounds of the clause a given investor might demand “better” standard than the one resulting from the basic treaty. Traditionally it was assumed that the most favoured nation treatment clause is applicable to rules and regulations concerning the issues of expropriation, nationalization, fair and equitable treatment, non-discrimination, full protection and safety and connected with them detailed obligations of states, i.e. material provisions of treaties.

On the grounds of the most favoured nation treatment clause a state takes an obligation not to discriminate investors from one state in relation to investors from other states. Thus, an investor has a guarantee that he will not be treated less favourably than his counterparts from other states. The issue of the most favoured nation treatment clause in the above context has been a subject of discussions for dozens of years, among others in the International Court of Justice and other tribunals or bodies competent to decide on the grounds of international law.

In practice, it happens that an investor claiming compensation from a state for contract breach on the grounds of a treaty on investment protection that does not include broadly formulated jurisdictional provisions¹⁸⁶ bases its claim on

¹⁸⁴ *National Grid plc v. Argentine Republic*, decision on jurisdiction, 20 June 2006, www.investmentclaims.com, para. 169.

¹⁸⁵ Referring to the most favoured nation treatment clause in further part of the paper the term “clause” will also be used.

¹⁸⁶ Further on the wordings “procedural provisions”, “jurisdictional” or referring to “settlement of disputes” will be used interchangeably

a treaty concluded between a host state with a state other than the one from which a given investor comes, and this treaty (in literature referred to as “a treaty with third state”) provides solutions more favourable than these resulting from a proper treaty (referred to as “basic treaty”). Some representatives of a doctrine do not see any arguments against applying this clause also in the above-mentioned cases.¹⁸⁷

Considering the content of provisions in particular treaties, in context of the state’s responsibility for obligations resulting from contracts, the following questions arise: (a) whether an investor may take advantage of the clause in procedural matters, (b) whether an investor may demand that the dispute arising in connection with the contract concluded by the investor with a host state is settled by a treaty tribunal pointing out that a treaty with a third state includes a provision broadly defining the jurisdiction of an arbitral tribunal stating that any disputes between a state and an investor shall be settled on the principles included in the treaty.

Problems with interpretation are connected with the necessity to make a choice which treaty interpretation rules specified in art. 31.1 of the Vienna Convention on the Law of Treaties will have precedence.¹⁸⁸ If then a treaty does not contain any limitations on the scope of the clause and exemptions do not apply to jurisdictional provisions it may be argued that on the grounds of a principle that “ordinary meaning to be given to the terms of the treaty” these issues are not covered by it.

With reference to jurisdictional provisions, the second part of article 31.1 of Vienna Convention on the Law of Treaties may be emphasized, namely the requirement for interpreting the clause with regard to the context of a treaty. As a consequence, this clause aims at ensuring investors equal treatment in scope guaranteed by material provisions of a treaty and procedural provisions are excluded from its scope. Jurisdictional provisions, due to their special feature, in each case have been negotiated by states for the needs of a particular treaty. The possibility of referring to them on the grounds of broadly defined clause is excluded if no clear consent is expressed in a basic treaty for their application for the needs of settling disputes arising in connection with treaties concluded with third parties. If, however, a starting point for interpretation will be the “object and purpose” of the treaty (as stated in art. 31.1. of the Vienna Convention on the Law of Treaties) then

¹⁸⁷ J. Savage, *Investment Treaty Arbitration and Asia: Survey and Comment*, *op. cit.*, p. 31; P. Turner, M. Mangan, A. Baykitch, *Investment Treaty Arbitration, and Australian Perspective*, 24(2) *Journal of International Arbitration* (2007), p. 118; T. Weiler, *Discussion on MFN*, 1(1) *Transnational Dispute Management* (2004), p. 2.

¹⁸⁸ According to this article “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

lack of limitation of the clause scope may be interpreted as an encouragement to extend it also to procedural provisions. The subject and purpose is usually specified in the preamble stating that a treaty is concluded in order to promote and protect investments made on the territory of contracting parties by citizens of the other contracting party. It may be then claimed that a basic treaty should be interpreted so that it favours investment protection by inter alia admitting to take advantage of more “privileged” procedural provisions included in treaties with third parties.

The first case in which the tribunal had to decide on admissibility of the application of the most favoured nation treatment clause included in a treaty for investment promotion with reference to procedural matters was the dispute between *Maffezini and Spain*.¹⁸⁹

The dispute arose in connection with actions of Spain resulting in alleged breach of treaty guarantees given to a citizen of Argentina (Emilio Augustin Maffezini) in connection with his investment in Spain. Spain alleged lack of competence of the arbitral tribunal, claiming that *Maffezini* had not exhausted domestic appeal measures provided for in Argentina – Spain treaty. Although *Maffezini* admitted that he had not taken legal actions in Spain before initiating arbitration procedure, he argued that in substance he was not obliged to do so since the clause included in the treaty between Argentina and Spain allowed him to demand the settlement of the dispute in accordance with more favourable procedural provisions included in Spain – Chile treaty. In contrary to the treaty with Argentina, the treaty between Spain and Chile did not demand exhausting domestic measures before initiating arbitration procedure.

In art. 4 of Argentina – Spain treaty, after a section concerning fair and equitable treatment, the parties agreed that “[i]n all matters subject to this agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country.” The main issue which required settlement was the meaning of the wording “any matters”, in particular if it includes exclusively material provisions of a treaty or if it extends also to procedural provisions. At the beginning, the tribunal pointed out the necessity to apply the rule of *eiusdem generis*, from which it appeared that most favoured nation treatment clause might refer only to identical types of matters as the ones specified in the clause itself.¹⁹⁰ Further it said that this rule did not have to be interpreted narrowly and for this purpose used the interpretation guideline included in the *Ambatielos* decision: “It is true that the ‘administration of justice’, when viewed in

¹⁸⁹ *Emilio Augustin Maffezini v. Kingdom of Spain*, decision of the tribunal on objections to jurisdiction, 25 January 2000, www.investmentclaims.com.

¹⁹⁰ *Ibidem*, para. 49.

isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders’. Definitely the rights ensuring protection to traders are entailed in matters included in treaties on commerce and navigation. ‘Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most favoured nation clause, when the latter includes ‘all matters relating to commerce and navigation.’”¹⁹¹

Further reasoning of the tribunal was as follows. First, the tribunal declared that the treaty concluded between Argentina and Spain was the basic one. It stated that from the above it appeared that if those issues were subject to more favourable treatment in a treaty concluded with a third state, then by operation of the clause, the treatment applied also to the beneficiary of the basis treaty. If, however, the treaty with a third state specified an issue not covered by the basic treaty, then that issue was *res in alios acta* and therefore did not apply to the beneficiary of the basic treaty clause.¹⁹² Afterwards, the tribunal emphasized “[t]hat the second major issue concerns the question whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favoured nation clause applies (...).”¹⁹³ Assuming that the rules on settlement of disputes are inherently connected with protection of foreign investments¹⁹⁴ and as international arbitration and other means of settling disputes are necessary to protect right guaranteed in treaties,¹⁹⁵ the court tribunal found that “if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *eiusdem generis* principle.”¹⁹⁶

In the summary, the tribunal came to the conclusion that, as a rule, the clause applied to procedural provisions unless the intention of the parties to the treaty was different. In the subject matter no other intention of the parties was proved. On the contrary, the tribunal found items confirming the general rule. Namely, the clause provided that it is applicable to “all matters”, no other treaty concluded by Spain included this wording and in treaties signed by Argentina it appeared only in some of them.

¹⁹¹ *Ibidem*.

¹⁹² *Ibidem*, para. 45.

¹⁹³ *Ibidem*, para. 46.

¹⁹⁴ *Ibidem*, para. 54.

¹⁹⁵ *Ibidem*, para. 55.

¹⁹⁶ *Ibidem*, para. 56.

In the event that the rule is too broadly interpreted, the tribunal pointed out there were certain limitations for taking advantage of the clause, although they did not apply in the *Maffezini* case and declared that “[t]he scope of the clause might thus be narrower than it appears at first sight.”¹⁹⁷ The tribunal enumerated four limitations: (a) obligation to exhaust domestic appeal measures, (b) possibility for the plaintiff to make a choice between submission to domestic courts or to international arbitration (so called *fork in the road*), (c) indication of specified forum for settling disputes in the treaty, (d) agreement on detailed principles for conducting the arbitral procedure.¹⁹⁸

In the *Siemens v. Argentina*¹⁹⁹ judgement the tribunal generally confirmed the soundness of the reasoning presented in the *Maffezini* case and decided that the clause included in Argentina – Germany treaty entitled the investor to make a claim before the arbitral tribunal without exhausting domestic appeal measures within the period of 18 months. In this respect, Siemens referred to a more favourable for it treaty between Argentina and Chile that did not include such requirement.

The tribunal began the analysis in a way other than the one adopted by the tribunal in *Maffezini* case and focused on the content and purpose of the treaty emphasizing that the starting point is the purpose of the treaty defined in its title and preamble from which it appeared that the treaty is to protect and promote investments.²⁰⁰ Afterwards the tribunal made an analysis of art. 3 of the treaty providing that the most favoured nation clause extends to treatment of investment and activities relating to investments subject to the enumerated exceptions. Finding that (a) “[t]he term ‘treatment’ is neither qualified nor described except by the expression ‘not less favourable’; (b) ‘[t]he term ‘activities’ is equally general’; and (c) ‘[t]he need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions,’”²⁰¹ the court came to the conclusion, taking into account the purpose of the treaty and ordinary meaning of used wordings, that the scope of the clause might not be limited only to protection ensured to the investment itself but extended also to provisions allowing investors to execute their treaty guarantees by allowing access to international arbitration.²⁰² In other words, it is one of the elements of the protection guaranteed by the treaty entailed in the notion of “treatment”.²⁰³

¹⁹⁷ *Ibidem*, para. 62.

¹⁹⁸ *Ibidem*, para. 63.

¹⁹⁹ *Siemens A.G. v. Argentine Republic*, decision on jurisdiction, 3 August 2004, *op. cit.*

²⁰⁰ *Ibidem*, para. 81.

²⁰¹ *Ibidem*, para. 85.

²⁰² *Ibidem*, para. 86.

²⁰³ *Ibidem*, para. 102.

The decisions of both tribunals, from the point of view of *Maffezini* and *Siemens* as plaintiffs are identical. However, conclusions presented by the latter tribunal are further reaching. First, the most favoured nation clause in the Germany – Argentina treaty did not include the wording “all matters subject to the agreement”, therefore, the tribunal began its examination from the treaty purpose and the meaning of the notion “treatment”. Second, as to the allegation made by Argentina that provisions on settling disputes were negotiated for the needs of a specific treaty and thus might not be modified on the basis of the clause, the court answered that: “the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted. It complements the undertaking of each State Party to the Treaty not to apply measures discriminatory to investments under Article 2.”²⁰⁴

The issue discussed above was a subject of the decision in the *Camuzzi and Argentina* case.²⁰⁵ The dispute concerned claims arising from Argentina – Luxembourg treaty. Similarly as in cases analysed above, the plaintiff claimed that he was not obliged to exhaust domestic appeal measures within the period of 18 months, referring to the clause included in the treaty and indicating, in this respect more favourable treatment resulting from a treaty between the USA and Argentina. The tribunal shared the arguments presented earlier in the *Siemens* case.

In the *Gas Natural*,²⁰⁶ the tribunal resolved the same doubt, i.e. the possibility to initiate international arbitration before domestic appeal measures had been exhausted, as in the *Maffezini* dispute. Both cases concerned the clause from the same Argentina – Spain Treaty. The arbitrators not only shared the opinions presented in previous decisions, but unanimously admitted that since it was not clear that the states – parties to the treaty or parties to a specific investment contract agreed on any other way of settling possible disputes, it should be assumed that the most favoured nation clause would be applicable to settlement of disputes.²⁰⁷ If in the treaty content jurisdictional matters are not excluded from the scope of the clause, then there is a presumption that it was the intention of the parties to include them in the clause. Contrary proof is possible but the burden of proving would lie with the responding state that would have to show what the real intention of the parties was at the date of signing the treaty.²⁰⁸

²⁰⁴ *Ibidem*, para. 106.

²⁰⁵ *Camuzzi International S.A. v. Argentine Republic*, decision of the tribunal on objections to jurisdiction, 10 June 2005, www.investmentclaims.com.

²⁰⁶ *Gas Natural SDG, S.A. v. Argentine Republic*, decision of the tribunal on preliminary questions on jurisdiction, 17 June 2005, www.investmentclaims.com.

²⁰⁷ *Ibidem*, para. 49.

²⁰⁸ *Ibidem*.

Identical conclusions as in the *Gas Natural* case were presented by tribunals deciding in the disputes between *Suez, Sociedad General de Aguas de Barcelona and Interagua Servicios Integrales de Agua v. Argentina*,²⁰⁹ *Suez, Sociedad General de Aguas de Barcelona, Vivendi Universal AWG v. Argentina*²¹⁰ and *National Grid plc v. Argentina*.²¹¹

In the *Salini v. Jordan*²¹² case the dispute concerned the contract for building a dam in Karameh. *Salini* referring to the clause attempted to show that the arbitral tribunal was competent to settle disputes resulting from the investment contract despite the fact that it indicated Jordanian domestic courts as competent. Moreover, art. 9.2 of Italy – Jordan treaty in section concerning the settlements of disputes stipulated that “[i]n case the investor and an entity of the Contracting Parties have stipulated an Investment Agreement, the procedure foreseen in such investment Agreement shall apply.”²¹³ Considering the above, Jordan argued that as the parties (i.e. Jordan and *Salini*) were bound by an investment contract, *Salini* could enforce its contractual claims only before domestic courts. In turn, the plaintiff claimed that the clause included in the basic treaty entitled him to refer to more favourable provisions on the settlement of disputes in other treaties to which Jordan is a party. Treaties concluded with the USA and Great Britain, in *Salini's* opinion, entitled the arbitral tribunal to settle disputes also arising in connection with contracts on the grounds of broadly formulated provision on jurisdiction.²¹⁴ Therefore, he argued that it was admissible to enforce a claim for contract breach before the arbitral tribunal, regardless of the content of art. 9.2 of the Italy – Jordan contract and a choice of court made in the investment contract.

The tribunal referring to the decision in the *Maffezini* case stated that: it “(...) shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by

²⁰⁹ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, decision on jurisdiction, 16 May 2006, *op. cit.*, para. 66.

²¹⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A., Vivendi Universal S.A. and AWG Group Ltd. v. Argentine Republic*, decision on jurisdiction, 3 August 2006, www.investmentclaims.com, para. 68.

²¹¹ *National Grid plc v. Argentine Republic*, decision on jurisdiction, 20 June 2006, *op. cit.*, para. 93.

²¹² *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, decision on jurisdiction, 29 November 2004, www.investmentclaims.com.

²¹³ *Ibidem*, para. 66.

²¹⁴ It should be noted here that *Salini* formulated a thesis on admissibility of adjudication of treaty tribunal in matters connected with contractual claims on the grounds of broadly formulated jurisdictional provision.

authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of ‘treaty shopping’.”²¹⁵

The tribunal concluded that the factual state differed from the one presented in the *Maffezini* case since the most favoured nation clause did not include the wordings like “all rights” or “all matters” subject to the treaty²¹⁶. “Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to disputes settlement. It does not envisage ‘all rights or all matters covered by the agreement’. Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most favoured nation clause apply to dispute settlement.”²¹⁷. On the other hand, if even only one from the above mentioned circumstances was found, the tribunal would be ready to admit that the clause was applicable to jurisdictional matters.

In consequence the tribunal stated that: “the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.”²¹⁸

The dispute between *Plama and Bulgaria*²¹⁹ concerned the purchase of shares by a Cypriot investor in Bulgarian company Nova Plama conducting an oil refinery. The claimant initiated proceedings before the arbitral court ICSID on the grounds of chapter 5 of the Energy Charter of the treaty between Bulgaria and Cyprus. Some doubts appeared as for the other legal basis for enforcing claims

²¹⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, decision on jurisdiction, 29 November 2004, *op. cit.*, para. 115.

²¹⁶ According to B. Appleton, one may have justified doubts as for the rightness of presented argumentation with regard to distinguishing these two cases. In the *Maffezini* case the tribunal did not base its decision on the fact that the clause included wording “in all matters”. This tribunal proposed broader thesis, namely that at present arrangements connected with settlement of disputes were inherently connected with protection of foreign investments and therefore international arbitration was indispensable for protecting rights guaranteed in the treaties. The differences in both factual states truly lied in the fact that in the *Maffezini* case the plaintiff invoked the clause in order to avoid 18-month period whereas in the *Salini* case the investor wanted to extend the jurisdiction of the arbitral tribunal to matters not specified in a basic contract, i.e. compensation for contract breach. (B. Appleton, *MFN and international investment treaty arbitration: Have we lost sight of the forest through the trees?* 1(2) Appleton’s International Investment Law & Arbitration News (2005), p. 22).

²¹⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, decision on jurisdiction, 29 November 2004, *op. cit.*, para. 118.

²¹⁸ *Ibidem*.

²¹⁹ *Plama Consortium Limited v. Republic of Bulgaria*, decision on jurisdiction, 8 February 2005, www.investmentclaims.com.

since the jurisdictional provision of the treaty mentioned only *ad hoc* arbitration (UNITRAL) and limited the court competence to issue decisions with regard to the amount of compensation for expropriation after the merits of the dispute had been decided according to the procedure in Bulgarian law.

The claimant referred to the ICSID arbitral tribunal demanding to decide on the amount of compensation despite the fact that the proceedings should have been conducted before an *ad hoc* tribunal according to UNCITRAL rules and regulations (and might have applied only to specified aspects) and did not initiate proceedings before Bulgarian courts to make it Plama invoked the clause from Bulgaria – Cyprus treaty arguing that it applied to any “treatment” including also rules for the settlement of disputes and thus allowed for enforcing claims according to more favourable conditions set forth in other treaties concluded by Bulgaria. The claimant referring to the *Maffezini* precedent stated that more favourable treatment in the scope of procedural matters was foreseen in the treaty between Bulgaria and Finland, which indicated ICSID arbitral tribunal as competent to settle disputes, and moreover much more broadly defined its competence. According to the Bulgaria – Finland treaty, arbitral tribunal was entitled to adjudicate not only as to the amount of compensation when the responsibility had already been attributed by a domestic court but in disputes involving contract breaches as well. The tribunal was of different opinion holding that: “[i]t is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism. (...) in none of these cases was it held that the dispute settlement provisions in the basic treaty are replaced in toto by the dispute settlement provisions contained in the other treaty through operation of the MFN provision in the basic treaty.”²²⁰ According to the tribunal, the number of concluded contracts and more and more often cases in which investors invoke the clause in different aspects may not be interpreted as abandoning one of the fundamental principles of international and domestic law, namely that settlement of disputes by the arbitral tribunal is conditioned by clear agreement between concerned parties.

The examination of the tribunal in the *Plama* case may be summarized in the following way: (a) competence of the arbitral tribunal may arise only from an agreement between the parties in which the parties express their consent to the same mode of settling the disputes, (b) consent of Bulgaria for submitting the dispute to arbitral tribunal in a very limited scope is an effect of negotiations between Bulgaria and Cyprus, (c) in situation, in which a state concludes a treaty with a specific

²²⁰ *Plama Consortium Limited v. Republic of Bulgaria*, decision on jurisdiction, 8 February 2005, *op. cit.*, paras. 209, 210.

arbitration clause it may not be presumed that it gave its consent to replace it in future with other solution included in other treaties by operation of a provision, (d) presumption on lack of such consent may be questioned by referring to a clear provision in the treaty or practice of the parties.²²¹

It is also interesting is that the tribunal could come to the same conclusions basing on one of the limitations of the most favoured nation clause suggested in the *Maffezini* case. It seems that it did not do it on purpose since it found that lack of clear treaty provision indicating that the clause applied also to procedural issues should be interpreted as lack of such consent.²²² The tribunals in *Maffezini and Siemens* cases began from a contrary assumption. The tribunal, however, did not explain how it understood the notion of clear provision. It referred to a model treaty of Great Britain from which it resulted directly that the clause also included the settlement of disputes. In particular the tribunal did not explained if the wording “all matters” appearing in other treaties would be sufficient in its opinion.

The opinion presented in the *Plama* case was shared by the tribunal settling the dispute between *Telenor and Hungary*.²²³ Jurisdiction provision included in the Norway – Hungary treaty specified that the jurisdiction of an arbitral tribunal was generally limited to issues of the amount of compensation for expropriation. The claimant argued that the provision allowed him to invoke broadly formulated jurisdictional provisions included in other treaties to which Hungary is a party and thus to state that the competence of the tribunal extended to any dispute arising from basic treaty breach. The tribunal did not share this opinion and to support its thesis it presented four arguments. It found that in view of the guidelines included in w the Vienna Convention on the Law of Treaties the treaty provision in the Norway – Hungary treaty should be interpreted as applying only to material and not procedural provisions.²²⁴ Second, broad interpretation of the clause would lead to “treaty shopping” and would extend the competence of tribunals to issues which had not been agreed by the parties to the basic treaty.²²⁵ Third, this would end up in destabilization and uncertainty in the sense that the agreed mode of settling

²²¹ L. Hsu, *MFN and Dispute Settlement, When the Twain Meet*, 7(1) Journal of World Investment and Trade (2006), pp. 32, 33. The author accepts the conclusions presented in the *Plama* case but points out that the tribunal could have used more pertinent arguments (*Ibidem*, p. 36).

²²² *Plama Consortium Limited v. Republic of Bulgaria*, decision on jurisdiction, 8 February 2005, *op. cit.*, para. 223.

²²³ *Telenor Mobile Communications A.S. v. Republic of Hungary*, award, 13 September 2006, www.investmentclaims.com.

²²⁴ *Ibidem*, para. 92.

²²⁵ *Ibidem*, para. 93.

disputes for the needs of a specific treaty would be replaced by other solutions included in other treaties.²²⁶ Finally the will of the parties to the treaty, in the opinion of the tribunal, was important and if they agreed on particular mode of settling the disputes, then in case there are no proofs to the contrary one may not assume that the parties' will was to allow for replacing it with another mode included in any other treaty.²²⁷

Although the decisions mentioned differ from one another, it may be claimed that some uniform line of jurisprudence may be drawn for the issue of admissibility of invoking the most favoured state clause by investors in jurisdictional matters.

First, all tribunals stated that the investor is as a rule was entitled to enforce claims against states by taking advantage of broadly formulated provision on the settlement of disputes included in a treaty with a third state (by invoking the clause in the basic treaty). The effectiveness of this claim would depend on the content of the provisions on which these claims are based included both in the basic treaty and in the third state treaty.

Second, arbitral tribunals in the *Maffezini*, *Siemens*, *Camuzzi*, *Gas Natural*, *Suez* and *National Grid* cases declared that it was admissible to refer to the more favourable procedural provisions from other treaties which do not influence the scope of competence of the arbitral tribunal specified in the basic treaty.

Third, the tribunals (in the *Salini*, *Plama*, *Telenor* cases) consistently held that the most favoured state clause might not lead to extending the cognition of the arbitral tribunal which is each time negotiated by the parties for the needs of a given treaty. Assuming otherwise would lead to questioning the rule binding in international law and many domestic legal systems that the written arbitration agreement had to be precise and might not leave any doubts as to the parties' will.

²²⁶ *Ibidem*, para. 94.

²²⁷ *Ibidem*, para. 95.

*Łukasz Gruszczyński** ■

EC INCENTIVE ARRANGEMENTS FOR SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE (GSP PLUS) AND WTO LAW – CRITICAL ANALYSIS

INTRODUCTION

International trade appears to be one of the most effective tools for the promotion of development and the eradication of poverty. By limiting tariffs, nations gain access to foreign markets at considerably reduced costs. As proposed by the theory of comparative advantage, countries should specialize in the production of goods whereby their limited domestic resources, when invested in specific activities, can provide the largest gains and increase the total output, and hence raise overall economic welfare. In consequence, it is argued that development of international trade contributes to reduction of poverty.¹ Tariffs and other barriers, the theory holds, can disturb this model and divert the gains from consumers around the world to powerful protected industries.² However, in the real world tariffs

* **Łukasz Gruszczyński, Ph.D.**, assistant professor at the Polish Academy of Science. The author would like to thank Prof. Petersmann and Prof. Tomann for their valuable comments on the earlier drafts of this article. All omissions and mistakes are author's sole responsibility.

The electronic version of this article may differ from its hard copy version with regards to the formatting of the text, but the substantive content of both versions is the same.

¹ For the more elaborated discussion on the relationship between trade liberalization, economic growth and poverty reduction, see P. Van den Bossche, *The Law and Policy of the World Trade Organisation. Text, Cases and Materials*, Cambridge University Press, New York: 2005, pp. 11–19. The Declaration adopted by the 2002 WTO Ministerial Conference in Doha also recognizes that international trade can play an important role in the reduction of poverty.

² There are also arguments against unlimited liberalization of international trade (e.g., the concept of optimal tariff and infant industries, revenue-raising function of tariffs as well as national security considerations); for details, see M.J. Trebilcock & R. Howse, *The Regulation of International Trade*, Routledge, London and New York: 2005, pp. 6–10.

are actually quite frequently used by national governments. Therefore, the effort of international trade liberalisation concentrates, on the one hand, on the reduction of existing tariffs, and on the other hand, on the maintenance of equal opportunities for all countries (i.e., applicability of the same tariffs irrespective of the exporting country). At the same time, it is also widely recognized that, due to specific needs of developing countries, some trade incentives are required to promote export from such countries. This special treatment is intended to help developing countries compete more effectively on international markets and to promote their industrialization, at the same time encouraging the diversification of their economies and acceleration of their economic growth.³

The subject of this article is precisely located in the above context. It attempts to analyze the specific part of the general system of preferences (GSP), a regulatory scheme of the European Communities (EC) established in 2005 that aims at assisting developing countries in their integration with the international trading system. The analysis is undertaken in the light of EC's trade obligations arising from law of the World Trade Organization (WTO) and corresponding case law of the Appellate Body. In this context, the article argues that there are certain aspects of the new system which may potentially conflict with the requirements of international trade law. According to the article, one of the problematic areas is special incentive arrangements for sustainable development and good governance.

This article proceeds as follows. The first part briefly discusses the relevant obligations of WTO law. The second part describes the basic elements of the old GSP scheme, while the third concentrates on the new regime. Against this background, the fourth part attempts to assess the conformity of the new system, in so far as it concerns the special incentive agreements for sustainable development and good governance, with WTO law. Finally, the last part intends to draw some overall conclusions on the new GSP scheme.

1. THE WTO AND INTERNATIONAL TRADE OBLIGATIONS

The WTO is an international organization responsible for liberalization of international trade. This aim is primarily achieved through maintenance of a rule-based system, which regulates different aspects of the international trade of goods and services as well as related matters (e.g., intellectual property rights). In addition,

³ European Commission, Directorate-General for Trade, *The European Union's Generalized System of Preferences* (2004), at 2, available at http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf (last visited 10 April 2009).

the WTO constitutes a convenient venue for negotiations rounds on liberalisation of international trade. Besides these functions, the WTO also plays an important role as a place for settlement of international trade disputes between its Members. In legal terms, such controversies are decided by *ad hoc* panels and can be appealed with respect to issues of law to a permanent tribunal (the Appellate Body). The final report of the Appellate Body is subject to approval from the Dispute Settlement Body (DSB), being the congregation of all WTO Members. In contrast to the old system created by the General Agreement on Trade and Tariffs (GATT 1947), the adoption of reports is now *quasi* automatic, since only the rejection by all Members (including a winning Member) results in the dismissal of a report. A losing WTO Member is obliged to bring its policy in line with the recommendations of the DSB. If it fails to do so, the DSB may authorize the winning Member to impose limited trade sanctions in the form of suspension of tariff concessions.⁴

The EC⁵ as well as its Member States are all members of the WTO. Nevertheless, it became common practice that it is only the EC which speaks for and represents both itself and its Member States. This results from the fact that the external trade policy of the EC belongs to its exclusive competences. This also means that the EC is solely responsible for the adoption and maintenance of special tariff preferences granted to developing countries.

As already mentioned, the WTO agreements set forth the “rules of the game” in international trade. One of the cornerstone obligations of WTO law (as well as the old GATT 1947 system) is the most-favoured nation principle (MFN). In short, it requires WTO Members to treat products of another Member no less favourably than like products of any other country.⁶ At the same time, as early as in 1960s, it was recognized that developing countries might require special treatment in order to address more effectively their development needs.⁷ Since such treatment

⁴ On the WTO dispute settlement system generally, see, D. Palmetier & P. C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge University Press, New York: 2004.

⁵ The EU acts within the WTO as the European Communities; for details see generally R. Leal-Arcas, *Theory and Practice of EC External Trade Law and Policy*, Cameron May, London: 2008.

⁶ Article I of the GATT 1994 specifically stipulates that “with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.

would have constituted a violation of the MFN principle (some countries would be treated more favourably than others), a special waiver from the obligations of the GATT 1947 was adopted (GSP Decision⁸). This decision was subsequently amended in 1979 (Enabling Clause⁹) and incorporated in 1995 into the WTO legal system. The aim of all these efforts was to provide additional benefits to developing countries by increasing their export earnings, promoting industrialization and accelerating their rates of economic growth¹⁰ and at the same time, to guarantee the compatibility of any special schemes with WTO obligations.

Unfortunately, the Enabling Clause was formulated in very broad and ambiguous language leaving many aspects open for interpretation. In general terms, it provides that WTO Members may accord differential and more favourable treatment to developing countries (it is not an obligation but rather an option for WTO Members), without according such treatment to other Members. Developed countries that want to establish preferential treatment are, however, expected to observe certain requirements as any trade preferences need to be: (i) generalized; (ii) non-reciprocal; and (iii) non-discriminatory. Since the Enabling Clause does not explain the above terms, it is for the WTO case law and legal scholarship to clarify the content of these requirements. As far as first condition is concerned, the relevant literature explains that the term “generalized” was introduced in order to distinguish preferences that were applied to all developing countries from those which were allocated on a selective basis to predetermined recipients.¹¹ In other words, the condition may be understood as requiring availability of the system to any developing country without *a priori* exclusions.

The meaning of the second condition is ambiguous. One may read this term broadly and exclude any type of conditionality (i.e., preferential treatment cannot be conditional at all). On the other hand, a more limited interpretation would exclude only those types of conditionality which relate to market access

⁷ See generally, L. Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6(2) *Journal of International Economic Law* (2003), p. 507; the early efforts were particularly undertaken within the United Nations Conference on Trade and Development (UNCTAD).

⁸ GATT Document, Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

⁹ GATT Document, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 L/4903.

¹⁰ Compare, Recital (1) of the GSP Decision.

¹¹ Bartels, *supra* note 8, p. 523; Bartels also notes that the term “generalized”, as used in the expression “generalized system of preferences”, may be seen as an attempt of the drafters to establish a common scheme that would be adopted by all major developed countries; of course no such system has been ever created.

(i.e., additional tariff preferences in exchange for trade concessions from developing countries).¹² Note that both the *travaux préparatoires* as well as the recent ruling of the Appellate Body points to the second interpretation.¹³ In consequence, as a general rule it is arguably possible to offer special tariff preferences and subject them to some non-market access conditions (e.g., observance of certain labour and environmental standards as required by the EC).

The third requirement is probably the most important one. Both the panel and the Appellate Body concentrated on this condition when they assessed the compatibility of the old EC GSP scheme with WTO law. Moreover, it appears that its interpretation raises some particularly interesting legal questions. This is the reason why the subsequent parts of this article analyze the non-discriminatory requirement in more detail.

2. THE OLD GENERAL SYSTEM OF PREFERENCES

The previous EC General System of Preferences (Old GSP)¹⁴ provided for five different schemes: (i) general GSP, benefiting all developing countries (subject to the escape clause),¹⁵ (ii) special incentive arrangements for observance of environmental standards, (iii) special incentive arrangements for observance of labour standards, (iv) special incentive arrangements to combat drug production and trafficking (Drug Arrangements), and (v) special arrangements for least developed countries (LDCs) or so-called “everything but arms” arrangements. Depending on the scheme, developing countries enjoyed different trade preferences (i.e., different tariffs and products coverage).

The conformity of the Old GSP with WTO law was examined in 2004 by the panel and the Appellate Body upon India’s request. India specifically asked for the evaluation of the Drug Arrangements.¹⁶ In its report, adopted by the DSB on

¹² *Ibidem*, pp. 526–30.

¹³ *Ibidem*, p. 526.

¹⁴ Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2001 to 31 January 2004 (IJ 2001, L 346/1). Note also that the Old GSP was not the first EC scheme and the initial efforts can be traced back to 1971.

¹⁵ E.g. Article 12.1 of the Regulation No 2501/2001 provided a possibility of removing tariff preferences in respect of products originating in a beneficiary country if the EC imports from that country exceeded 25 % of EC imports of the same products from all beneficiary countries.

¹⁶ Initially, India challenged all three schemes (special incentives arrangements for observance of environmental and labour standards as well as the Drug Arrangements), and only afterwards limited its claim to the Drug Arrangements; *for details see*, G. Shaffer & Y. Apea,

20 April 2004, the Appellate Body found it incompatible with WTO law, particularly with the provisions of the Enabling Clause.¹⁷ It condemned the system as inflexible (no mechanism for adding new countries to the list of beneficiaries), non-transparent (no conditions for assessing the status of a beneficiary), and arbitrary (no explanations on how the Drug Arrangements responded to the needs of developing countries).¹⁸ In addition, the Appellate Body also made a number of more general observations, relating to non-discrimination condition of the Enabling Clause. It found among others, that:

- in granting differential tariff treatment, developed countries are required to ensure that identical treatment is available to all similarly situated GSP beneficiaries;¹⁹
- the preference-granting country needs to positively respond to the development, financial or trade needs of developing countries, meaning that the response of a preference-granting country must be made with the view to improving the development, financial or trade situation of a beneficiary country, based on the particular need in question;²⁰
- the existence of development, financial or trade needs must be assessed according to objective standards; recognition set out in multilateral instruments adopted by international organizations could serve as such a standard;²¹
- a sufficient nexus needs to exist between the preferential treatment and the likelihood of alleviating the relevant development, financial or trade needs;²²
- the tariff preferences accorded to some developing countries under the scheme cannot raise barriers nor create undue difficulties for the trade of any other contracting parties.²³

The Appellate Body also addressed the first condition of the Enabling Clause, finding that term “generalized” requires GSP schemes to be generally applicable. At the same time, the Appellate Body also confirmed that some

Institutional Choice in the General System of preferences Case: Who Decides the Conditions from Trade Preferences? The Law and Politics of Rights, University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No. 1008, 2006, p. 7.

¹⁷ Appellate Body Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted on 20 April 2004, para. 182.

¹⁸ *Ibidem*, paras. 182–84 and 187–88.

¹⁹ *Ibidem*, para. 154.

²⁰ *Ibidem*, para. 164.

²¹ *Ibidem*, para. 163.

²² *Ibidem*, para. 164.

²³ *Ibidem*, para. 167.

degree of conditionality in GSP schemes is acceptable under WTO law and does not violate the first requirement.²⁴ The Appellate Body did not address the second condition at all.

3. THE NEW GSP SCHEME

On 7 July 2004, the European Commission adopted guidelines on the Community's generalised system of preferences (New GSP) for the ten-year period from 2006 to 2015.²⁵ Subsequently, on 27 June 2005, the Council adopted the Regulation, which set out the rules for the operation of the New GSP system for a period of the first three years (2006-2008).²⁶ The new regulation (for the period 2009-2012)²⁷ was adopted in 2008. It repeats most of the provisions of the Regulation 980/2005 and introduces only small changes. The list of beneficiaries of GSP Plus scheme was adopted in the form of a separate decision of the Commission on 9 December 2008.²⁸

The New GSP provides for three different schemes of tariff preferences: (i) the general arrangement; (ii) a special incentive arrangements for sustainable development and good governance (GSP Plus); and (iii) a special arrangement for LDCs. The General Arrangement and GSP Plus are both selective, in the sense that not all products are considered as eligible for preferential treatment (meaning that non-eligible products are treated under the MFN rule). The products that are excluded consist, for example, of some agricultural goods, pharmaceutical products, arms, and ammunition. The eligible products are divided into sensitive and non-sensitive categories. Sensitive products consist of a mixture of agricultural, textile, clothing, apparel, carpets and footwear items. They receive lower tariff reduction as compared to non-sensitive

²⁴ *Ibidem*, para. 156.

²⁵ The Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM(2004) 461, Official Journal C 242 of 29.9.2004 (Communication).

²⁶ Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (Regulation 980/2005).

²⁷ Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 (Regulation 732/2008).

²⁸ Commission Decision of 9 December 2008 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for in Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 (Decision 2008/938/EC).

products. Note that the distinction between those two categories reflects internal political considerations of the EC. Products that are classified as sensitive belong to those sectors of the EC economy which normally receive higher protection.²⁹

The general arrangement covers about 6,300 products. With respect to non-sensitive products, it exempts them from all duties; as far as the sensitive products are concerned, there is a general tariff reduction of 3.5 percentage points to *ad valorem* duties compared to the application of the standard MFN tariff (with some exceptions). The list of countries qualified for the General Arrangement scheme is predetermined in the sense that all beneficiaries are enumerated in Annex I to the Regulation 732/2008 and currently includes 176 countries and territories. In addition, Article 3 of the Regulation stipulates that a beneficiary country will be removed from the list when it is classified by the World Bank as a high-income country over three consecutive years, and when the value of exports for the five largest sections of its GSP-covered exports to the Community represents less than 75% of the total GSP-covered exports of the beneficiary country to the Community. The Regulation, however, does not contain any provision, which would allow for the immediate supplementation of a list with new countries. That can be done only in the review process, which takes place once every three years.

GSP Plus covers approximately the same products as the General Arrangement. In general terms, all sensitive and non-sensitive products under GSP Plus are duty-free. That relates to both *ad valorem* and specific duties. The scheme is designed for vulnerable countries with special development needs. Beneficiaries, however, must meet a number of additional criteria. Regulation 732/2008 in particular states that:

- a beneficiary country needs to be considered a “vulnerable country” meaning that: (i) it is not classified by the World Bank as a high income country during three consecutive years; (ii) the five largest sections of its GSP-covered exports to the EC represent more than 75 percent of its total GSP-covered exports; and (iii) its GSP-covered exports to the EC represent less than 1 percent of total GSP covered exports to the EC;
- a beneficiary country needs to ratify and effectively implement 16 conventions on human and labour standards and 11 conventions related to good governance and the protection of the environment;³⁰

²⁹ Note also that the distinction between sensitive and non-sensitive products does not violate WTO rules since the Enabling Clause does not require consistency in tariff reduction.

³⁰ Core human and labour rights UN/ILO Conventions include: International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against

- a beneficiary country must give an undertaking to maintain the ratification of the conventions and their implementing legislation and measures, and accept regular monitoring and review of its implementation record in accordance with the implementation provisions of respective conventions.

The Regulation 732/2008 also enumerates situations in which the preferential arrangements may be temporarily withdrawn (e.g., serious and systemic violations of principles laid down in the conventions, export of goods made by prison labour).

As will be discussed below in more detail, the initial qualification round for GSP Plus status under the Regulation 980/2005 was very short. The applicants had approximately 5 months to submit their applications and fulfil required conditions.³¹ The second round was preceded by a considerably longer period of time (the deadline for application was set for 31 October 2008). Pursuant to the Regulation 980/2005, previous beneficiaries were also obliged to re-apply. Currently, there are 16 countries, which qualify for GSP Plus treatment.³²

Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Minimum Age for Admission to Employment (N° 138); Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (N° 182); Abolition of Forced Labour Convention (N° 105); Forced Compulsory Labour Convention (N° 29); Equal Remuneration of Men and Women Workers for Work of Equal Value Convention (N° 100); Discrimination in Respect of Employment and Occupation Convention (N° 111); Freedom of Association and Protection of the Right to Organise Convention (N° 87); Application of the Principles of the Right to Organise and to Bargain Collectively Convention (N° 98); International Convention on the Suppression and Punishment of the Crime of Apartheid.

Conventions related to environment and governance principles include: Montreal Protocol on Substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Stockholm Convention on persistent Organic Pollutants; Convention on International Trade in Endangered Species; Convention on Biological Diversity; Cartagena Protocol on Biosafety; Kyoto Protocol to the UN Framework Convention on Climate Change; UN Single Convention on Narcotic Drugs (1961); UN Convention on Psychotropic Substances (1971); UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); Mexico UN Convention Against Corruption.

³¹ Under Regulation 980/2005 a beneficiary country was obliged to ratify and effectively implement 16 core conventions on human and labour standards and 7 (out of 11) of the conventions relating to good governance and the protection of the environment. The remaining 6 conventions had to be ratified by 31 December 2008. The Regulation 980/2005 also provided that GSP Plus may be granted to the country which had not ratified and effectively implemented maximum of two out of 16 conventions on human and labour standards. However, such option was only available only if a country faced specific constitutional constraints (i.e., incompatibility between the provisions of the conventions with its constitution) and convention had to be ratified by 31 December 2006 anyway.

³² This includes the following countries: Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Paraguay, Peru, Sri Lanka, and Venezuela.

Finally, there is a special arrangement for LDCs. The countries included in the list of LDCs receive exemption from duties on all products except for arms and ammunition. The list of countries, which qualify for a special arrangement is pre-determined and all beneficiary countries are enumerated in the Annex I to the Regulation 732/2008. This list corresponds to the list of LDCs published by the UN High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. The Regulation 732/2008 also grants a right for the Commission to remove a country from the arrangement when such a country is excluded by the UN from the list of LDCs. There is no analogous provision regulating the manner in which a list is supplemented. Arguably this can be done during the review process once every three years.

4. COMPATIBILITY OF THE NEW GSP PLUS SCHEME WITH WTO LAW

At the DSB meeting on 20 July 2005, the EC announced in a special Communication that the Drug Arrangements had been repealed as of 1 July 2005 and that a new regulation had been promulgated bringing the EC into compliance with the DSB recommendations. The Communication directly refers to the decision of the Appellate Body,³³ while both Regulations 980/2005 and 732/2008 stress that the Community's common commercial policy has to comply with the WTO requirements, and in particular with the Enabling Clause.³⁴ At the same time, a number of developing countries have expressed their concerns with respect to the New GSP and its compatibility with WTO law.³⁵ It is also worth noting in this context that a precise assessment of the New GSP Plus scheme is very difficult, as the Appellate Body findings refer predominantly to the Drug Arrangements, which do not have an equivalent in the new system. As discussed above, the GSP regime as such was addressed only in general terms and only with respect to one particular condition (the non-discriminatory requirement). Nevertheless, it seems that some parts of the New GSP may be incompatible with the obligations provided by WTO law. The subsequent section will analyze the potential problems in more detail.

³³ See, the Communication where the Commission stated that "the GSP ... must ... comply with the Enabling Clause as interpreted by the WTO Appellate Body in the recent case taken by India against Community's existing GSP scheme."

³⁴ E.g., Recital (2) of the Regulation 732/2008.

³⁵ See e.g., India statement during the DSB meeting on 20 July 2005, and more recently the discussion on the renewal of GSP Plus status for Sri Lanka (http://www.tamilstar.com/news/lanka/article_7693.shtml, last visited on 26 March 2009), see also "Not Many Pluses" in *The Economist* (14 August 2008).

4.1. Identical Treatment For All Similarly Situated GSP Beneficiaries

The term “non-discriminatory”, as interpreted by the Appellate Body, requires that identical treatment is accorded to all similarly situated GSP beneficiaries. It is disputable whether beneficiaries can be defined as “similarly situated” on the basis of their commitments and adherence to the international treaties and conventions. Countries that have not adhered to particular conventions may have exactly the same development needs (and in consequence be similarly situated) as those which have already gone through the ratification process. The same problem arises with respect to those countries, which, although have not ratified particular legal instrument, nevertheless observe its requirements (e.g., on the basis of their national law). It is not clear in what sense their situation differs from countries that are party to a particular convention. Moreover, even within the group of beneficiaries (those countries that in fact have ratified relevant conventions) there may be great differences. As noted by one of the commentators, a country whose starting point was very backward will “be facing an unjustifiable burden by being asked to effectively implement the conventions to the same extent as countries which start from much more advance position”.³⁶

Arguably, there are other criteria, which better reflect the situation of potential beneficiaries. Moreover, these criteria also seem to fit more properly into other requirements enumerated by the Appellate Body (e.g., an objective assessment of the existence of development, financial and trade needs). As an example, one can give the Human Development Index (HDI) published annually by the United Nations Development Programme, which is a comparative index reflecting the level of poverty, literacy, education, life expectancy, childbirth, and other factors for countries. Would it not be natural to apply such a comprehensive indicator as a criterion for qualifying that two countries are similarly situated? If one applies the HDI to countries enumerated in the Decision 2008/938/EC, it appears that the beneficiary countries belong to completely different categories (e.g., Costa Rica, which is qualified as having high HDI, while Guatemala is specified as having medium HDI). However, under the Decision 2008/938/EC, they are in the same category. Besides, there are a number of countries qualified as having medium HDI, which are not included in the list (e.g., Brazil or India).

³⁶ J. Harrison, *Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform*, 42 Common Market Law Review (2005), p. 1682.

4.2. Positive Response to Development, Financial or Trade Needs of a Developing Country

The Appellate Body made clear that GSP schemes must respond positively to the needs of developing countries, namely to their development, financial and trade needs. One may wonder what, under the GSP Plus scheme, actually constitutes a positive response to the above needs. Is it an adherence to international labour, human rights and good governance conventions? Or rather the possibility of additional tariff preference granted to those countries which comply with pre-requirements of the GSP Plus? Neither the Regulation 2008/938/EC nor the Communication provides a clear answer in this respect. For the sake of the subsequent analysis, I will assume that both functions can be qualified as positive response to the needs of developing countries.

One of the basic issues requiring clarification is the meaning of the expression “development, financial or trade needs of a developing country”. Some authors argue for a broad interpretation, submitting that the term “development need” should be understood as covering both economic and non-economic considerations. Indeed, such an approach finds some support in other international legal instruments. As pointed out by Bartels, the 1986 UN Declaration on the Right to Development defines development as a comprehensive economic, social cultural and political process. A similar stance is taken by the 2002 UN Johannesburg Declaration on Sustainable Development, which supplements the above list with environmental concerns.³⁷ This broad reading allows one to accept that the requirement for adherence to (and observance of) certain international conventions may indeed constitute a positive response to development needs (i.e., development also relates to social, political and environmental progress).

On the other hand, the above argument seems to contradict the explicit language of the GSP Decision, which enumerates solely economic objectives. According to the third recital of the GSP Decision, the goal of the generalized system is to increase export earnings, promote industrialization, and accelerate rates of economic growth of developing countries. Note that all these objectives have a purely economical character. Exactly the same language was used in the 1968 UNCTAD resolution, the document which was a basis for subsequent WTO instruments.³⁸ This clearly shows that the negotiators wanted to limit the disciplines of the differential and special treatment within the GSP schemes only to economic considerations. This interpretation is also supported by the language used by the Appellate Body

³⁷ L. Bartels, *The WTO Legality of the EU's GSP+ Arrangements*, 10(4) *Journal of International Economic Law* (2007), p. 875.

³⁸ *Compare*, Resolution 21 (ii) taken at the UNCTAD II Conference in New Delhi in 1968.

in its report. The Appellate Body, when discussing this issue stressed that a development need must be by its very nature something that can be effectively addressed through tariff preferences.³⁹ This statement clearly indicated a strong economic dimension of a “legitimate” need.

The narrow reading (i.e., exclusion of non-economic needs from the coverage of the Enabling Clause) is, however, not necessarily fatal to the GSP Plus scheme. Arguably, there is nothing in the language of the Enabling Clause which would require a direct connection between proposed action and the alleviation of a particular need (in the economic sense). In consequence, it seems that the relationship can be construed as being more indirect and remote (e.g. the requirement to adhere to a particular set of conventions will only contribute indirectly to the alleviation of certain economic needs). This understanding also seems to be reflected in the Communication, which stresses that there is a link between development in the economic sense and respect for basic human, labour rights, environment and basic principles of governance.⁴⁰ This is clearly uncontroversial in respect to good governance obligations. There are also some economic studies,⁴¹ which suggest a positive correlation between compliance with the core labour standards and higher levels of economic growth. As far as the protection of the environment and compliance with human rights is concerned, there is, however, less evidence and some researchers argue that no connection exists between observance of human rights obligations (or environmental standards) and economic growth.⁴²

4.3. Does Not Create a Barrier or Undue Difficulty For the Trade of Any Other Contracting Party

The Appellate Body also required that the special preferential treatment accorded to some developing countries under the scheme cannot raise barriers nor create undue difficulties for the trade of any other WTO Member. Some authors claim that the GSP Plus indeed creates such undue difficulties for non-beneficiary countries. Although there are only a few empirical studies assessing the influence of the GSP programs on the export from non-beneficiaries countries, it seems that the impact may be very limited. Note that countries, which benefit from GSP Plus

³⁹ Appellate Body Report, *EC – Tariff Preferences*, *supra* note 18, para. 164.

⁴⁰ Communication, *supra* note 26, at 10.

⁴¹ OECD, *Trade, Employment and Labour Standards; A Study of Core Workers Rights and International Trade* (1996).

⁴² Compare with the literature cited in M. Chabreckova, M. Zeugin & J. Wang, *The EU GSP Program Challenged by India: An Evaluation of the Case, the Political Conditionality in GSP Schemes and the Future Consequences*, a paper available at <http://hei.unige.ch/sections/sp/agenda/wto/Geneva%20-%20Paper%20on%20GSP.pdf> (last visited on 25 April 2009).

scheme are rather small economies in terms of their export to the EC. Due to their size, they are not able to affect the prices of goods on the EC internal market because their export is insignificant relative to the size of the market as such. Moreover, the definition of a vulnerable country (which is a prerequisite for qualifying for GSP Plus) clearly stipulates that a country may qualify for the GSP Plus scheme only if its GSP-covered exports to the EC represent less than 1 percent of the total GSP covered exports to the EC. This additionally limits the influence of exporters from any beneficiary on the internal price in the EC. Since the prices of particular goods are not affected, the conditions of competition for non-beneficiary countries remain as they would be without a GSP Plus scheme.⁴³ In consequence, it may be assumed that the GSP Plus system does not generally raise barriers nor create undue difficulties for the trade of any other WTO Member.

It also worth to stress in this context that what actually may be problematic for a developing countries is their withdrawal from the GSP Plus list. Note that the cost of production of a particular good in a beneficiary country may be at such a level that when combined with the applicable EC tariff, it could result in the price that will exceed the market price at which goods are sold on the EC internal market (either because of low efficiency of the production process in the exporting country, or because of high EC tariffs applicable to particular goods). In such a case, removal of the country from the list of beneficiaries will have serious consequences for its export.⁴⁴ This aspect of the GSP, however, falls outside of the scope of this article.

4.4. Objective Criteria

According to the Appellate Body, selection of GSP beneficiaries should be based on objective criteria. At first sight, it seems that the GSP Plus complies fully with this condition. It establishes objective benchmarks against which the assessment of developing countries may be carried out. However, a closer inspection reveals some problematic issues. If one compares the list of the countries included within the Drug Arrangements and that of GSP Plus, it appears that the great majority of the countries are covered by both lists (including countries, which were in the application process under the Old GSP, i.e., Sri Lanka, Georgia and

⁴³ Compare also, G. M. Grossman & A. O. Sykes, *A Preference for Development: The Law and Economics of GSP*, International Law Workshop, University of California, Berkeley, Paper No. 6 (2004), p. 23.

⁴⁴ E.g., According to the research carried out at the University of Sussex, losing GSP Plus status by Sri Lanka would lead to a 4% cut in its garment exports and overall it would cost app. 2% of Sri Lanka's gross domestic product ('Not Many Pluses' in *The Economist* (14 August 2008)).

Mongolia).⁴⁵ Moreover, as was mentioned above, the initial deadline for application to the GSP Plus scheme under Regulation 980/2005 was very short, while the interim safeguards were rather weak (i.e., countries were obliged to immediately ratify and observe great majority of the conventions). This short period may also indicate that the selection of conventions required under GSP Plus scheme was made in order to qualify a predetermined set of countries. In consequence, one may argue that the EC did not base its selection on objective criteria, but designed the GSP requirement in such a way as to promote those countries that previously had benefited from the Drug Arrangements.

The above observation on the arbitrary character of the list is additionally supported by the selection of the conventions for the purpose of the GSP Plus program. As noted by Bartels, the list includes, for example, the Apartheid Convention, which was not ratified by two-thirds of EU Member States. At the same time, the list does not contain the UN Migration Convention, which is considered as central to international human rights law.⁴⁶ Moreover, inclusion of some conventions on the list seems to be motivated by internal political considerations rather than development needs of developing countries. For example, the EC requires ratification of the Cartagena Protocol on Biosafety, the convention, which is perceived by some countries as an instrument promoting the European regulatory model with respect to genetically modified organisms. This, in turn, may indicate that the GSP Plus is at least partially motivated by internal EC considerations rather than development needs of other WTO Members.

It also needs to be noted that the above problem (at least with respect to the time necessary for the required adjustments to take place) was somehow mitigated in the recent qualification round under Regulation 732/2008. Potential applicants have almost three years to meet the criteria set out by the Communication. Of course, this fact alone does not change the general concern with respect to the selection of the conventions.

4.5. Flexibility of the GSP Scheme

The Appellate Body, when assessing the Drug Arrangements noted that the system was not sufficiently flexible,⁴⁷ in the sense that there was no mechanism for

⁴⁵ Note also that all countries included in the Drug Arrangements, except from Pakistan, became qualified the GSP Plus scheme.

⁴⁶ Bartels, *supra* note 37, at p. 878 (also giving an example of the Genocide Convention which was not ratified by Malta, and another case includes the UN Convention against corruption which was not ratified by Estonia).

⁴⁷ Appellate Body Report, EC – Tariff Preferences, *supra* note 18, para. 182; *compare also* with the findings of the Appellate Body in the *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, adopted on 6 November 1998, para. 117.

adding new countries to the list of beneficiaries. The New GSP Plus scheme definitively constitutes an improvement. Initially, under Regulation 980/2005, potential beneficiaries could be added to the GSP Plus list only during the review process that took place once every three years. The new Regulation 732/2008 goes even further. It provides an additional opportunity for applications in mid-2010 (which is half-way through the life of the Regulation). At the same time, the GSP Plus beneficiaries, which were successfully qualified in 2008 round, do not need to re-apply and their status will normally be maintained throughout the three year period provided by the Regulation. Nevertheless, the lack of immediate procedure may still be questioned. It is possible that a country which complies with all the requirements of the Regulation 732/2008 cannot take advantage of tariff preferences until the new review process is completed. Moreover, the inflexibility of the system may be also criticized on more general grounds. Note that the GSP Plus system refers to formal requirements (adhesion to particular conventions) without providing an applicant with the possibility to prove the actual observance of certain labour, environmental or goods governance standards. Whether such an approach meets the threshold set by the Appellate Body is highly disputable.

CONCLUSIONS

This article analyses a part of the New GSP scheme, which establishes a special incentive arrangements for sustainable development and good governance. The article argues that the arrangements contain elements that may be inconsistent with obligations of the EC under WTO law. In particular, the article questions whether different countries may be considered as similarly situated on the basis of their adherence to international treaties. In this context, it proposes to apply other criteria such as HDI. The article also submits that development needs as provided in the Enabling Clause should be understood in an economic sense. In this context, the article recognizes that the EC as a party bearing the burden of proof in potential WTO proceedings, may have difficulties in providing evidence on the existence of a relationship between development and adherence to labour or environmental standards. Another feature of GSP Plus, which seems to be disputable from the perspective of WTO law, is the objectivity of the criteria used by the EC. The short initial application period and the selection of the conventions cast doubts as to the good faith of the EC actions. Finally, the article criticizes the inflexibilities, which are built into the GSP Plus system (i.e., lack of procedure to allow for the immediate inclusion of new beneficiaries).

On the other hand, one also needs to realize that despite the above legal deficiencies of the GSP Plus scheme, it may be politically impossible for developing countries to bring a case to the WTO. As noted in the literature, such an action could endanger the existence of the current system of preferences, since nothing in WTO law requires donor countries to maintain schemes that are no longer politically acceptable.⁴⁸ Moreover, it also seems that the current Regulation 732/2008 addresses some flaws of the previous system in a manner, which is compatible with the obligations of the Enabling Clause. This can also reduce a tension between the EC and potential beneficiaries.

⁴⁸ Grossman & Sykes, *supra* note 43, at p. 19.

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