

Jadranka Osrečak¹

Državno odvjetništvo Republike Hrvatske

Gajeva 30a, 10000 Zagreb

ORCID ID: <https://orcid.org/0000-0003-0156-8725>

jadranka.osrecak@dorh.hr



A MISSED OPPORTUNITY: PROCEDURAL EVASION AND JURISDICTIONAL GAPS IN THE MIHALJEVIĆ V. CROATIA ICSID CASE²

ABSTRACT

This article provides a critical analysis of the procedural and jurisdictional issues in *Marko Mihaljević v. Republic of Croatia*, an ICSID arbitration case that was ultimately dismissed on the grounds of the Claimant's Croatian nationality.

While the Tribunal reached the correct outcome by declining jurisdiction, its path to it remains problematic. The article scrutinizes the Tribunal's decision to deny Croatia's application for summary dismissal under ICSID Arbitration Rule 41(5), arguing that it set an unduly high threshold for establishing the burden of proof by characterising fundamental jurisdictional defects—specifically, the claimant's dual nationality and the invalidity of the Donation Agreement purporting his alleged investment—as complex factual disputes unsuitable for summary determination.

Furthermore, the article investigates the Tribunal's failure to address the Claimant's novel and potentially abusive "reaffirmation of consent" theory, which proposed that an individual investor who was disqualified from ICSID jurisdiction at the time of his consent to arbitration of the dispute on grounds of nationality could retroactively cure the jurisdictional defect by changing his nationality and "perfecting" his consent. By failing to address this untenable theory, the Tribunal

¹ Jadranka Osrečak was the sole individual involved on the side of the Republic of Croatia as the party in the *Mihaljević case* from the initial registration of the request for arbitration until the conclusion of the proceedings. Consequently, she has gained a comprehensive understanding of the legal arguments, the facts of the case, and the progression of the proceedings. The views expressed in this article are her personal opinions and do not necessarily reflect those of any institutions or organizations with which the author is currently or has in the past been affiliated.

² The author expresses appreciation for the review and comments on this article provided by Ms. Miriam Harwood, who served as lead counsel appointed by Croatia in the ICSID proceedings.

has missed the opportunity to affirm the jurisdictional boundaries of the ICSID Convention as clearly set out in Article 25 with respect to individual investors.

Finally, the article questions the effectiveness of the Secretary-General's screening power under Article 36(3) of the ICSID Convention, using the *Mihaljević* case to argue for a more robust initial gatekeeping function to protect States from claims that are manifestly outside the Centre's jurisdiction. The case serves as a cautionary tale about the potential for the exploitation of procedural mechanisms, highlighting the need for tribunals and the ICSID Secretariat to actively prevent abuses of process and, hence, protect States from frivolous claims and excessive costs.

Key words: ICSID arbitration, preliminary objection, consent, abuse of process

I. Introduction

The international investment arbitration initiated by Marko Mihaljević (the Claimant or Marko Mihaljević) against the Republic of Croatia³ was concluded a few years ago. In this case, the Tribunal denied jurisdiction on the grounds that the Claimant was a Croatian citizen at all relevant times, and therefore did not enjoy protection under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or under the bilateral investment treaty concluded between Croatia and Germany.

The decision in the ICSID case *Marko Mihaljević v. Republic of Croatia* (the *Mihaljević* case) denying Croatia's Rule 41(5) application is not publicly available, but the award and the concurring opinion⁴ are publicly available. This article examines the facts of the case from three perspectives: (i) the registration of the request for arbitration, (ii) the decision on the preliminary objection, and (iii) the award with respect to Croatia's jurisdictional objection that the Claimant was a dual national—one of them Croatian—and therefore not entitled to protection under Article 25⁵ of the ICSID Convention.

³ *Marko Mihaljević v. Republic of Croatia*, ICSID Case No. ARB/19/35.

⁴ Award of May 19, 2023, and Concurring Opinion of May 19, 2023 available at: <https://www.italaw.com/cases/10607>. Accessed 17 September 2025

⁵ Article 25(1) and (2)(a) of the ICSID Convention reads as follows:

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

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant

Specifically, by analyzing the facts of the case, this article investigates consent and the impact (if any) of reaffirmation of consent, including the powers of the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID or the Centre) to deny registration of a request for arbitration.

It is necessary to revisit the issue of consent because the Claimant proposed a theory under which his own consent to arbitration of the dispute could be disregarded precisely because he was a Croatian national and therefore disqualified under Article 25 of the ICSID Convention. Under his theory, rather than being precluded from pursuing arbitration of the dispute, he should be able to change nationality, remove the impediment, re-consent to arbitration, and proceed with his claim against Croatia. This, however, stands Article 25 of the ICSID Convention on its head. Article 25 clearly states that the jurisdictional requirements, including nationality, are determined at the time of consent to arbitration of the dispute. By attempting to render his own consent “invalid,” and then “reaffirming” his consent after attempting to shed his Croatian nationality, the Claimant engaged in a manifest abuse of process, contrary to one of the core principles of the ICSID Convention: that a State cannot be subject to ICSID arbitration of a dispute with one of its own nationals.

At the core of the Claimant’s arguments is the theory that if there is a jurisdictional bar like the one in this case, there cannot be valid consent, i.e., the arbitration agreement cannot be concluded, given that the offer to arbitrate cannot be validly accepted. This theory is not only incorrect for the reasons already mentioned, but it is also contrary to the basic principles of contract law.

This article argues that the ICSID Secretary-General and arbitral tribunals must recognise abuses of process and either deny registration or uphold preliminary objections in cases such as the *Mihaljević* case, to protect States from frivolous claims.

The article also briefly examines the burden of proof in proceedings under Rule 41(5) of the ICSID Arbitration Rules, specifically in relation to the *Mihaljević* case, and contends that dismissal is warranted in similar cases.

to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.

Available at: <https://icsid.worldbank.org/sites/default/files/documents/Old%20Rules/2006%20-%20ICSID%20Convention%2C%20Regulations%20and%20Rules%20-%20ENG.pdf> Accessed 3 September 2025.

II. The Arbitration Proceedings

1. Background of the Dispute and the Facts

The case comes from a prolonged dispute over a piece of land in Croatia. Srećko Mihaljević, the claimant's father and a Croatian citizen, bought the land in 1993 from Gortan, a corporation that had been privatised in the 90s.

A 2005 decision of the Croatian State Privatisation Fund declared that the original seller (Gortan) never had a valid title to transfer the part of the land not registered in its share capital. This legally meant that Srećko Mihaljević's claim to ownership of the land not indicated in the sale contract was no longer valid. Srećko Mihaljević filed a lawsuit against Gortan and won. Following the 2005 decision, Croatia filed a lawsuit against Srećko Mihaljević as the owner registered in the land registry, arguing that Croatia was, under the law, the rightful owner of the part of the land not listed in the seller's [Gortan] share capital.

Srećko Mihaljević was also charged with a criminal offense arising from the registration of ownership of the property. A clerk at the Zagreb Municipal Court was found guilty of accepting a bribe to register land ownership in the name of Srećko Mihaljević. However, the charges against Srećko Mihaljević for giving the bribe were dropped because the statute of limitations had expired.⁶

Finally, Srećko Mihaljević personally sent several notices of arbitration to Croatia in his own name, the last of which was sent in February 2018, in which he informed Croatia that he was the owner of the property and that he intended to commence ICSID arbitration against Croatia because he was prevented from developing an investment on the disputed part of the property. None of the letters stated that his son, Marko Mihaljević, was the owner of the property.⁷ The case took a new turn in

⁶ Petrušić, Željko, APSURD PRAVOSUĐA 22 godine od počinjenja djela, 11 godina suđenja, 4 prvostupanijske presude ... i sve pada u zastaru 4. lipnja, in *Jutarnji list* (daily newspaper), May 31, 2019, writes: „Thus, the Supreme Court ultimately upheld the verdict against the accused land registry clerk Milivoj Vrban, which stated, in short, that he had carried out the disputed registrations in favour of Srećko Mihaljević “at his request,” thereby committing the criminal offence of abuse of position and authority. (...) And so, in the end, Milivoj Vrban was finally legally convicted of abuse of office because, for some unknown reasons known only to him, he conducted land registry procedures in Mihaljević's favour. Mihaljević, after the Supreme Court's decision was overturned, is saved by statute of limitations regardless of the new non-final verdict.“ Available at: <https://www.jutarnji.hr/vijesti/crna-kronika/apsurd-pravosuda-22-godine-od-pocinjenja-djela-11-godina-sudenja-4-prvostupanijske-presude-i-sve-pada-u-zastaru-4-lipnja-8946968>. Accessed 10 September 2025.

⁷ Croatia submitted letters from Srećko Mihaljević as evidence to its Rule 41(5) Application (Preliminary Objection).

2019 when Marko Mihaljević, Srećko's son, who held German citizenship (as well as Croatian citizenship), became the named Claimant to invoke the Germany-Croatia BIT and initiate ICSID arbitration.

2. Registration of the request for arbitration

Marko Mihaljević, asserting his German nationality, initiated arbitration against Croatia under the Germany-Croatia Bilateral Investment Treaty⁸ (BIT) and the ICSID Convention. His first request for arbitration, filed in October 2019, was withdrawn after ICSID inquired about his nationality status, and he was unable to confirm that he met the requirements of Article 25 of the ICSID Convention, specifically, that he was not a national of Croatia, the Respondent State. After withdrawing the first request for arbitration, he filed an application with the Croatian Ministry of the Interior in November 2019, requesting a discharge from his Croatian citizenship. Before the Ministry issued a decision on the application, he re-submitted his request for arbitration with ICSID on December 6, 2019, [with a footnote erroneously stating that he had already “revoked”/”renounced” his Croatian citizenship].⁹ On the same day, he sent Croatia a “reaffirmation” of his consent to arbitrate the dispute pursuant to the ICSID Convention and the Germany-Croatia BIT.

Croatia formally objected to the registration of the second request for arbitration on pivotal jurisdictional grounds: the Claimant remained a Croatian national at all relevant times. Croatia anchored its objection in a crucial distinction under Croatian law between two methods of termination citizenship: discharge and renunciation.

- Discharge: Marko Mihaljević submitted an application to the Croatian Ministry of the Interior requesting a discharge from citizenship under Article 18 of the Croatian Citizenship Act (CCA). Discharge from citizenship is not irreversible under the CCA, given that Croatian citizenship can be re-acquired upon application at a later time. The decision of the competent body has a constitutive effect,

⁸ The Treaty between the Republic of Croatia and the Federal Republic of Germany was the Reciprocal Encouragement and Protection of Investments. The Germany-Croatia Bilateral Investment Treaty in German is available at: <https://www.italaw.com/sites/default/files/laws/18028.pdf> Accessed 17 September 2025.

⁹ The footnote stated: „On November 5, 2019, Mr. Mihaljević renounced any Croatian citizenship he might have been deemed to have pursuant to Article 18 of the Croatian Citizenship Act. See Certificate Prepared by the Immigration, Citizenship and Administration Division of the Zagreb Police of the Ministry of the Interior (Nov. 5, 2019), Exhibit 10. Article 24a of the Croatian Citizenship Act states that “Croatian citizenship will cease by renunciation on the day of the submission of the statement on the renunciation of Croatian citizenship.”

meaning it produces legal effects only upon the formal delivery of a positive decision by the state authority—which did not occur until May 2020, five months after his second request for arbitration was filed with ICSID and registered.

- **Renunciation:** Although Marko Mihaljević claimed he had “renounced” his Croatian citizenship, he did not, in fact, pursue this route. The Croatian Citizenship Act provides for renunciation in Article 21 and specifies the procedures, documents, and statements required to invoke the mechanism. Renunciation of citizenship is irreversible under the CCA. Unlike in the case of discharge, the applicant cannot later re-acquire Croatian citizenship. Importantly for timing purposes, once the competent body issues its decision approving an application for renunciation, the decision is declaratory in nature, meaning that the termination of citizenship is effective from the date the applicant submitted his application and statement of renunciation to the competent authority.

This distinction between “discharge” and “renunciation” under Croatian law was not merely procedural but was fundamentally determinative of the jurisdictional outcome in the *Mihaljević* case. Croatia argued that the Claimant chose a path to fully retain his Croatian nationality throughout the critical periods for establishing ICSID jurisdiction under Article 25 of the ICSID Convention, notwithstanding his arguments to the contrary.

Furthermore, Croatia contended that Mr. Mihaljević’s consent to arbitration was given several months earlier than the date of his first or second request for arbitration, specifically, when he sent his March 2019 Notice of Dispute and accepted Croatia’s standing offer to arbitrate under the Germany-Croatia BIT at a time when his Croatian nationality was uncontested. Consequently, his subsequent application for discharge of citizenship, in addition to his later “reaffirmation” of consent, could not retroactively cure his disqualification from ICSID arbitration as a dual national when he consented.

In response, Mihaljević argued that his original consent was “invalid” and should be disregarded, and that by “reaffirming” his consent to arbitrate after filing his application to terminate his Croatian citizenship, he had effectively “perfected” the previously invalid consent at a time when he was no longer a Croatian national, thus complying with Article 25(2) of the ICSID Convention. This theory is erroneous both on the facts and in the law, under both Croatian citizenship law and the ICSID Convention’s jurisdictional rules.

The request was registered by ICSID on 31 December 2019, notwithstanding Croatia’s objection and detailed explanation of the Claimant’s status as a Croatian national.

3. Croatia's Application for Dismissal under Rule 41(5) of the ICSID Arbitration Rules

After the Tribunal was constituted, Croatia promptly filed an application for dismissal of the case under Rule 41(5) of the ICSID Arbitration Rules, arguing that the claims were “manifestly without legal merit” on two independent grounds, each of which warranted dismissal.

1. Lack of Jurisdiction Due to the Claimant's Croatian Nationality: A fundamental rule of ICSID arbitration, laid out in Article 25 of the ICSID Convention, is that an investor cannot bring a claim against his or her own country. For a “natural person,” like the Claimant in the *Mihaljevic* case, the nationality test is set forth in Article 25(2)(a), which provides that the nationality requirements must be met on two key dates: the date of the party's consent to arbitration and the date on which the arbitration request is registered. The rules for determining the nationality status of a “natural person” set forth in Article 25(2)(a) are different from the rules pertaining to a “juridical person”, which are contained in Article 25(2)(b), and refer only to the date of consent, not the date of registration. Notably, legal writings examining the ICSID Convention drafting history and intent indicate that the dual-date test for individuals, looking at nationality on the date of consent and the date a request for arbitration is registered, was intended to bar efforts by individuals to change nationality and circumvent the jurisdictional bar that precludes claims against a State by its own nationals.
 - Croatia proved that Marko Mihaljevic was a dual national of Germany and Croatia on both critical dates specified in Article 25(2)(a)— the dates of consent and registration. He consented to arbitration in March 2019, the date of his Notice of Dispute, when he was indisputably a Croatian citizen, as well as on the date on which his second request for arbitration was registered by ICSID in December 2019, while his application for discharge from citizenship was still pending with the Croatian Ministry of the Interior, at which time he had remained a Croatian citizen (his citizenship was not officially terminated until May 2020).
 - His attempt to terminate his Croatian citizenship after he had already consented to arbitration was ineffective for the purpose of establishing ICSID jurisdiction.

- Croatia supported its arguments with two expert reports prepared by a judge of the High Administrative Court of the Republic of Croatia who holds a PhD in Administrative Law.¹⁰
2. Lack of Ownership and Therefore No Investment: To claim expropriation, Marko Mihaljevic had to prove that he held valid property rights under Croatian law.
- Croatia argued that the Claimant never owned the property in question. The Land Registry, the official record of ownership in Croatia, never listed the Claimant, Marko Mihaljevic, as the owner, nor had he ever attempted to register his ownership.
 - The Claimant’s case relied solely on a one-page 1996 “Donation Agreement” from a German company (Mihaljević GMBH), which was owned by his father. Croatia contended that this document was legally deficient, and therefore null and void: the company itself never owned the property, the document was not notarized or signed either by Marko Mihaljevic or his father Srećko Mihaljević,¹¹ and under Croatian law, even a valid private contract alone cannot transfer property ownership—it must be registered in the Land Registry.
 - Croatia supported its arguments with two expert reports prepared by a renowned professor of civil law.

Croatia’s position was that the arbitration tribunal lacked jurisdiction, given that the Claimant was a national of the respondent State, and that even if jurisdiction existed, the claim failed on the merits, as the Claimant had no legal ownership of the property he claimed was expropriated.

The Claimant countered Croatia’s assertions regarding the lack of jurisdiction based on nationality by presenting two witness statements in which he declared his desire to renounce all Croatian citizenship permanently, and at the time, he promptly submitted his application for discharge in November 2019.

¹⁰ Identical arguments and case law were advanced in the bifurcated proceedings in which the Tribunal rendered the Award of May 19, 2023, and the Concurring Opinion of May 19, 2023. Croatia, due to the Tribunal, considered the Claimant’s date of consent to arbitration as novel, supported by its arguments with Professor Christoph H. Schreuer’s expert opinion.

¹¹ The Tribunal in the Decision on the Respondent’s Application Under Rule 41(5) of the ICSID Arbitration Rules of June 23, 2021, at [5], states: ... Mr. Mihaljević senior [i.e., Srećko Mihaljević, author’s comment] successfully obtained a declaratory judgment from the district court in Zagreb on 21 September 1994 confirming that he was the rightful owner of the Property. Following the declaratory judgment, Mr. Mihaljević senior recorded his title on the property at the Zagreb land registry.

In countering Croatia's arguments regarding the validity of the 1996 "Donation Agreement" and the issue of property ownership, the Claimant presented several articles concerning the validity of the donation agreements and the alleged lack of investment; however, none of these articles effectively countered the reports submitted by Croatian experts. The evidence he submitted concerning unregistered property rights included a non-legal article from an NGO called "Hazud" (the Croatian Academic Community of the Homeland and Diaspora),¹² and a brief statement from the legal website IUS INFO,¹³ asserting that "no one can be an 'unregistered owner' based on a legal transaction, regardless of the reason why the right is not registered." The non-lawyer and author of the web article identified herself as a "Shorthand and Typewriting Specialist licensed to practice accounting (bookkeeping)," lacking any legal training, experience, or a tertiary degree. The second source was an article containing a single paragraph translated from Croatian to English; however, the article itself in fact supported Croatia's statements regarding Croatian property law.

Croatia's reports from two experts (each drafted two reports) were supported by 37 legal authorities, 38 pieces of evidence relating to the validity of the Donation Agreement and ownership, and 13 pieces relating to citizenship. Two witness statements, eight pieces of factual evidence, and 18 legal authorities—six of which concerned the ownership and legitimacy of the donation agreement and none of which related to citizenship—were used to refute Croatia's expert findings. A hearing was held at which Mr. Mihaljević and Croatia's legal experts testified, and the parties presented oral arguments.

The Tribunal denied Croatia's Rule 41(5) Application, reasoning that the objection depended on the determination of consent:

52. (...) if a Rule 41(5) objection requires an in-depth analysis of factual or legal issues, the standard will not be met and the Rule 41(5) application would be dismissed.

65. (...) The Respondent therefore argues that the Claimant's Reaffirmation Letter dated 6 December 2019 did not withdraw or revoke but simply reaffirmed the validity of his previous consent in March 2019.

¹² The article referred to in the text is authored by Landeka, Nada, Unregistered Ownership, What is Registered and What is Unregistered Ownership? Available at: <https://www.hazud.hr/stjecanje-vlasnistva-sto-to-knjizno-a-sto-vanknjizno-vlasnistvo/> Accessed: 21 September 2025.

¹³ The article referred to in the text is authored by Zrilic, Zrinko, Unregistered Ownership – Acquisition and Protection. Available at (subscription needed): <https://www.iusinfo.hr/strucnici-clanci/CLN20V01D2001B100> Accessed: 21 September 2025.

67. *The Claimant submits that consent is perfected when the conditions for consent to be effective are met...*

69. *Having considered the Parties' submissions and the Rule 41(5) standard, **the Tribunal is of the view that the date of consent to arbitration in this case is a complex legal issue that is unsuitable for determination in an application under Rule 41(5) [emphasize added].***

70. *The factual circumstances of the present case are unusual, and in the Tribunal's view, **the determination of the date of consent to arbitration in such circumstances is novel and does not involve application of undisputed or indisputable legal rules [emphasize added].** On the contrary, it involves novel issues of interpretation and analysis.*

73. *The determination of the date of consent in the circumstances of this case does not involve the application of undisputed or indisputable legal principles to undisputed facts. As such, this issue should be ventilated fully and not resolved by means of a summary procedure such as that of Rule 41(5).¹⁴*

The Tribunal denied Croatia's Rule 41(5) Application, reasoning that the date of the termination of the Claimant's Croatian nationality was a disputed issue:

93. *It is clear from both Parties' submissions that the resolution of this issue would involve a determination on the Claimant's "intention" or "will", and whether the Claimant manifested such an intention or will. The correspondence sent subsequent to the Claimant's visit to the Ministry of the Interior on 5 November 2019 would be relevant but so would the Claimant's words and actions during that visit. **To deal with the issue, the Tribunal is invited to make assessments of the credibility of the Claimant's testimony about what happened during that visit. Such assessment is inherently unsuited for a Rule 41(5) summary determination [emphasize added].** Despite the Tribunal's concerns with the Claimant's case arising from the documentary record, the Tribunal is unable to safely rule out the Claimant's claim with final and definitive effect in the absence of more detailed examination at a fuller hearing.¹⁵*

The Tribunal denied Croatia's Rule 41(5) Application, reasoning that the validity of the Donation Agreement and the issue of ownership were unsuitable for summary determination:

¹⁴ Decision on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules of June 23, 2021.

¹⁵ Ibid.

110. *In the present case, by contrast, the Claimant's claim to title in the Property was based on an alleged "gift" from his father [emphasize added], and there appears to be a possible basis for the Claimant to say that his father is indeed the registered owner of the Property. The Respondent's expert Prof. dr. sc. Josipović has confirmed, based on her review of the Land Registry in Zagreb (as of 20 May 2020) that the Claimant's father is the registered owner of the Property.¹⁶ Hence, whether or not the Respondent's actions "effectively prevented" the Claimant from registering his interest in the Property is in dispute, and the issue of the nature of the Claimant's interest in the Property is not so clear-cut such that the Tribunal is able to make a summary determination [emphasize added].¹⁷*

In conclusion, as to Croatia's Rule 41(5) Application, the Tribunal explained:

113. *By making a Rule 41(5) application, the Respondent took on the heavy burden of demonstrating that the claim that has been brought is clearly and unequivocally unmeritorious. On the other hand, the Claimant merely has to show an arguable case to survive the Rule 41(5) Application. Thus, an application under Rule 41(5) will only succeed in the clearest of cases.¹⁸*

4. The jurisdictional phase on Croatia's objection to jurisdiction under Article 25 of the ICSID Convention

After the Tribunal denied Croatia's application to dismiss the case pursuant to Rule 41(5), it suggested conducting a separate jurisdictional phase in which the Tribunal would again consider Croatia's objection to jurisdiction under Article 25 of the ICSID Convention arising from the Claimant's Croatian nationality, but without applying the "stringent" standard that they previously applied for summary dismissal under Rule 41(5). Croatia followed the suggestion of the Tribunal and requested bifurcation of the proceedings. The Tribunal granted Croatia's request, directing the bifurcation of the proceedings to exclusively address the citizenship issue.¹⁹

¹⁶ The Tribunal indicated that the Claimant's father was recorded in the land registry; thus, as Croatia attempted to clarify during the proceedings, the Claimant should have either submitted a request to the land registry to have the ownership documented (with the counter-party being the Claimant's father as the registered owner) or initiated legal action against his father, who is the registered owner and the signatory of the donation agreement in his capacity as director of the donating company.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Procedural Order no. 4, Decision on Bifurcation of 28 July 2021. The Tribunal indicated in the decision that:

Once again, the parties submitted essentially the same arguments on dual nationality, ICSID jurisdictional requirements, and the Claimant's belated effort to be discharged from Croatian citizenship after consenting to arbitration of the dispute. The Claimant submitted two additional witness statements. Croatia submitted the third legal expert report on Croatian citizenship law and an additional legal expert report on abuse of process under international law and the ICSID Convention's jurisprudence.

Croatia argued that the claim was inadmissible because of a fundamental jurisdictional defect as set out in Article 25(2)(a) of the ICSID Convention. This provision creates an "absolute bar" to arbitration for a State's own nationals, explicitly including dual nationals in this prohibition. The bar is strengthened by a temporal stipulation: nationality must be evaluated on both the date of consent to arbitration and the date of registration of the request for arbitration.

Croatia also contended that accepting Mr. Mihaljević's subsequent "reaffirmation" of consent would undermine the temporal test of the Convention and endorse a manipulative "abuse of process." Furthermore, it argued that his actions exemplify an unacceptable attempt to misrepresent a domestic investment dispute as an international one, a practice uniformly denounced by ICSID jurisprudence. Croatia reinforced its stance by referencing *Phoenix Action v. Czech Republic*²⁰ and urged the Tribunal to uphold the "fundamental principles" of the Convention by rejecting a claim that would otherwise undermine its jurisdictional boundaries because Tribunals are obligated to ensure that the ICSID system does not extend protection to investments not intended for such protection, particularly when domestic investments are misrepresented as international to obtain jurisdiction.

After conducting the jurisdictional phase, which included a second hearing consisting of testimony from the Claimant, the same legal expert on Croatian citizenship law, a new legal expert on abuse of process, and oral arguments by counsels, the

"3. By way of the Rule 41 (5) Decision, the Tribunal dismissed the Rule 41 (5) Application and directed that the Parties consider whether it would be expedient to bifurcate the proceedings so that jurisdictional objections can be dealt with before the merits, and that the Parties consider whether the Citizenship Issue or the Property Ownership Issue, or both, should be dealt with in a bifurcated jurisdictional proceeding.

4. On 7 July 2021, the Respondent informed the Tribunal that while both Parties agreed to have a bifurcated jurisdictional phase in which the Citizenship Issue is dealt with but not the Property Ownership Issue, the Parties did not reach agreement on the scope of the bifurcation proceeding."

²⁰ *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009, paragraph 144 of the Award stating "... The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism." Available at: <https://www.italaw.com/cases/850> Accessed 21 September 2025.

Tribunal issued its Award, sustaining Croatia’s objection to jurisdiction and dismissing the case. While the Tribunal declined jurisdiction, it failed to address a key legal question: whether the Claimant failed the nationality test on the date he consented to arbitration, and whether his attempt to later change nationality status and “reaffirm” or “perfect” his consent was permissible. The Tribunal avoided this question, resting instead on its determination that the Claimant was still a Croatian national on the date the request for arbitration was registered, and therefore failed the nationality test on at least this second requisite date:

*135. The Tribunal finds much force in Prof. Dr. Schreuer’s reasoning. However, **the Tribunal considers it unnecessary to express a definitive view on the date of consent [emphasize added]** for the purposes of Article 25(2)(a), in light of its finding that the Claimant remained a Croatian national on the date the Request for Arbitration was registered. The Tribunal therefore declines jurisdiction over the present dispute.²¹*

Although Ms. Maria Vicien-Milburn’s Concurring Opinion to the Award dated May 19, 2023,²² explicitly indicated that altering nationality to obtain the protections of the ICSID Convention constitutes an abuse of process,²³ the Opinion regrettably did not address the matter of reaffirmation of consent and, consequently, the date of consent in a straightforward manner. However, it implicitly addressed the issue by arguing that one cannot alter nationality to obtain jurisdiction and consequently “reaffirm” consent based on the altered nationality.

III. Discussion

1. Introductory remarks

Ciurtin explains that the ICSID Convention afforded foreign investors direct access to international litigation. The Convention allowed a sovereign to bring legal proceedings against another sovereign’s subject without the latter’s agreement. The agora was no longer horizontally partitioned among sovereign equals; it also facilitated asymmetric confrontations between States and private entities (or persons) from

²¹ Award of May 19, 2023, available at: <https://www.italaw.com/sites/default/files/case-documents/18029.pdf#page=28.51> Accessed 18 September 2025.

²² Opinion. Available at: <https://www.italaw.com/sites/default/files/case-documents/18030.pdf#page=3.00> Accessed 18 September 2025.

²³ See point 5 of the Opinion. Available at: <https://www.italaw.com/sites/default/files/case-documents/18030.pdf#page=3.00> Accessed 18 September 2025.

different States.²⁴ In other words, as McLachlan accurately notes, investment arbitration seeks to present disputes between two parties of disparate and asymmetrical nature—a private investor and a State—to an international arbitral tribunal, where each party is ostensibly afforded equal treatment.²⁵ At the core of investment arbitration is the consent of both parties to the dispute, according to specifically defined terms.

Jourdain-Fortier analyses the question of whether a State may restrict arbitration without violating the right to access to a court and concludes that it can. She supports her conclusion with the reasoning of the European Court of Human Rights in *Julius Kloiber Schlachthof GmbH and others v. Austria*,²⁶ in which the Court explained that access to justice requires States to guarantee individuals' ability to access a court. As a result, access to arbitration need not be guaranteed.²⁷

This is one of the reasons why upfront consent of a Member State²⁸ with respect to the protection of foreign investors and investments contained in international

²⁴ Ciurtin, Horia, Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in International Investment Law (February 15, 2017), in Crina Baltag (ed.), *ICSID Convention After 50 Years: Unsettled Issues*, Kluwer International, 2017, p. 47. Available at SSRN: <https://ssrn.com/abstract=2927900> Accessed 9 September 2025.

²⁵ See in McLachlan, Campbell, and Institute of International Law, *The Institute of International Law's Resolution on the Equality of Parties before International Investment Tribunals*, Introduction, Text and Commentaries, Cambridge University Press, 2022, Summary or in 18ème commission, in *Equality of Parties before International Investment Tribunal*, Rapporteur: Campbell McLachlan, p. 419. Available at: <https://www.idi-iil.org/app/uploads/2019/06/Commission-18-Equality-of-parties-before-international-investment-tribunals-McLachlan-Travaux-La-Haye-2019.pdf> Accessed 10 September 2025.

²⁶ *Julius Kloiber Schlachthof GmbH and others v. Austria*, nos 21565/07, 21572/07, 21575/07, and 21580/07. Judgment of the European Court of Human Rights of 4 April 2013. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-118045%22%7D> Accessed 6 September 2025.

²⁷ Jourdain -Fortier, Clotilde, Access to Justice and Arbitration: Is Consent to Arbitrate Still at Stake? in Oliveira, Leonardo V. P. de, and Sara Hourani, eds., *Access to Justice in Arbitration: Concept, Context and Practice*. Alphen aan den Rijn: Wolters Kluwer, 2021, p. 37.

²⁸ It is important to emphasise that, by submitting to arbitration, a State does not relinquish part of its sovereignty or, in the words of Nippold: „[t]he subjection to an arbitral court absolutely depends on the free will of states. (...) Subjection to the arbitral court always rests, even if it has a quite general character, on the sovereign will of the contracting partners; it is in all circumstances the result of this sovereign will and as such can never be considered a contradiction to state sovereignty”, quoted in Cornelis G. Roelofsen: *International Arbitration and Courts in Bardo Fassbender, Anne Peters (eds.): The Oxford Handbook of the History of International Law*; online edition Oxford Academic, 28. December 2012, p. 146. Available at: <https://doi-org.peacepalace.idm.oclc.org/10.1093/law/9780199599752.003.0007>. Accessed on August 16, 2025.

treaties and the ICSID Convention²⁹ is of utmost importance and is considered one of the cornerstones of international investment arbitration.

In other words, once the investor accepts the State's offer contained in an international treaty to resolve the dispute in arbitration, the arbitration agreement (contract) is formed.³⁰

For the purposes of ICSID arbitration, the registration of the request for arbitration is the first step in the proceedings, and, accordingly, the following two paragraphs will be dedicated to consent (and the issue of reaffirmation of the offer) and to the registration of the request for arbitration.

2. Reaffirmation of the offer – the issue of consent

The *Mihaljević* case raises the question of whether investors who do not meet the jurisdictional requirements set out in Article 25 of the ICSID Convention can reaffirm a previously accepted offer after the jurisdictional barrier has been lifted, particularly given that the Tribunal did not take a clear stance on this issue. This issue revolves around consent.

²⁹ As Baltag rightly notices, “it is no longer peculiar for individuals and corporations to have claims against governments. This is probably the most notable development of international law of the last fifty years that can be credited to the ICSID Convention.” Crina Baltag: *The ICSID Convention: A Successful Story – The Origins and History of the ICSID*, p. 1., in Crina Baltag (ed.): *ICSID Convention after 50 Years, Unsettled Issues*, 2017 Kluwer Law International BV.

³⁰ Tupa's writing on consent to international arbitration in investment agreements lacking a forum is instructive because it indicates that such contracts are unenforceable. With respect to formation of arbitration agreement in investment arbitration cases Tupa writes: “in investment arbitration, where the relevant investment agreement contains a unilateral offer to submit disputes to international arbitration in its investor-State dispute settlement provision, the arbitration agreement is formed by a two-step process, which is generally referred to as “arbitration without privity”: an offer made by the host State in the dispute settlement provision of the investment agreement followed by an acceptance by the foreign investor of the home State – either by a communication to the host State accepting the offer or by initiating an international arbitration against the host State.” Tupa, Fernando, *The Dilemma of Consent to International Arbitration in Investment Agreements without a Forum*, Brill Research Perspectives in International Law, Series: Brill Research Perspectives in International Investment Law and Arbitration, 2023, pp. 12. See also, Audit, Mathias, Forteau, Mathias, “Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?”, *Journal of International Arbitration*, Volume 29, Issue 5, 2012, pp. 581 (“If anything, the arbitration agreement is expressed by two independent consents given at different times.”) or Sacerdoti, Giorgio, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, *ICSID Review - Foreign Investment Law Journal*, Volume 19, Issue 1, Spring 2004, pp. 6, available at: <https://doi.org/10.1093/icsidreview/19.1.1>. Accessed 6 September 2025.

It is widely accepted that in investment arbitration, States extend an offer to foreign investors to resolve investment disputes through arbitration, through national law and bilateral and multilateral treaties. Once a foreign investor accepts a standing offer, either by notifying the State of its intention to initiate arbitration or by filing a request for arbitration with ICSID, the State cannot revoke its offer. Furthermore, the fact that an investor accepts an offer creates not only a contract (arbitration agreement) but also legal consequences for both parties.

This means that jurisdictional requirements, such as the requirement that the investor not hold the nationality of the respondent State, are frozen in time once the agreement has been concluded, and subsequent changes in nationality do not alter the legal situation established at the time the agreement has been concluded. Such an investor is precluded from initiating ICSID arbitration and from later reaffirmation of the offer to arbitrate, i.e., subsequent conclusion of the arbitration agreement that has already been concluded is not legally possible.

This is supported by the writings of scholars like Schreuer, Malintoppi, Reinsch and Sinclair, who conclude that “the binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim *pacta sunt servanda* and that irrevocability of consent operates only after the consent has been perfected”³¹ or Scherer and Jensen, who argue “that there is no question that parties cannot unilaterally denounce an arbitration agreement because it is a contract which must be honoured, but that, on the other hand, a unilateral standing offer is a different creature because, under more than a few contract laws, standing offers to an uncertain group of recipients can be revoked before accepted”.³²

³¹ Schreuer, Christoph H., Loretta Malintoppi, August Reinisch, and Anthony Sinclair. *The ICSID Convention: A Commentary*. 2nd ed. Cambridge: Cambridge University Press, 2009, p. 254. See also Van Harten, Gus, *Investment Treaty Arbitration and Public Law*, Oxford Monographs in International Law, Oxford University Press, 2008, p. 55, Schreuer, Christoph H., “Part IV Chapter 15: Denunciation of the ICSID Convention and Consent to Arbitration”, in Waibel, Michael, Kaushal, Asha, et al. (eds), *The Backlash against Investment Arbitration*, Wolters Kluwer, 2010, pp. 356-357, Fouret, Julien, *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: “Manufacturing Consent” to ICSID Arbitration?*, *Journal of International Arbitration*, Volume 25, Issue 1, Kluwer Law International, 2008, p. 84, Potestà, Michele, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, *Arbitration International* 27, no. 2, 2011, p. 153 (Potestà writes: “Let us briefly examine how such consent comes into existence in the event of an offer by the state contained in its own laws. The perspective is, at the end of the day, the traditional offer-acceptance method, derived from the contractual world.”).

³² Scherer, Maxi, Jensen, Ole, *Forced Joinder: Arbitration Without Privity or Consent in Disguise?* Brekoulakis, Romesh Weeramantry, Stavros Nagapetyan, Lilit (eds.), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC*, Wolters Kluwer, 2023, p. 213.

The Tribunal's decision on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules of June 23, 2021, and the Award of May 19, 2023, in the *Mihaljević* case not only neglected to resolve the matter of consent but also left the door open to an alternative approach distinct from the one elaborated in the preceding paragraphs. This is unfortunate, as it leaves the door open to abuse of process and advancing arguments suggesting that once a standing offer has been accepted and an arbitration agreement perfected, potential claimants might, in order to annul the effect of jurisdictional hurdles and circumvent jurisdictional obstacles, do exactly what Mr. Mihaljević did: reorganise their investment or alter their nationality and then reaffirm the acceptance of the offer to gain access to investment arbitration.

3. Registration of the request for arbitration

The ICSID website provides information regarding the Secretary-General's duties during the registration process. Once a Request for Arbitration is lodged and the registration fee has been paid, the Secretary-General must immediately evaluate whether the dispute is manifestly outside the Centre's jurisdiction. This decision is based on information contained in the Request. If a requirement under Article 25 of the ICSID Convention is plainly absent, the Secretary-General must refuse to register the Request. Otherwise, the Secretary-General is required to register the dispute. The registration of the Request is not subject to appeal and does not affect the Tribunal's jurisdiction, competence, or the merits of the case.³³

According to the Report of the Executive Directors on the ICSID Convention, the Secretary-General has limited power to "screen" requests for conciliation or arbitration proceedings to avoid embarrassment to a party (particularly a State) and to prevent the possibility that the Centre's mechanism might be set in motion in cases that are clearly outside its jurisdiction, e.g., because either the applicant or the other party is not eligible to be a party to proceedings under the Convention.³⁴

Sutton observes that "it is becoming more difficult to persuade the 'gatekeeper' of ICSID, the Secretary-General, to register a request for arbitration than it is to persuade an arbitral tribunal to exercise jurisdiction over a claim. This is troubling, given

³³ Article 36(3) of the ICSID Convention reads as follows: The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

³⁴ Report of the Executive Directors on the ICSID Convention, point 20, p. 35 Available at: https://icsid.worldbank.org/sites/default/files/Report_Executive_Directors.pdf Accessed 23 September 2025

that there is no appeal available to a putative claimant should the Secretary-General refuse to register a request for arbitration. The ICSID screening process is also not in line with the increasingly transparent approach to international arbitration, which today often allows for *amicus curiae* submissions.³⁵

Puig and Brown argue that “in contrast to the screening procedure under Article 36(3) of the ICSID Convention, Rule 41(5) of the ICSID Arbitration Rules permits ICSID tribunals to consider the merits of the claim in deciding whether it should be dismissed summarily. At a level of generality, Article 36(3) and Rule 41(5) serve complementary functions, namely the efficient filtering of manifestly unworthy claims from other claims which are potentially meritorious.”³⁶

Sipiorski examines the registration procedure through the lens of the principle of good faith, concluding that the Secretary-General of ICSID possesses the authority to assess whether the dispute satisfies the initial jurisdictional requirements. However, this authority does not extend to evaluating whether the dispute has been initiated in good faith.³⁷

Potestà rightly observes that, even though the Secretary-General is not required to hear the other party (respondent) during the registration process, because ICSID is required to transmit the request to the respondent, it may nonetheless receive spontaneous comments challenging the registrability of the request.³⁸

This is precisely what happened in the *Mihaljević* case. After receiving a notification from ICSID, Croatia challenged the registrability of the Request. It sent two letters to the Secretary-General, accompanied by evidence of citizenship, outlining the procedure for terminating Croatian citizenship. Croatia emphasised that Mr Mihal-

³⁵ Sutton, Stephen, ‘*Emilio Augustin Maffezini v Kingdom of Spain* and the ICSID Secretary-General’s Screening Power’ (2005) 21 *Arbitration International*, pp. 126.

³⁶ Sergio, Puig, Chester W., Brown, The Secretary-General’s Power to Refuse to Register a Request for Arbitration Under the ICSID Convention (March 21, 2012), ICSID Review—Foreign Investment Law Journal. Available at SSRN: <https://ssrn.com/abstract=2045645> Accessed 11 September 2025, pp. 2.

³⁷ Sipiorski, Emily, Good Faith in International Investment Arbitration, Oxford International Arbitration Series (2019; online edn, Oxford Law Pro), pp. 54. Available at: <https://doi.org/10.1093/law/9780198826446.001.0001>. Accessed 11 September 2025.

³⁸ Potestà, Michele, Preliminary Objections to Dismiss Claims that are Manifestly without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules in Baltag, Crina (ed), ICSID Convention After 50 Years: Unsettled Issues, Wolters Kluwer 2017, pp. 252, footnote 17. Similarly, Radović, Relja, Screening Powers in Investment Arbitration: Questions of Legal Change and Legitimacy, in Legitimacy of Unseen Actors in International Adjudication, edited by Freya Baetens, Studies on International Courts and Tribunals, Cambridge University Press, 2019, pp 461.

jević was a Croatian national and that the evidence he submitted was inaccurately translated (a certificate from the Ministry of the Interior on the Claimant's request for discharge from citizenship had been misinterpreted as a request to renounce Croatian citizenship). Croatia argued that Mr Mihaljević's Croatian citizenship was maintained at all relevant times, preventing registration of the Request. The Request was registered despite the Claimant's clear status as a Croatian national. As mentioned before, Mr Mihaljević filed a request for arbitration less than a month before initiating this procedure, but after he received notification from the Secretary-General stating that the registration would be denied due to his Croatian nationality, he withdrew the Request.

This case illustrates the necessity for better transparency, as instances such as Mr Mihaljević's not only pass through the registration process but also successfully progress through the Rule 41(5) application, ultimately being resolved at the bifurcated stage, after substantial taxpayer funds have been expended on legal representation and opinions of experts in the arbitration proceedings. Although the Secretary-General's screening establishes facts only *prima facie* and may deny registration only in exceptional circumstances, cases like the *Mihaljević* case raise the question of whether the Secretary-General should have denied the registration. Finally, the award of all costs in favour of Croatia is only a red herring, as Croatia has been unable so far to trace Mr Mihaljević's property or to collect the costs award.

4. A brief discussion on the burden of proof in proceedings governed by Rule 41(5) of the ICSID Arbitration Rules

Markert asserts that the party requesting a summary dismissal must prove that the claim is legally invalid because it is the party making the preliminary objection. The typical distribution of the burden of proof in international arbitration requires that each party must substantiate the facts that support its position. It is quite challenging for an application to obtain a summary dismissal, as tribunals usually prefer the claimant's position when there are any concerns or uncertainties about the extent of their claims. This means that the party requesting summary dismissal must show that the claimant's case, as it stands, is manifestly without legal merit, i.e., has no legal basis. In other words, the requesting party must show the tribunal that the claimant cannot, in any situation, provide facts or legal arguments that would support the claim's legal merit. Accordingly, the application for summary dismissal has a heavy burden of proof.³⁹

³⁹ Markert, Lars, Summary Dismissal of ICSID Proceedings, *ICSID Review, Foreign Investment Law Journal* vol. 31, no. 3, 2016, pp. 706-707. Similarly, Yanaca-Small, Katia, *Arbitration Under*

Croatia contended that the Tribunal ought to adopt the methodology employed in the *Lotus v. Turkmenistan* case,⁴⁰ wherein the tribunal determined that the procedure under Rule 41(5) promotes the efficient administration of justice and serves the interests of both parties because the dismissal of a claim prevents the claimant from wasting time and resources on an unviable claim and spares the respondent from the burden of defending against a claim that is evidently and fundamentally flawed, thus warranting no further defence prior to dismissal.

Croatia further argued that, despite the Claimant successfully navigating the “limited screening” authority of the ICSID Secretary-General and improperly securing registration of the Request for Arbitration, this was achieved through the misrepresentation of essential facts, even after Croatia explicitly contested the registration on the grounds of the Claimant’s Croatian nationality.

The structure and purpose of the ICSID Arbitration Rule 41(5), as noted by Market, serve precisely to limit potentially abusive behaviour.⁴¹

Further to the abusive behaviour of the Claimant in the *Mihaljević* case, Croatia referenced the *Almasryia v. Kuwait* case,⁴² where the tribunal underscored that, while it must accept the Claimant’s facts as true when considering an application under Arbitration Rule 41(5), it cannot disregard the evident implications of the evidence presented.

Unfortunately, the Tribunal dismissed all arguments advanced by Croatia and reinforced the warning of Wong and Yackee, who concluded that Arbitration Rule 41(5) may simply lead to a reallocation of information between the request for arbitration and the memorial brief, rather than serve as a useful screening device for putting to rest frivolous claims.⁴³

International Investment Agreements: A Guide to the Key Issues (2nd ed.), Oxford University Press, 2018, p. 148 (“Under this standard of review, the objecting party potentially faces a high burden to establish that the claim appears to be ‘certain’ to fail at the outset of the proceeding.”).

⁴⁰ *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award of April 6, 2020, paragraph 159. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11411.pdf> Accessed 24 September 2025.

⁴¹ Op. cit. 39, p. 710.

⁴² *Almasryia for Operating & Maintaining Touristic Construction Co. LLC v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules of November 1, 2019, paragraph 58, Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11114_0.pdf Accessed 24 September 2025.

⁴³ Wong, Jarrod, Yackee, Jason, The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules, in Karl P. Sauvant (ed), Yearbook on International Investment Law & Policy 2009–2010, Oxford University Press, 2010, p. 240.

5. Should there be a possibility for an arbitrator to dissent or concur with a decision under Rule 41(5) of the ICSID Arbitration Rules?

Even though the ability to dissent from or concur with a decision under Rule 41(5) of the ICSID Arbitration Rules is not the primary focus of this article, it will be briefly addressed as a matter warranting thorough analysis.

McLachlan, Shore and Weinger rightly conclude that well-written and tightly argued dissenting opinions have contributed greatly to the ability of those involved in successive arbitrations to engage critically in the debate at the point where the previous tribunal left off.⁴⁴

While decisions⁴⁵ on applications under Rule 41(5) of the ICSID Arbitration Rules that deny the application do not include concurring or dissenting opinions, their inclusion would be valuable. Analyses of the *Mihaljević* case demonstrate that concurring and dissenting opinions could enhance discourse on the pertinent legal issues, such as the issue of consent, burden of proof, and other unresolved matters.

IV. Conclusion

Although the Tribunal in paragraph 93 of the Decision rejecting Croatia's Rule 41(5) Application accurately noted that a comprehensive credibility evaluation of witness testimony (specifically the Claimant's testimony) may be inappropriate for a summary procedure under Rule 41(5), this conclusion is nonetheless illogical in the *Mihaljević* case. The Tribunal conducted a three-day hearing, affording ample opportunity to address not only the credibility of the Claimant's testimony but also any concerns regarding the application of Croatian law, as both of Croatia's experts provided testimony during the hearing. The Tribunal's failure to evaluate the reliability of the Claimant's testimony constitutes a significant oversight, as it remains obligated to determine whether the factual assertions, if accepted as genuine, can substantiate the legal claims presented. The Tribunal's rejection of Croatia's Rule 41(5) Application meant that the Claimant simply had to show an "arguable case," even when

⁴⁴ McLachlan, Campbell, Laurence, Shore, and Matthew, Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, Second edition, 2017. p. 91.

⁴⁵ According to Diop "the decision requires less elaboration and, in theory, less time to produce" which further supports the argument that dissenting and concurring opinions would enhance the discussion of unresolved legal issues. For more information, see Diop, Aïssatou, Objection under Rule 41(5) of the ICSID Arbitration Rules, *ICSID Review - Foreign Investment Law Journal*, Volume 25, Issue 2, Fall 2010, p.335. Available at: <https://doi.org/10.1093/icsidreview/25.2.312> Accessed 24 September 2025.

there was strong evidence of a serious jurisdictional flaw, such as dual nationality. This approach runs counter to the main purpose of Rule 41(5), which is to promptly dismiss claims that lack any substance, and it imposes an excessive burden on States that must respond to claims that appear defective from the outset.

The *Mihaljević* case also illustrates the necessity for States to ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration,⁴⁶ as this will ensure complete transparency of the proceedings, enabling scholars to examine tribunal decisions through the lens of the arguments presented in specific cases. Although publishing awards and decisions in investment arbitration promotes consistency, a comprehensive understanding of a case can only be achieved by examining all submissions and arguments presented therein.

The Tribunal entertained an unconventional theory suggesting that if an investor consents to arbitration while encountering jurisdictional impediments, the investor may subsequently return to the State to reaffirm its offer once these impediments are resolved. This theory is predicated on the notion that a valid agreement cannot exist if a prospective claimant is confronted with jurisdictional challenges as set out in Article 25 of the ICSID Convention. Regardless of the fact that the Tribunal accepted Croatia's jurisdictional objection and strongly implied that it agreed with Croatia's argument (Award, p. 135⁴⁷), the Tribunal's oversight in addressing the "reaffirmation of consent" theory is unfortunate, as it neglected to explicitly assert that this theory contradicts the essential intent of Article 25 of the ICSID Convention, particularly its temporal stipulations, and the foundational principle of *pacta sunt servanda*. By not explicitly addressing the Claimant's "reaffirmation of consent" theory, the Tribunal inadvertently fostered the very forum-shopping and abuse of process (noted in the concurring opinion⁴⁸) that investment arbitration jurisprudence, exemplified by the *Phoenix Action* case,⁴⁹ aims to deter.

The *Mihaljević* case also shows the limitations of the Secretary-General's screening power under Article 36(3) of the ICSID Convention and raises the question of

⁴⁶ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf> and accompanying UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> Accessed 25 September 2025.

⁴⁷ See above, under: 4. The jurisdictional phase on Croatia's objection to jurisdiction under Article 25 of the ICSID Convention

⁴⁸ Op. cit. 22

⁴⁹ Op. cit. 20

whether, in circumstances like those in the *Mihaljević* case, the Secretary-General should deny registration of the case.

In sum, the *Mihaljević* case serves as a stark reminder that achieving the correct result at the end of the day is not enough and that future tribunals should be willing to deal with such clear abuse of process in summary procedure under Rule 41(5) because setting the bar too high for the objection to succeed makes Rule 41(5) obsolete and allows the ICSID Convention to risk being undermined by procedural technicalities and novel, but ultimately manipulative, legal theories.

BIBLIOGRAPHY:

- Audit, Mathias, Forteau, Mathias, Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?, *Journal of International Arbitration*, Volume 29, Issue 5, 2012
- Crina Baltag: The ICSID Convention: A Successful Story – The Origins and History of the ICSID, in Crina Baltag (ed.): *ICSID Convention after 50 Years, Unsettled Issues*, 2017 Kluwer Law International BV
- Ciurtin, Horia, Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in International Investment Law (February 15, 2017), p. 47. In Crina Baltag (ed.), *ICSID Convention After 50 Years: Unsettled Issues*, Kluwer International, 2017, Available at SSRN: <https://ssrn.com/abstract=2927900>
- Diop, Aissatou, Objection under Rule 41(5) of the ICSID Arbitration Rules, *ICSID Review - Foreign Investment Law Journal*, Volume 25, Issue 2, Fall 2010, pp.335. Available at: <https://doi.org/10.1093/icsidreview/25.2.312>
- Jourdain-Fortier, Clotilde, Access to Justice and Arbitration: Is Consent to Arbitrate Still at Stake?, In Oliveira, Leonardo V. P. de, and Hourani, Sara, eds., *Access to Justice in Arbitration: Concept, Context and Practice*. Alphen aan den Rijn: Wolters Kluwer, 2021
- Fouret, Julien, Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: “Manufacturing Consent” to ICSID Arbitration?, *Journal of International Arbitration*, Volume 25, Issue 1, Kluwer Law International, 2008
- Markert, Lars, Summary Dismissal of ICSID Proceedings, *ICSID Review, Foreign Investment Law Journal* vol. 31, no. 3, 2016
- McLachlan, Campbell, Laurence, Shore, and Matthew, Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, Second edition, 2017
- McLachlan, Campbell, and Institute of International Law, *The Institute of International Law’s Resolution on the Equality of Parties before International Investment Tribunals*, Introduction, Text and Commentaries, Cambridge University Press, 2022, Summary or in 18ème commission, in *Equality of Parties before International Investment Tribunal*, Rapporteur: Campbell McLachlan. Available at: <https://www.idi-iil.org/app/uploads/2019/06/Commissi->

on-18-Equality-of-parties-before-international-investment-tribunals-McLachlan-Travaux-La-Haye-2019.pdf

- Potestà, Michele, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, *Arbitration International* 27, no. 2, 2011
- Potestà, Michele, *Preliminary Objections to Dismiss Claims that are Manifestly without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules in Baltag, Crina (ed.), ICSID Convention After 50 Years: Unsettled Issues*, Wolters Kluwer 2017
- Puig, Sergio, Brown, Chester W., *The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention*, *ICSID Review—Foreign Investment Law Journal*, March 21, 2012. Available at SSRN: <https://ssrn.com/abstract=2045645>
- Radović, Relja, *Screening Powers in Investment Arbitration: Questions of Legal Change and Legitimacy*, in *Legitimacy of Unseen Actors in International Adjudication*, edited by Freya Baetens, *Studies on International Courts and Tribunals*, Cambridge University Press, 2019
- Roelofsen, Cornelis G., *International Arbitration and Courts in Fassbender, Bardo, Peters, Anne (eds.), The Oxford Handbook of the History of International Law*; online edition Oxford Academic, 28. December 2012. Available at: <https://doi-org.peacepalace.idm.oclc.org/10.1093/law/9780199599752.003.0007>
- Sacerdoti, Giorgio, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, *ICSID Review - Foreign Investment Law Journal*, Volume 19, Issue 1, Spring 2004. Available at: <https://doi.org/10.1093/icsidreview/19.1.1>
- Scherer, Maxi, Jensen, Ole, *Forced Joinder: Arbitration Without Privity or Consent in Disguise?* Brekoulakis, Romesh Weeramantry, Stavros, Nagapetyan, Lilit (eds.), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC*, Wolters Kluwer, 2023
- Schreuer, Christoph H., Loretta Malintoppi, August Reinisch, and Anthony Sinclair. *The ICSID Convention: A Commentary*. 2nd ed. Cambridge: Cambridge University Press, 2009
- Schreuer, Christoph H., "Part IV Chapter 15: Denunciation of the ICSID Convention and Consent to Arbitration", in Waibel, Michael, Kaushal, Asha, et al. (eds.), *The Backlash against Investment Arbitration*, Wolters Kluwer, 2010
- Sutton, Stephen, "Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary-General's Screening Power," *Arbitration International*, Volume 21, 2005
- Sipiorski, Emily, *Good Faith in International Investment Arbitration*, *Oxford International Arbitration Series*, 2019; *Oxford Law Pro*. Available at: <https://doi.org/10.1093/law/9780198826446.001.0001>
- Tupa, Fernando, *The Dilemma of Consent to International Arbitration in Investment Agreements without a Forum*, *Brill Research Perspectives in International Law*, Series: Brill Research Perspectives in International Investment Law and Arbitration, 2023
- Van Harten, Gus, *Investment Treaty Arbitration and Public Law*, *Oxford Monographs in International Law*, Oxford University Press, 2008

Wong, Jarrod, Yackee, Jason, The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules, in Karl P. Sauvant (ed), Yearbook on International Investment Law & Policy 2009–2010, Oxford University Press, 2010

Yanaca-Small, Katia, Arbitration Under International Investment Agreements: A Guide to the Key Issues (Second Edition), Oxford University Press, 2018

JUDGEMENTS AND OTHER DECISIONS:

Almasryia for Operating & Maintaining Touristic Construction Co. LLC v. State of Kuwait, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules of November 1, 2019, paragraph 58. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11114_0.pdf

Julius Kloiber Schlachthof GmbH and others v. Austria, nos 21565/07, 21572/07, 21575/07, and 21580/07. Judgment of the European Court of Human Rights of 4 April 2013. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-118045%22%7D>

Lotus Holding Anonim Şirketi v. Republic of Turkmenistan, ICSID Case No. ARB/17/30, Award of April 6, 2020, paragraph 159. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11411.pdf>

Marko Mihaljevic v. Republic of Croatia, ICSID Case No. ARB/19/35. Award of May 19, 2023, and Concurring Opinion of May 19, 2023. Available at: <https://www.italaw.com/cases/10607>

Marko Mihaljevic v. Republic of Croatia, ICSID Case No. ARB/19/35. Decision on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules of June 23, 2021. Not publicly available.

Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5. Available at: <https://www.italaw.com/cases/850>

REGULATIONS AND DOCUMENTS:

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) Available at: <https://icsid.worldbank.org/sites/default/files/documents/Old%20Rules/2006%20-%20ICSID%20Convention%2C%20Regulations%20and%20Rules%20-%20ENG.pdf>

Report of the Executive Directors on the ICSID Convention, point 20, p. 35 Available at: https://icsid.worldbank.org/sites/default/files/Report_Executive_Directors.pdf

Treaty between the Republic of Croatia and the Federal Republic of Germany concerning the Reciprocal Encouragement and Protection of Investments. Available at: <https://www.italaw.com/sites/default/files/laws/18028.pdf>

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the “Mauritius Convention on Transparency”) Available at: <https://uncitral.un.org/en/texts/arbitration/conventions/transparency>

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf>

INTERNET SOURCES:

Petrušić, Željko, APSURD PRAVOSUĐA 22 godine od počinjenja djela, 11 godina suđenja, 4 prvostupanjske presude ... i sve pada u zastaru 4. lipnja, in Jutarnji list (daily newspaper), May 31, 2019. Available at: <https://www.jutarnji.hr/vijesti/crna-kronika/apsurd-pravosuda-22-godine-od-pocinjenja-djela-11-godina-sudenja-4-prvostupanjske-presude-i-sve-pada-u-zastaru-4-lipnja-8946968>

PROPUŠTENA PRILIKA: ZLOUPORABA POSTUPKA I NEODLUČIVANJE O PRIGOVORIMA U POGLEDU NADLEŽNOSTI U ICSID SLUČAJU MIHALJEVIĆ PROTIV HRVATSKE

SAŽETAK

Članak pruža kritičku analizu procesnih pitanja i pitanja nadležnosti tribunala u predmetu Marko Mihaljević protiv Republike Hrvatske, ICSID arbitražnom predmetu koji je na kraju odbačen jer je tužitelj u relevantno vrijeme bio hrvatski državljanin.

Iako je tribunal odbijanjem nadležnosti postigao ispravan rezultat, put do tog ishoda je problematičan. Članak analizira odluku tribunala kojom je odbijen zahtjev Hrvatske za odbacivanje tužbe prema pravilu 41(5) ICSID Arbitražnih pravila, tvrdeći da je postavio neprimjereno visok prag za teret dokaza u odnosu na osnovne prigovore nenadležnosti – dvojno državljanstvo tužitelja i nevaljanost ugovora o darovanju koji predstavlja navodno ulaganje – kao složene činjenične sporove neprikladne za rješavanje u postupku iz pravila 41(5).

Nadalje, članak istražuje propust tribunala da se pozabavi novom teorijom “ponovnog potvrđivanja prihvata ponude” tužitelja, prema kojoj strani ulagatelj može prihvatiti ponudu na arbitražu samo nakon što otkloni prepreke u odnosu na nadležnost ICSID tribunala. Odlučivši da ne adresira tu teoriju u svojim odlukama, tribunal je propustio priliku jasno utvrditi granice nadležnosti proklamirane u članku 25. ICSID Konvencije.

Na kraju, članak dovodi u pitanje učinkovitost ovlasti glavnog tajnika da odbije registraciju zahtjeva za arbitražu prema članku 36. stavku 3. ICSID Konvencije kroz prizmu činjenica u predmetu Mihaljević uz zaključak da je glavni tajnik čuvar vrata ICSID-a i zadaća mu je zaštititi države od tužbi koje su očito izvan nadležnosti ICSID-a. Analiza predmeta Mihaljević služi kao upozorenje o mogućnosti zlorabe procesnih prava, uz naglasak da je zadaća tribunala i glavnoga tajnika ICSID-a da spriječe zlorabu postupka i na taj način zaštite države od neosnovanih zahtjeva i pretjeranih troškova.

Ključne riječi: ICSID arbitraža, preliminarni prigovor, pristanak, zloraba postupka

JADRANKA OSREČAK naslovna je docentica. Završila je na Queen Mary, University of London s *distinction* poslijediplomski studij (Master of Laws) iz područja međunarodne komparativne trgovačke, međunarodne investicijske i međunarodne energetske arbitraže. Na istom je fakultetu, nakon završetka poslijediplomskog studija, uspješno položila dodatni ispit iz pisanja arbitražnih pravorijeka.

Na Pravnom fakultetu Sveučilišta u Zagrebu doktorirala je *magna cum laude* na doktorskom znanstvenom studiju iz trgovačkog prava i prava društva na temi iz područja međunarodne trgovačke i investicijske arbitraže. Upisana je na listu arbitara Hrvatske gospodarske komore.

Od 2011. godine zaposlena je u državnom odvjetništvu. Imenovana je zamjenicom općinskoga državnog odvjetnika u Zagrebu 2015. godine, a od 2016. godine upućena je na rad u Državno odvjetništvo Republike Hrvatske, gdje radi na predmetima međunarodne trgovačke i investicijske arbitraže i na sporovima pred stranim sudovima.