

**UNCITRAL Arbitration Proceedings**  
**Quantum proceedings**

***CME Czech Republic B.V. (The Netherlands)***  
**v.**  
***The Czech Republic***

**Legal Opinion Prepared by**

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## Preliminary Statement

Counsel for the Czech Republic have requested us to prepare an opinion in connexion with the proceedings before the Tribunal for the quantum phase of the arbitration.

Our opinion is directed at three major areas which are relevant in the quantum stage of the arbitration proceedings. The first of these concerns the principle of *res judicata* in relation to the parallel UNCITRAL arbitration proceedings that ended with the Final Award of 3 September 2001. The second concerns the Tribunal's duty to apply the proper law, in particular its duty to apply the law of the Czech Republic. The third concerns the Tribunal's use of a theory of joint tortfeasors that has no foundation in international law.

In preparing the opinion, August Reinisch has drafted the section dealing with *res judicata*. Professor Philippe Sands has supplied valuable information on that section. Christoph Schreuer has drafted the section dealing with the duty to apply the proper law. With regard to the section on joint tortfeasors, we were greatly assisted by Dr. Stephan Wittich, an experienced specialist in the field of State responsibility. Despite this division of labour in the opinion's drafting, we have closely cooperated in its overall preparation. Therefore, we are jointly responsible for the opinion as a whole.

We have appended statements of our qualifications at the end of this opinion.

*Christoph Schreuer*  
*August Reinisch*

Vienna, 20 June 2002

## PART ONE: *RES JUDICATA*

### 1. The Principle of *res judicata*

1. The principle of *res judicata* derives from the Roman Law ideals of legal security and finality of decisions which was widely followed in Common and Civil Law countries<sup>1</sup> and is sometimes considered inherent to any legal system.<sup>2</sup> The “end of litigation” achieved via *res judicata*<sup>3</sup> is also emphasized in the related Latin maxim of *ne bis in idem* or *non bis in idem*. It protects defendants from having to defend themselves twice in the same matter. At the same time *res judicata* is a principle of judicial economy aimed at preventing (costly) re-litigation of already decided cases. Further, it serves the purpose of legal security by avoiding the potential of divergent decisions in identical cases.

2. For the Common Law, *res judicata* has been defined as

[a] matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.<sup>4</sup>

3. Similarly, Civil Law traditions follow this concept.<sup>5</sup>

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<sup>1</sup> Supreme Court Act 1981, s. 49(2)(England); Civil Jurisdiction and Judgments Act 1982, s. 34 (England). A legal action brought in violation of the *res judicata* principle is to be deemed an abuse of process, and the courts are expected to strike it out. Rules of the Supreme Court, Order 18, rule 11 (1)(England); U.S. Constitution, Art. IV, Sec. 1; Code Civil § 1351 (France); *Harold Koch and Franck Diedrich*, Civil Procedure in Germany 70 (1998).

<sup>2</sup> See *Peter R. Barnett*, Res judicata, estoppel and foreign judgments (2001); *Elihu Harnon*, Res Judicata and Identity of Actions - Law and Rationale, 1 Israel L. Rev. 539 (1966).

<sup>3</sup> “*Interest reipublicae ut sit finis litium, and nemo debet bis vexari pro una et eadem causa.*” “It is in the public interest that there should be an end of litigation and no one needs to be vexed twice for one and the same cause.” 16 Halsbury's Laws of England, at 852 n.1.

<sup>4</sup> Black's Law Dictionary 1305 (6th ed. 1990).

<sup>5</sup> *Klaus P. Berger*, Internationale Wirtschaftsschiedsgerichtsbarkeit 427 (1992).

## 2. *Res judicata* as a Rule of International Law

4. It is widely accepted that *res judicata* is also a rule of international law. While some authors refer to it as a rule of customary international law,<sup>6</sup> most others see it as a general principle of law.<sup>7</sup>

5. In a number of cases before international courts and arbitral tribunals *res judicata* has been identified as a legally binding principle.<sup>8</sup>

6. The leading early case is the *Pious Fund Arbitration* between the US and Mexico.<sup>9</sup> In its 1902 award an arbitral tribunal set up under the auspices of the Permanent Court of Arbitration held that an earlier arbitral award, a decision rendered by an umpire in 1875, constituted *res judicata* between the parties in the matter. As a result, Mexico's obligation to make payments to a "Pious Fund of the Californias" could not be disputed again. With regard to *res judicata* in general the arbitral tribunal said that

this rule applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromis.<sup>10</sup>

7. In a similarly broad fashion, the arbitrators in the *Trail Smelter Case* stated

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.<sup>11</sup>

8. In his famous dissenting opinion in the *Chorzow Factory Case* before the Permanent Court of International Justice (=PCIJ) Judge Anzilotti referred to *res judicata* as one of the

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<sup>6</sup> William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and *Res judicata* Under Chapter Eleven of NAFTA, 23 Hastings Int'l & Comp. L. Rev. 357, at 365 (2000).

<sup>7</sup> Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 336 (1953); Sir Hersch Lauterpacht, The Development of International Law by the International Court 19, 325-26 (1958).

<sup>8</sup> See on the early arbitral practice Heinrich Lammasch, Die Rechtskraft internationaler Schiedssprüche (1913).

<sup>9</sup> See Karl Lamers, Pious Fund Arbitration, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, VOL. 3, 1032 (1997).

<sup>10</sup> *Pious Fund of the Californias (U.S. v. Mex.)*, Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902).

“general principles of law recognised by civilised nations”<sup>12</sup> in the sense of Art 38 of the PCIJ Statute, now Art 38 of the Statute of the International Court of Justice (=ICJ).<sup>13</sup>

9. The ICJ has also repeatedly recognized and applied the principle of *res judicata*. For instance, in the 1960 *Arbitral Award Case*<sup>14</sup> the World Court rejected a challenge to an arbitral award rendered in 1906 by the King of Spain in a boundary dispute between Honduras and Nicaragua. Instead, the ICJ considered the award a *res judicata* between the parties. In the *UN Administrative Tribunal Case*, which dealt with the power of the UN General Assembly to establish an administrative tribunal competent to hear staff disputes, the ICJ referred to *res judicata* as a “well-established and generally recognized principle of law.”<sup>15</sup>

10. In a sense also Article 59 of the Statute of the ICJ, according to which “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,” can be viewed as an affirmation of the *res judicata* principle.<sup>16</sup> Although this provision was mainly intended to exclude the possibility of a Common Law-type doctrine of binding precedent or *stare decisis*,<sup>17</sup> it clearly reaffirmed the principle that the parties are bound by a judgment in respect of a particular case.

11. In its most recent practice the ICJ has relied on the *res judicata* principle in a matter-of-course fashion without even stating that it considers this rule a general principle of law. For instance, in the *Request for Interpretation of the Judgment of 11 June 1998 in the Land and*

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<sup>11</sup> *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, at 1950 (1941).

<sup>12</sup> *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 P.C.I.J. (Ser. A) No. 11, at 27 (Dec. 16) (dissenting opinion of Judge Anzilotti).

<sup>13</sup> See already Lord Phillimore in the Advisory Committee of Jurists appointed to draft the ICJ Statute: “the general principles [...] were these which were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*.” cited in *Iain Scobbie, Res judicata*, Precedent and the International Court: A Preliminary Sketch, 20 *The Australian Yearbook of International Law* 299 (1999), at 299.

<sup>14</sup> Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), 1960 I.C.J. Rep., 192 (Nov. 18, 1960). *Arbitral Award Made by H. M. Alfonso III, King of Spain, in the Border dispute Between the Republics of Honduras and Nicaragua*, on 23 December 1906, Pleadings, Oral Arguments, Documents, Vol. I, Annex II, at 18-26.

<sup>15</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) I.C.J. Rep., 47, at 53: The Court said that it is a “well-established and generally recognized principle of law” that “a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute.”

<sup>16</sup> *Bin Cheng*, 340, 341.

<sup>17</sup> *Mohamed Shahabuddeen*, Precedent in the World Court 99 (1996).

*Maritime Boundary Case between Cameroon and Nigeria*<sup>18</sup> and in the *Boundary Dispute between Qatar and Bahrain Case*<sup>19</sup> the validity of the *res judicata* principle was taken for granted.<sup>20</sup>

12. Also in more recent arbitral proceedings such as the 1978 *Channel Arbitration*<sup>21</sup> between France and the UK concerning the delimitation of the continental shelf, *res judicata* was recognized. The arbitral court considered “it to be well settled that in international proceedings the authority of *res judicata* attaches”<sup>22</sup> to decisions like the earlier arbitral award of 1977 in the same matter.

13. Also the European Court of Justice (=ECJ) has repeatedly relied upon *res judicata* in declaring actions inadmissible in cases that have already been decided by previous judgments although the Court's Rules of Procedure do not expressly refer to *res judicata*.<sup>23</sup>

14. As *Bin Cheng* put it succinctly: “There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings.”<sup>24</sup> Similarly, it was stated that “[t]here is invariably in municipal legal systems a doctrine to the effect that once a matter is judicially determined that matter may not be litigated again by the same parties or parties in the same interest. This doctrine, commonly called *res judicata*, applies equally to international arbitral tribunals and judicial decisions.”<sup>25</sup>

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<sup>18</sup> *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (Cameroon v. Nigeria), 1999 ICJ Rep., 31, 39. (March 25, 1999)

<sup>19</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits (Qatar v. Bahrain), (Diss. Op. Torres Bernárdez), 2001 ICJ Rep., para. 303. (Mar. 16, 2001)

<sup>20</sup> Since the conditions for its application were held not to be present in both cases, *res judicata* was not applied.

<sup>21</sup> *Delimitation of the Continental Shelf (UK v. France)*, 18 R.I.A.A. 271.

<sup>22</sup> *Id.*, 295.

<sup>23</sup> Case 14/64, *Mrs Emilia Gualco (née Barge) v. High Authority of the European Coal and Steel Community* [1965] ECR 51; Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] ECR. 2831; Cases 358/85, 51/86, *France v. Parliament* [1988] ECR 4846, 4849-50. See also *Michael Reiling*, Streitgegenstand und Einrede der „res judicata“ im Direktklageverfahren vor den Gemeinschaftsgerichten, 13 Europäische Zeitschrift für Wirtschaftsrecht 136 (2001).

<sup>24</sup> *Bin Cheng*, 336.

<sup>25</sup> *Clive Parry et al. (eds), Encyclopaedic Dictionary of International Law* 341 at 339 (1986).



### 3. Requirements of International *res judicata*

15. While the existence of *res judicata* as a rule of general international law is uncontroversial, its application may depend upon the circumstances of a case and the conditions governing its application. The conditions for *res judicata* in international law are similar to those required in national legal systems. The doctrine of *res judicata* in international law requires that both the parties and the question in issue be the same. Accordingly, in the *Polish Postal Service in Danzig Case* the PCIJ held that “[t]he doctrine of *res judicata* [applies when] not only the Parties but also the matter in dispute [are] the same.”<sup>26</sup> In *re S.S. Newchwang* the arbitral tribunal held that “It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.”<sup>27</sup> Similarly, in the *Pious Fund Arbitration* the tribunal stated that *res judicata* applied where „there is not only identity of parties to the suit, but also identity of subject-matter.”<sup>28</sup>

16. Broadly speaking one may identify three preconditions for the applicability of the doctrine of *res judicata* in international law, namely proceedings must have been conducted

1. before international courts or arbitral tribunals,
2. between the same parties,
3. concerning the same issues.

#### **a. *Res judicata* Applicable between International Courts and Tribunals**

17. *Res judicata* in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. The international character is broadly understood and includes mixed arbitration between States and private parties. *Res judicata* does not apply, however, with regard to proceedings before national courts, on the one hand, and international tribunals, on the other hand. Thus, international dispute

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<sup>26</sup> *Polish Postal Service in Danzig Case*, 1925 P.C.I.J. (Ser. B) No. 11, at 30 (May 16).

<sup>27</sup> *In re S.S. Newchwang (Gr. Brit. v. U.S.)*, 16 Am. J. Int'l L. 323, 324 (1922).

settlement organs are not considered bound by decisions of national courts or tribunals.<sup>29</sup> In other words, *res judicata* applies to tribunals operating within the same legal order.

18. That mixed arbitration between private investors and host States can be regarded as international arbitration for purposes of *res judicata* (and *lis pendens*) is clearly evidenced by the approach followed by an ICSID tribunal in the case *SPP v. Egypt*.<sup>30</sup> There, the ICSID arbitral tribunal did not exercise jurisdiction until an ICC award previously rendered concerning the same dispute had been annulled. It formally stayed its own proceedings awaiting the eventual annulment of the ICC award. Although the ICSID tribunal purported to act on discretionary principles, in effect, it complied precisely with the requirements of the *res judicata* and *lis pendens* doctrine by treating the ICC award – until annulment – as a *res judicata* of the matter.<sup>31</sup>

19. In the recent *Boundary Dispute between Qatar and Bahrain Case* the ICJ recognized that a decision of an arbitration panel may be *res judicata* for that Court. The court stated that “[r]es judicata is precisely a notion of procedural law intrinsically linked to the form adopted by the procedure and decision concerned and the jurisdictional character of the organ adopting it [...] [i]ndependently of the name given to it (arbitration, adjudication, enquiry, etc.) [...]”<sup>32</sup>

## **b. Identity of Parties**

20. “Identity of the parties” is unequivocally stated as a requirement for the application of *res judicata* in almost all of the international precedents. There is rarely any discussion about this

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<sup>28</sup> *Pious Fund of the Californias (U.S. v. Mex.)*, Hague Ct. Rep. (Scott) 1, at 5 (Perm. Ct. Arb. 1902).

<sup>29</sup> *Ian Brownlie*, *Principles of Public International Law* 52 (5<sup>th</sup> ed. 1998) (“There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned [...]”); *Bin Cheng*, at 337, n.6 (“a decision of municipal law does not constitute *res judicata* in international law”).

Also the ICSID Tribunal in *Amco v. Indonesia* put it succinctly, “an international tribunal is not bound to follow the result of a national court.” See *Amco v. Indonesia* (Award, Nov. 20, 1984), 1 ICSID Rep. 413, 460 (1993), sustained in relevant part, *Amco v. Indonesia* (Decision on the Application for Annulment, May 16, 1986), 1 ICSID Rep. 509, 526-27 (1993).

<sup>30</sup> *SPP v. Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.

<sup>31</sup> *SPP v. Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, at 129, 130.

<sup>32</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, (Diss. Op. Torres Bernárdez), 2001 ICJ Rep., para. 303. (Mar. 16, 2001)

prerequisite, which is not surprising since most relevant international cases were either genuine inter-States disputes or concerned the espousal by a State of claims belonging to its national.

### ***1.) The “Economic Approach” to Identity of Legal Persons in International Practice***

21. In the case at hand, the question arises whether legally separate entities of a corporate group may be regarded as an identical party or at least sufficiently closely related for the application of the *res judicata* doctrine. There appears to be no directly relevant case law of international courts and tribunals on this issue.

22. Nevertheless, it is important to recognize that international arbitral practice has developed an “economic approach” under which strict legal distinctions, not reflecting the underlying economic realities, may be disregarded.<sup>33</sup>

23. In application of such an “economic” approach, an ICC arbitral tribunal upheld its jurisdiction in proceedings where arbitration clauses were signed by some, but not all companies, of a corporate group of parent and subsidiaries instituting arbitral proceedings. Among others, the tribunal considered the fact that the parent company exercised absolute control over its subsidiaries to be a crucial factor in extending the arbitration agreement to the parent which had not participated in it. The tribunal reasoned:

[...]irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral tribunal should take account when it rules on its own jurisdiction [...].<sup>34</sup>

24. Arbitral tribunals operating under the auspices of the ICSID have also followed an “economic approach” with regard to separate legal personality vs. economic unity. They

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<sup>33</sup> See *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration 131 at 136 (1984): “The decisions of [ICC] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.”

<sup>34</sup> *Id.*

generally take a “realistic attitude”<sup>35</sup> when identifying the party on the investor’s side. They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary.

25. In *Amco v. Indonesia*<sup>36</sup> the question arose whether a parent company, Amco Asia, could institute ICSID arbitration where the arbitration agreement literally covered only its subsidiary, PT Amco. The ICSID tribunal answered this question in the affirmative and thus upheld its jurisdiction. It stated:

The foreign investor was Amco Asia; PT Amco was but an instrumentality through which Amco Asia was to realize the investment. Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?<sup>37</sup>

26. A similarly “realistic attitude” was taken in *Klöckner v. Cameroon*.<sup>38</sup> There the question arose whether Klöckner, the majority shareholder at the time of consent of a joint venture company called SOCAME, could be substituted for SOCAME with respect to the arbitration agreement between SOCAME and the host State. The ICSID tribunal found that it had jurisdiction also over the foreign majority shareholder although that shareholder was not a party to the agreement containing consent to arbitration. The tribunal stated:

This Agreement, although formally signed by the Government and SOCAME, was in fact negotiated between the Government and Klöckner [...] Moreover, it is undeniable that it was manifestly concluded in the interest of Klöckner, at a time when Klöckner was SOCAME’s majority shareholder. The Establishment Agreement reflected the contractual relationship between a foreign investor, acting through a local company, and the host country of this foreign investment.<sup>39</sup>

27. If such an “economic approach” is accepted for jurisdictional purposes this requires that the same standard is also applied for purposes of *res judicata*. Otherwise individual

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<sup>35</sup> See *Christoph Schreuer*, *The ICSID Convention: A Commentary* (2001), Art 25, para. 216.

<sup>36</sup> *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389.

<sup>37</sup> *Id.*, p. 400.

<sup>38</sup> *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9.

<sup>39</sup> *Id.*, p. 17.

companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of separate legal identities.

28. That such a realistic approach is to be adopted also for *res judicata* purposes is explicitly stated in the *Restatement on Judgments* which provides:

A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.<sup>40</sup>

29. As far as separately incorporated legal persons are concerned international investment law follows the tendency to disregard the corporate veil and to look at the underlying “real” or “economic” relations. In particular, in the field of international investment agreements there is a trend to extend protection to investors regardless of the form of the investments made whether directly or indirectly through subsidiaries or other controlled entities. This is clearly evidenced by a large number of bilateral investment treaties (=BITs) which now regularly protect not only direct investments but all forms of indirect investments including the ownership of shares in companies.<sup>41</sup> These BITs enable also parent companies or natural persons owning or controlling subsidiaries to assert international claims.

30. The ICSID Convention follows a similar approach. Its investment dispute settlement is normally open to foreign investors having “the nationality of a Contracting State other than the State party to the dispute”<sup>42</sup>. However, taking into account economic realities the Centre’s dispute settlement is also available to juridical persons having the nationality of the Contracting State party to the dispute, if the parties have agreed that “because of foreign control” it should be treated as a national of another Contracting State.<sup>43</sup>

31. Many other fields of modern international economic law have adopted a similar “economic or realistic approach” vis-à-vis corporate entities by focusing on the underlying economic realities instead of the formal legal structure of corporate groupings. Another

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<sup>40</sup> *American Law Institute* (ed.), *Restatement 2<sup>nd</sup> Judgments*, § 39.

<sup>41</sup> Cf. Art I para 1 (a) (ii) US-Czech BIT.

<sup>42</sup> Art 25 para 2 (a) ICSID Convention.

<sup>43</sup> Art 25 para 2 (b) ICSID Convention.

special field where this approach has gained importance also for purposes of establishing jurisdiction over affiliated companies is EC competition law. According to the “*single economic entity*” doctrine developed by the ECJ in the *Dyestuffs Case* “the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.” The Court continued to specify the criteria of “imputability” by saying that

[s]uch may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.<sup>44</sup>

32. The ECJ refined this concept in the *Continental Can Case* in which it stated that

[t]he circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.<sup>45</sup>

33. In the specific case, the ECJ concluded that the subsidiary had acted on the instructions of its parent company.

34. As a consequence of disregarding the separate legal personality of subsidiaries under the “*single economic entity*” doctrine, the ECJ is able to identify their activities as activities of the parent companies which thereby fall under the EC's competition law jurisdiction.

35. As a result, one can clearly identify an increasingly “economic approach” or “realistic attitude” adopted by international arbitral tribunals with regard to standing of parent companies before such tribunals in cases where only the subsidiaries owned and/or controlled by them have formally signed arbitration agreements. It is important that in such situations, where not only the direct investor is given the right to institute proceedings but also the ultimate owner of the direct investor, re-litigation of the same issue is prevented. This can only be accomplished by realizing that the *res judicata* principle applies to related parent and subsidiary companies.

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<sup>44</sup> Cf. Case 48/69 *ICI v. Commission (Dyestuffs Case)* [1972] ECR 619, para. 133, and Case 52/69 *Geigy v Commission* [1972] ECR 787, para. 44.

36. Finally, and particularly important for purposes of *res judicata*, there is case-law of international tribunals that demonstrates that essentially identical parties, although legally separate, are prevented from re-litigating the same issues. In *Martin v. Spain*,<sup>46</sup> the European Commission on Human Rights held that a claim by 23 Union activists, presented in their personal capacity, which was identical in its object and scope to a previous claim brought before the ILO Committee on Freedom of Association by the trade organization to which the applicants belonged, was precluded by virtue of ex Article 27(1)(b)<sup>47</sup> of the European Convention on Human Rights (=ECHR).<sup>48</sup> Although, formally speaking the parties were different, the Commission held that they were ‘essentially the same’.<sup>49</sup>

37. It follows that related parent and subsidiary companies can be regarded as the “same party” for purposes of *res judicata* where a parent company has been allowed to bring a claim for its subsidiary or vice versa. Where a “realistic attitude” is pursued for purposes of jurisdiction this must also be followed for purposes of *res judicata*.

## **2.) Privity**

38. Further, the doctrine of *res judicata* does not even require strict legal identity of the parties. While identity is, of course, the normal case, it is sufficient that either the parties or their “privies” are the same.<sup>50</sup> “Privity” is defined as “mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as

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<sup>45</sup> Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para. 15.

<sup>46</sup> European Commission of Human Rights, Application 16358/90, *Martin v. Spain*, Decision on Admissibility of 12 October 1992, available under <http://hudoc.echr.coe.int/Hudoc2doc/hfdec/sift/948.txt>.

<sup>47</sup> Now Art. 35(2)(b) of the Convention. See para. 73 *infra*.

<sup>48</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), 213 UNTS 221.

<sup>49</sup> According to the European Commission of Human Rights, “dans le présent cas la plainte a été soumise matériellement par les mêmes requérants.” “Dès lors, deux instances internationales - le Comité de la liberté syndicale de l'Organisation Internationale du Travail et la Commission - ont été saisies successivement de requêtes ayant essentiellement le même contenu et les mêmes requérants.” Application 16358/90, *Martin v. Spain*, Decision on Admissibility of 12 October 1992. (Emphasis added).

<sup>50</sup> Cf. Black's Law Dictionary 1305 (6<sup>th</sup> ed., 1990) defining *res judicata* as “[a] matter adjudged, a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.” (Emphasis added).

to represent the same legal right.”<sup>51</sup> In the context of litigation this relationship has been specified in the following terms:

Concept of 'privity' pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party.<sup>52</sup>

39. A flexible privity concept includes a wide range of closely affiliated business actors. In this context it has been stressed that

courts are likely to find that corporations are bound by arbitration decisions involving corporate alter egos and that arbitration decisions in favor of a principal bar a subsequent suit against the principal's agent if the suit is based on the same transaction.<sup>53</sup>

40. The Common Law notion of “privity” can be regarded as a specific expression of the general principle that identity is not to be understood as strict legal identity but rather as a sufficient degree of identification or real substantive identity versus formalistic differentiation. This becomes very apparent in the English decision of *Gleeson v. J Wippel*:

I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a *sufficient degree of identification* between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase “privity of interest”<sup>54</sup>

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<sup>51</sup> Cf. Black's Law Dictionary 1079 (5<sup>th</sup> ed., 1979).

<sup>52</sup> *Id.*

<sup>53</sup> According to *G. Richard Shell, Res judicata and Collateral Effects of Commercial Arbitration*, 35 U.C.L.A. L. Rev. 623 (1988), at 647, “[t]he concept of “privity” is extremely flexible under traditional *res judicata* doctrine and remains so when *res judicata* is applied based on a prior arbitration. For example, courts are likely to find that corporations are bound by arbitration decisions involving corporate alter egos and that arbitration decisions in favor of a principal bar a subsequent suit against the principal's agent if the suit is based on the same transaction. There do not appear to be any special privity rules for arbitral preclusion cases.” (footnotes omitted).

<sup>54</sup> *Gleeson v. J Wippel & Co. Ltd.* [1977] 3 All ER 54, 60 (Emphasis added):



### **c. Identity of Issues: Identity of Object (*petitum*) and Ground (*causa petendi*)**

41. As far as the requirement of an identical issue or subject-matter of litigation is concerned, it has been asserted that *res judicata* applies only if both the “object” (*petitum*) and the “ground” (*causa petendi*) of two claims are the same.<sup>55</sup>

42. This distinction is also clearly expressed in international judicial practice. In the *Chorzow Factory* case Judge Anzilotti spoke about “three traditional elements for identification, persona, petitum, causa petendi.”<sup>56</sup> Similarly, in the *Trail Smelter* Case the arbitral decision referred to “[t]he three traditional elements for identification: parties, object, and cause [...]”.<sup>57</sup>

43. Identical “object” (*petitum*) means that the same type of relief is sought in different proceedings. Identical “ground” (*causa petendi*) means that the same legal arguments are relied upon in different proceedings. Closely linked to these conditions is the issue of identical “facts” since the factual background will be determinative of both the kind of remedies that may be sought and the type of legal arguments that can be made in pursuit of such claims.

#### **1.) Identical Object**

44. The requirement of an identical “object” refers to the remedies sought in litigation, i.e. whether the same type of relief is sought in different proceedings. If this is the case, subsequent litigation will be barred by *res judicata*.

45. The distinction between the “object” and the “grounds” of a claim is clearly made in international case-law. International tribunals have also been aware of the risk that if they use

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<sup>55</sup> See *Bin Cheng*, 340, stating that “[t]he second element of identification, i.e., question at issue, has sometimes been subdivided into the object (*petitum*) and the grounds (*causa petendi*) of the case.”; See also *Dodge*, 366.

<sup>56</sup> *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 P.C.I.J. (Ser. A) No. 11, at 23 (dissenting opinion of Judge Anzilotti).

<sup>57</sup> *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1952 (1941).

too restrictive criteria of identity of “object” and “grounds”, the doctrine of *res judicata* would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of *res judicata*, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon. Dodge speaks in this regard of the possibility of “claim splitting” in order to “avoid the *res judicata* effect of a prior award by seeking a different sort of relief or by raising new grounds in support of the same claim for relief.”<sup>58</sup> This would be the case, for instance, if in a typical investment dispute, involving allegations of acts amounting to expropriation, the investor first sought *restitutio in integrum* as relief from the host State and in a later litigation changed the “object” of his case to requesting compensation.

46. There are important policy arguments against the possibility of “claim splitting” which would render the purpose of *res judicata*, i.e. the finality of the results of dispute settlement moot.<sup>59</sup> In addition, there is case-law by arbitral tribunals to the effect that such claim splitting will not be allowed. They have barred claimants from raising closely related claims that they could have raised in an earlier arbitration.

47. For instance, in the *Delgado* case<sup>60</sup> before a US-Spanish Claims Commission, a claim for damages against Spain for seizure of property in Cuba was brought and denied by an umpire in 1876. Subsequently another claim was brought by the same applicant this time for the value of the property seized. The defendant State moved to dismiss on the ground of *res judicata* arguing that the “test of identity was not whether the measure of relief demanded, but whether the injury that formed the foundation of the claim, was the same in both cases.” The umpire held that the question of identity depended upon “whether new rights are asserted in [the second] claim.”<sup>61</sup> Although he seems to have accepted that the two claims did in fact relate to different grounds he dismissed for *res judicata* holding that

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<sup>58</sup> Dodge, 366.

<sup>59</sup> See *Bin Cheng*, at 344 (“Eadem res, in the maxim bis de eadem re non sit actio, should... be construed as the entire claim without regard to the fact whether the various and separate items therein contained have all been presented or not.”).

<sup>60</sup> *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196 (Span.-U.S. Claims Commission 1881). See also *Danford Knowlton & Co. and Peter V. King & Co.* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2194, 2195 (Span.-U.S. Claims Commission 1881).

<sup>61</sup> *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196, at 2199 (Span.-U.S. Claims Commission 1881).

[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.<sup>62</sup>

48. An even broader approach was pursued by the same Commission in the *Machado* case<sup>63</sup> where in a first case damages arising from the seizure of a house were claimed and in a second one restoration of the house as well as rent and damages for its detention were claimed. The umpire to whom the issue was referred dismissed the second claim on *res judicata* grounds regarding both claims as identical. He said:

that the questions whether this claim No. 129 is a new one, or the same as No. 3, does not depend upon whether the items included be the same in both cases, but that the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number.<sup>64</sup>

## **2.) Identical Ground**

49. Identity of the issue or subject-matter of dispute settlement is also relevant where a claimant makes identical requests in different proceedings based on formally different legal grounds, in other words, where the “object” is identical, but where the “cause” or “ground” appears to be different.

50. Such a situation may arise, for example, where a party seeks compensation for expropriation, in one case, under customary international law, in another, under a BIT, or where a party bases its claim, in one case, on a multilateral agreement, in another, on a bilateral one or on two different BITs such as in the present case. Technically speaking in such a situation the “cause”, “ground” or “*causa petendi*” is non-identical which would seem to exclude application of the *res judicata* principle. It is evident, however, that this is a highly

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<sup>62</sup> *Id.*

<sup>63</sup> *Machado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881).

artificial distinction since in all cases mentioned the legal grounds for the compensation sought would be a rule of international law calling for compensation for expropriation whether contained in custom or expressed in a treaty. It is far more appropriate to look at the specific rules and to examine how far they are substantively identical or different. If it is the same rule reflected in different legal instruments this should not cast any doubt on the identity of the “cause” and thus of the subject-matter of the disputes.

51. Under modern international law, it is common that acts and omissions of States (or other international actors) may be subject to more than one treaty instrument, and therefore more than one dispute settlement mechanism. For example, many human rights are protected under more than one human rights convention (both at the global and regional level); and this is also the case with many issues regulated by international economic law and international environmental law. Consequently, adoption of the position that parallel sets of litigation based on substantially identical provisions found in different instruments do not compete with each other, would tend to promote multiplicity of proceedings, and might also result in conflicting decisions concerning the State’s international rights and obligations.

52. There is recent international practice in this regard. An arbitral tribunal under the 1982 UN Convention on the Law of the Sea (“UNCLOS”) in the *Southern Bluefin Tuna Case*<sup>65</sup> had to determine whether a dispute about Japanese fishing practices was to be settled under the Convention for the Conservation of Southern Bluefin Tuna 1993 (=CCSBT) or (also) under UNCLOS. Because it regarded the dispute settlement provisions of the CCSBT as excluding the application of the mandatory dispute settlement procedures under UNCLOS, the tribunal held that it lacked jurisdiction.

53. In the course of assessing the character of the legal dispute at issue, the Tribunal also pronounced itself on the identity or non-identity of the dispute over fishing practices, which can be viewed under the rules of the CCSBT as well as under UNCLOS, and stated:

[T]he Parties to this dispute ... are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a

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<sup>64</sup> *Id.*, at 2194.

<sup>65</sup> *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000).

dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.<sup>66</sup>

54. Based on the “artificiality” of such a distinction the tribunal regarded the “two” disputes as relating to the same issue or subject-matter and thus to constitute just “one” dispute. The CCSBT contains norms regarding total allowable catch. UNCLOS establishes more general norms regarding fisheries conservation and management. Despite the significant difference in the “cause” or legal ground of the claims they were regarded as identical constituting one single dispute.

55. It follows from this precedent that a dispute may be considered a single identical dispute based on identical grounds where claims are based on two fairly different treaties as long as they all relate to the same factual background. *Argumento a minore*, this principle applies even more where two separate treaties contain essentially identical provisions.

### ***3.) Identical Facts***

56. The *Southern Bluefin Tuna Case*<sup>67</sup> also shows a tendency to focus on the facts or the factual background of claims in order to determine whether disputes are different or identical. This demonstrates that identical “facts” play an important role in actual practice, even where the test of identity of issues remains theoretically limited to identical “object” and identical “ground”.

57. This is also evidenced by the above mentioned<sup>68</sup> arbitral decision in the *Machado* case<sup>69</sup> where two different claims were made, both as a consequence of the seizure of a private house. In dismissing the second claim on *res judicata* grounds because he regarded both claims as identical the umpire found:

that the test is whether both claims are founded on the same injury.<sup>70</sup>

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<sup>66</sup> *Id.*, at 1388, para 48.

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* para. 55.

<sup>69</sup> *Machado Case*, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881).

<sup>70</sup> *Id.*, at 2194.

58. Also human rights organs, when they have to decide whether the same application has already been brought in another forum, tend to focus on the identity of the underlying facts that give rise to individual complaints.

59. These cases also support the principle that *res judicata* applies where the same dispute arises under different treaties as long as the different treaties contain similar rules on which the complaints are based.<sup>71</sup> This is clearly the case in human rights cases where the same acts are challenged as constituting violations of corresponding provisions under the International Covenant on Civil and Political Rights (=ICCPR)<sup>72</sup> and the ECHR.

60. In *Glaziou v. France* the UN Human Rights Committee noted:

that the author's complaint before the European Commission was *based on the same events and facts* as the communication that was submitted under the Optional Protocol to the Covenant, and that it raised substantially the same issues; accordingly, the Committee is seized of the “same matter” as the European Commission.<sup>73</sup>

61. In *Trébutien v. France* the complainant alleged that various measures taken by French authorities constituted a violation of Arts. 9 and 14 of the ICCPR. Since the same measures had already been challenged before the European Commission of Human Rights as infringements of the similarly though not strictly identically worded Art. 5 of the ECHR the case was declared inadmissible by the UN Human Rights Committee which held that:

the 'same matter' [...] must be understood as referring to the facts and events which were at the basis of the author's complaints.<sup>74</sup>

62. In both cases the UN Human Rights Committee declared the complaints inadmissible because it found that the same issue had already been brought before the European Commission of Human Rights. Similar decisions of inadmissibility have also been rendered by the European Commission and the European Court of Human Rights when they found that the same matter had already been brought before another human rights tribunal.<sup>75</sup>

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<sup>71</sup> See *supra* para. 257.

<sup>72</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI) (1966), 999 UNTS 171.

<sup>73</sup> UN Human Rights Commission 452/1991, *Glaziou v. France*, Decision of 18 July 1994, CCPR/C/51/D/452/1991, p. 6, para. 7.2 (Emphasis added).

<sup>74</sup> UN Human Rights Commission 421/1990, *Trébutien v. France*; Decision of 18 July 1994, CCPR/C/51/D/421/1990, p. 7, para. 6.3.

<sup>75</sup> See the *Pauger* case discussed para. 73 *infra*.

#### **4.) Rejection of an Overly Formalistic Approach in Finding Identity of Objects, Grounds and Facts**

63. It has been recognized that if too restrictive criteria of identity with regard to the “object”, the “ground”, and “facts” of different cases are used, the doctrine of *res judicata* would rarely apply. This has led international courts and tribunals to refrain from an overly formalistic approach vis-à-vis the question of the identity of issues.

##### **a.) Partial Nullification of an Award Leaves Intact the *res judicata* Effect of the Valid Part**

64. An example of a less formalistic and more material view on the concept of “same grounds” derives from the practice of partial annulment and *res judicata* effect of the non-annulled award. The umpire in the review phase of the Orinoco Steamship Case<sup>76</sup> held:

[F]ollowing the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the arbitrator are not questioned; this being ground for pronouncing separately on each of the points at issue.<sup>77</sup>

65. Therefore, what matters is the substantive aspects of an entire claim. If parts of an arbitral award can have *res judicata* effect, it is the substantive arguments accepted or rejected by a tribunal which may preclude re-litigation and not the formal identity of the entire claim.

66. It has thus been asserted that “[t]he customary international law doctrine of *res judicata* also includes what American lawyers think of as issue preclusion or collateral estoppel.”<sup>78</sup>

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<sup>76</sup> *Orinoco S.S. Co. Case (U.S. v. Venez.)*, Hague Ct. Rep. (Scott) 226 (Perm. Ct. Arb. 1902).

<sup>77</sup> *Id.*, at 231.

<sup>78</sup> *Dodge*, 366.

**b.) *Res judicata* Effect Goes Beyond the *dispositif* of an Award**

67. A related issue also concerning the scope of the *res judicata* effect is the question whether *res judicata* attaches to the entire decision including its reasoning or only to the ruling or *dispositif*.<sup>79</sup> Practice follows a wide concept, not restricting the preclusive effect to the *dispositif*.

68. In the *Compagnie Generale de l'Orenoque* Case the Franco-Venezuelan Mixed Claims Commission held that

[e]very matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its grounds and basis, is concluded by said judgment, and the claimants themselves and the claimant government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.<sup>80</sup>

69. In the *Pious Fund Arbitration* the tribunal stated:

[A]ll the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and [...] they all serve to render precise the meaning and the bearing of the *dispositif* [...] and to determine the points upon which there is *res judicata* and which thereafter can not be put in question.<sup>81</sup>

70. This view was recently upheld in the *Channel Arbitration*<sup>82</sup> which stated that although *res judicata* “attaches in principle only to the provisions of [the decision’s] *dispositif* and not to its reasoning” it was equally clear that “having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*.”<sup>83</sup>

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<sup>79</sup> See *Scobbie*, 303.

<sup>80</sup> *Compagnie Generale de l'Orenoque* (Franco-Venezuelan Mixed Claims Commission 1905), *Jackson H. Ralston & W.T.S. Doyle*, Report of the French-Venezuelan Mixed Claims Commission of 1902, 244, 355 (1906).

<sup>81</sup> *Pious Fund*, Hague Ct. Rep. (Scott) at 5.

<sup>82</sup> *Delimitation of the Continental Shelf (UK v. France)*, 18 R.I.A.A. 271.

<sup>83</sup> *Id.*, at 295.



**c.) Not Literally Identical, but Substantially Identical Issues are Required  
for *res judicata***

71. In order to avoid unnecessary re-litigation of already decided disputes it is necessary to look at the underlying nature of a dispute and not at its formal classification. Thus, what may not appear to be literally identical, may be substantially identical.

72. In this respect it was rightly argued that

[t]he doctrine of *res judicata* indicates that if legal claims have already been put in issue and decided by a competent tribunal, that decision is dispositive and the same claim may not be raised again in another tribunal in a *substantially identical* action between the parties.<sup>84</sup>

73. This standard of substantial, instead of strict formal identity of issues is also reflected in relevant case law. *Pauger v. Austria*, a human rights case before the European Commission and then the European Court of Human Rights, raised the question of the admissibility of parallel proceedings because the applicant had already filed a complaint with the UN Human Rights Committee. The European Convention on Human Rights - as an expression of a general principle of *lis pendens* - prevents the Strasbourg organs from hearing a case that is "substantially the same as a matter that [...] has already been submitted to another procedure of international investigation or settlement [...]"<sup>85</sup> In its decision on admissibility the European Commission of Human Rights held that:

[...] it is against the letter and spirit of the Convention if the same matter is simultaneously submitted to two international institutions. Article 27 para. 1 (b) (Art. 27-1-b) of the Convention aims at avoiding the plurality of international procedures concerning the same case. In considering this issue, the Commission needs to verify whether the applications to the different institutions have *substantially* the same content.<sup>86</sup>

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<sup>84</sup> *Vaughan Lowe*, Overlapping Jurisdiction in International Tribunals, 20 The Australian Yearbook of International Law 191 at 202 (1999) (emphasis added).

<sup>85</sup> Art 35(2)(b) ECHR (previously Art 27(1)(b) ECHR).

<sup>86</sup> European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility of 9 Jan. 1995, 80 D&R 24 (1995) (emphasis added). In the specific case the application was admissible because the Claimant had raised a violation of the non-discrimination principle before the UN Human Rights Committee and a violation of the right of access to courts, two fundamental rights arising under totally separate Articles both with the ICCPR and the ECHR. Therefore the Commission was correct in holding that: "the applicant did not submit substantially the same matter as raised in his application to the Human Rights Committee of the

## 4. A Chronology of the London and the Stockholm Arbitral Proceedings

74. On 19 August 1999 Mr. Lauder initiated arbitration proceedings against the Czech Republic on the basis of the bilateral investment treaty between the Czech Republic and the US<sup>87</sup> (=London Proceedings). These arbitral proceedings were conducted in accordance with the UNCITRAL Arbitration Rules. Mr. Lauder claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of the US/Czech BIT.

75. On 3 September 2001, a final arbitration award was rendered in London between Mr. Lauder and the Czech Republic (=London Award). In the award the tribunal held unanimously that the Czech Republic had committed a breach of its obligations under the US/Czech BIT in relation to the 1993 events only; but that this breach did not give rise to liability on the part of the Czech Republic. The London Tribunal also decided that Mr. Lauder's claim for a declaration that the Czech Republic had committed further breaches of the US/Czech BIT in relation to the 1996 Events and the 1999 Events be denied and that all claims for damages be denied.

76. While the London proceedings were still pending, on 22 February 2000, CME, a company incorporated in The Netherlands and controlled by Mr. Lauder, initiated arbitration proceedings against the Czech Republic pursuant to the Netherlands/Czech BIT<sup>88</sup> (=Stockholm Proceedings). CME alleged the same violations and facts as Mr. Lauder in the London proceedings.

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United Nations. While before [the Human Rights Committee] he complained of discrimination against him, before the Commission he complained about issues related to the proceedings before the Austrian authorities and courts.”

It is also worth stressing that at the time of the European Commission's decision on admissibility the potential procedural bar was no longer one of *lis pendens* but rather one of *res judicata* since the UN Human Rights Committee had already made its decision in 1992. See *Pauger v. Austria*, Communication no. 415/1990, Human Rights Committee, Views of the Committee, 26 March 1992, UN Doc. A/47/40, Supp. No. 40, at 325. Without hesitation the Commission applied the same “substantial identity” standard.

<sup>87</sup> *Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 22 October 1991 (=US-Czech BIT), in: ICSID, Investment Promotion and Protection Treaties, Loose-leaf.

<sup>88</sup> *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed on 29 April 1991(=Netherlands-Czech BIT), in: ICSID, Investment Promotion and Protection Treaties, Loose-leaf..

77. Ten days after the rendering of the London Award, on 13 September 2001 a Partial Award was adopted by the Stockholm Tribunal. It came to diametrically opposing conclusions from the London Award.

## **5. *Res judicata* as Applied to the London and the Stockholm Arbitral Proceedings**

78. The above analysis makes it possible to evaluate the current proceedings from the perspective of the principle of *res judicata*. Therefore, it is necessary to examine the fulfillment of the requirements as set out above, in particular, whether the proceedings were conducted

1. before two international arbitral tribunals,
2. between the same parties,
3. concerning the same issues.

### **a. Two International Arbitral Tribunals**

79. The London and the Stockholm arbitral proceedings took place before international tribunals on the basis of bilateral investment treaties between the Czech Republic on the one hand and the US<sup>89</sup> respectively The Netherlands<sup>90</sup> on the other hand. Both proceedings were conducted according to the UNCITAL arbitration rules between a private investor and a State party. Both tribunals acted in mixed arbitration of an international character. Therefore *res judicata* is relevant.

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<sup>89</sup> *Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 22 October 1991.

<sup>90</sup> *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed on 29 April 1991.

## **b. Identity of Parties**

80. Both arbitral proceedings, the one before the London Tribunal and the one before the Stockholm Tribunal, took place between, in essence, the same parties.

81. It is undisputed that the respondent in both cases was the Czech Republic. The formal claimant in the London proceedings was Mr. Lauder, while the Stockholm proceedings were officially instituted by CME.<sup>91</sup>

82. This formal difference between Mr. Lauder and CME does not, however, exclude the applicability of the *res judicata* principle since

1. the real party in interest is the same and
2. strict legal identity of the parties is not required under *res judicata*.

A purely formalistic approach towards the question of identical or separate personality of companies would contrast sharply with practice in international investment law in general and international investment arbitration in particular.<sup>92</sup>

### ***1.) Identity of the Real Party in Interest***

83. The real party in interest as Claimant is the same in both proceedings. It is always Mr. Lauder as the “ultimate controlling shareholder” of all the companies involved, in particular of CME, the formal claimant in the Stockholm proceedings.

84. The fact that the real party in interest was always Mr. Lauder was acknowledged by himself.<sup>93</sup> In the Stockholm proceedings the arbitral tribunal recognized not only that Mr. Lauder is the “ultimate controlling shareholder of CME” but also that

[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.<sup>94</sup>

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<sup>91</sup> This formal lack of identity was stressed by the London award at p. 35 para.171.

<sup>92</sup> See paras. 21 *et seq.* *Supra*.

<sup>93</sup> In the London Proceedings, Mr. Lauder asserted that his injury was the same as the injury to CME Media and the injury to CME and the injury to ČNTS.

85. This economic background is relevant also for purposes of *res judicata*. As was recognized by an ICC arbitral tribunal,<sup>95</sup> discussed above<sup>96</sup>:

[...] irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral tribunal should take account [...].<sup>97</sup>

86. The control actually exercised by Mr. Lauder over CME also becomes apparent in the conduct of the two arbitrations. They were conducted in an almost identical fashion using the services of the same lawyers, raising the same arguments, using the same evidence and requesting the same relief.

87. Given the degree of control exercised by the Claimant in the London proceedings (Mr. Lauder) over the Claimant in the Stockholm proceedings (CME) it is safe to assume that they can be regarded as identical Claimant for purposes of *res judicata*.

88. Further, the very fact that Mr. Lauder was recognized as an investor in the London proceedings, although he had no direct and personal involvement in the investment, demonstrates the validity of the “economic approach” in modern investment arbitration.

## **2.) Privity**

89. Strict legal identity of the parties is not required under the doctrine of *res judicata*. While identity is, of course, the normal case, it is sufficient that either the parties or their privies are the same.<sup>98</sup> This extension of the *res judicata* effect to privies is uncontroversial. That such “privity” can be assumed as between Mr. Lauder and CME is apparent.

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<sup>94</sup> Para. 143 on p. 47 of the Stockholm Award.

<sup>95</sup> *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 *Yearbook of Commercial Arbitration* 131 (1984).

<sup>96</sup> See para. 23 *supra*.

<sup>97</sup> *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 *Yearbook of Commercial Arbitration* 131 at 136 (1984).

<sup>98</sup> See para. 38 *supra*.

90. Mr. Lauder is a controlling shareholder of the Bermuda incorporated CME Enterprises Ltd. which owns, through a chain of fully-owned subsidiaries, also the Dutch company CME Czech Republic B.V. Though legally distinct, these corporate entities have served as vehicles for the investment made by Mr. Lauder in the Czech Republic. As a result of their domination by Mr. Lauder as the “ultimate controlling shareholder” they can be regarded as alter egos of the investor.

91. If one takes into account non-international arbitral practice, with its broad and flexible privity concept,<sup>99</sup> it seems that privity can be safely assumed between the various companies owned and controlled by Mr. Lauder.

### **c. Identity of Issues**

92. As has been shown above,<sup>100</sup> *res judicata* requires that both claims concern the same issue and divides this requirement into the necessity that both the “object” (*petitum*) and the “grounds” (*causa petendi*) of the two claims are identical.

#### ***1.) Identical Object***

93. The same relief was sought in both arbitrations. In both arbitral proceedings the relief sought by the Claimant was initially directed at reinstatement of the benefit of the investment. Subsequently, in both arbitral proceedings this was changed to damages from the Czech Republic as a result of allegedly suffering loss of that same investment.

94. In the London proceedings the Claimant initially sought restoration of the contractual and legal rights associated with his investments, in particular, to secure the exclusive right of ČNTS, one of the Claimant’s subsidiaries to provide broadcasting services in the Czech Republic.<sup>101</sup> This relief was subsequently withdrawn and Claimant requested the tribunal to

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<sup>99</sup> See para. 39 *supra*.

<sup>100</sup> See paras. 41 *et seq. supra*.

<sup>101</sup> London award, p. 5 para. 11.

declare that he was entitled to damages as a result of breaches of the following provisions of the US-Czech BIT<sup>102</sup>:

- the obligation of fair and equitable treatment of investments,<sup>103</sup>
- the obligation to provide full protection and security to investments,<sup>104</sup>
- the obligation to treat investments at least in conformity with principles of international law,<sup>105</sup>
- the obligation to not to impair investments by arbitrary and discriminatory measures,<sup>106</sup> and
- the obligation not to expropriate investments directly or indirectly through measures tantamount to expropriation.<sup>107</sup>

95. In the Stockholm proceedings Claimant initially requested *restitutio in integrum*, i.e. the restoration of the broadcasting rights of its Czech subsidiary,<sup>108</sup> which was subsequently withdrawn and replaced by a demand for damages from respondent for a violation of the following obligations under the Netherlands-Czech BIT<sup>109</sup>:

- the obligation of fair and equitable treatment,<sup>110</sup>
- the obligation to not to impair the operation, management, maintenance, use, enjoyment or disposal of investments by unreasonable or discriminatory measures,<sup>111</sup>
- the obligation of full security and protection,<sup>112</sup>
- the obligation to treat investments at least in conformity with the rules of international law,<sup>113</sup> and
- the obligation not to deprive Claimant of its investments by direct or indirect measures.<sup>114</sup>

96. It is apparent that the slight variation in the language of the claims used in the two proceedings is only a consequence of the intention to draft the prayer of relief in both cases as closely as possible in accordance with the text of the applicable BITs concerned. In substance, the requests for *restitutio in integrum* and subsequently for compensation for violations of rights under the two applicable BITs are identical.

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<sup>102</sup> Cf. London award, p. 11 para. 42.

<sup>103</sup> Art II para 2 (a) US-Czech BIT.

<sup>104</sup> Art II para 2 (a) US-Czech BIT.

<sup>105</sup> Art II para 2 (a) US-Czech BIT.

<sup>106</sup> Art II para 2 (b) US-Czech BIT.

<sup>107</sup> Art III US-Czech BIT.

<sup>108</sup> Stockholm award, p. 10 para. 25.

<sup>109</sup> Stockholm award, p. 11 para. 26.

<sup>110</sup> Art 3 para. 1 Netherlands-Czech BIT.

<sup>111</sup> Art 3 para. 1 Netherlands-Czech BIT.

<sup>112</sup> Art 3 para. 2 Netherlands-Czech BIT.

<sup>113</sup> Art 3 para. 5 Netherlands-Czech BIT.

<sup>114</sup> Art 5 Netherlands-Czech BIT.

97. Even if the relief requested were not considered to be fully identical, this does not change the fact that the two arbitral proceedings concerned identical claims. Under the identity test employed in the *Machado* case<sup>115</sup> “whether both claims are founded on the same injury”<sup>116</sup> the two arbitral proceedings were clearly identical because they both related to the same acts and measures allegedly involving the responsibility of the defendant. That they did indeed arise from the same facts was even expressly acknowledged by the Stockholm Tribunal.<sup>117</sup>

98. Thus, the Stockholm Tribunal should hold inadmissible the proceedings before it which were not only instituted later in time than the London proceedings, but are also subject to the procedural bar of *res judicata* since the London Award has been rendered.

## ***2.) Identical Grounds***

99. In both arbitral proceedings the same legal arguments were relied upon. Formally there are two different BITs which the Claimant invoked in the parallel proceedings. Of course, the Claimant had to invoke different BITs in order to persuade the two different arbitral tribunals to exercise jurisdiction.

100. In substance, however, in both proceedings materially identical provisions under the respective BITs, providing the same grounds, were invoked. In both proceedings it was argued that the Czech Republic had breached its obligations to provide fair and equitable treatment and full protection and security; to prohibit arbitrary and discriminatory conduct, and not to expropriate without compensation.<sup>118</sup>

101. The two BITs in question, the US-Czech BIT and the Netherlands-Czech BIT, in substance contain the same standards of protection relevant to investors. A comparison of the core provisions of both BITs reveals their virtual identity implying that they contain ‘substantially the same’ standard of protection:

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<sup>115</sup> *Machado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881). See para.48 *supra*.

<sup>116</sup> *Id.*, at 2194.

<sup>117</sup> In para. 143 on p. 47 of the Stockholm award the tribunal recognized that “[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.”

<sup>118</sup> See the requests for relief in the two proceedings paras. 94 and 95 *supra*.



102. Both BITs contain similarly broad definitions of what is protected as an “investment” including “shares” and “other interests in companies.”<sup>119</sup> Both BITs provide that investments of nationals of either State shall receive the better of national treatment or most-favoured-nation treatment.<sup>120</sup> Under both BITs expropriations can occur only in accordance with a high level of international law standards: for public purpose/in the public interest, in a non-discriminatory manner, under due process of law, and upon compensation.<sup>121</sup> Only with regard to the level of compensation the formulations employed in the two BITs may appear to differ. While the US-Czech BIT uses the language of the Hull-formula demanding “prompt, adequate and effective” compensation,<sup>122</sup> the Netherlands-Czech BIT merely speaks of “just compensation.” In specifying these standards, however, also the language of both BITs gets very close again by stating that compensation should be paid “without delay”<sup>123</sup> / “without undue delay”<sup>124</sup>, “be freely transferable”<sup>125</sup> / “in any freely convertible currency accepted by the claimants”<sup>126</sup>, and “be equivalent to the fair market value of the expropriated investment”<sup>127</sup> / “shall represent the genuine value of the investments affected”<sup>128</sup>. Under both BITs nationals of either State have direct access to binding arbitration.<sup>129</sup>

103. It is useful to compare the specific BIT provisions invoked by Claimant in the two arbitral proceedings in more detail. This will show that in both arbitral proceedings identical legal grounds were raised.

104. In both proceedings a breach of the obligation of fair and equitable treatment of investments, to provide full protection and security to investments, and to treat investments at least in conformity with principles of international law was alleged.<sup>130</sup>

105. As far as these specific claims are concerned, the US-Czech BIT provides:

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<sup>119</sup> Art I para 1 subpara. 1 (a) (ii) US-Czech BIT and Art 1 (a) (ii) Netherlands-Czech BIT.

<sup>120</sup> Art II para 1 US-Czech BIT and Art 3 para 2 Netherlands-Czech BIT.

<sup>121</sup> Art III para 1 US-Czech BIT and Art 5 Netherlands-Czech BIT.

<sup>122</sup> See *Malcolm Shaw*, *International Law* 577 (4<sup>th</sup> ed., 1997).

<sup>123</sup> Art III para 1 US-Czech BIT.

<sup>124</sup> Art 5 (c) Netherlands-Czech BIT.

<sup>125</sup> Art III para 1 US-Czech BIT.

<sup>126</sup> Art 5 (c) Netherlands-Czech BIT.

<sup>127</sup> Art III para 1 US-Czech BIT.

<sup>128</sup> Art 5 (c) Netherlands-Czech BIT.

<sup>129</sup> Art VI US-Czech BIT and Art 8 Netherlands-Czech BIT.

<sup>130</sup> See paras. 94, 95 and 100 *supra*.

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.<sup>131</sup>

106. The Netherlands-Czech BIT provides in this regard:

Each Contracting Party shall ensure fair and equitable treatment to the investors of the other Contracting Party [...]<sup>132</sup>  
[...] each Contracting Party shall accord to such investments full security and protection [...]<sup>133</sup>  
If [...] obligations under international law existing at present or established hereafter [...] contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.<sup>134</sup>

107. In both proceedings a violation of the obligation not to impair investments by arbitrary and discriminatory measures was alleged.<sup>135</sup>

108. The US-Czech BIT provides:

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. [...].<sup>136</sup>

109. The Netherlands-Czech BIT provides here:

Each Contracting Party [...] shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, or disposal [of investments].<sup>137</sup>

110. As has been discussed above also with regard to the expropriation claim, the substantive protection contained in the two BITs, although couched in different terms, is substantially the same.<sup>138</sup>

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<sup>131</sup> Art II para 2 (a) US-Czech BIT.

<sup>132</sup> Art 3 para. 1 Netherlands-Czech BIT.

<sup>133</sup> Art 3 para. 2 Netherlands-Czech BIT.

<sup>134</sup> Art 3 para. 5 Netherlands-Czech BIT.

<sup>135</sup> See paras. 94 and 95 *supra*.

<sup>136</sup> Art II para 2 (b) US-Czech BIT.

<sup>137</sup> Art 3 para. 1 Netherlands-Czech BIT.

111. The US-Czech BIT provides:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for public purpose; in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely useable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.<sup>139</sup>

112. The Netherlands-Czech BIT provides:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law;
- b) the measures are not discriminatory;
- c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investment affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants and in any freely convertible currency accepted by the claimants.”<sup>140</sup>

113. Although phrased in slightly different language, the standards of protection afforded by both BITs correspond to the same high level of investment protection afforded by modern treaties in this field. The causes or legal grounds provided by them can thus be regarded as identical.

114. The identity of the issues in the two proceedings is particularly obvious since in both the London and the Stockholm arbitrations, virtually identical written pleadings were filed, the same witnesses submitted virtually the same witness statements, substantially the same

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<sup>138</sup> See para. 102 *supra*.

<sup>139</sup> Art III para 1 US-Czech BIT.

<sup>140</sup> Art 5 Netherlands-Czech BIT.

arguments were made to the two tribunals by the same counsel, and the parties jointly tried to ensure that the same oral testimony given to each tribunal was available to the other.<sup>141</sup>

#### **a.) Identical Grounds under Separate Legal Instruments**

115. The formal point that the two proceedings were technically brought under different BITs is irrelevant for purposes of ascertaining the identity of the “cause” or “ground” of the two arbitrations. This is supported and reinforced by the ruling in the *Southern Bluefin Tuna Case*<sup>142</sup> where an arbitral tribunal refused to regard a fisheries dispute that arose both under CCSBT norms regarding total allowable catch as well as under UNCLOS rules regarding fisheries conservation and management obligations as two separate disputes. The tribunal expressly held:

To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.<sup>143</sup>

116. The *Southern Bluefin Tuna Case* involved two very differently structured treaties, such as UNCLOS and the CCSBT. Because the dispute arose from identical facts and always concerned the permissibility of Japanese fishing practices, the tribunal held that any differences between the claims based on the two different treaties (UNCLOS and CCSBT) could be regarded as negligible. In other words, the claims arising under their respective norms were sufficiently similar so as to render any distinction between them “artificial”.

117. Against this background it would appear to be far more “artificial” to regard claims arising under almost identically worded and substantially identical provisions of two different BITs to constitute distinct legal disputes. Thus, the London proceedings and the Stockholm proceedings arising under the US-Czech BIT and the Netherlands-Czech BIT respectively, both concerning identical facts and both raising the issue of the legality of acts and omissions of the Czech Republic, cannot be considered to be distinct legal disputes.

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<sup>141</sup> Stockholm award p. 176, para. 620.

<sup>142</sup> *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000). See para. 52 *supra*.

<sup>143</sup> *Id.*, at 1388, para 54.

118. This is further corroborated by the practice of human rights institutions which have consistently held that the same dispute may arise under different treaties as long as the different treaties contain similar rules on which the complaints are based.<sup>144</sup>

119. If one takes the *Trébutien* Case<sup>145</sup> as a point of reference, it becomes clear that in the present proceedings before the London and the Stockholm Tribunals the same dispute was brought to arbitration. In the case before the UN Human Rights Committee, it was held that a complaint alleging that certain measures taken by French authorities constituted a violation of Arts. 9 and 14 of the ICCPR was the “same matter” as an earlier complaint brought before the European Commission of Human Rights concerning the same measures challenged as infringements of the similarly, though not strictly identically worded Art. 5 of the ECHR. The language of these provisions in two separate treaties is not identical, though the substantive content is very similar.

120. Following this rationale, it is clear that claims, arising under almost identically worded and substantially identical provisions of the US-Czech BIT and the Netherlands-Czech BIT respectively, such as those brought in the London proceedings and then in the Stockholm proceedings have to be viewed as the same matter or same dispute.

### **b.) Admission of the Identity of the Issues**

121. That the parallel arbitral proceedings in London and Stockholm derived from the same circumstances, concerned the same subject matter, and gave rise to the same cause of action was also acknowledged by the Claimant in the Stockholm proceedings and by the Stockholm Tribunal itself.

122. In its notice of arbitration the Claimant CME stated that Mr. Lauder, “the controlling ultimate shareholder of CME,” had already instituted arbitration proceedings against the

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<sup>144</sup> See UN Human Rights Commission 452/1991, *Glaziou v. France*, Decision of 18 July 1994, CCPR/C/51/D/452/1991, *supra* note 304 and European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility of 9 Jan. 1995, 80 D&R 24 (1995), note 86 *supra*.

<sup>145</sup> UN Human Rights Commission 421/1990, *Trébutien v. France*; Decision of 18 July 1994, CCPR/C/51/D/421/1990, p. 7.

Czech Republic on 19 August 1999 (=the London Proceedings) under the US-Czech BIT. Claimant CME expressly acknowledged that

[t]he relevant substantive protections in that treaty are substantially similar to those provided in the Treaty here [i.e. the Netherlands-Czech BIT], and the dispute underlying the arbitration is the same in both instances.<sup>146</sup>

123. This acknowledgement was reaffirmed in Claimant's statement of claim wherein CME repeated that

[t]he provisions of that treaty [i.e. the US-Czech BIT] are similar to those of the Treaty underlying this arbitration [i.e. the Netherlands-Czech BIT], and the factual predicate of the claims in that proceeding are virtually identical to the factual predicate of this action.<sup>147</sup>

124. In discussing the Claimant's arguments the Stockholm Tribunal accepted that the two proceedings were based on "identical facts."<sup>148</sup> In its decision on costs the Stockholm Tribunal even expressly acknowledged that the

Claimant [i.e. CME] initiated these arbitration proceedings [i.e. the Stockholm proceedings] after having initiated and partly carried through the *Lauder vs/ The Czech Republic UNCITRAL Arbitration Proceedings* which, in essence, deal with the same dispute.<sup>149</sup>

125. It took "account of this situation and also of the fact that the claimant and its ultimate shareholder, by initiating two parallel UNCITRAL Treaty Proceedings had [...] *two bites of the apple*."<sup>150</sup>

126. Furthermore, in the SEC filing for the year 1999, CME Ltd., the Bermudan holding company of claimant CME which is controlled by Mr. Lauder, reported that its wholly owned subsidiary CME had instituted arbitration proceedings on 22 February 2000 and that "[t]he claims asserted by the company (i.e. CME) are substantially similar to those asserted by Mr.

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<sup>146</sup> Notice of Arbitration of Claimant CME Czech Republic B.V., February 22, 2000, para. 9. (Emphasis added.)

<sup>147</sup> Statement of Claim of Claimant CME Czech Republic B.V., September 22, 2000, para. 77.

<sup>148</sup> In para. 143 on p. 47 of the Stockholm award the tribunal recognized that "[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action."

<sup>149</sup> Para. 620 on p. 176 of the Stockholm award (Emphasis added).

<sup>150</sup> Para. 621 on p. 177 of the Stockholm award (Emphasis in the original).

Lauder in the arbitration proceedings that he has instituted in his personal capacity against the Czech Republic.”<sup>151</sup>

### **c.) Prohibition of Claim-Splitting**

127. Even if one were to reach the conclusion that the two claims before the London and the Stockholm Tribunal are not fully identical, further proceedings before the Stockholm Tribunal should now be considered inappropriate on *res judicata* grounds. This follows from the fact that all the claims raised in the Stockholm arbitration were closely related to those raised in the London proceedings and could have been raised there. Legally this results from the prohibition of claim-splitting for the purpose of evading the prohibition of re-litigating identical disputes in accordance with *res judicata*.

128. Under the established case-law of arbitral tribunals, claim-splitting has been rejected. Following the *Delgado* case,<sup>152</sup> discussed above,<sup>153</sup> it is obvious that even if the Claimant in the Stockholm proceedings had not precisely asked for the same relief as in the London proceedings, he had had the “power to do so” and thus “can not have relief by a new claim” before another tribunal.<sup>154</sup>

129. Apart from claim-splitting, for purposes of having “two bites of the apple”, it is necessary to avoid re-litigation of an already decided dispute. This can be achieved by recognizing that *res judicata* applies to “substantially identical actions”<sup>155</sup> between the parties.<sup>156</sup> If there are any doubts left as to the precise identity of the issues in the two arbitral proceedings, there can be no question that they were “substantially identical actions.”

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<sup>151</sup> CENTRAL EUROPEAN MEDIA ENTERPRISES LTD – 10-K – Annual report, Date Filed: 3/15/2000, 6.

<sup>152</sup> *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196 (Span.-U.S. Claims Commission 1881).

<sup>153</sup> See note 60 *supra*.

<sup>154</sup> In *Delgado* the umpire held “[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.” *Id.*, at 2199.

<sup>155</sup> *Lowe*, AusYBIL, 202.

<sup>156</sup> See para. 71 *supra*.

### 3.) *Identical Facts*

130. Both arbitrations concerned the same facts. It is incontestable and even acknowledged by the arbitral panels themselves that the London and Stockholm proceedings address the same facts.<sup>157</sup> Both are concerned with the events surrounding the regulatory and other involvement of the Czech Media Council in the television broadcasting joint venture undertaken by a Czech company (CET 21) and a series of foreign companies controlled by Mr. Lauder (the Claimant in the London proceedings).

131. In the London proceedings Mr. Lauder claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of the US/Czech BIT.

132. In the Stockholm proceedings, instituted by CME, a company controlled by Mr. Lauder, the Claimant alleged the same violations and facts as the Claimant in the London proceedings. CME claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of The Netherlands/Czech BIT.

133. This clearly shows that “both claims are founded on the same injury” in the sense of the *Machado* decision.<sup>158</sup> Following the reasoning applied in this and in other arbitral decisions,<sup>159</sup> the dispute before the London Tribunal is to be regarded as identical to the dispute brought before the Stockholm Tribunal.

134. Consequently, after the London Tribunal has rendered its award, the Stockholm Tribunal should now abstain from deciding the same dispute as a result of *res judicata*.

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<sup>157</sup> Stockholm award, p. 109, para. 412. Also p. 47, para. 143 of the Stockholm award recognizes that “[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.”

<sup>158</sup> *Machado Case*, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193, at 2194 (Span.-U.S. Claims Commission 1881).

<sup>159</sup> *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000).



## 6. Conclusions: The Importance of *res judicata* in the Present Case

135. It is undeniable that lawyers may disagree about the correct legal assessment of legal disputes. This is the underlying premise of the ordinary appellate system in domestic proceedings. It is, however, equally clear that the international arbitral system is based on expediency and efficiency, a cornerstone of which is the finality and binding force of arbitral decisions. If matters decided by arbitration are to be open to re-arbitration this would seriously undermine the international arbitration system since it could jeopardise the confidence of the business community in the reliability and expeditiousness of international arbitration.

136. It was rightly asserted with particular regard to international arbitration that “inconsistent findings by different tribunals on the same facts deprive the law of its predictability and hence of its ability to provide effective guidance; and hence, they threaten to undermine [...] the Rule of Law.”<sup>160</sup>

137. It is exactly these policy considerations which are protected by *res judicata* to reduce the risk of multiple proceedings, which may lead to inconsistent or even contradictory outcomes, and to minimise undue burdens imposed upon the parties by virtue of multiple litigation.

138. It is understandable that in the short period of time between 3 September 2001, when the London Tribunal rendered its award, and 13 September 2001, when a majority of the Stockholm Tribunal agreed on the Partial Award decision, – in particular in view of the difficulties of the Stockholm Tribunal to secure the participation of the entire arbitral tribunal – it may have been difficult to react immediately to the earlier award.

139. Today, however, nine months after the London Tribunal unanimously adopted its Final Award and with the full knowledge of the essential identity of the two claims brought before the London and the Stockholm tribunals, the Stockholm Tribunal should now try to avoid the

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<sup>160</sup> Vaughan Lowe, *Res judicata* and the Rule of Law in International Arbitration, 8 African Journal of International and Comparative Law 38 at 48 (1996).

contradictory results actually arrived at in its own Partial Award and in the Final Award of the London Tribunal. Thus, the Stockholm Tribunal should defer to the doctrine of *res judicata* and end the proceedings since the London Tribunal has already rendered a decision in the same matter.

140. Such deference would help to avoid a situation such as in the instant case, that parallel proceedings lead to different results. Ending the Stockholm proceedings would be crucial to preventing a seriously damaging effect on the international arbitral process. Trust and confidence in the time- and cost-effective settlement of international business disputes would be seriously eroded if the Stockholm proceedings continued.

## **PART TWO: DUTY TO APPLY THE PROPER LAW**

### **1. Arbitration Agreements and Choice of Law**

141. Arbitration is based on an agreement between the disputing parties. The power of arbitrators derives from this agreement. The parties have much latitude in determining the framework for the tribunal's activity. On the other hand, the tribunal is bound by the arbitration agreement and the instructions of the parties contained therein. Any substantial deviation from the arbitration agreement by the tribunal constitutes an excess of powers (*excès de pouvoir*). Most arbitration systems provide that an excess of powers makes the award a nullity. Arbitral practice confirms this finding.

142. The applicable law is part of the issues that may be agreed by the parties in their arbitration agreement. An agreement on applicable law or choice of law is part of the framework for decision that the tribunal is bound to observe.<sup>161</sup> Non-observance of an agreement on applicable law amounts to an excess of powers and leads to nullity. This finding too, is confirmed by arbitral practice.

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<sup>161</sup> For a general analysis of this point see *E. Gaillard/J. Savage* (eds.), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* 785 *et seq.* (1999).

143. In the instant case, the parties' choice of law is contained in Article 8(6) of the Bilateral Investment Treaty between the Netherlands and the Czech and Slovak Federal Republic [now: the Czech Republic] (the BIT) in the following terms:

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
- the law in force of the Contracting Party concerned;
  - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
  - the provisions of special agreements relating to the investment;
  - the general principles of international law.

144. This choice of law provision is contained in the Article dealing with dispute settlement between the host State and the investor. The same Article also contains the consent to arbitration which is the basis of the present arbitration proceedings. The choice of law clause, by its own terms, applies to these arbitration proceedings. Therefore, there is no doubt that the choice of law clause, as quoted above, is part of the parties' arbitration agreement which is binding on the Tribunal.

145. In the case of investor/State arbitration based on BITs, consent to arbitration is also the result of an agreement between the disputing parties, i.e. the host State and the foreign investor. The clause on dispute settlement in the BIT, in our case Article 8 of the Netherlands/Czech BIT, constitutes a standing offer by the two countries to investors from the other country. The arbitration agreement is perfected by the acceptance of this offer by the investor. This acceptance may take place simply by the institution of arbitration proceedings. This way of reaching an arbitration agreement between a host State and a foreign investor is accepted by international arbitral practice.<sup>162</sup> The same method of entering into investor/State arbitration agreements is also employed on the basis of multilateral treaties and domestic legislation.<sup>163</sup>

146. The offer to arbitrate contained in a BIT may be subject to conditions and specifications. Many, though not all, BITs contain choice of law clauses as part of the offer to

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<sup>162</sup> *AMT v. Zaire*, Award, 21 February 1997, 36 ILM 1531, 1545/6 (1997); *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 251; *Fedax v. Venezuela*, Decision on Jurisdiction, 11 June 1997, 37 ILM 1378, 1384 (1998); *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 264 (1999); *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 40 ILM 457, 460, 468, 471; *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review – FILJ 212 (2001); *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000).

<sup>163</sup> *Schreuer, C.*, The ICSID Convention: A Commentary 198-210, 221-224 (2001).

arbitrate. By taking up the offer of consent to arbitration, the investor accepts the choice of law clause contained in the BIT. The provision on applicable law becomes part of the arbitration agreement. Therefore, the clause on applicable law becomes a choice of law agreed by the parties to the arbitration.

147. In the case of arbitration based on the UNCITRAL Arbitration Rules, like in the present case, the tribunal's obligation to respect a choice of law made by the parties is reinforced by Article 33(1) of these rules:

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.<sup>164</sup>

148. It follows that the provision on choice of law contained in Article 8(6) of the BIT is part of the arbitration agreement between the parties which is binding upon the Tribunal.

## **2. Types of Agreements on Applicable Law**

149. Choice of law clauses in arbitration agreements are common but by no means the norm.<sup>165</sup> Some BITs contain them<sup>166</sup>, others do not.<sup>167</sup> Multilateral documents providing for investor/State arbitration are also not uniform in this regard. The North American Free Trade Agreement (NAFTA)<sup>168</sup> and the Energy Charter Treaty<sup>169</sup> contain choice of law clauses for investor/State arbitration. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) defers to an agreement by the parties on applicable law but provides its own choice of law clause in the absence of such an

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<sup>164</sup> <http://www.uncitral.org/en-index.htm>.

<sup>165</sup> Parra, A. R., Provisions on the Settlement of Investment Disputes in Modern Investment Laws, *Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 *ICSID Review—Foreign Investment Law Journal* 287, 332 (1997); Peters, P., *Dispute Settlement Arrangements in Investment Treaties*, 22 *Netherlands Yearbook of International Law* 91, 147/8 (1991).

<sup>166</sup> See note 176.

<sup>167</sup> See e.g. Sri Lanka-United Kingdom BIT, see *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 *ICSID Reports* 250.

<sup>168</sup> Article 1131, 32 *ILM* 605 (1993).

<sup>169</sup> Article 26(6), 34 *ILM* 400 (1995).

agreement.<sup>170</sup> By contrast, the ICSID Additional Facility Rules do not specify the applicable law, in the absence of an agreement by the parties, but merely prescribes a method for ascertaining it.<sup>171</sup>

150. Treaties containing provisions on the applicable law for investor/State arbitration employ different formulae. Some choice of law clauses only refer to international but not to domestic law. For instance, the NAFTA refers to international law including the NAFTA itself:

**Article 1131: Governing Law**

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.<sup>172</sup>

151. The Energy Charter Treaty contains a very similar provision<sup>173</sup>.

152. Other agreements dealing with investor/State arbitration contain choice of law clauses that include the domestic law of the host State as well as international law.<sup>174</sup> These compound choice of law clauses combining domestic and international law have much to commend themselves. Most investments are complex operations involving numerous transactions of different kinds. In the vast majority of instances these transactions will be closely linked to the local law whether it is commercial law, property law, company law, administrative law, labour law or any other area of regulation by the host State. In terms of the conflict of laws, the transaction will have its closest connection to the host State's legal system. From a practical perspective, it seems hardly realistic not to include the law of the country where the investment takes place since international law does not provide guidance for many of the questions that are likely to arise. On the other hand, the applicability of international law gives the investor the necessary security in case the local law should fall below international minimum standards.

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<sup>170</sup> Article 42(1), 4 ILM 524 (1965).

<sup>171</sup> Article 55, 1 ICSID Reports 249: (1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.

<sup>172</sup> 32 ILM 605, 645 (1993).

<sup>173</sup> Article 26(6), 34 ILM 400 (1995).

<sup>174</sup> For a general analysis of combined or concurrent choice of law clauses see *Redfern, A. / Hunter, M.*, Law and Practice of International Commercial Arbitration 104-106 (1999).

153. Combined choice of law clauses are not a recent invention. Clauses of this kind can be found already in some older investor/State agreements. For instance, Deeds of Concession concluded between Libya and two American companies between 1955 and 1968 contained a provision on arbitration part of which was the following choice of law clause:

(7) This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.<sup>175</sup>

154. Where BITs contain a choice of law in the context of investor/State arbitration, the applicable law is typically also national as well as international. Most of these clauses refer to the host State's law, to the BIT itself and to the rules and principles of international law. Some BITs add a reference to agreements relating to the particular investment.<sup>176</sup> Article 8(6) of the BIT between the Netherlands and the Czech Republic, which is applicable in this case, is fairly typical of this group of BITs.

155. The ICSID Convention<sup>177</sup> also contains a compound choice of law clause, containing a reference to the host State's law as well as to international law. But the parties retain the freedom to make their own selection of the applicable law. Article 42(1) of the ICSID Convention provides:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>178</sup>

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<sup>175</sup> *Texaco v. Libya*, Award, 19 January 1977, 53 ILR 389, 404. The Tribunal proceeded to analyse and apply the domestic law of Libya, in addition to international law in some detail. See also *LIAMCO v. Libya*, Award, 12 April 1977, 62 ILR 140, 172; *British Petroleum v. Libya*, 10 October 1973, 53 ILR 297.

<sup>176</sup> See e.g. Art 10(7) of the Argentina/Netherlands BIT of 1992 quoted in *Schreuer, C.*, The ICSID Convention: A Commentary, p. 582 (2001); Art. 9(5) of the Netherlands/Venezuela BIT of 1991, see *Fedax v. Venezuela*, Award, 9 March 1998, 37 ILM 1391, 1396 (1998); Art. 8(5) of the Belgian-Luxemburg Economic Union/Burundi BIT of 1989, see *Antoine Goetz v. Burundi*, Award, 10 February, 1999, 15 ICSID Review-FILJ 454, 498-499; Art. 10(5) of the Argentina/Spain BIT of 1991, see *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review-FILJ 207, 219 (2001).

<sup>177</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, in force: 14 October 1966.

<sup>178</sup> <http://www.worldbank.org/icsid/basicdoc/22.htm>.

156. Under this provision, there are two ways whereby the applicable law may be determined. The first is by agreement of the parties. Such an agreement on applicable law may be expressed in a direct contract between the host State or the investor. It may also come about through the operation of a treaty such as a BIT or legislation offering arbitration subject to a choice of law clause. The operation of these treaties and their possibilities for a choice of law have been described above.

157. If the parties have not reached an agreement on the applicable law, Article 42(1) of the ICSID Convention offers an autonomous rule: the tribunal is to apply the law of the host State and applicable international law rules. Therefore, in the absence of an explicit choice of law by the parties, the ICSID Convention also offers a compound choice of law rule combining the host State's law as well as international law. This formula incorporating both the host State's law and international law is the result of a carefully considered compromise.<sup>179</sup>

158. This survey of provisions dealing with the law applicable in investor/State arbitration leads to the following conclusion: An explicit agreement on applicable law is not uncommon but by no means always present. Where a choice of law is made, it often but not always combines a reference to the host State's domestic law and to international law. It follows that a choice of law clause forming part of an arbitration agreement is not a formality that may be neglected by arbitrators. Its existence as well as its contents merit serious consideration and observance. Where a provision on applicable law combines reference to domestic as well as to international law, tribunals are enjoined to analyse and apply both systems of law.

159. The fact that some or all of the arbitrators are not familiar with the domestic law of the host State is no reason for its non-application. For arbitrators who are not trained in a legal system that they are bound to apply the temptation to ignore or bypass that legal system is great. But yielding to that temptation may have serious consequences (see paras 197-220 *infra*). As *W.M. Reisman* has put it:

Since [the]... task of exploration of the law may involve substantial investigation into a legal system with which the arbitrators have no training, first-hand experience, or even basic language facility, the

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<sup>179</sup> For the drafting history see *Schreuer, C.*, *The ICSID Convention: A Commentary*, pp. 598-600 (2001).

burden may be great. But the difficulty of the task is no excuse for avoiding it.<sup>180</sup>

160. A tribunal has several possibilities to ascertain the legal rules of a legal system that it is bound to apply. First and foremost, the parties will rely on the relevant provisions of the applicable law in their pleadings. If the pleadings do not shed sufficient light on the applicable law, the tribunal may obtain information through expert witnesses or otherwise. Arbitral practice demonstrates that tribunals have routinely applied legal systems even where arbitrators had no training in a legal system to be applied by them.

### **3. Practice of Arbitral Tribunals**

161. An examination of arbitral practice confirms the conclusion that tribunals must carefully observe the clauses on applicable law under which they operate. In particular, where the dispute is governed by a combined choice of law clause, such as in the present case, a tribunal may not restrict itself to applying one of several sources of law listed in that clause. Combined choice of law clauses do not offer the tribunal an alternative. Rather, the tribunal must examine and apply the entire range of legal rules prescribed by the parties' agreement. Put differently, the choice of law is not with the tribunal but with the parties. The tribunal is bound to follow the parties' instructions.

162. Arbitration taking place under the ICSID Convention has generated a considerable amount of practice dealing with combined choice of law clauses. The cases making up this practice involve situations in which the parties had agreed on the application of domestic and international law as well as cases that were decided under the residual rule of Article 42(1) of the ICSID Convention which also combines the host State's law and international law. In all these cases, the tribunals did not confine themselves to applying just one system of law but attempted to strike a careful balance between the different systems of law that they had been instructed to apply. In doing so, they also developed a doctrine which defines the relationship of domestic law to international law for purposes of investment disputes.

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<sup>180</sup> *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 ICSID Review – FILJ 362, 369 (2000).



163. The practice of ICSID tribunals on this point is fully relevant to an UNCITRAL arbitration such as the present one. The ICSID cases, discussed below, deal with situations in which the applicable law is a combination of the host State's law and international law, just like in the present case. Both Article 33(1) of the UNCITRAL Rules and Article 42(1) of the ICSID Convention (see paras. 147, 155 *supra*) instruct tribunals to respect a choice of law made by the parties. Where there is no choice of law, Article 42(1) of the ICSID Convention instructs the tribunal to apply the law of the host State and applicable rules of international law leading to essentially the same result as the choice of law made by the parties in the present case. Therefore, no valid distinction can be made between ICSID and non-ICSID arbitration as far as the applicable law is concerned.

164. The following analysis of the practice of tribunals on this point will first look at cases in which the parties had reached a direct agreement on applicable law that included the host State's law and international law. After that, practice under the residual rule of Article 42(1), which combines the same systems of law, will be examined. Finally, an analysis will be made of cases in which a choice of law had been made through a BIT. It is obvious that this latter category is most relevant to the case at hand. Cases that gave rise to annulment proceedings on the basis of complaints that the relevant domestic law of the host State had not been applied will be examined in a separate section (paras. 197-220 *infra*). Issues arising from the relationship of the host State's law and international law will also be examined in a separate section (paras. 221-247 *infra*).

#### **a. Direct Agreement on Applicable Law**

165. In *AGIP v. Congo*, the choice-of-law clause contained in an agreement of the parties read as follows:

The law of the Congo, supplemented if need be by any principles of international law, will be applicable.<sup>181</sup>

166. The Tribunal stated that the nationalisation measures in question “must be considered first of all in relation to Congolese Law. The Tribunal will then ask itself whether the

question must also be viewed with respect to international law.”<sup>182</sup> The Tribunal went through an examination of Congolese Law including the Constitution. On that basis, it reached the conclusion that a breach of Congolese Law by the acts of nationalization that were the object of the dispute had been established. Only after having reached this result did the Tribunal find that it also had to examine the acts of nationalization from the point of view of international law. That examination led to the same result.<sup>183</sup>

## **b. The Residual Rule under the ICSID Convention**

167. As pointed out above (para. 157 *supra*), the ICSID Convention, in the absence of an agreed choice of law, instructs the tribunal to apply the law of the host State and international law. Therefore, it leads to a situation on applicable law that is very similar to the one in the present case.

168. In *Benvenuti & Bonfant v. Congo*, the Tribunal found that the agreements between the parties did not contain any provision regarding the applicable law. Therefore, it had to apply Congolese law and international law. The Tribunal said:

4.2. These Articles do not contain any provisions regarding the law applicable. In this case, according to Article 42(1) of the Convention, the Tribunal applies the law of the contracting State which is a party to the dispute as well as the principles of international law in the matter.

4.3 Congolese law applies to civil and commercial matters French law as it existed at the time of the accession of the country to independence (1960). This body of rules, and in particular the French Civil Code, has the force of law by virtue of Article 23 of the French decree of 28 September 1897. This legislation falls within the framework of the Constitution of the People's Republic of the Congo...<sup>184</sup>

169. In *SOABI v. Senegal*, the claim was based on a breach of contract between the Government and the investor. The Tribunal quoted Art. 42(1) of the ICSID Convention and

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<sup>181</sup> Art. 15 of the Agreement of 2 January 1974, Award, 30 November 1979, 1 ICSID Reports 313. This provision was supplemented by stabilization clauses contained in separate Articles.

<sup>182</sup> *AGIP v. Congo*, Award, 30 November 1979, 1 ICSID Reports 322.

<sup>183</sup> At pp. 322-324.

<sup>184</sup> *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 349.

noted the absence of an agreement on the applicable law. This led the Tribunal to the conclusion that the law of Senegal was applicable:

In the Tribunal's view, in the absence of agreement between the parties, the national law applicable to the relations of two Senegalese parties in respect of a project that was to take place in Senegal, can only be Senegalese law. The Tribunal is of the opinion that the agreements in question must be characterized as "government contracts", the effect and execution of which are governed primarily by the Code of Governmental Obligations (C.G.O.)...<sup>185</sup>

170. The Tribunal proceeded to examine and apply Senegalese Law, especially the Code of Governmental Obligations.<sup>186</sup> It also noted that the Senegalese legal systems was heavily influenced by French law and relied on that law as a way of establishing the appropriate rules of the host State's domestic law.<sup>187</sup>

171. In *LETCO v. Liberia*, there was disagreement between the parties as to whether there had been an express choice of law by the parties. The Tribunal said with respect to Article 42(1) of the ICSID Convention:

This provision of the ICSID Convention envisages that, in the absence of any express choice of law by the parties, the Tribunal must apply a system of concurrent law. The law of the Contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. ... the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach.<sup>188</sup>

172. The Tribunal proceeded to examine the legality of the revocation of the concession and the question of damages under both Liberian and international law. It came to the conclusion that

... both according to international law and, more importantly, Liberian law, LETCO is entitled to compensation for damages...<sup>189</sup>

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<sup>185</sup> *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 221.

<sup>186</sup> At pp. 221 et seq., 229, 249 et seq., 257.

<sup>187</sup> At pp. 222-223.

<sup>188</sup> *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 358/9.

<sup>189</sup> At p. 372.

173. In *SPP v. Egypt*,<sup>190</sup> the question of whether there had been an agreement on the applicable law was also disputed. Egypt argued that there had been a choice of Egyptian Law. The Claimant denied that an agreement on choice of law in favour of Egyptian law existed and argued that the second sentence of Art. 42(1) would have to be applied leading to the application of Egyptian law and of applicable rules of international law.<sup>191</sup> The Tribunal refused to take a position on this question. It said:

The Parties' disagreement as to the manner in which Article 42 is to be applied has very little, if any, practical significance.<sup>192</sup>

174. The Tribunal held that under either solution Egyptian and international law would have to be applied and that the same sources of law would apply under the first and second sentences of Art. 42(1).<sup>193</sup> It found that if municipal law contained a lacuna or if international law was violated by the exclusive application of municipal law, the Tribunal was bound to apply international law directly. It proceeded to apply international law in addition to national law in a variety of contexts.<sup>194</sup>

175. In *Cable TV v. The Federation of St. Christopher (St.Kitts) and Nevis*, the Tribunal, after quoting Art. 42(1) of the ICSID Convention, said:

The Agreement is silent on the matter of applicable law and, in the circumstances, in accordance with Article 42(1) of the Convention the law of the Federation and applicable international law will apply.<sup>195</sup>

176. The Tribunal proceeded to apply the Companies Act of the host State and other pertinent sources of domestic law.

177. In *CDSE (Santa Elena) v. Costa Rica*, the Tribunal found that the parties had not reached a clear and unequivocal agreement that their dispute would be decided solely in accordance with international law. The Tribunal said:

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<sup>190</sup> *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189.

<sup>191</sup> At p. 207.

<sup>192</sup> *Loc. cit.*

<sup>193</sup> At pp. 207-209.

<sup>194</sup> At pp. 208, 225-228, 234/5, 242-244.

<sup>195</sup> *Cable TV v. The Federation of St. Christopher (St.Kitts) and Nevis*, Award, 16 December 1996, 13 ICSID Review-FILJ 328, 371.

This leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) ... and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which must be taken into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail.<sup>196</sup>

178. This case law demonstrates unequivocally that in applying the residual rule of Article 42(1) of the ICSID Convention, tribunals have sought to follow carefully the instruction to apply the host State's domestic law as well as international law. In none of these cases did the tribunals ignore domestic law or even less claim that it was irrelevant to their decision.

### **c. Choice of Law Clauses in BITs**

179. Investment arbitration based on consent clauses in BITs has become common. Some of these cases have involved BIT clauses that included a choice of law. These choice of law clauses refer to the law of the host State as well as to international law, including the BIT itself, and are very similar to Article 8(6) of the Czech/Netherlands BIT (see para. 143 *supra*) which governs the present arbitration. Therefore, these decisions are particularly pertinent to the case at hand.

180. In *Fedax v. Venezuela*, jurisdiction was based on the Netherlands/Venezuela BIT of 1991. The Netherlands/Venezuela BIT contains the following provision on applicable law to investor/State disputes in its Article 9(5):

5. The arbitral award shall be based on:
  - the law of the Contracting Party concerned;
  - the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
  - the provisions of special agreements relating to the investments;
  - the general principles of international law; and
  - such rules of law as may be agreed by the parties to the dispute.

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<sup>196</sup> *CDSE v. Costa Rica*, Award, 17 February 2000, 15 ICSID Review-FILJ 191 (2000).

181. The Tribunal said:

30. Besides the provisions of the [ICSID] Convention and the Agreement [i.e. the BIT], the Tribunal finds that Venezuelan law is also relevant as the applicable law in this case. In fact, the promissory notes subject matter of the dispute are in turn governed by the provisions of the Venezuelan Commercial Code and more specifically by those of the Law on Public Credit, having been issued under the terms of the latter. Both parties have pointed in their pleadings to relevant aspects of the Venezuelan legislation and the Tribunal has examined these provisions with particular attention. It is of interest to note in this respect that the various sources of the applicable law referred to in Article 9(5) of the Agreement [i.e. the BIT], including the laws of the Contracting Party, the Agreement, other special agreements connected with the investment and the general principles of international law, have all had an important and supplementary role in the consideration of this case as well as in providing the basis for the decision on jurisdiction and the award on the merits. This broad framework of the applicable law further confirms the trends discernible in ICSID practice and decisions.<sup>197</sup>

182. This case confirms unequivocally that the law of the host State is part of the law to be applied where the applicable law is governed by a choice of law clause in a BIT such as the one in the instant case.

183. In *Maffezini v. Spain*, jurisdiction was based on the BIT between Argentina and Spain of 1991. That BIT contains the following provision on applicable law to investor/State disputes in its Article 10(5):

5. The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements concluded between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law.<sup>198</sup>

184. The Tribunal did not embark upon a theoretical discussion on the law applicable to the dispute but did, in fact, apply Spanish law. It referred to and applied the Spanish Law on Public Administration and Common Administrative Procedure,<sup>199</sup> the Spanish

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<sup>197</sup> *Fedax v. Venezuela*, Award, 9 March 1998, 37 ILM 1391, 1396 (1998). Footnotes omitted.

<sup>198</sup> *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review – FILJ 219 (2001).

<sup>199</sup> Award, 13 November 2000, paras. 47-49, 92,  
[http://www.worldbank.org/icsid/cases/emilio\\_DecisiononJurisdiction.pdf](http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf).

Constitution,<sup>200</sup> environmental legislation, including an EEC Directive,<sup>201</sup> the Spanish Civil Code as well as the Spanish Commercial Code together with authoritative commentaries.<sup>202</sup>

With respect to one of the claims the Tribunal concluded:

71. The Kingdom of Spain and SODIGA [a State entity] have done no more in this respect than insist on the strict observance of the EEC and Spanish law applicable to the industry in question. It follows that Spain cannot be held responsible for the decisions taken by the Claimant with regard to the EIA [Environmental Impact Assessment]. Furthermore, the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation. The Tribunal accordingly also dismisses this contention by the Claimant.<sup>203</sup>

185. This case too, confirms that a tribunal acting under a BIT which contains a choice of law clause, such as in the present dispute, is enjoined to apply the domestic law of the host State.

186. Perhaps the clearest statement on the issue at hand came from the Tribunal in *Antoine Goetz v. Burundi*.<sup>204</sup> Jurisdiction was based on the BIT between the Belgium-Luxemburg Economic Union and Burundi of 1989. That BIT contains the following provision on applicable law to investor/State disputes in its Article 8(5):

L'organisme d'arbitrage statue sur base:

- du droit national de la partie contractante partie au litige, sur le territoire de laquelle l'investissement est situé, y compris les règles relatives aux conflits de lois;
- des dispositions de la présente Convention;
- des termes de l'engagement particulier qui serait intervenu au sujet de l'investissement;
- des règles et principes de droit international généralement admis.<sup>205</sup>

187. The Tribunal specifically confirmed that a choice of law clause contained in a provision of a BIT dealing with investor/State disputes constituted an agreement on applicable law

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<sup>200</sup> Para. 68.

<sup>201</sup> Paras. 68,69.

<sup>202</sup> Paras. 82, 89, 90.

<sup>203</sup> Para 71.

<sup>204</sup> *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000), <http://www.worldbank.org/icsid/cases/goetz.pdf>.

<sup>205</sup> At p. 499.

between the parties to the dispute. This was a consequence of the host State's offer contained in the BIT and the investor's acceptance of that offer expressed through the institution of the proceedings:

Sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants), mais par les parties à la Convention d'investissement (Burundi et Belgique). Comme cela a été le cas pour le consentement des parties, le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention. Si ce n'est pas la première fois, on l'a signalé, que la compétence du Centre résulte directement d'une convention bilatérale de protection des investissements, et non pas d'un accord distinct entre l'Etat hôte et l'investisseur, c'est l'une des premières fois, semble-t-il, qu'un tribunal du CIRDI est appelé à faire application du droit directement déterminé par une telle convention.<sup>206</sup>

188. The Tribunal concluded that the applicable legal rules were a combination of domestic and international law. The four categories of sources listed in the BIT could be regrouped into two: the law of Burundi on one hand and international law on the other. The provisions of the BIT were part of the applicable rules and principles of international law.<sup>207</sup> After summarizing the opinions on the relationship between domestic law and international law under the second part of Article 42(1) of the ICSID Convention (see para. 155 *supra*), the Tribunal turned to the applicable law in the case before it:

98. Dans la présente affaire – qui met en cause, il faut le rappeler, la première phrase de l'article 42 de la Convention du CIRDI – c'est un rapport de complémentarité qui doit prévaloir. Que le Tribunal doive faire application du droit burundais ne saurait faire de doute, puisque aussi bien ce dernier est cité en tout premier lieu par la disposition pertinente de la Convention belgo-burundaise d'investissement.<sup>208</sup>

189. Therefore, the Tribunal pointed out that the obligation to apply the law of Burundi was beyond doubt not least because it was listed first in the pertinent provision of the BIT. The Tribunal continued by saying that international law was also applicable for two reasons. First,

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<sup>206</sup> *Loc.cit.*

<sup>207</sup> At p. 500.



because it was incorporated into the law of Burundi, second because Burundi was bound by the international obligations it had assumed under the BIT.

190. The Tribunal's analysis of the merits of the case followed a two-pronged approach. First, it undertook a detailed analysis of the problem from the perspective of the law of Burundi.<sup>209</sup> This analysis led to the conclusion that under the law of Burundi the actions in question were not illegal and, consequently, the State had not incurred responsibility. This result was reached both by looking at delictual responsibility as well as at non-delictual responsibility (*responsabilité sans faute*). Having reached this result, the Tribunal then examined the same issue from the perspective of international law, in particular in light of the BIT. This examination led to the result that the Republic of Burundi was under an obligation to pay compensation to the Claimant.<sup>210</sup>

191. These cases demonstrate clearly that a Tribunal operating under a BIT which contains a provision on applicable law that includes the law of the host State may not restrict itself to looking at international law alone but must examine and apply both systems of law. The last case also demonstrates that this method does not disadvantage the investor but may lead to an entirely satisfactory result from the investor's perspective. The consequences of disregarding the rules on applicable law will be examined in the next chapter.

#### **d. Decision *ex aequo et bono* by *amiable compositeurs***

192. Decisions of international courts and tribunals based not on law but on equity are not unheard of. A number of documents governing international adjudication provide for decision *ex aequo et bono*.<sup>211</sup> The most famous provision of this kind is Article 38(2) of the

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<sup>208</sup> At p. 501.

<sup>209</sup> At pp. 502-510.

<sup>210</sup> At pp. 510-516.

<sup>211</sup> ICC Rules of Arbitration (1998), Art. 17(3), 36 ILM 1612 (1997); ICSID Convention, Article 42(3) ; ILC Model Rules on Arbitral Procedure (1958), Art. 10(2), YBILC 84 (1958-II). See also *Sohn, L. B.*, The Function of International Arbitration Today, 108 Recueil des Cours 1 at 41-59 (1963-I); *Scheuner, U.*, Decisions *ex aequo et bono* by International Courts and Arbitral Tribunals, *in*: International Arbitration Liber Amicorum for Martin Domke 275 (1967); *Lauterpacht, E.*, Aspects of the Administration of International Justice 117 *et seq.* (1991); *Schreuer, C.*, Decisions *Ex Aequo et Bono* Under the ICSID Convention, 11 ICSID Review – FILJ 37 (1996).

Statute of the International Court of Justice.<sup>212</sup> The underlying idea is to free the decision-maker from the rigidities of positive law and to permit considerations of justice and fairness.

193. The relevant rule governing the proceedings before the Stockholm Tribunal is Article 33(2) of the UNCITRAL Arbitration Rules:

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.<sup>213</sup>

194. Therefore, the power of the tribunal to decide *ex aequo et bono* is contingent upon an agreement by the parties. This is the normal rule in international arbitration. If breached it would justify the setting aside of the award (see paras. 207-209, 216, 218 *infra*). No such agreement exists in the present case. Article 8(6) of the Netherlands/Czech BIT, which governs the applicable law in the instant case, is detailed and explicit in directing a tribunal to apply positive law. Article 8(6) specifically says in part:

The arbitral tribunal shall decide on the basis of the law, ...

195. A subsequent agreement between the parties before the tribunal on a decision *ex aequo et bono* would have been possible.<sup>214</sup> But there is no evidence of such an agreement in the instant case.

196. A decision based on equity, rather than on law, without an authorization by the parties, constitutes an excess of powers for failure to apply the proper law.<sup>215</sup> The ICSID Convention contains a provision on decision *ex aequo et bono* which is similar to Article 33(2) of the

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<sup>212</sup> Art. 38(2): This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

<sup>213</sup> <http://www.uncitral.org/en-index.htm>.

<sup>214</sup> *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 338, 342, 349; *Schreuer, C.*, Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID Review – FILJ 42-44 (1996).

<sup>215</sup> See *Broches, A.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Yearbook of Commercial Arbitration 627, 666 (1993); *Delaume, G. R.*, L'affaire du Plateau des Pyramides et le CIRDI. Considérations sur le droit applicable, Revue de l'arbitrage 39, 55 (1994); *Feldman, M. B.*, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Review—Foreign Investment Law Journal 85, 104 (1987); *Giardina, A.*, ICSID: A Self-Contained, Non-National Review System, in: International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity? (*Lillich, R. B./Brower, C. N.* eds.) 199, 212 (1994); *Seidl-Hohenveldern, I.*, Die Aufhebung von ICSID Schiedssprüchen, 2 Jahrbuch für die Praxis der Schiedsgerichtsbarkeit 100, 108 (1989); *Schreuer, C.*, Decisions Ex Aequo et Bono Under the ICSID

UNCITRAL Arbitration Rules.<sup>216</sup> In annulment proceedings under the ICSID Convention, *ad hoc* committees have consistently held that a decision *ex aequo et bono* without a party authorization amounts to an excess of powers (see paras. 207-209, 216, 218 *infra*).

## 4. Consequences of the Non-Application of the Proper Law

197. The provisions on applicable law are essential elements of the parties' agreement to arbitrate and constitute part of the parameters for the tribunal's activity. The application of a law other than that agreed to by the parties constitutes an excess of powers and is a ground for annulment. On the other hand, a mere error in the application of the proper law is not a ground for annulment.<sup>217</sup>

198. The ICSID Convention contains a provision on annulment of awards. This provision (Article 52) includes among the reasons for annulment "that the Tribunal has manifestly exceeded its powers;".<sup>218</sup> During the drafting of this provision the Chairman explained that while a mistake in applying the law would not be a valid ground for annulment, applying a different law from that agreed to by the parties would lead to an award that could be properly challenged on the ground that the arbitrators had gone against the terms of the *compromis*.<sup>219</sup> A failure to apply the proper law would constitute an excess of powers if the parties had

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Convention, 11 ICSID Review—Foreign Investment Law Journal 37, 53, 61 (1996) ; Schreuer, C., The ICSID Convention: A Commentary 956-962 (2001).

<sup>216</sup> Article 42(3) of the ICSID Convention: "(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree." For Article 42(1) of the ICSID Convention see para.15 *supra*. Article 42(2) contains a prohibition of a finding of *non liquet*.

<sup>217</sup> For an incisive analysis of this distinction see Caron, D. D., Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, 7 ICSID Review—Foreign Investment Law Journal 21 (1992).

<sup>218</sup> Article 52(1) of the ICSID Convention provides:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

<sup>219</sup> History of the Convention, Vol. II, p. 518.

instructed the tribunal to apply a particular law.<sup>220</sup> This view is widely shared by scholars writing on this topic.<sup>221</sup> The Swedish Arbitration Act of 1999 contains a similar provision in Section 34(1) providing for the setting aside of an award where the arbitrators have “exceeded their mandate”. There is every reason to assume that this provision should be read in the same sense as the excess of powers under Article 52 of the ICSID Convention.

199. Under the ICSID Convention applications for annulment are dealt with by *ad hoc* Committees which are specifically established for this purpose.<sup>222</sup> These *ad hoc* Committees have held consistently that a failure to apply the proper law constitutes an excess of powers which may lead to the annulment of the award.

200. The principle that a failure to apply the proper law constitutes an excess of powers and hence a ground for annulment was expressed by the *ad hoc* Committee in *Amco v. Indonesia* in the following terms:

The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention.<sup>223</sup>

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<sup>220</sup> At p. 851.

<sup>221</sup> See esp. *Berranger de, T.*, L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique, *Revue de l'Arbitrage* 93, 108 (1988); *Broches, A.*, Observations on the Finality of ICSID Awards, 6 *ICSID Review—Foreign Investment Law Journal* 321 (1991); *Gaillard, E.*, Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales, 114 *Journal du Droit International* 135, 188 *et seq* (1987); *Niggemann, F.*, Das Washingtoner Weltbankübereinkommen von 1965—Das Nichtigkeitsverfahren im Ad-Hoc-Komitee, 4 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 97, 109 *et seq* (1990); *Pirrwitz, B.*, Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 23 *Texas International Law Journal* 73, 103 *et seq.* (1988); *Rambaud, P.*, L'annulation des sentences Klöckner et Amco, 32 *Annuaire Français de Droit International* 259, 263 *et seq* (1986); *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 *ICSID Review – FILJ* 370/71 (2000); *Seidl-Hohenveldern, I.*, Die Aufhebung von ICSID Schiedssprüchen, 2 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 100, 104 (1989); *Schreuer, C.*, The ICSID Convention: A Commentary, pp. 555-558, 943-966 (2001).

<sup>222</sup> Article 52(3) provides:

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

<sup>223</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 *ICSID Reports* 515.

201. The *ad hoc* Committee in *MINE v. Guinea* reached the same result. Its reasoning was based on party autonomy and the tribunal's terms of reference. It said:

... the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.<sup>224</sup>

202. The principle that failure to apply the proper law leads to annulment is best illustrated by giving brief summaries of the pertinent cases.

203. In *Klöckner v. Cameroon* there was no agreement on choice of law. Therefore, the second sentence of Art. 42(1) of the ICSID Convention (see para. 155 *supra*) became operative. That provision directs the Tribunal to apply the law of the State party to the dispute and such rules of international law as may be applicable. The Tribunal determined that it had to apply the law of the State, that is the civil and commercial law applicable in Cameroon, which in its relevant part is based on French law.<sup>225</sup> The Tribunal's analysis does indeed contain some references to French authorities.<sup>226</sup> But the Tribunal, while purporting to apply domestic law, added that a "duty of full disclosure to a partner in a contract" was not only a principle of French civil law but that this was "indeed the case under the other national codes which we know of" and that this was the criterion which "applies to relations between partners in simple forms of association anywhere".<sup>227</sup>

204. The *ad hoc* Committee took these allusions as a reference to general principles of law.<sup>228</sup> In annulling the Award, it deplored the absence of any authority for these general principles or universal requirements<sup>229</sup> and concluded that the Award's reasoning seemed

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<sup>224</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 87.

<sup>225</sup> *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 59.

<sup>226</sup> At pp. 62 *et seq.*, 66/7, 70/1.

<sup>227</sup> At p. 59.

<sup>228</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 121/2.

<sup>229</sup> At p. 123.

more like a simple reference to equity.<sup>230</sup> On the permissibility to resort to international law the *ad hoc* Committee said:

the arbitrators may have recourse to the “principles of international law” only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State’s law.

Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the “rules” or “principles of international law.”<sup>231</sup>

205. The *ad hoc* Committee also found it unacceptable that the Tribunal had simply asserted the existence of a domestic legal principle without relying on any sources. The absence of specific legal authority made it impossible to determine whether the proper law had been applied:

71. Does the “basic principle” referred to by the Award ... as one of “French civil law” come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions.<sup>232</sup>

206. By not demonstrating the existence of concrete rules, the Tribunal had not applied the proper law:

79. *In conclusion*, it must be acknowledged that in this reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied “the law of the Contracting State.”<sup>233</sup>

207. The *ad hoc* Committee also dealt with the issue of a decision *ex aequo et bono* without authorization. The parties had not authorized the Tribunal to decide *ex aequo et bono*. Relying on earlier non-ICSID arbitral awards, the *ad hoc* Committee held:

Excess of powers may consist of the non-application by the arbitrator of the rules contained in the arbitration agreement (*compromis*) or in the application of other rules. Such may be the

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<sup>230</sup> At p. 124.

<sup>231</sup> At p. 122. Italics original.

<sup>232</sup> At p. 122.

<sup>233</sup> At p. 125. Italics original.

case if the arbitrator ... reaches a solution *in equity* while he is required to decide *in law* ...<sup>234</sup>

208. The *ad hoc* Committee held that the Tribunal's broad finding on an obligation of full disclosure amounted to an unauthorized resort to equitable principles:

77. Now, the Award's reasoning and the legal grounds on this topic ( ... ) seem very much like a simple reference to equity, to "universal" principles of justice and loyalty, such as amiable compositeurs might invoke.<sup>235</sup>

209. This, in the Committee's view, constituted a manifest excess of powers since the Tribunal had acted

... outside the framework provided by Article 42(1), applying concepts or principles it probably considered equitable (acting as an amiable compositeur, which should not be confused with applying "equitable considerations" as the International Court of Justice did in the *Continental Shelf* case). However justified its award may be (a question on which the Committee has no opinion), the Tribunal thus "manifestly exceeded its powers" within the meaning of Article 52(1)(b) of the Washington Convention.<sup>236</sup>

Therefore, the Award was annulled in its entirety.

210. The annulment decision in *Klöckner* has attracted criticism.<sup>237</sup> In particular, it was argued that the Tribunal had identified the applicable law correctly but had merely erred in the details of its application. The *ad hoc* Committee in *Klöckner* was not so much concerned

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<sup>234</sup> At p. 119. Italics original.

<sup>235</sup> At p. 124.

<sup>236</sup> At p. 125.

<sup>237</sup> Broches, A., Observations on the Finality of ICSID Awards, 6 ICSID Review—Foreign Investment Law Journal 321, 360 *et seq.* (1991); Feldman, M. B., The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Review—Foreign Investment Law Journal 85, 92, 101 *et seq.* (1987); Paulsson, J., ICSID's Achievements and Prospects, 6 ICSID Review—Foreign Investment Law Journal 380, 389 (1991); Pirrwitz, B., Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 23 Texas International Law Journal 73, 103, 106 (1988); Redfern, D. A., ICSID—Losing its Appeal?, 3 Arbitration International 98, 106 *et seq.* (1987); Reisman, W. M., The Breakdown of the Control Mechanism in ICSID Arbitration, Duke Law Journal 739, 766 *et seq.* (1989); Berranger de, T., L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique, Revue de l'Arbitrage 93, 112, 114 (1988); Gaillard, E., Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales, 114 Journal du Droit International 135, 140 (1987); Kahn, P., Le contrôle des sentences arbitrales rendues par un Tribunal CIRDI, in: La juridiction internationale permanente (Société Française pour le Droit International, Colloque de Lyon) 363, 376 (1986); Schreuer, Ch., Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID Review—Foreign Investment Law Journal 57-59 (1996).

with the application or not of the proper law, nor even with its correct application, but rather with the judicial quality of the reasoning underlying it. The main shortcoming of the Tribunal's reasoning in *Klöckner* was its laxity in citing sources and its failure to rely on specific legal authority.<sup>238</sup>

211. In *Amco v. Indonesia*,<sup>239</sup> the Tribunal found that, since the Parties had not expressed agreement as to rules of applicable law, Indonesian law and such rules of international law as it deemed applicable were to be applied by virtue of Article 42(1), second sentence of the ICSID Convention.<sup>240</sup> The Tribunal examined a number of legal questions from the perspectives of Indonesian law and international law finding that both systems led to identical solutions.<sup>241</sup>

212. The *ad hoc* Committee in *Amco v. Indonesia* took it for granted that a failure to apply the proper law constitutes a manifest excess of powers and a ground for annulment.<sup>242</sup> It said:

The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity...<sup>243</sup>

213. The *ad hoc* Committee also had no doubt as to the relevance of the host State's law:

The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with ...<sup>244</sup>

214. The Tribunal had calculated the total sum of actual investments at U.S. \$2,472,490 and had concluded that the shortfall in relation to the required amount of U.S. \$3,000,000 had been immaterial and did not justify the revocation of Amco's investment licence.<sup>245</sup> The *ad hoc* Committee found the Tribunal's calculation faulty since, under the relevant provision of

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<sup>238</sup> Schreuer, C., The ICSID Convention: A Commentary 950-954(2001).

<sup>239</sup> *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413.

<sup>240</sup> At p. 452.

<sup>241</sup> At pp. 466/7, 473, 490-494, 498-501, 504, 506.

<sup>242</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 515.

<sup>243</sup> At p. 515.

<sup>244</sup> *Loc. cit.*

<sup>245</sup> *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 489.



Indonesian law, only amounts recognized and registered by the competent Indonesian authority were investments within the meaning of the Foreign Investment Law. Amco had not complied with the approval and registration formalities for all the amounts involved. The *ad hoc* Committee concluded:

95. The evidence before the Tribunal showed that as late as 1977, Amco's investment of foreign capital duly and definitely registered with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US \$983,992 ... . The Tribunal in determining that the investment of Amco had reached the sum of US \$2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The *ad hoc* Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.<sup>246</sup>

215. This case demonstrates that the omission or neglect of a single provision in the applicable law may lead to annulment. The Tribunal had identified the applicable law, including Indonesian law, correctly and had purported to apply it. In the *ad hoc* Committee's view, the non-application of one important rule of Indonesian law dealing with the approval and registration of invested capital was enough to annul the Award.

216. In *Amco v. Indonesia*, the *ad hoc* Committee found that no impermissible resort to equitable principles appeared in the Award. But it still pointed out that in view of the law applicable to the case a decision *ex aequo et bono*

... would constitute a decision annulable for manifest excess of powers. Nullity would be a proper result only where the Tribunal decided an issue *ex aequo et bono* in lieu of applying the applicable law.<sup>247</sup>

217. In *MINE v. Guinea*, the *ad hoc* Committee confirmed the view that disregard of the agreed rules of law would constitute a derogation from a tribunal's terms of reference and could hence constitute an excess of powers (see para. 201 *supra*). In that case, the parties had agreed on the law of Guinea, subject to a stabilization or intangibility clause, as the applicable law.<sup>248</sup> The *ad hoc* Committee did not find that there was a failure to apply the proper law. MINE had relied on Art. 1134 of the Code Civil de l'Union Française applicable

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<sup>246</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports, 534/5.

<sup>247</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 516, 517.

<sup>248</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 94.

in Guinea and containing the principles of *pacta sunt servanda* and good faith. The Tribunal had erred in that it had cited Art. 1134 of the French Civil Code.<sup>249</sup> In its Application for Annulment, Guinea claimed that the Tribunal had “failed to apply any law, let alone the correct law” thereby committing a manifest excess of powers.<sup>250</sup> The *ad hoc* Committee noted that the two Articles in the two Codes not only bore the same number but also had the same contents and that this technical error did not warrant annulment.<sup>251</sup>

218. The *ad hoc* Committee also confirmed the principle that a decision based on equity without authorization constitutes an excess of powers. The *ad hoc* Committee pointed out that, unless the parties had agreed on a decision *ex aequo et bono*, a decision not based on any law would constitute a derogation from the tribunal’s terms of reference.<sup>252</sup> In the particular case, no such decision was found to exist.

219. Therefore, *MINE* confirms the principle that failure to apply the proper law will lead to annulment. But in the particular case, the *ad hoc* Committee found that there was no failure to apply the proper law.

220. The above cases, which were decided under Article 52 of the ICSID Convention, confirm the principle that a failure by a tribunal to apply the proper law constitutes an excess of powers. Such an excess of powers makes the award liable to annulment. The same principle would apply in an UNCITRAL arbitration except that the annulment of an UNCITRAL award depends on the intervention of domestic courts. The Swedish Arbitration Act 1999 provides the basis for such an annulment in its Section 34(1) providing for the setting aside of an award in case the arbitrators have exceeded their mandate.

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<sup>249</sup> See *MINE v. Guinea*, Award, 6 January 1988, 4 ICSID Reports 73.

<sup>250</sup> *MINE v. Guinea*, Decision on Annulment, p. 95.

<sup>251</sup> At pp. 95/6, 98.

<sup>252</sup> *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 87.

## 5. The Relationship of Domestic and International Law

221. As demonstrated above, combined choice of law clauses embracing the law of the host State as well as international law are common. This raises the question of the relationship of the two legal system in a particular decision situation before a tribunal.

222. The BIT between the Netherlands and the Czech Republic contains a provision that deals with certain aspects of the relationship of the host State's law and the substantive provisions of the BIT. Article 3(5) provides:

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

223. This clause provides that if rules of the host State's domestic law, of general international law and of the BIT should not lead to identical results, the rule more favourable to the investor shall prevail. The application of this "whichever is more favourable" clause by no means exhausts the question of the relationship of the sources of law listed in Article 8(6) of the BIT. Article 3(5) merely attempts to secure the highest level of protection to the investor. It does not deal with the numerous technical issues that arise under the law of the host State and under international law which cannot be resolved by applying this formula. Therefore, it is necessary to take a broader look at the relationship of the two legal systems in situations where both have been made applicable.

224. During the negotiating process for the ICSID Convention this problem was discussed to some extent. As pointed out above, the ICSID Convention contains a clause that, in the absence of an agreement between the parties on applicable law, provides for the application of the domestic law of the host State and of international law (see para. 155 *supra*). In the course of the deliberations leading to the ICSID Convention it was made clear that international law would prevail where the host State's domestic law violated international law, for instance, through a subsequent change of its own law to the detriment of the

investor.<sup>253</sup> The Chairman explained that international law would come into play both in the case of a lacuna in domestic law and in the case of any inconsistency between the two.<sup>254</sup> This formula of the supplemental and corrective effect of international law in relation to domestic law has since found wide acceptance. Most commentators agree that the function of international law in this context is to close any gaps in domestic law as well as to remedy any violations of international law which may arise through the application of the host State's law.<sup>255</sup>

225. Arbitral practice does not always offer a theoretical analysis on this point. In some cases the tribunals looked at domestic law and at international law without any discussion of their relationship. In these cases the tribunals simply stated that the host State's domestic law was in conformity with international law or that the application of domestic law and of international law led to the same result.

226. For instance, in *Adriano Gardella v. Côte d'Ivoire* the Tribunal found that the principles of "pacta sunt servanda" and of good faith, on which the Claimant had relied, were equally recognized by the law of the Ivory Coast as well as by French law.<sup>256</sup> In *Benvenuti & Bonfant v. Congo*, the Tribunal found that the principle of compensation in case of nationalization

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<sup>253</sup> History of the Convention, Vol. II. pp. 570/1, 985

<sup>254</sup> At p. 804.

<sup>255</sup> *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331, 392 (1972-II); *Delaume, G. R.*, Transnational Contracts, Applicable Law and Settlement of Disputes Ch. XV, 68 *et seq.* (1990); *Feuerle, P.*, International Arbitration and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes, 4 *Yale Studies in World Public Order* 89, 118/119 (1977); *Giardina, A.*, The International Centre for Settlement of Investment Disputes between States and Nationals of other States (ICSID), in: *Essays on International Commercial Arbitration* (*Sarcevic, P.* ed.) 214 at 217 (1989); *Goldman, B.*, Le droit applicable selon la Convention de la B.I.R.D., du 18 mars 1965, pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, in: *Investissements Etrangers et Arbitrage entre Etats et Personnes Privées*, La Convention B.I.R.D. 133, 151 (1969); *Hirsch, M.*, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 134, 140/1 (1993); *Jaenicke, G.*, The Prospects for International Arbitration: Disputes between States and Private Enterprises, in: *International Arbitration: Past and Prospects* (*Soons, A. H. A.* ed.) 155 at 159 (1990); *Kahn, P.*, The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 *Indiana Law Journal* 1, 27-29 (1968); *Lauterpacht, E.*, The World Bank Convention on the Settlement of International Investment Disputes, in: *Recueil d'études de droit international en hommage à Paul Guggenheim* 642, 660 (1968); *Rubino-Sammartano, M.*, International Arbitration Law 55 (1990); *Chukwumerije, O.*, International Law and Municipal Law in ICSID Arbitration, 1 *Canadian Journal of International Business Law and Policy* 61, 82 *et seq.* (1996); *Elombi, G.*, ICSID Awards and the Denial of Host State Law, 11 *Journal of International Arbitration* 61, 66 *et seq.* (1994); *Igbokwe, V. C.*, Developing Countries and the Law Applicable to International Arbitration, 14 *Journal of International Arbitration* 99, 114 *et seq.* (1997); *Nassar, N.*, Internationalization of State Contracts: ICSID, The Last Citadel, 14 *Journal of International Arbitration* 185, 202 *et seq.* (1997); *Shihata, F.I./Parra, A.R.*, Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 9 *ICSID Review - FILJ* 183 (1994); *Schreuer, C.*, The ICSID Convention: A Commentary, 622-631 (2001).

was in accordance with the Congolese Constitution and constituted one of the generally recognized principles of international law as well as of equity.<sup>257</sup> In *Klöckner v. Cameroon*, the Tribunal, after examining the law of the host State on the *exceptio non adimpleti contractus*, simply added that international law reaches similar conclusions.<sup>258</sup> In *Amco v. Indonesia*, the Tribunal examined a number of legal questions from the perspectives of Indonesian law and international law finding in each case that both systems led to identical solutions.<sup>259</sup>

227. These instances of a parallel application of domestic and international law, coupled with assurances of their harmony, confirm the position that both legal systems must be applied. But they do not provide much useful information on the interaction of the two legal systems. In particular, they do not offer any guidance as to the applicable law in case of any contradiction between the two legal systems.

228. In *SOABI v. Senegal*, the Tribunal had to apply the host State's law and international law. But it examined the legal questions surrounding the Government's unilateral termination of a contract purely from the perspective of the host State's law. On that basis, it found in favour of the investor and awarded compensation.<sup>260</sup> The Tribunal did not offer an explanation for its choice of law.

229. In another group of decisions, a more careful discussion of the interaction of international and national law can be observed. These cases follow the doctrine of the supplemental and corrective function of international law in relation to the host State's domestic law.

230. The *ad hoc* Committee in *Klöckner v. Cameroon*, found that where the host State's domestic law had to be applied together with international law, the principles of international law had a dual role namely:

... *complementary* (in the case of a "lacuna" in the law of the State),  
or *corrective*, should the State's law not conform on all points to the

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<sup>256</sup> *Adriano Gardella v. Côte d'Ivoire*, Award, 29 August 1977, 1 ICSID Reports 287.

<sup>257</sup> *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 357.

<sup>258</sup> *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 63.

<sup>259</sup> *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 466/7, 473, 490-494, 498-501, 504, 506.

<sup>260</sup> *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 221 *et seq.*

principles of international law. *In both cases*, the arbitrators may have recourse to the “principles of international law” only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State’s law.

Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the “rules” or “principles of international law.”<sup>261</sup>

231. The Tribunal in *LETCO v. Liberia* reached a similar result. In discussing the system of concurrent law under the second sentence of Article 42(1) of the ICSID Convention it said:

The law of the Contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. The role of international law as a “regulator” of national systems of law has been much discussed, with particular emphasis being focused on the problems likely to arise if there is divergence on a particular point between national and international law. No such problem arises in the present case; the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach.<sup>262</sup>

232. The *ad hoc* Committee in *Amco v. Indonesia* also subscribed to the formula of the supplemental and corrective function of international law:

20. It seems to the *ad hoc* Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.  
21. ...The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention...<sup>263</sup>

233. The second Tribunal in the resubmitted case of *Amco v. Indonesia* accepted that international law was only relevant if there was a lacuna in the law of the host State, or if the

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<sup>261</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 122. Italics original.

<sup>262</sup> *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 358/9.

<sup>263</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 515.

law of the host State was incompatible with international law, in which case the latter would prevail. The Tribunal said:

40. This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as “only” “supplemental and corrective” seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.<sup>264</sup>

234. The Tribunal proceeded to examine the substantive questions before it in accordance with this method.<sup>265</sup>

235. In *SPP v. Egypt*, the Tribunal found that Egyptian and international law had to be applied. It held that if municipal law contained a lacuna or if international law was violated by the exclusive application of municipal law, the Tribunal was bound to apply international law directly. The Tribunal said:

84. When municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.<sup>266</sup>

236. The Tribunal applied international law in addition to national law in a variety of contexts. The Tribunal’s findings on interest offer some interesting insights concerning the interaction of national and international law. On the rate of interest it held that the determination must be made according to Egyptian law because there was no rule of international law that would fix the rate or proscribe the limitation imposed by Egyptian law.<sup>267</sup> On the other hand, the Tribunal observed that Egyptian law lacked any provision concerning the date from which interest would run for compensation arising out of an act of expropriation. In the face of this gap in the host State’s law, the Tribunal turned to

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<sup>264</sup> *Amco v. Indonesia*, Resubmitted Case: Award, 5 June 1990, 1 ICSID Reports 580.

<sup>265</sup> At pp. 599, 604/5, 611-613, 617.

<sup>266</sup> *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 208.

<sup>267</sup> At p.241/2.

international law, which it found to offer a rule providing for interest from the date on which the dispossession effectively took place.<sup>268</sup>

237. In *CDSE (Santa Elena) v. Costa Rica*, the Tribunal stated that the relevant rules and principles of Costa Rican law were generally consistent with international law. But it added that in case of any inconsistency public international law would have to prevail.<sup>269</sup>

238. In some cases tribunals have used language that might be interpreted in the sense of a priority or precedence of the host State's domestic law over international law. For instance, in *AGIP v. Congo*, the Tribunal said that the nationalisation measures in question "must be considered first of all in relation to Congolese Law."<sup>270</sup> But it does not appear that that this phrase was meant to signify a relationship of precedence. Rather it seems to indicate a temporal or methodological sequence: the examination of the issue should be undertaken first in relation to domestic law, then in relation to international law.

239. In *Antoine Goetz v. Burundi*,<sup>271</sup> the Tribunal applied a clause on applicable law in a BIT that listed the host State's law first and the other sources of law, including the BIT itself and principles of international law, subsequently. The Tribunal used language that seems to attribute significance to this succession of sources of law:

Que le Tribunal doive faire application du droit burundais ne saurait faire de doute, puisque aussi bien ce dernier est cité en tout premier lieu par la disposition pertinente de la Convention belgo-burundaise d'investissement.<sup>272</sup>

240. But it would seem that here too the phrase "en tout premier lieu" cannot be interpreted as endowing the host State's law with a higher rank than international law. The Tribunal's own analysis (see para. 190 *supra*) demonstrates that the Claimant's right to compensation was upheld by reference to international law despite the fact that the Tribunal had found no illegality under the law of Burundi.

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<sup>268</sup> At pp. 243/4.

<sup>269</sup> *CDSE v. Costa Rica*, Award, 17 February 2000, 15 ICSID Review – FILJ 191 (2000).

<sup>270</sup> *AGIP v. Congo*, Award, 30 November 1979, 1 ICSID Reports 322.

<sup>271</sup> *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000), <http://www.worldbank.org/icsid/cases/goetz.pdf>.

<sup>272</sup> At p. 501.



241. In a recent article in the ICSID Review,<sup>273</sup> Professor *W. Michael Reisman* of Yale Law School goes one step further. In interpreting the phrase “...the Tribunal shall apply the law of the Contracting Party to the dispute ( ... ) and such rules of international law as may be applicable”, as it appears in Article 42(1) of the ICSID Convention, he postulates a primacy for the operation of the host State’s law over international law. A *lacuna* in the host State’s law requiring supplementation would, in his opinion, exist only when the State engages in transactions for which its legal system has not yet considered regulations or remedies, in other words in circumstances in which there is a socio-legal lag.<sup>274</sup> The corrective function of international law would only come into play in case domestic law violates fundamental international legal norms, in other words *jus cogens*. A mere inconsistency between domestic law and international law would not suffice.<sup>275</sup>

242. Even if one is not prepared to go as far as *Reisman*, the practice, as outlined above, makes it clear that the starting point for any analysis governed by a combined choice of law clause, such as in the present case, must be the host State’s law. The result thus reached may then be checked against international law. International law may be used to close gaps left by national law and to correct a result achieved on the basis of domestic law that is in violation of international law. But it is clearly impermissible to apply international law alone and to ignore or bypass the host State’s domestic law in this process.

243. The correct position has been summarized succinctly by *A. Broches*, the leading authority on ICSID. He writes with respect to the second sentence of Article 42(1) of the ICSID Convention which provides for the application of domestic law and international law:

The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State’s law, but may result in not applying it where that law, or action taken under that law, violates international law.<sup>276</sup>

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<sup>273</sup> *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 ICSID Review – FILJ 362 (2000).

<sup>274</sup> At pp. 371-373.

<sup>275</sup> At pp. 374-377.

<sup>276</sup> *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 392 (1972-II).

244. The fact that international law has a corrective function and that domestic law that is in violation of international law is to be disregarded does not make the examination and application of domestic law superfluous. There are good reasons why the tribunals, in the cases cited above, have insisted on the application of the host State's domestic law before turning to international law. Many questions are subject to detailed regulation in domestic law for which there is simply no corresponding rule in international law. The numerous provisions of civil law (torts, contract etc.), commercial law, administrative law and corporate law of domestic legal systems illustrate this point. International law merely offers a broad international minimum standard against which these provisions of domestic law may be checked. A decision which can be based on the host State's domestic law need not be sustained by reference to international law. A tribunal may give a decision based on the host State's domestic law, even if it finds no positive support in international law as long as it is not prohibited by any rule of international law.<sup>277</sup> If the host State's law is more favourable than international law, including the BIT, Article 3(5) of the BIT gives precedence to domestic law. All of this makes the examination and application of domestic law indispensable.

245. Therefore, the Tribunal must first examine the legal issues in the present arbitration under Czech law. For example, the Tribunal must examine the legal issues arising from the contractual arrangements between ČNTS and CET 21 from the perspective of Czech law. In doing so, the Tribunal must take into account decisions of the Czech courts. The last word on matters of Czech law is with the Czech courts, notably the Supreme Court. Only after examining these issues from the perspective of Czech law and in the light of the final court decisions is it possible to check the result thus reached for compliance with international law. Not until the Czech courts have decided the issue will we know whether the change in the contractual arrangements deprived CME of the protection of its investment.

246. The principle that an international court or tribunal must apply questions of domestic law by reference to the decisions of domestic courts of that country has long been established and has been confirmed by the International Court of Justice:

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<sup>277</sup> See also *Schreuer, C.*, *The ICSID Convention: A Commentary* 631 (2001).

Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts,...<sup>278</sup>

247. Awaiting the final decision of the Czech courts on this question is quite different from an exhaustion of local remedies. The exhaustion of local remedies deals with the prior pursuit of the primary claim against the State in question, in our case the Czech Republic. The lawsuit between ČNTS and CET 21 pending in the Czech courts is of a different nature. The lawsuit is between the two business partners ČNTS and CET 21. From the Tribunal's perspective, the domestic lawsuit concerns the preliminary question whether the Media Council's actions really contributed to destroying the legal protection of CME's investment under Czech law.

## **6. Conclusions on the Duty to Apply the Proper Law**

248. The power of arbitrators derives from an agreement of the parties. The applicable law is often determined as part of this agreement. Article 33(1) of the UNCITRAL Rules, applicable to the present case, requires that the Tribunal shall apply the law designated by the parties.

249. In the present case, this choice of law is based on Article 8(6) of the Bilateral Investment Treaty between the Netherlands and the Czech Republic. This clause refers to the host State's law as well as to international law.

250. Where a provision on applicable law combines reference to domestic law as well as to international law, tribunals are under an obligation to apply both systems of law. This is borne out by the practice of previous arbitration tribunals. In particular, in cases in which tribunals had to apply choice of law clauses in BITs that are similar to the one applicable in this arbitration, they have carefully examined and applied the relevant domestic law.

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<sup>278</sup> *Case Concerning Elettronica Sicula (ELSI)* ICJ Reports 1989, p. 47. See already *Case of Brazilian Loans*, PCIJ Ser. A, Nos. 20/21, 1929, p. 124.

251. A decision by a tribunal based not on law but on equity is permitted only if the parties have authorized a decision *ex aequo et bono*. No such authorization has been given in the instant case.

252. A failure to apply the proper law constitutes an excess of powers. Tribunals that failed to apply the host State's domestic law, although the latter was part of the applicable law, were found to have committed an excess of powers. The awards tainted by this form of excess of powers were annulled. This also applies where a decision *ex aequo et bono* is given without an authorization by the parties.

253. In the relationship between the host State's domestic law and international law, the latter has a supplemental as well as a corrective function. This means that domestic law that is in violation of international law will not be applied by the tribunal. But the tribunal remains under the obligation to apply domestic law and then examine it for compliance with international law. In practice this means that the Tribunal is bound to examine all relevant issues before it, first of all, from the perspective of the law of the Czech Republic. After doing so, it should check the results thus obtained for compliance with international law, especially the BIT.

254. Therefore, the Stockholm Tribunal must respect the clause on applicable law in the Bilateral Investment Treaty. In particular, the Tribunal must apply the law of the Czech Republic, as well as international law.

## **PART THREE: JOINT TORTFEASORS**

### **1. The Award of the Stockholm Tribunal**

255. The Partial Award of the Stockholm Tribunal of 13 September 2001 bases its findings concerning the alleged joint and several liability of Dr. Železný and the Czech Republic largely on the work of the International Law Commission (ILC) of the United Nations on the

responsibility of States for internationally wrongful acts.<sup>279</sup> The Tribunal argues that the ILC “in its Commentary on State responsibility recognizes [that] a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury”.<sup>280</sup>

256. With regard to cases of concurrent causality, i.e. where several acts or factors combine to cause damage, the Partial Award reproduces the text of the ILC Commentary to Article 31 on the duty of a State having committed an internationally wrongful act to make good the damage caused by that act. In particular, the Partial Award quotes from the ILC Commentary that “international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes”.<sup>281</sup>

257. With regard to the facts as established by it, the Tribunal holds that the interference in 1996 of the Media Council with CME’s investment “by depriving ČNTS’s broadcasting operations of their exclusive use of the broadcasting licence, which was contributed by CET 21 to ČNTS as a corporate contribution”, as well as the “Media Council’s actions and omissions in 1999 must be characterized similar to actions in tort”.<sup>282</sup> Therefore, the Tribunal concludes that the legal principles and “standards” as established above apply, and that “CME as aggrieved Claimant may sue the Respondent in this arbitration and it may sue Dr. Železný in separate proceedings”. And further: “In this arbitration the Claimant’s claim is not reduced by the Claimant’s and/or ČNTS’s possible claims to be pursued against Dr. Železný in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other potential tortfeasor only the full amount of its damage.”<sup>283</sup>

258. Concerning the question of concurrent causation, the Tribunal concludes that the allocation of the entire injury or loss allegedly “suffered by CME to the Media Council’s acts and omissions is appropriate”.<sup>284</sup> The main argument of the Tribunal is that the Media

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<sup>279</sup> Partial Award, paras. 580-585.

<sup>280</sup> *Ibid.*, at para. 580, with reference to the Commentary on Article 31 of the ILC’s Articles. The ILC’s Articles are reproduced in the Report of the ILC on the work of its 56<sup>th</sup> session (2001), <http://www.un.org/law/ilc/index.htm>.

<sup>281</sup> Partial Award, para. 583. ILC Commentary to Article 31 at para. (12). The two most prominent cases in this respect are the *Diplomatic and Consular Staff in Tehran* and the *Corfu Channel* cases, both of which are referred to by the ILC.

<sup>282</sup> *Ibid.*, para. 582.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*, para. 585.

Council “must have understood the foreseeable consequences of its actions, depriving CME of the legal ‘safety net’ for its investment in the Czech Republic”.<sup>285</sup> The Tribunal also takes the view that “in 1999 the Media Council must have foreseen the consequences of supporting Dr. Železný, in dismantling the exclusiveness of ČNTS’ services for CET 21 by the Council’s regulatory letter of May 15, 1999, which supported Dr. Železný’s actions ‘to harm ČNTS’”.<sup>286</sup>

## **2. Principles of State Responsibility as Relevant in the Present Case**

### **a. The Rules of Attribution**

259. The law of State responsibility is based on the essential premise that a State is only responsible for conduct, consisting in an action or an omission, which violates an obligation incumbent on it under international law and which is attributable to it. Accordingly, the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts stipulates in Article 2:<sup>287</sup>

#### **Article 2**

##### *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

260. As Article 2 para. (a) makes clear, attribution is a necessary condition for State responsibility. A State is not responsible for conduct unless that conduct is attributable to it under at least one of the “positive attribution” principles set out by the International Law Commission in chapter II of Part One (Articles 4-11). This means that a State cannot be held

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<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> The ILC’s Articles are reproduced in the Report of the ILC on the work of its 56<sup>th</sup> session (2001), <http://www.un.org/law/ilc/index.htm>.

responsible for conduct of other States or of private individuals. This principle appears to be valid without exception, for even in those cases where conduct of other entities (States, international organisations etc.) or of private individuals are “imputed” to a State, the latter is responsible only for its own internationally wrongful conduct. For instance, in case of an attack by private individuals against the embassy of the sending State, the receiving State can only be responsible for its own conduct consisting in a failure to prevent the attack; but it is not responsible for the attack itself, which is committed by private individuals.<sup>288</sup> The latter’s acts are only the “occasion” for, and not the basis of, the receiving State’s responsibility for its own omissions.

261. The rules of attribution relevant to the present case are the rule on direction or control of the State over the conduct of the private individual, and the rule on the acknowledgement and adoption of the individual’s conduct by the State. They will be dealt with in the following paragraphs.

262. The rule on direction or control is governed by Article 8 of the ILC’s Articles which provides:

#### Article 8

##### *Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the persons or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

263. In the exceptional circumstances that a State instructs, directs or controls the conduct of private persons or entities, this private conduct may be converted to conduct of the State under strict conditions. In particular with regard to conduct carried out “under the direction or control” of a State, the degree of control which must be exercised by the State in order for the conduct to be attributable to it is very high. This was held by the International Court of Justice in the *Military and Paramilitary Activities* [hereinafter *Nicaragua*] case. There the Court had to address the question whether the conduct of the Nicaraguan *contras*, who were supported by the United States, was attributable to the latter so as to hold the United States

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<sup>288</sup> See already the Report of the Committee of Jurists in the *Tellini* case of 1923, which established the modern rule: “In accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve

responsible for breaches of international humanitarian law committed by the *contras*. The Court came to the conclusion that the *contras* depended heavily on the United States in terms of planning, financial, military and logistic support. Nevertheless, the Court held that

even the general control by the respondent State over a force with a high degree of dependency on it, would not in [itself] mean [...] that the United States directed or enforced the perpetration of the acts contrary to [international law]. [...] For this conduct [of the *contras*] to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>289</sup>

264. As the ILC Commentary to Article 8 points out,<sup>290</sup> the Court thus confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State. Instead, what is required is that the State directs or controls a specific operation and the conduct of the individual is an integral part of that operation.<sup>291</sup>

265. It is true that the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case applied a lower degree of control of a State over the actions of individuals.<sup>292</sup> However, the Yugoslavia Tribunal was concerned with legal issues as well as facts which were completely different from those relevant in the *Nicaragua* case. The Tribunal's mandate is directed to issues of criminal responsibility of individuals, not State responsibility; and the question in that case concerned not responsibility at all, but the applicable rules of international humanitarian law.<sup>293</sup>

266. In the present case, neither Dr. Železný nor CET 21 were dependent on or effectively controlled by the Czech Republic. Both acted in their capacity as private individuals, and the Media Council at no moment exercised *control*, let alone *effective control* over their conduct; nor did the Media Council direct Dr. Železný or CET 21 in their conduct towards CME.

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the responsibility of the State.” League of Nations, *Official Journal*, 5<sup>th</sup> Year, No. 4 (April 1924), p. 524, as adopted unanimously by the Council of the League.

<sup>289</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, ICJ Reports 1986, 14, at para. 115.

<sup>290</sup> Commentary to article 8, para. (4).

<sup>291</sup> *Ibid.*, para. (3).

<sup>292</sup> *Prosecutor v. Tadić*, Case IT-94-1, International Criminal Tribunal for the Former Yugoslavia (1999), 38 International Legal Materials, p. 1518, at p.1541, para. 117.

<sup>293</sup> This important point is made clear in the ILC's Commentary to Article 8, para. (5).



267. The second rule of attribution relevant in the present context is that of acknowledgement and adoption of the conduct of the private individual by the State as its own. The relevant provision is Article 11 of the ILC Draft:

Article 11

*Conduct acknowledged and adopted by a State as its own*

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

268. Article 11 covers cases where a State acknowledges and adopts a conduct previously carried out by private individuals or entities. The *cause célèbre* in this respect is the *Diplomatic and Consular Staff in Tehran* case decided by the International Court of Justice. After militant students had seized the United States embassy and its personnel in Tehran, the Iranian State issued a decree which expressly approved and maintained the situation. The Court drew a clear distinction between the two events, when it held:

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.<sup>294</sup>

269. Despite the clarity of the rule so established, several remarks must be made. First, the elements of “acknowledgement” and “adoption” are formulated in a cumulative way. Only if a State acknowledges *and* adopts the private conduct as its own, will this conduct be attributable to it.<sup>295</sup> Second, the act of acknowledgment and adoption, whether it takes the form of words or conduct, “must be clear and unequivocal”.<sup>296</sup> Thus, in the *Diplomatic and Consular Staff* case, the Ayatollah issued an official decree in his capacity of head of State.

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<sup>294</sup> *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, ICJ Reports 1980, 3, at 35, para. 74.

<sup>295</sup> ILC Commentary to Article 11, para. (9).

<sup>296</sup> ILC Commentary to Article 11, para. (8).

Moreover, this decree and its content were repeatedly confirmed and generally complied with by other State organs of Iran.<sup>297</sup>

270. Third, it must be emphasized that the principle established by Article 11 governs the question of attribution only. Even where conduct has been acknowledged and adopted by a State, it will still be necessary to establish that the conduct itself was internationally wrongful.<sup>298</sup> For example, in the *Tehran* case, it was clear that Iran violated its obligation under international law by not applying due diligence in preventing the attack against the United States embassy and the taking of hostages of the personnel. However, if Iran had applied due diligence but if it could nevertheless not prevent the attack, it would not have become responsible for this attack under international law, even if it had subsequently acknowledged and adopted this attack.<sup>299</sup> The mere attribution of private conduct does not replace the illegality of that conduct, illegality being a necessary element for State responsibility.

271. This is made clear by the Commentary of the International Law Commission which states that “a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity”.<sup>300</sup>

272. Finally, Article 11 provides that the State must acknowledge and adopt the conduct in question “as its own”. This phrase is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.<sup>301</sup> In international controversies, States often take positions which amount to approval or endorsement of private conduct in some general sense but do not involve any assumption of responsibility. Accordingly, what is required by Article 11 is something more than a general acknowledgement, endorsement or support of private conduct; rather, the State must make the conduct in question its own in a clear and unequivocal manner.

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<sup>297</sup> See the quotation in para. 268.

<sup>298</sup> ILC Commentary to Article 11, para. (7).

<sup>299</sup> This assumption of course holds only true for Iran’s obligation to prevent the attack. The legal situation is certainly different with regard to the continuing obligation to free the hostages.

<sup>300</sup> ILC Commentary to Article 11, para. (7).

<sup>301</sup> ILC Commentary to Article 11, para. (6).

273. In applying Article 11 to the present case and in the light of the Commentary by the International Law Commission as set out above, it is clear that there is no such clear and unequivocal acknowledgement and adoption on the part of the Czech Republic of the conduct by Dr. Železný. The Tribunal itself takes the view<sup>302</sup> that “[t]he Czech Republic, acting through its broadcasting regulator, the Media Council, massively supported Dr. Železný in his efforts to destroy CME’s investment in the Czech Republic”. However, according to Article 11 of the ILC’s Articles on State Responsibility and the Commentary thereto, such mere support — even if it may be massive — does not suffice of itself to attribute the private conduct of Dr. Železný to the Czech Republic.

274. Further, the actions of the Media Council fail to be of such a nature as to amount to an acknowledgement and adoption of the private conduct of Dr. Železný. The letter dated 15 March 1999, which the Tribunal considers so essential in establishing Respondent’s responsibility,<sup>303</sup> did not contain any binding order, directive, instruction or similar official act. The Stockholm Tribunal itself considers that by this letter “the Media Council did not pursue any regulatory purpose”.<sup>304</sup> Compared to the official decree by the Ayatollah, which the International Court of Justice deemed so essential in the *Diplomatic and Consular Staff* case, the conduct by the Media Council can hardly be considered as an adoption and acknowledgement of the acts performed by CET 21 and Dr. Železný.

## **b. Causation**

275. The various factors relevant in the context of the origin of State responsibility are strictly to be distinguished. Thus even where a specific conduct is attributable to a State, it will still be necessary to establish that this attributable conduct is contrary to an international legal obligation of the acting State. In other words, to demonstrate that a certain conduct is attributable to a State does not imply or even prejudice the legality or illegality of this conduct. Conversely, an act which is said to be in violation of an international obligation of a State must, in order to entail the responsibility of that State, be attributable to the latter.

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<sup>302</sup> Partial Award, para. 558.

<sup>303</sup> See, e.g., Partial Award, paras. 544-558.

<sup>304</sup> Partial Award, para. 554.

276. Likewise, the fact that the conduct of a State is considered causal in relation to an injury suffered says nothing about the question as to whether this conduct was contrary to international law or, more specifically, contrary to an international legal obligation of that State. International law requires for responsibility to attach to an act of a State that the conduct must constitute a breach of an international legal obligation in force for that State at that time.<sup>305</sup> As has been pointed out, “State responsibility results from an internationally wrongful act, not from damage”.<sup>306</sup> Neither the establishment of attribution of a conduct to a State, nor the establishment of the causation of damage by this attributable conduct suffice of themselves to entail State responsibility.

277. The Partial Award seems to merge these separate requirements or elements of State responsibility, i.e. wrongful conduct, attribution, and causality. In particular, it finds that the Media Council’s alleged actions and omissions “caused the complete destruction of CME’s investment”.<sup>307</sup> The Tribunal thus equates the alleged causality of the Media Council’s conduct with the alleged violation of international law. In doing so, the Partial Award relies on the work of the International Law Commission, specifically on the Commentary to Article 31 on reparation. That Commentary states that in cases where the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international judicial practice appears not to support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.<sup>308</sup> However, this general observation must be qualified in two aspects.

278. First it is clear that the ILC’s Article 31 requires that it is established that the State whose conduct is in question has violated an obligation incumbent on it under international law. Only after the illegality of the conduct is clearly ascertained, may the causality of this conduct be scrutinized. It is significant that the Tribunal deals with the issue of causation *before* it addresses the question as to whether the acts and omissions by the Respondent, as established by the Tribunal, amounted to a violation of the Treaty.

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<sup>305</sup> This is clearly evidenced by para. (b) of Article 2. With the exception of a few specific treaty regimes, not relevant here, international law does not provide for liability of States for lawful activities causing damage or injury to other States.

<sup>306</sup> *Graefrath, B.*, Responsibility and Damages Caused: Relationship between Responsibility and Damages, 185 *Receuil des cours – Collected Courses of The Hague Academy of International Law* 9, 34 (1984 II).

<sup>307</sup> Partial Award, para. 579.

<sup>308</sup> ILC Commentary to Article 31, para. (12).

279. Second, the International Law Commission bases its comment on concurrent causes on two cases decided by the International Court of Justice, namely the *Corfu Channel* and the *Diplomatic Staff in Tehran* cases. The former case is also invoked by the Tribunal.<sup>309</sup> Yet these cases have to be distinguished from the present case in that they were concerned with direct injury between two States. More importantly, in the *Corfu Channel* case<sup>310</sup> as well as in the *Diplomatic and Consular Staff* case<sup>311</sup> the relevant conduct of the State whose responsibility was clearly established was performed *after* the concurrent acts by the other State or the private individuals. Thus in the *Corfu Channel* case, after a third State had laid the mines Albania did not warn other States of the presence of those mines. In the *Diplomatic and Consular Staff* case, the militant students first attacked and seized the United States Embassy. Thereafter, this illegal situation was acknowledged and approved by Iran. Hence in both cases the unlawful conduct of the responsible State itself was the intervening and last cause for the damage inflicted.

280. In the present case, however, the situation is exactly the reverse. The acts by the Media Council were superseded by the acts of a private individual or entity, respectively. The termination by CET 21, which was controlled by Dr. Železný, of the Service Agreement in 1999 was the ultimate or immediate cause for the damage allegedly suffered. The “chain of causes”, as it were, was thereby interrupted by a supervening later conduct of a private individual, a conduct which is not attributable to the Respondent under the rules of attribution generally recognised.<sup>312</sup>

281. Two conclusions may be drawn from these observations. First it is doubtful whether the acts by the Media Council constituted a condition *sine qua non* for the alleged damage. But even if this is the case, it is clear that, second, the real cause for the damage was the conduct of a private individual which was an intervening cause that broke the chain of causation.

282. Finally, it must be emphasised that in establishing the proximate cause, the Tribunal should have applied the “foreseeability test”. This test does not establish causation only by recognizing a mere factual link or relationship between the act and the damage; rather it provides that the causality of a conduct is adequately established if the injurious

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<sup>309</sup> Partial Award, para. 583.

<sup>310</sup> *Corfu Channel (Merits) (United Kingdom v. Albania)*, ICJ Reports 1949, 4.

<sup>311</sup> Para 268 *supra*.

consequences are *reasonably* foreseeable.<sup>313</sup> One of the leading cases in this regard is the *Samoan Claims Award*, where the commissioners stated that “damages for which a wrongdoer is liable are the damages [...] which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action”.<sup>314</sup>

283. According to the foreseeability test not all consequences that are possible in *in abstracto* are considered as proximately caused; rather only those consequences which are likely to ensue from the wrongful conduct are considered as falling under the ambit of reparation. This restriction of the obligation to reparation is also confirmed by the well-known *dictum* of the Permanent Court of International Justice in the *Chorzów Factory* case which the Stockholm Tribunal refers to.<sup>315</sup> In that case the Permanent Court held that reparation is due only to the extent that it re-establishes “the situation which would, *in all probability*, have existed if [the wrongful] act had not been committed”.<sup>316</sup>

284. Applied to the present case, the principle of foreseeability might well lead to the result that the injurious consequences inflicted upon Applicant were conceivable as a theoretical possibility. However, it cannot be argued that this conduct would in all probability and likelihood lead to the damage allegedly suffered by Applicant. Since the ultimate decision to terminate the Service Agreement lay with CET 21 and Dr. Železný, the Media Council could reasonably and validly expect that Applicant would not suffer any damage at all.

### 3. Joint and Several Liability in International Law

285. The issue of joint liability is by no means settled in international law. Questions of a plurality of responsible States are rarely dealt with both in doctrine and judicial and arbitral

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<sup>312</sup> See paras. 259-274 *supra*.

<sup>313</sup> *Rovine, A. & Hanessian, G.*, Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in *Lillich, R.B.* (ed.), *The United Nations Compensation Commission*, p. 235, at p. 247 (1995).

<sup>314</sup> Joint Report No. 2 of 12 August 1904, as quoted in *Whiteman, M.*, *Damages in International Law*, volume 3, p. 1779-1780 (1943).

<sup>315</sup> Partial Award, para. 617.

<sup>316</sup> *Factory at Chorzów (Germany v. Poland) (Merits)*, 1928 PCIJ Ser. A, No. 17, p. 41 (emphasis added).

practice. In the context of the responsibility of States, there has to date been no case where a court or tribunal applied the concept of joint and several liability.

286. The ILC's Special Rapporteur on State responsibility, Professor James Crawford, endorsed a cautious approach when he stated that with regard to joint and several liability "more than usual care [was] needed in the use of municipal law analogies here" since "[d]ifferent legal traditions have developed in their own ways, subject to their own historical influences".<sup>317</sup>

287. The ILC itself was even more succinct in its Commentary to Article 47 dealing with several responsible States:<sup>318</sup>

It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as 'joint', 'joint and several' and 'solidary' responsibility derive from different legal traditions and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that *each State is separately responsible* for conduct attributable to it [...]. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.<sup>319</sup>

288. The fact that an international law concept of joint and several liability would, at best, constitute progressive development may also be inferred from the fact that the ILC omitted any reference to multiple State responsibility in its draft as adopted on first reading in 1996.

289. Professor Brownlie considers the concept of joint responsibility as a possible candidate for a general principle of law. Nevertheless he states that "the practice of states [...] strongly suggests by its silence the absence of joint and several liability in delict in state relations".<sup>320</sup>

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<sup>317</sup> Crawford, J., Third report on State responsibility, UN Doc. A/CN.4/507/Add.2, para. 263, note 489.

<sup>318</sup> Article 47 reads as follows:

*Plurality of responsible States*

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
  - (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
  - (b) is without prejudice to any right of recourse against the other responsible States.

<sup>319</sup> Commentary to Article 47, para. (3) (emphasis added, footnote omitted).

<sup>320</sup> Brownlie, I., *System of the Law of Nations. State Responsibility*, Part I, p. 189 (1983).

In his recent edition of “Principles of Public International Law”, Brownlie reaffirms this view by stating that “[t]he principles relating to joint responsibility of states are as yet indistinct, and municipal analogies are unhelpful”.<sup>321</sup> Brownlie continues to argue *de lege ferenda* that “[a] rule of joint and several liability in delict should certainly exist as a matter of principle”. Even authors who argue in favour of a regime of joint and several liability in case of multiple State responsibility, deem it necessary to underline that such a regime would constitute a measure of progressive development.<sup>322</sup>

290. There is also evidence that there is no *opinio iuris* of States as to the existence of the concept of joint and several liability of States in international law. In the *Certain Phosphates Land in Nauru* case,<sup>323</sup> Australia was sued by Nauru for having violated its obligations as one of the three administering powers under the Trusteeship Agreement. Australia contested that it could be sued alone by Nauru and argued that the alleged responsibility of the three States making up the Administrative Authority (Australia, New Zealand and the United Kingdom) was “solidary” rather than joint and several and that a claim could not be made against only one of them. Thus Australia clearly rejected the idea of joint and several liability.<sup>324</sup>

291. The foregoing considerations illustrate that to date, the international law of responsibility of States for wrongful conduct does not contain a well-established concept of joint and several liability or responsibility. The only (limited) area where the subject of multiple party compensation in cases of concerted activity by several States is regulated, is the law governing activities of States in outer space. Thus, Article V of the Convention on International Liability for Damage Caused by Space Objects<sup>325</sup> provides that the States jointly participating in a launch of a space object “shall be jointly and severally liable for any damage caused”.

292. However, this provision does not form a model for the concept in general for two reasons. First, it is significant for the underdeveloped status of the general international law

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<sup>321</sup> Brownlie, I., *Principles of Public International Law*, p. 459 (5<sup>th</sup> ed. 1998).

<sup>322</sup> See, in particular, Noyes, J.E./Smith, B.D., *State Responsibility and the Principle of Joint and Several Liability*, 13 *Yale Journal of International Law* 225, at 258 *et seq* (1988). See also Graefrath, B., *Complicity in the Law of International Responsibility*, 29 *Revue belge de droit international* 370, at 379 (1996).

<sup>323</sup> *Certain Phosphates Land in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reports 1992, at 240.

<sup>324</sup> The case was subsequently withdrawn by agreement.

<sup>325</sup> Convention on International Liability for Damage Caused by Space Objects, 29 March 1979, 961 United Nations Treaty Series 187.



of State responsibility that, in order to be applicable, the concept of joint and several liability had to first find its way into a treaty. This reaffirms the statement by the ILC that in the absence of agreement to the contrary between the States concerned, general international law only provides for an *independent* responsibility of States. Second, the Convention on the Liability for Space Objects is concerned with *liability* for damage caused by *lawful* activities, whereas under the law of State responsibility, States are only accountable for damage caused by internationally wrongful conduct.<sup>326</sup>

293. In any event, even if one were to come to the conclusion that the concept of joint and several liability forms part of the international law of State responsibility, the concept is only applicable as between States. State responsibility, by its very nature, only regulates the origin and consequences of violations of international law by States. Even if one were to assume that the concept of joint and several liability forms part of the international law of State responsibility, there is no indication whatsoever in the ILC's Articles or elsewhere that this concept is applicable as between States and individuals as responsible subjects. Accordingly, the few authors who deal with the issue of joint and several liability confine themselves to the relation between States as the responsible entities.<sup>327</sup>

294. The idea of States and individuals being jointly and severally liable towards an injured party runs counter to the basic principle of State responsibility that a State shall only be liable for its own unlawful conduct which constitutes a breach of an obligation. The assumption of joint and several liability of States and individuals ignores the different layers in which the legal relations between States and individuals operate. General international law on State responsibility does not regulate the relation between the responsibility of States on the one side, and that of individuals on the other side. Therefore, joint and several liability of States and individuals has no basis in international law.

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<sup>326</sup> See introductory para. 4 of the ILC Commentary.

<sup>327</sup> Noyes, J.E./Smith, B.D., *supra* note 323, *passim*; Brownlie, *supra* note 321, at 189-192; Graefrath, *supra* note 323, at 379; Quigley, J.; Complicity in International Law: A New Direction in the Law of State Responsibility, 57 British Yearbook of International Law 77, at 105-107 (1986).

## 4. Conclusions on Joint Tortfeasors

295. Under the general international law of State responsibility, neither the conduct of CET 21 nor that of Dr. Železný may be attributed to the Czech Republic.

296. With regard to causation, the present case is concerned with State conduct which is supervened by the conduct of private individuals. Since the chain of causation is thus interrupted, the conduct by the Czech Republic is *not proximate cause* for the damage allegedly suffered by CME.

297. The general international law of State responsibility does not contain a principle of joint and several liability. Such a principle may well be accepted in domestic law; however, it has developed differently in the various systems of municipal law, and there is no judicial practice as to such a principle in international law. On the contrary, it is one of the most fundamental principles of State responsibility in international law that even in case of a plurality of responsible States, each State is *separately* responsible for its *own internationally wrongful conduct*.

298. Even if a concept of joint and several liability existed in international law, it would only operate as between States. The law of State responsibility only regulates the consequences of internationally wrongful acts by States. Therefore the idea of a joint and several liability between a State and a private individual is conceptually mistaken from the perspective of the general international law on State responsibility.

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## **Articles**

Over 60 articles on a large variety of subjects of international law.

## **Writings on International Arbitration**

### ***a) Articles***

- The Contribution of the UN to the Harmonization of Arbitration: The Case of ICSID, in: Contemporary International Law Issues: Conflicts and Convergence, Third Joint Conference ASIL-NVIR 4-7 (1995).
- Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID - Foreign Investment Law Journal 37-63 (1996).
- International and Domestic Law in Investment Disputes - The Case of ICSID, 1 Austrian Review of International and European Law 89-120 (1996).
- Access to ICSID Dispute Settlement for Locally Incorporated Companies, in: Towards International Economic Law with a Human Face (Eds. F. Weiss, P. de Waart, E. Denters) (1997).
- The Interpretation of ICSID Arbitration Agreements, in: Liber Amicorum Eric Suy 719-735 (1998).
- Settlement of Investment Disputes in the Cause of Development, in: Development and Developing International and European Law, Essays in Honour of K. Ginther 285-297 (1999).
- Settlement of Disputes at ICSID. Consent to Arbitration, in Handbook on Dispute Settlement (Ed. UNCTAD) (2001).

### ***b) The ICSID Convention: A Commentary***

A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Under the auspices of the Research Centre for International Law, University of Cambridge. Published jointly by Cambridge University Press and the International Centre for Settlement of International Disputes. 1466 pp., 2001.  
Prepublication in ICSID Review - Foreign Investment Law Journal Vol. 11 (1996) – 15 (2000)

### ***c) Numerous Unpublished Legal Opinions dealing with international investment arbitration***

## August Reinisch

### STATEMENT OF QUALIFICATIONS

#### EDUCATION

- 1998 Universitätsdozent (venia docendi) University of Vienna
- 1991 Dr. iur. University of Vienna
- 1990 Mag. phil. University of Vienna
- 1989 LL.M. New York University
- 1988 Mag. iur. University of Vienna

#### PROFESSIONAL QUALIFICATIONS

- 1994 Diploma in International Law Hague Academy of International Law
- 1990 Admission to the Bar of New York and Connecticut

#### POSITIONS

2001 - Present	US Government-appointed arbitrator on the <b>In rem Restitution Panel</b> according to the Austrian General Settlement Fund Law
1999 - Present	<b>University of New South Wales, Sydney:</b> Visiting Fellow and Lecturer
1999 - Present	<b>Bologna Center of The Paul H. Nitze School of Advanced International Studies/Johns Hopkins University:</b> Professorial Lecturer
1998 - Present	<b>University of Vienna, School of Law, Department of International Law and International Relations:</b> Professor of International and European Law
1992 - 1993	<b>Austrian Federal Ministry for Foreign Affairs Legal Adviser's Office</b>
1990 - 1998	<b>University of Vienna, School of Law, Department of International Law and International Relations:</b> Assistant Professor

## **PUBLICATIONS**

### **Books**

- US-Exportkontrollrecht in Österreich, 146 pp. (Manz-Verlag, 1991).
- State Responsibility for Debts, 154 pp. (Böhlau-Verlag, 1995).
- with *Gerhard Hafner*, Staatensukzession und Schuldenübernahme beim “Zerfall” der Sowjetunion, 168 pp. (Service-Fachverlag, 1995).
- International Organizations before National Courts, 449 pp. (Cambridge University Press, 2000).

### **Selected Articles:**

- Widening the US Embargo Against Cuba Extraterritorially. A few public international law comments on the “Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996”, in: 7 *European Journal of International Law* 545-562 (1996).
- Die neuen Schiedsregeln der internationalen Handelskammer, in: 8 *ecolex* 280-283 (1998).
- with *P. Oberhammer*, Restitution of Jewish Property in Austria, 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 737-761 (2000).
- Developing a Human Rights and Humanitarian Law Accountability of the UN Security Council for the Imposition of Economic Sanctions, 95 *American Journal of International Law* 851-872 (2001).
- Governance without Accountability, 44 *German Yearbook of International Law* 270-306 (2001).

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