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# APPLICABLE LAW IN INVESTOR-STATE ARBITRATION

The Interplay Between National  
and International Law

Hege Elisabeth Kjos

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Applicable Law in Investor–State Arbitration

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HEGE ELISABETH KJOS

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'International investment law is one of the fastest-growing areas of international law today. Only a decade ago, the current surge in investor-state arbitrations [...] was beyond imagination.'<sup>1</sup> It was just a bit more than a decade ago that I was fortunate to enter the field of international investment arbitration. The rise in the number of arbitrations and the accompanying growth in scholarship partly explain the time it has taken to present this study. Relatedly, the fact that I have been examining a 'moving target' has made the process more stimulating. I feel privileged to be able to continue to work in this area that brings together so many facets of the law; the 'field trip'<sup>2</sup> is not over. In this respect, I am especially grateful to be part of the project 'International Law through the National Prism: the Impact of Judicial Dialogue' funded by the European Science Foundation as a European Collaborative Research Project in the Social Sciences, as it has allowed me to explore more deeply the larger theme of this book: the interactions between the national and the international legal orders.

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I would like to dedicate this book to my family in Norway and the Netherlands, and then especially to my husband Bertil—I could not have wished for a better partner and

<sup>1</sup> S.W. Schill, Book Review, *Principles of International Investment Law* (2009) 20(2) *Eur. J. Int'l L.* 471 (reviewing R. Dolzer and C. Schreuer, *Principles of International Investment Law* [Oxford, Oxford University Press, 2008]). Cf. A. Diehl, *The Core Standards of International Investment Protection* (2012), 1 ('Little more than a decade ago, investment arbitration was virtually unknown beyond the circles of those who were involved in the negotiation of investment treaties').

<sup>2</sup> See Chapter 8 (concluding observations).

<sup>3</sup> Catharina Bröllmann, Filip De Ly, Pieter Jan Kuijper, André Nollkaemper, Christoph Schreuer, Nico Schrijver, Ole Spiermann, and Erika de Wet. The Honorable Charles N. Brower served in the role of independent expert.

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Hege Elisabeth Kjos, Amstelveen, 18 September 2012

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## *List of Abbreviations*

AAA	American Arbitration Association
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DIAC	Dubai International Arbitration Centre
ECT	Energy Charter Treaty
EU	European Union
FTA	Free Trade Agreement
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes/Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreement
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law

# 1

## General Introduction

It is not too much to say that the interaction of international and national law constitutes one of the largest challenges for the law in the century ahead. [...] We will not in our lifetimes resolve these questions finally. Indeed, it is not our duty to finish the task. But neither are we free of the moral obligation to try.<sup>1</sup>

### 1. Motivations for the Study

We live in an era in which the processes of globalization have reached unprecedented levels. A corollary development has been the increasing interaction between national legal orders on the one hand, and the international legal order on the other.<sup>2</sup> There are more and more areas governed by international law; and at the same time, there has been a parallel expansion of state regulation of activities taking place in as well as outside its respective territory.<sup>3</sup> As a result, the same transactions are more and more likely to be governed by both national and international law. Such overlap raises the practical question of which source of law ought to be applied in the event of a legal dispute; and simultaneously, it carries with it an important theoretical dimension concerning the relationship between the legal orders. Traditionally, this topic has been dominated by the two doctrines: monism and dualism.<sup>4</sup> In recent times, however, the value of these doctrines in accurately depicting practice has been questioned or even disparaged. As Galindo states:

Speaking about monism and dualism has become a taboo, nearly a sinful act, in international legal scholarship. For several decades, jurists from around the globe have stressed how futile and useless the theoretical debate about the relationship between international and municipal law is. Expressions such as *discussion d'école* or 'dialogue of the deaf' and others have been repetitively used to describe it.<sup>5</sup>

<sup>1</sup> M. Kirby (Justice, High Court of Australia), *International Law: The Impact on National Constitutions*, 7th Annual Grotius Lecture, Delivered to the Annual Meeting of the American Society of International Law, Washington, DC, 30 March 2005 (2006) 21 *Am. U. Int'l L. Rev.* 327, 363–4 (references omitted).

<sup>2</sup> See A. Nollkaemper, 'Internationalisering van nationale rechtspraak' in *Preadviezen. Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (P.A. Nollkaemper, J.W.A. Fleuren, J. Wouters, and D. Van Eeckhoutte eds, The Hague, T.M.C. Asser Press) 1–67.

<sup>3</sup> See M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 2008), 129–30.

<sup>4</sup> See D.J. Bederman, *The Spirit of International Law* (Athens, GA, University of Georgia Press, 2006), 141 ('Reduced to its essentials, monism is the idea that international law and domestic law are parts of the same legal system, but international law is higher in prescriptive value than national law. Dualism is the position that international law and municipal law are separate and distinct legal systems that operate on different levels, and international law must be incorporated or transformed before it can be enforced in national law' [references omitted]). See generally *New Perspectives on the Divide Between National and International Law* (A. Nollkaemper and J.E. Nijman, eds, Oxford, Oxford University Press, 2007). See also Chapter 5, Section 3.2.2 (on the supervening role of international law).

<sup>5</sup> G. Galindo, 'Revisiting Monism's Ethical Dimension' 3 *Select Proceedings of the European Society of International Law* (J. Crawford and S. Nouwen, eds, Oxford and Portland, OR, Hart Publishing, 2010), 141 (references omitted). This constitutes the background for two projects of which the

The present study nevertheless seeks to contribute to the debate, although from a narrow angle: that of the applicable substantive law, or *lex causae*,<sup>6</sup> in the arbitral settlement of investment disputes between foreign investors and host states.<sup>7</sup>

This field of dispute settlement lends itself particularly well to a discussion on the relationship between national and international law. An overarching justification is the longstanding ambiguity in investor–state arbitration regarding the role of national and international law as the law applicable to the merits. The ICSID<sup>8</sup> Tribunal in *Antoine Goetz v Republic of Burundi* (1999) stated:

[The issue] has received divergent responses, abundantly commented on in academic writings: hierachal relationships according to some, domestic law applying first of all but being overborne where it contradicts international law; according to others, relationships based on subsidiarity, with international law being called upon only to fill lacunae or to settle uncertainties in national law; according to others again, complementary relationships, with domestic law and international law each having its own sphere of application.<sup>9</sup>

And Schreuer observes: ‘The practice of tribunals on the issue of applicable law varies considerably. [...] The applicable law in investment disputes has turned out to be a dangerous area. It takes great nautical skill to keep the proper balance between the Scylla and Charybdis of the two legal systems.’<sup>10</sup> As such, the topic does not only have theoretical interest, it also has ‘great practical importance in the real world of foreign investment dispute settlement’.<sup>11</sup>

There are several structural features inherent in investor–state arbitration that account for the ambiguity surrounding the applicable law. These features can be grouped under three labels: (i) the system of arbitration, (ii) the constellation of the disputing parties, and (iii) investment law as a substantive area of law.

As to the system of arbitration, there is first the controversy concerning the nature of the tribunals (i), which have been given different designations, ranging from national to international, as well as the more amorphous terms delocalized, supra-, or a-national.<sup>12</sup> Relatedly, some scholars liken the arbitrators’ role to that of agents of the state in which

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<sup>6</sup> For a definition of substantive applicable law, see Section 2 (on the scope of and terminology used in the study).

<sup>7</sup> For a definition of investment/investor–state arbitration, see Section 2 (on the scope of and terminology used in the study). See also S. Wittich, ‘The Limits of Party Autonomy in Investment Arbitration’, in *Investment and Commercial Arbitration: Similarities and Divergences* (C. Knahr, ed., Utrecht, Eleven International, 2010), 47, 49 (‘International investment law—and, as a corollary, international investment arbitration—may be validly considered a specific branch of (public) international law’ [references omitted]).

<sup>8</sup> The (ICSID/Washington) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (hereinafter ICSID/Washington Convention).

<sup>9</sup> *Antoine Goetz and others v Republic of Burundi*, ICSID Case No. ARB/95/3, Award (embodying the Parties’ Settlement Agreement), 10 February 1999 (P. Weil, M. Bedjaoui, and J.-D. Bredin, arbs), para. 97.

<sup>10</sup> C. Schreuer, ‘Investment Arbitration: A Voyage of Discovery’ (2005) 71 *Arbitration* 73, 75.

<sup>11</sup> A.F.M. Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist versus Dualist Controversies’ (2001) 12(2) *Eur. J. Int’l L.* 309. Cf. E. Gaillard and Y. Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18(2) *ICSID Rev-FILJ* 375, 380 (‘[T]he application of the rules of international law may have a major impact on the result of the arbitration. In fact, it could sometimes make the difference between winning or losing the case’).

<sup>12</sup> See generally Chapter 2 (on territorialized and international arbitration tribunals).

the tribunal is seated or of the international legal order; while others view them solely as agents of the parties to the dispute.<sup>13</sup> A proper characterization of arbitral tribunals is of importance for this study. This is due to our premise that the applicable law depends on the source of these tribunals' mandate to render awards, in a way similar to how the mandate of national and international<sup>14</sup> courts (or tribunals) determines their choice-of-law methodology.<sup>15</sup> National courts normally solve disputes on the merits by reference to their own national law. Where the case at hand involves a transnational issue, the quest for the appropriate applicable law is made through the application of the national choice-of-law rules of the state in which the court is seated.<sup>16</sup> This reliance on the law of the seat, also referred to as the *lex fori* or the curial law,<sup>17</sup> is rarely questioned as it is presumed that national judges apply the procedural laws and regulations of the state from which they receive their authority to render judgments.<sup>18</sup> Accordingly, for a US or a Norwegian court, for instance, it would be US or Norwegian law, respectively, that would determine whether it would apply the substantive law of, for example, Russia, Egypt, or Mexico. National courts are also guided by the *lex fori* as to the extent to which they may apply international law.<sup>19</sup> The same rationale may be applied, mutatis mutandis, to international courts. As their mandate is founded in the international legal order, rather than the state in which they are seated, their *lex fori* is international law.<sup>20</sup> Hence, they will apply international choice-of-law rules and seek guidance in the statute of the court or tribunal, the *compromis* of the states parties to the dispute, and/or general rules of international law.<sup>21</sup>

If arbitral tribunals receive their mandate from a legal order, they would—like national and international courts—arguably be bound by the choice-of-law rules of the legal order in which they operate. If, however, arbitrators should be viewed as agents solely of the parties, both the parties and the arbitrators would have much freedom with respect to the applicable law. The parties would be able to agree to the application of national and/or international law; or they could decide to leave the decision on the applicable law to the arbitrators, who would be free to apply both national and/or international law.

This brings us to a second feature of the system of arbitration that accounts for the ambiguity surrounding the applicable law, and it stems from the flexibility provided by

<sup>13</sup> See Chapter 2.

<sup>14</sup> For a discussion on the definition of international courts and tribunals, see Chapter 2, Section 4 (on internationalized tribunals).

<sup>15</sup> Cf. M. Mohebi, *The International Law Character of the Iran–United States Claims Tribunal* (The Hague, Kluwer Law International, 1999), 99.

<sup>16</sup> See C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 554.

<sup>17</sup> See European Commission, European Judicial Network, Glossary, available at <[http://ec.europa.eu/civiljustice/glossary/glossary\\_en.htm#LexFori](http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#LexFori)> (last visited 1 May 2012) ('The *lex fori* is a specific concept of private international law and refers to the law of the court in which the action is brought'); G. Petrochilos, *Procedural Law in International Arbitration* (Oxford, Oxford University Press, 2004), 6.

<sup>18</sup> See J.G. Collier, *Conflict of Laws* (Cambridge University Press, 2001).

<sup>19</sup> See J. Nijman and A. Nollkaemper, 'Beyond the Divide' in *New Perspectives on the Divide Between National and International Law* (J. Nijman and A. Nollkaemper, eds, Oxford, Oxford University Press, 2007), 341.

<sup>20</sup> See D.D. Caron, 'The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 *Am. J. Int'l L.* 104, at fn. 29; K. Lipstein, 'The Hague Conventions on Private International Law, Public Law and Public Policy' (1959) 8(3) *Int'l & Comp. L. Quart.* 506, 522.

<sup>21</sup> See K. Lipstein, 'Conflict of Laws Before International Tribunals: A Study in the Relation Between International Law and Conflict of Laws' (1941) 27 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read Before the Society in the Year 1941* 143, 149–50.

the legal framework regulating arbitration at both the national<sup>22</sup> and the international levels.<sup>23</sup> States generally allow the disputing parties to choose the substantive applicable law and in the absence of such choice, they grant arbitral tribunals considerable freedom as regards their choice-of-law methodology.<sup>24</sup> This state practice is mirrored in arbitration rules promulgated by institutions such as the International Chamber of Commerce (ICC),<sup>25</sup> the London Court of International Arbitration (LCIA),<sup>26</sup> the Stockholm Chamber of Commerce (SCC),<sup>27</sup> and the United Nations Commission on International Trade Law (UNCITRAL).<sup>28</sup> As Kaufmann-Kohler states: ‘what is truly striking in international commercial arbitration is [...] arbitrators’ broad discretion in determining and applying the law that governs the merits of any particular case.’<sup>29</sup>

As will be demonstrated,<sup>30</sup> it follows from this freedom that national and international law is *prima facie* applicable in arbitral proceedings between foreign investors and host states; and this feature sets investment tribunals apart from national and international courts. The latter organs namely have the proclivity to restrict the application of international and national law respectively:<sup>31</sup> national courts through doctrines such as transformation, the supremacy of conflicting national law, and the last-in-time rule;<sup>32</sup> international courts on the basis that their mandate is generally limited to the settlement of international claims by virtue of the  *compromis* or the statute and/or rules governing the functioning of the court or tribunal. In this vein, it has been observed that the International Court of Justice (ICJ), ‘like a domestic court, is under an obligation to reach a judicial solution to the dispute submitted to it, based upon the sources of law enumerated in article 38 of the Statute which may be compared to the “law of the land” that national courts are obliged to apply in determining

<sup>22</sup> For a compilation of various national arbitration laws, see International Council for Commercial Arbitration, *Related Arbitration Links, National Arbitration Laws*, available at <<http://www.arbitration-icca.org/related-links.html#03>> (last visited 1 May 2012). Compilations can also be accessed (by subscription) through these websites: Oxford University Press, *Investment Claims*, available at <<http://investmentclaims.com/>> (last visited 1 May 2012); Kluwer Arbitration, available at <<http://www.kluwerarbitration.com/>> (last visited 1 May 2012).

<sup>23</sup> In this study, those treaties are (i) the ICSID Convention; and (ii) the Algiers Accords, including the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration).

<sup>24</sup> See Chapter 3, Section 3 (on choice-of-law rules). Cf. E. Gaillard, ‘The Role of the Arbitrator in Determining the Applicable Law’ in *The Leading Arbitrators’ Guide to International Arbitration* (L.W. Newman and R.D. Hill, eds, Huntington, NY, Juris, 2004), ch. 10, s. V.

<sup>25</sup> Rules of Arbitration of the International Chamber of Commerce (ICC) (in force as from 1 January 2012).

<sup>26</sup> London Court of International Arbitration (LCIA) Arbitration Rules (in force as from 1 January 1998).

<sup>27</sup> Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (as in force as from 1 January 2010).

<sup>28</sup> UNCITRAL Arbitration Rules (as revised in 2010).

<sup>29</sup> G. Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23(3) *Arb. Int’l* 357, 364.

<sup>30</sup> See Chapter 3, Section 3 (on choice-of-law rules).

<sup>31</sup> But see Nollkaemper, fn. 2, at 11 (Nollkaemper refers to the ‘nationalization’ of international jurisprudence and the ‘internationalization’ of national jurisprudence).

<sup>32</sup> See E. Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’ (1993) 4(2) *Eur. J. Int’l L.* 159 (also referring to the doctrines act of state, political question, and non-justiciability). See also Chapter 5, Section 3.1.1 (on international law as part of the ‘law of the land’).

domestic disputes'.<sup>33</sup> The application of national law by international courts is also limited by the rule that a state may not rely on the provisions of its internal law as justification for a failure to comply with an international obligation.<sup>34</sup> The schism between international and national law in the international legal order is further reflected in the view that '[f]rom the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law'.<sup>35</sup> For international courts and tribunals, therefore, national law is generally extraneous as a source of substantive applicable law; and even more so than international law for national courts.<sup>36</sup>

A different structural reason explaining the ambiguity surrounding the applicable law in investment arbitration relates to the constellation of the disputing parties: a private party on the one hand and a sovereign state on the other (ii).<sup>37</sup> The relevance of international law to this 'mixed' relationship connects with the larger debate on whether private parties are viewed as subjects or mere objects/beneficiaries of international law. Currently, it is well-accepted that private parties, such as investors, can be true right-holders of international norms;<sup>38</sup> and there has been, mainly due to the surge in the number of investment treaties, an expansion of international claims available to them.<sup>39</sup> Still, also in treaty arbitration, national law continues to govern the Investor-State relationship. The ICSID Tribunal noted in *Antoine Goetz*:

This internationalisation of investment relationships—whether they be contractual or otherwise—has certainly not led to a radical 'denationalisation' of the legal relations springing from international investment, to the point that the domestic law of the host State would be deprived of all relevance or application in the interests of an exclusive role for international law. It merely signifies that these relations relate at once—in parallel, one might say—to the sovereign supremacy of the host State in domestic law and to the international undertakings to which it has subscribed.<sup>40</sup>

<sup>33</sup> E. Valencia-Ospina, 'The Use of Chambers of the International Court of Justice' in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (V. Lowe and M. Fitzmaurice, eds, Cambridge, Grotius Publications, Cambridge University Press, 1996), 503, 513–14.

<sup>34</sup> See generally, Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law).

<sup>35</sup> R. Jennings and A. Watts, eds, *Oppenheim's International Law*, 9th edn (London, Longman, 1992), Vol. 1, at 83. See generally Chapter 6, Section 3.1.3 (on national provisions as facts or law).

<sup>36</sup> See W.W. Burke-White, 'International Legal Pluralism' (2004) 25 *Mich. J. Int'l L.* 963, 966; G. Biebler, *Procedures in International Law* (Berlin, Heidelberg, Springer, Verlag, 2008), 312. A further reason that has been offered for the non-application of national law by international courts and tribunals is the sovereign equality of States. Cf. FMC Corporation and 'The Ministry of National Defence et al., Award No. 292–353–2, 12 February 1987, Dissenting Opinion of Bahrami Ahmadi, 14 Iran–U.S. C.T.R. 111, at section B.1.

<sup>37</sup> Cf. D. Di Pietro, 'Applicable Law Under Article 42 of the ICSID Convention: The Case of *Amco v. Indonesia*' in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 223.

<sup>38</sup> See A. Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31 *Cal. W. Int'l L.J.* 241, 242–3. See also Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>39</sup> See United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties in the Mid-1990s* (New York, United Nations, 1998), 1. ('For nearly 40 years, countries have been concluding bilateral treaties with a view towards promoting and protecting foreign investment. These treaties, known generically as bilateral investment treaties (BITs), impose certain obligations on the contracting parties with respect to the treatment of foreign investment, and they create dispute-resolution mechanisms to enforce those obligations'); UNCTAD, *World Investment Report* (2012), 84 ('By the end of 2011, the overall IIA universe consisted of 3,164 agreements, which included 2,833 BITs and 331 "other IIAs"'). See also Section 2 (on the scope of and terminology used in the study).

<sup>40</sup> *Goetz v Burundi*, fn. 9, at para. 69. See also G.R. Delaume, 'State Contracts and Transnational Arbitration' (1981) 75 *Am. J. Int'l L.* 784, 796, at fn. 58.

The ICSID Tribunal in *Enron Corporation Ponderosa Assets, L.P. v Argentine Republic* (2007) phrased it this way: ‘While on occasions writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognized.’<sup>41</sup>

As indicated in these awards, the ambiguity as to the applicable law relates to a further structural feature of investment arbitration: the very nature of the substantive law at issue (iii). Investment law is namely one of the fields that best illustrates the aforementioned trend of an increase in law-making at both the national and international levels. Indeed, it is the rule, rather than the exception, that both sources of law govern the investor–state relationship.<sup>42</sup> Douglas states: ‘The important insight from the architecture of the investment treaty is that states do not purport to displace municipal laws and regulations on foreign investment in a wholesale fashion by the perfunctory signing of an investment treaty. Instead they envisage a relationship of coordination between international and municipal laws.’<sup>43</sup> This development results in situations in which acts and omissions of a host state can constitute breaches of obligations under national law, for instance contractual breaches; and, at the same time, the conduct may violate obligations under an investment treaty,<sup>44</sup> customary international law (including the minimum standard of treatment of aliens),<sup>45</sup> and, to a more limited extent, general principles of law.<sup>46</sup> In our and Douglas’ view, ‘[t]his explains the critical role that choice of law rules must play in the resolution of investment disputes.’<sup>47</sup>

The relevance of both sources of law to the investor–state relationship is also supported by party practice. Choice-of-law clauses reveal that investors and states agree to the application of national law or international law, and quite frequently even a combination thereof.<sup>48</sup> This feature is also present in investment treaties entered into between the host state and the investor’s home state, as they often provide for the application of up to four different sources of law of both a national and international nature.<sup>49</sup> As stipulated in the bilateral investment treaty (BIT) between the United Kingdom and Argentina:

<sup>41</sup> *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (F. Orrego-Vicuña, A.J. van den Berg, P.-Y. Tschanz, arbs), para. 207 (references omitted).

<sup>42</sup> Cf. Y. Banifatemi, ‘The Law Applicable in Investment Treaty Arbitration’ in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 191, 204.

<sup>43</sup> Z. Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009), xxiii.

<sup>44</sup> On investment treaties, see fns 99–100.

<sup>45</sup> See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008), 265; M.N. Kinnear, ‘Treaties as Agreements to Arbitrate: International Law as the Governing Law’ in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Vol. 13, A.J. van den Berg, ed., Kluwer Law International, 2007), 401, 426.

<sup>46</sup> See C.F. Dugan et al., *Investor-State Arbitration* (New York, Oxford University Press, 2008), 216; Kinnear, fn. 45, at 426–7. But see C.H. Brower II, ‘The International Law Character of the Iran–United States Claims Tribunal by M. Mohebi’ (2000) 94 *Am. J. Int’l L.* 813 (book review) ([A]lthough general principles of law provide a source of rules for interstate disputes, their use in investor–state disputes does not represent an application of international law. To the contrary, it constitutes a form of transnational law that one routinely encounters in international commercial arbitration’).

<sup>47</sup> Douglas, fn. 43, at xxiii.

<sup>48</sup> See C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int’l & Eur. L.* 147, 149.

<sup>49</sup> See Schreuer et al., fn. 16, at 576 (‘A number of bilateral investment treaties (BITs) contain choice of law clauses. Most of these clauses incorporate references to the BIT itself, the law of the State

The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflicts of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.<sup>50</sup>

Faced with this very clause, the tribunal in *National Grid plc v Argentine Republic* (2008) stated:

This provision points to the application of the Treaty itself, Argentine law (including its rules on conflict of laws), and ‘*the applicable principles of international law*.’ Although the Parties do not disagree that these are the relevant sources of law applicable to this dispute, they note the absence of specific guidelines under the Treaty as to which aspect of the dispute is governed by one source or the other and how those sources interact in case of conflict *inter se*.<sup>51</sup>

The simultaneous applicability of national and international law is similarly reflected in the arguments disputing parties present to the tribunals. While the investor will often invoke international law, the host state frequently advocates the application of its own, national law.<sup>52</sup> This general<sup>53</sup> pattern flows from the competing interests of the disputing parties: the investor seeks the application of a neutral system of law and enhanced legal protection; the host state wants to retain the highest possible degree of control over the investor or investment in question. At the same time, the investor, not wanting to ‘put all its eggs in one basket’, recurrently relies on both national and international law. The ICSID Tribunal noted in *Generation Ukraine Inc. v Ukraine* (2003): ‘the Claimant has advanced an extraordinarily broad and heterogeneous [sic] swathe of claims based on Ukrainian tort law, Ukrainian constitutional and administrative law and the [bilateral investment treaty] itself.’<sup>54</sup> And in its Memorial on the Merits in *Wena Hotels Ltd v Arab Republic of Egypt* (2000), the investor claimed that ‘Egypt violated the [contract], Egyptian law and international law by expropriating Wena’s investment without compensation’.<sup>55</sup>

A related structural feature of the system of arbitration that contributes to the ambiguity concerning the applicable law is the jurisdiction of the tribunals. This feature is mainly linked with the first label concerning the system of arbitration (i), but it is also influenced by the constellation of the parties (ii) and investment law as a substantive area of law (iii). More often than not, and contrary to the jurisdiction of international

party to the dispute, including its rules on the conflict of laws, and the rules and principles of international law’ [references omitted].

<sup>50</sup> UK–Argentina BIT, art. 8(4).

<sup>51</sup> *National Grid plc v Argentine Republic*, Award, 3 November 2008 (A.M. Garro, J.L. Kessler, A.R. Sureda, arbs), para. 82 [emphasis in original, references omitted].

<sup>52</sup> See Schreuer et al., fn. 16, at 557 (“There are several possible motives for selecting a particular system of law. The parties may be influenced by [...] the wish to maximize the legal protection for one of them, most notably the foreign investor. [...] In addition, the State party to an investment contract may insist on the application of its own domestic law as a matter of principle and of national prestige.”). Cf. *BG Group Plc v Argentina*, Award, 24 December 2007 (A.M. Carro, A.J. van den Berg, G.A. Alvarez, arbs), para. 93. For other examples of cases in which the host state has argued in favour of the application of its own, national, law, see Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>53</sup> But see Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law). (Foreign investors may rely on national law, while the host state insists on the application of international law.)

<sup>54</sup> *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (E. Salpius, J. Voss, J. Paulsson, arbs), para. 8.9.

<sup>55</sup> *Wena v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (M. Leigh, I. Fadlallah, D. Wallace, arbs), para. 75.

courts and, albeit to a lesser extent, national courts in general, the jurisdiction of investment tribunals commonly extends to claims of both a national and an international nature.<sup>56</sup> This feature may be explained on the basis that investment arbitration is designed to serve as an alternative to, if not replace, two different forms of dispute settlement: diplomatic protection (a classic institution of public international law)<sup>57</sup> and litigation in domestic courts (generally governed by national law).<sup>58</sup> Importantly, and contrary to diplomatic protection,<sup>59</sup> the principle of the exhaustion of local remedies does not apply to investment arbitration, unless the consent of the host state expressly depends on such exhaustion.<sup>60</sup> Accordingly, the arbitral tribunal frequently represents a ‘one-stop shop’<sup>61</sup> for the settlement of disputes of both a national and an international nature. This feature, blurring the traditional lines between the national and the international order becomes apparent, in particular, in arbitration based on investment treaties. As Justice Aikens explained in *Republic of Ecuador v Occidental Exploration and Production Company* (2005):

Bilateral Investment Treaties have been developed as a mechanism to encourage investment between states, but using ‘investors’ that are non-governmental organisations. It is a long-standing principle of public international law that states owe duties to other states to protect their citizens. This is known as the ‘doctrine of international protection’. Effectively, BITs are treaties that acknowledge this principle of public international law, apply it to particular circumstances between two states and develop the protection of investors by giving them ‘standing’ to pursue a state directly in ‘investment disputes’ between an investor and a state Party in ways set out in the BIT.<sup>62</sup>

As a result, and depending on the specific scope of the parties’ arbitration agreement,<sup>63</sup> the disputing parties have the possibility of bringing multiple claims under both national and international law in relation to the same underlying dispute. This is illustrated by the case *Noble Energy, Inc. and Machalapower CIA. LTDA v Ecuador and Consejo Nacional de Electricidad* (2008):

The Claimants have submitted the following disputes to the Tribunal: a dispute between Noble Energy and the Respondents under the US–Ecuador bilateral investment treaty, a dispute between the Claimants and the Respondents under the Investment Agreement, and a dispute between MachalaPower and the Respondents under the Concession Contract.<sup>64</sup>

<sup>56</sup> See generally Chapter 4 (on the scope of the arbitration agreement: claims and counterclaims of a national and/or international nature).

<sup>57</sup> See International Law Commission (ILC), Draft Articles on Diplomatic Protection: with Commentaries (2006), art. 1. See also Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>58</sup> See V. Balas, ‘Review of Awards’ in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 1125, 1129; *Case concerning Ahmadou Sadio Diallo (Guinea v Congo)*, Preliminary Objections, ICJ, 24 May 2007, at para. 88.

<sup>59</sup> See ILC, fn. 57, art. 14(1).

<sup>60</sup> See Douglas, fn. 43, at 10 (Rule 2); C. Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4(1) *The Law and Practice of International Courts and Tribunals* 1.

<sup>61</sup> *Premium Nafia Products Limited (20th Defendant) and others v Fili Shipping Company Limited and others* [2007] UKHL 40. Cf. I. Alvik, *Contracting with Sovereignty* (Oxford, Hart, 2011), 42.

<sup>62</sup> *Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774 (Comm), 29 April 2005, at para. 11 (per Mr Justice Aikens). See also *BG Group Plc*, fn. 52, Award, para. 145.

<sup>63</sup> See Chapter 4 (on the scope of the arbitration agreement: claims and counterclaims of a national and/or international nature).

<sup>64</sup> *Noble Energy, Inc. and Machalapower CIA. LTDA v Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 (G. Kaufmann-Kohler,

On this basis, investment treaty arbitration has been characterized as a ‘hybrid legal process relying on and applying both municipal and international law in one integrated legal process’;<sup>65</sup> or even as being of a *sui generis* character, which cannot be adequately rationalized either as a form of public international or private transnational dispute resolution.<sup>66</sup> The current debate on the nature of and the law applicable to ‘umbrella’ or ‘sanctity-of-contract’ clauses in investment treaties highlights this hybrid character.<sup>67</sup>

It should further be noted that the ambiguity with respect to the applicable law is exacerbated by the ad hoc and non-hierarchical nature of the system of arbitration (i). The parties generally select their own arbitrators, so that the composition of each tribunal differs from case to case.<sup>68</sup> Added to this is the fact that arbitration does not subscribe to the doctrine of *stare decisis*.<sup>69</sup> The ICSID Tribunal stated in *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (2004):

[A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each [investment treaty] and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.<sup>70</sup>

Relatedly, arbitrators are bound to have individual preferences between various interpretations of legal provisions and concepts; and these different views may be included in separate and dissenting opinions.<sup>71</sup> With respect to the choice-of-law methodology of the Iran–United States Claims Tribunal, Crook observes:

Inevitably, after 7 years and several hundred decisions, the Tribunal’s handling of choice of law has not been wholly uniform. Arbitrators have come and gone; individual members have taken quite different approaches. Moreover, the Tribunal has four distinctive institutional configurations. All nine members sit *en banc* to hear some intergovernmental matters and important

B.M. Cremades, H. Alvarez, arbs), para. 14. See also at para. 21. See generally Chapter 4 (on the scope of the arbitration agreement: claims and counterclaims of a national and/or international nature).

<sup>65</sup> I. Alvik, ‘The Hybrid Nature of Investment Treaty Arbitration: Straddling the National/International Divide’ in *The New International Law: An Anthology* (C.C. Eriksen and M. Emberland, eds, Leiden, Nijhoff, 2010), 91.

<sup>66</sup> See Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *Brit. Y. B. Int’l* 151, 152–3.

<sup>67</sup> See Dolzer and Schreuer, fn. 45, at 153 ([A]n umbrella clause is a provision in an investment protection treaty that guarantees the observation of obligations assumed by the host State vis-à-vis the investor’). See generally Chapter 6, Section 3.1.2 (on ‘umbrella’ clauses).

<sup>68</sup> See Chapter 2, Section 2 (on features of the arbitral process). The Iran–United States Claims Tribunal differs in this respect. See Chapter 2, Section 4.1 (on the Iran–United States Claims Tribunal).

<sup>69</sup> Cf. N. Miller, ‘“Precedent” Across International Tribunals’ (2002) 15 *Leiden J. Int’l L.* 483, 488 (‘Precedent is understood by many to refer to the doctrine of *stare decisis* [...] not generally understood to be a feature of international law’ [references omitted]); Kaufmann-Kohler, fn. 29, at 358.

<sup>70</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 (A.S. El-Kosheri, J. Crawford, A. Crivellaro, arbs), para. 97.

<sup>71</sup> See C.H. Schreuer, *Preliminary Rulings in Investment Arbitration*, TDM (18 December 2007), at 2; UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Monitor No. 1 (April 2012), 12.

common issues. More frequently, the Tribunal sits in Chambers composed of three arbitrators. Each configuration has had its own approaches.<sup>72</sup>

At the same time, tribunals and scholars emphasize the desirability of consistency and the need to pay due regard to previous decisions. Indeed, in *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador* (2008), the ICSID Tribunal found that it had a 'duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law'.<sup>73</sup> Such practice enables us to establish trends, if not always a *jurisprudence constante*,<sup>74</sup> with respect to the applicable law in investment arbitration.<sup>75</sup>

An additional reason why investment arbitration lends itself to a discussion on the relationship between national and international law relates to the system of arbitration (i): it is the steep increase in the number of investment disputes being settled by arbitration and the corollary growth of jurisprudence.<sup>76</sup> Apart from the expansion of world investment flows,<sup>77</sup> this development is linked to the large number of investment treaties that provide for arbitration between foreign investors and host states.<sup>78</sup> Furthermore, whereas arbitration allows the parties to keep the award confidential, in investment disputes, the trend has been to make it, or at least parts thereof, available to the general public.<sup>79</sup> This is due to the involvement of a state, which necessarily increases the level of public interest. The Organisation for Economic Co-operation and Development (OECD) notes:

Investment arbitral awards may have a significant impact on the State's future conduct, the national budget and the welfare of the people, so the public interest in investment disputes is understandable. [...] There are a growing number of arbitration awards which are likely to influence future cases, and this has argued for their systematic and quick publication.<sup>80</sup>

<sup>72</sup> J.R. Crook, 'Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience' (1989) 83 *Am. J. Int'l L.* 278, 286.

<sup>73</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (G. Kaufmann-Kohler, E.G. Pinzón, A.J. van den Berg, arbs), para. 117 (references omitted). See also A.R. Sureda, 'Precedent in Investment Treaty Arbitration' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 830, 842.

<sup>74</sup> See Kaufmann-Kohler, fn. 29, at 360, fn. 16 ('One speaks of *jurisprudence constante* where there is a series of cases that resolve a particular issue in a certain way, which then acts as a guide in the future in resolving that same issue'). But see UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Monitor No. 1 (2009), at 12 ('[T]here is a trend towards divergent interpretations of treaty obligations made by international tribunals. This has led to new investor uncertainties and has resulted in a growing number of conflicting awards [...]'); J. Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) *Arb. Int'l* 351, 353.

<sup>75</sup> In this respect, we note the observation that tribunals may be relatively more inclined to cite other tribunals as concerns choice-of-law methodology. See Kaufmann-Kohler, fn. 29, at 362–3.

<sup>76</sup> See J. Paulsson, 'Jurisdiction and Admissibility' in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (Paris, International Chamber of Commerce, 2005), 601, 605.

<sup>77</sup> See W.H. Knull and N.D. Rubins, 'Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?' (2000) 11 *Am. Rev. Int'l Arb.* 531, 536.

<sup>78</sup> See UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Monitor No. 1 (2008), 2.

<sup>79</sup> See, e.g., *Democracy Watch and CUPW v Attorney-General of Canada*, Affidavit of J. Paulsson, 19 May 2003, para. 5. Awards (or references thereto) are available on, inter alia, the following websites: <<http://italaw.com/>>; <<http://icsid.worldbank.org/>>; <<http://investmentclaims.com/>>; <<http://archive.unctad.org/iai-dbcases/>>; <<http://www.kluwerarbitration.com/>>; <<http://www.investorstatelawguide.com/>>; <<http://www.iareporter.com/>>; <<http://westlaw.com/>>; (all last visited 1 May 2012).

<sup>80</sup> OECD, *International Investment Law: A Changing Landscape* (Paris, OECD, 2005), 24–5.

For this purpose, the Iran–United States Claims Tribunal Rules state that each award ‘shall be made available to the public’,<sup>81</sup> and the ICSID Rules of Procedure for Arbitration Proceedings state that the Centre shall ‘promptly include in its publications excerpts of the legal reasoning of the Tribunal’.<sup>82</sup> Thus, the increasing availability of and resort to arbitration,<sup>83</sup> and the ensuing growth in the number of awards rendered and made public, makes investor–state arbitration a sufficiently rich field for examination.

In sum, it is suggested that there is a need for a systematic analysis of the substantive applicable law as it pertains to the arbitral settlement of disputes between foreign investors and host states.<sup>84</sup> This is so not only from a practical point of view and for the purpose of advancing legal certainty; the topic also forms part of, and the present study thus seeks to contribute to, the debate on the relationship between the national and international legal orders in general. To this end, the study will draw general conclusions from scholarship and awards that may so far have been left fragmented.<sup>85</sup> This is particularly called for in view of the recent increase in the number of arbitral awards and the advent of new legal issues that investment treaty arbitration, in particular, has brought with it.<sup>86</sup> As such, Böckstiegel’s prophecy made two decades ago remains true: ‘[T]he arbitral system as it applies to states and foreign private parties should continue to prove a fascinating and challenging subject for the student of legal process.’<sup>87</sup>

## 2. The Scope of and Terminology Used in the Study

As indicated in the title and in the earlier text, the study is dedicated to an analysis of the law (or *lex causae*)<sup>88</sup> applied to the merits<sup>89</sup> in arbitration proceedings between

<sup>81</sup> Iran–United States Claims Tribunal, Tribunal Rules of Procedure, art. 32(5), 3 May 1983.

<sup>82</sup> ICSID Rules of Procedure for Arbitration Proceedings, art. 48(4).

<sup>83</sup> But see M. Sornarajah, ‘Reactions to Neo-Liberal Excesses in Investment Arbitration’ in *The Future of Investment Arbitration* (C.A. Rogers and R.P. Alford, eds, Oxford, Oxford University Press, 2009), ch. 14 (referring to withdrawals from ICSID and the denunciation of BITs); UNCTAD, World Investment Report, fn. 39, at 86–8. But see C.N. Brower and S.W. Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chi. J. Int’l L.* 471, 496 (‘The more drastic reactions of states, such as terminating investment treaties or withdrawing from the ICSID Convention [...] are a phenomenon that seems to be limited to a minority of states and can often be explained more by the countries’ internal political situation rather than a more widespread view of a lack of legitimacy of international investment law and arbitration’).

<sup>84</sup> Cf. V. Heiskanen, ‘Forbidding Dépeçage: Law Governing Investment Treaty Arbitration’ (2009) 32 *Suffolk Transnat’l L. Rev.* 367 ([T]he time now seems ripe to take a fresh look at the age-old controversy surrounding the concept of governing law in international arbitration—a controversy that [...] stretches back to the early 1960’s, and even beyond’).

<sup>85</sup> As illustrated by the multitude of sources referred to throughout the book, there is a wealth of legal scholarship on the law applicable to the arbitral settlement of investment disputes. Whereas many scholars address the relationship between national and international law, general theoretical conclusions are often, although not always, lacking.

<sup>86</sup> Cf. Heiskanen, fn. 84, at 399.

<sup>87</sup> K.-H. Böckstiegel, ‘Mixed International Arbitration. By Stephen J. Toope’ (1992) 86 *Am. J. Int’l L.* 228, 230 (book review).

<sup>88</sup> See C. McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2009), 95, 108 (‘LEX CAUSAE[:] The question of the law applicable to the substance of an investment treaty arbitration is a question of applicable law at two levels: (a) the identification, as a matter of choice of law, of the legal system or systems applicable to the issues before the tribunal; and (b) the determination, within any such system so designated as applicable, of the relevant rules necessary to decide the issue’).

<sup>89</sup> Cf. A. Orakhelashvili, ‘The International Court and “Its Freedom to Select the Ground upon which it will Base its Judgment”’ (2007) 56 *Int’l Comp. L. Quart.* 171, at fn. 1 (‘Merits can be conveniently defined as “the issues of fact and law which give rise to the cause of action, and which an

foreign investors and host states. Here and elsewhere this form of arbitration is referred to as ‘investment arbitration’,<sup>90</sup> or ‘investor–State arbitration’.<sup>91</sup> More specifically, the focus is placed on the interplay between national and international law as evidenced mainly by the tribunals’ choice-of-law methodology employed in awards and decisions; but we will also consider such interplay in light of relevant national and international legal instruments, jurisprudence, and scholarship.

For the term ‘arbitration’, we refer to Born, who defines it as ‘a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard’.<sup>92</sup> While the process is discussed in more detail in Chapter 2, it is appropriate to note already at this point that with some exceptions and variations, investment arbitration relies on the framework of international commercial arbitration. This framework was primarily designed for commercial disputes between private parties,<sup>93</sup> but because of the wide definition and scope of international commercial arbitration,<sup>94</sup> it also encompasses investor–state arbitration. Brower explains:

Historically, investor–state arbitration takes place within a framework that resembles international commercial arbitration. Thus, the ICSID Convention ‘borrow[s] heavily from the structures of international commercial arbitration.’ Likewise, ICSID’s Additional Facility Rules ‘are based on . . . provisions of the [ICSID] Convention which lend themselves to inclusion in an instrument of a contractual nature, and include some provisions derived from the UNCITRAL Rules and the ICC Rules.’<sup>95</sup>

According to Brower, this customary use of commercial arbitration models took root because it furthers international investment by providing investors with access to an efficient and predictable form of dispute resolution that produces enforceable outcomes.<sup>96</sup> And, as a consequence, the ‘thinking, attitudes, procedures and concepts of commercial arbitration dominate at present investment arbitration’.<sup>97</sup> For that reason,

applicant State must establish in order to be entitled to the relief claimed”, Judge Read, Anglo-Iranian Oil Co [1952] ICJ Rep 148’).

<sup>90</sup> Cf. T.W. Wälde, ‘The Specific Nature of Investment Arbitration’ in *New Aspects of International Investment Law* (P. Kahn and T.W. Wälde, eds, Leiden, Nijhoff, 2007), 43.

<sup>91</sup> Cf. Dugan et al., fn. 46.

<sup>92</sup> G. Born, *International Arbitration: Law and Practice* (Alphen aan den Rijn, Kluwer Law International, 2012), ch. 1, s. 1(A). See also J.-F. Poudret et al., *Comparative Law of International Arbitration* (London, Sweet & Maxwell, 2007), 1; Petrochilos, fn. 17, at 3 (“The jurisdictional function entrusted to the arbitrator, and the attendant binding force of his pronouncement, distinguishes arbitration from kindred alternative means of dispute settlement: expert valuation, mediation, conciliation, “mini-trial”, and so forth” [references omitted]).

<sup>93</sup> See Schreuer, ‘The Relevance of Public International Law’ in *International Commercial Arbitration: Investment Disputes*, at 9, fn. 28, available at <[http://www.univie.ac.at/intlaw/pdf/csunpubpaper\\_1.pdf](http://www.univie.ac.at/intlaw/pdf/csunpubpaper_1.pdf)> (last visited 1 May 2012).

<sup>94</sup> For a definition of international commercial arbitration, see UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006, with Explanatory Note), arts 1–2. But see F.A. Mann, ‘Lex Facit Arbitrum’ in *International Arbitration: Liber Amicorum for Martin Domke* (P. Sanders, ed., The Hague, Martinus Nijhoff, 1967), 157, 159 (“Although [...] it is not uncommon and, on the whole, harmless to speak, somewhat colloquially, of international arbitration, the phrase is a misnomer. In the legal sense no international commercial arbitration exists. [...] [E]very arbitration is national arbitration, that is to say, subject to a specific system of national law”).

<sup>95</sup> C.H. Brower II, ‘Beware the Jabberwock: A Reply to Mr Thomas’ (2002) 40 *Colum. J. Transnat'l L.* 465, 474–5 [references omitted]). Cf. G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford, Oxford University Press, 2007), 5 (Investment arbitration ‘piggybacks on the rules and structure of international commercial arbitration’).

<sup>96</sup> Brower II, fn. 95, at 475 [references omitted].

<sup>97</sup> Wälde, fn. 90, at 54.

this study will, where appropriate, also draw from sources concerning international commercial arbitration in general.

Still, we note that investment arbitration is evolving into a *sui generis* system with several distinguishing features.<sup>98</sup> Apart from the involvement in the proceedings of a sovereign state, this development is due in particular to the proliferation of treaty arbitration. International investment agreements (IIAs) and free trade agreements (FTAs), of a bi- and multilateral nature, are designed to stimulate foreign investments, and for that purpose they generally allow investor nationals of one contracting state to invoke in arbitral proceedings<sup>99</sup> substantive obligations vis-à-vis another contracting state: the host state. These obligations include 'national', 'most-favored-nation', and 'fair and equitable' treatment; 'full protection and security'; as well as the prohibition of expropriation of investments except in the public interest and against compensation.<sup>100</sup> In this context, Wälde makes the prediction that 'investment arbitration will increasingly separate itself from the model of private commercial arbitration and move towards the models of international judicial review of governmental conduct'.<sup>101</sup>

Importantly, these special features of investment (treaty) arbitration have significant impact on the main focus of this study: the law applied to the merits in investor-state arbitration. Traditionally, in proceedings involving a foreign element, choice-of-law rules<sup>102</sup> are applied to identify the substantive *national* law.<sup>103</sup> While this description generally<sup>104</sup> applies to commercial arbitration between two private parties, for

<sup>98</sup> Cf. T. Weiler and T.W. Wälde, 'Investment Arbitration under the Energy Charter Treaty in the light of new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation' (August 2002) 19 *ASA Special Series* 159, 162, at fn. 10, TDM 1(1) (2004). See also T.T. Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration' in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2009), 187, 188 ('[S]uch is the radically different nature of investor-State arbitration that commercial arbitration is now a false analogy'). But see D.D. Caron, 'Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2009) 32 *Suffolk Transnational L. Rev.* 513–14 ('System wide legitimacy critiques often focus on investor state arbitration as though it is a clearly distinguishable category of international dispute resolution. I have never agreed that a categorical distinction between investment arbitration and international commercial arbitration in terms of these critiques is so obvious as some assume [...]']).

<sup>99</sup> Cf. O. Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20(2) *Arb. Int'l* 179, 180 ('[A]rguably as "the main objective of bilateral investment treaties", all but a few arrange for international arbitration' [references omitted]).

<sup>100</sup> See generally Dolzer and Schreuer, fn. 45; A. Reinisch, *Standards of Investment Protection* (Oxford, Oxford University Press, 2008). For specific examples of the language used in bilateral investment treaties, see UNCTAD, *Investment Instruments Online: Bilateral Investment Treaties*, available at <[http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx)> (last visited 1 May 2012).

<sup>101</sup> Wälde, fn. 90, at 53–4. See also G. van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) *Eur. J. Int'l L.* 121, 122 (The regime of international investment arbitration provides 'a singularly important and under-appreciated manifestation of an evolving system of global administrative law').

<sup>102</sup> The term choice-of-law rules is also referred to as 'conflict of laws' or 'private international law', both of which are broader in scope than 'choice of law'. See US Rest 2d Conf'l Intro§ 1, Comment a. 3 (defining 'choice-of-law rules' as the rules of each state that 'determine which law (its own local law or the local law of another state) shall be applied by it to determine the rights and liabilities of the parties resulting from an occurrence involving a foreign element'); European Commission, European Judicial Network, *Glossary: Private International Law*, available at <[http://ec.europa.eu/civiljustice/glossary/glossary\\_en.htm#PrivIntLaw](http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#PrivIntLaw)> (last visited 1 May 2012).

<sup>103</sup> See G.C. Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8(3) *Global Jurist* 2.

<sup>104</sup> Note, however, the concept of *lex mercatoria*. See J.L. Daly, 'International Commercial Negotiation and Arbitration' (2001) 22 *Hamline J. Pub. L. & Pol'y* 217, 242 (referring to *lex mercatoria* as the customary principles of international commerce). See generally F. De Ly, *International Business Law and Lex Mercatoria* (Amsterdam, North-Holland, 1992).

investment arbitration, there is a need to broaden the concept choice-of-law rules in such a way that it also—or rather—concerns the question of whether *national or international* law should be applied to the merits.<sup>105</sup>

In any situation involving multiple sources of obligations there is an inherent chance of conflict. In this study, the focus is the interplay between national and international norms, rather than norms from each legal order *inter se*. By ‘conflict’ the study adopts the meaning used by the International Law Commission in its Report on Fragmentation of International Law, namely as ‘a situation where two rules or principles suggest different ways of dealing with a problem’.<sup>106</sup> As to the meaning of the term ‘national’ law, it is used synonymously with ‘municipal’, ‘domestic’, ‘internal’, or ‘local’ law.<sup>107</sup> The term ‘international’ law is employed in the meaning of ‘public international’ law, corresponding to the applicable law clause set out in the Statute of the ICJ. In the words of the UNCITRAL Tribunal in *Merrill & Ring Forestry L.P. v Canada* (2010):

The meaning of international law can only be understood today with reference to Article 38(1) of the Statute of the International Court of Justice, where the sources of international law are identified as international conventions, international custom, general principles of law, and judicial decisions and the teachings of the most highly qualified publicists as a subsidiary means for the determination of the rules of law.<sup>108</sup>

It should be added that the study does not deal with the nature or application of soft law in investment arbitration,<sup>109</sup> nor does it cover decisions rendered *ex aequo et bono*.<sup>110</sup>

The substantive law applicable to the merits should be differentiated from other systems of law or ‘legal orders’<sup>111</sup> involved in arbitration proceedings: (i) the law governing the parties’ capacity to enter into an arbitration agreement; (ii) the law

<sup>105</sup> Cf. G.R. Delaume, ‘Transnational Contracts, Applicable Law and Settlement of Disputes: A Study in Conflict Avoidance’, Booklet 1, *Table of Contents and Introduction* § I.01 (Oceana Publications, Inc. Dobbs Ferry, New York, 1983); Di Pietro, fn. 37, at 223.

<sup>106</sup> International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, 13 April 2006), A/CN.4/L.682, at Conclusions, para. 25. See also Conclusions, para. 14(2).

<sup>107</sup> Cf. N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 198, at fn. 129. On the (broad) meaning of the term ‘law,’ see J. Paulsson, *Unlawful Laws and the Authority of International Tribunals* (Lalive Lecture, Geneva, 27 May 2009) (2008) 23(2) *ICSID Rev.-FILJ* 215.

<sup>108</sup> *Merrill & Ring Forestry L.P. v Canada*, Award, 31 March 2010 (F.O. Vicuña, K.W. Dam, J.W. Rowley, arbs), para. 184; Statute of the International Court of Justice, art. 38(1). But see Wälde, fn. 90, at 94 ([I]nternational law remains a relevant source of applicable law governing investment disputes, but only with the caveat that the situation of investor–State arbitration is now distinct, in significant aspects, from the law for and by States’). Cf. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Bank for Reconstruction and Development, 18 March 1965, Doc. ICSID/2, 1 ICSID Rep. 31, at para. 40. On the qualification of legal rules as ‘domestic’ or ‘international’, see C. Brölmann, ‘Deterritorialization in International Law: Moving Away from the Divide Between National and International Law’ in *New Perspectives on the Divide Between National & International Law* (J. Nijman and A. Nollkaemper, eds, Oxford, Oxford University Press, 2007), 84, 86.

<sup>109</sup> See generally G. Kaufmann-Kohler, ‘Soft Law in International Arbitration: Codification and Normativity’ (2010) 1(2) *J. Int. Disp. Settlement* 283.

<sup>110</sup> Cf. R.D. Bishop, ‘A Practical Guide for Drafting International Arbitration Clauses’ (2000) 1 *Int'l Energy L. & Tax'n Rev.* 16, at Section 4 (‘Rather than deciding a case strictly on the basis of applicable law, under some circumstances, an arbitral panel may rule based on equitable principles. Generally, the arbitrators must be authorized to do so. This is usually accomplished by empowering the arbitrators either to act as *amiable compositeurs* or to decide the case *ex aequo et bono*’).

<sup>111</sup> See, e.g., P.-M. Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 *N.Y.U. J. Int'l L. & Pol.* 791, 793 (Dupuy

governing the arbitration agreement and the performance of that agreement;<sup>112</sup> (iii) the law governing the existence and proceedings of the arbitral tribunal—the *lex arbitri*; and (iv) the law governing recognition and enforcement of the award.<sup>113</sup> Apart from the third category, the identification of these other applicable laws does not constitute a focus of this study. *Lex arbitri* may be defined as ‘a body of rules which sets a standard external to the arbitration agreement, and the wishes for the parties, for the conduct of the arbitration’.<sup>114</sup> As will be elaborated in the subsequent chapter, the *lex arbitri* may coincide with the law of the tribunal’s ‘juridical seat’ (*siege d’arbitrage*), a term that refers to the state in which the tribunal is seated.<sup>115</sup> Tribunals whose *lex arbitri* is national in nature will be referred to as ‘territorialized’, while tribunals that operate outside a national framework are coined as ‘internationalized’. This latter term seeks, for the purposes of this study, to distinguish investment tribunals from non-arbitral international courts (and tribunals), such as the European Court of Human Rights, as well as international courts (and tribunals) set up solely to settle disputes between states, e.g. the International Court of Justice or the World Trade Organization dispute settlement system.<sup>116</sup>

Other key concepts used in this study include ‘foreign investor’, ‘home state’, ‘host state’, and ‘investment dispute’. For present purposes, it should suffice to state that the first concept includes both natural and juridical persons that have a nationality different than the host state, and which is one of the parties to the arbitral proceedings.<sup>117</sup> ‘Home state’ refers to the state of nationality of the foreign investor.<sup>118</sup> By ‘host state’ is meant the state in which the investment is (being) made, and the other party to the proceedings.<sup>119</sup> ‘Investment dispute’ refers to a legal dispute<sup>120</sup> between the foreign

defines legal order as ‘a system of norms binding on determined subjects which trigger some pre-established consequences when the subjects breach their obligations’).

<sup>112</sup> The law applicable to the arbitration agreement is briefly discussed. See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims); Chapter 5, Section 3.2.2.1 (on the corrective application of international law when the parties have agreed to the sole application of national law) (regarding the possibility that international law may play a supervening role vis-à-vis national law when the arbitration agreement is governed by international law).

<sup>113</sup> See Blackaby et al., fn. 107, at 164; L. Mistelis, ‘Reality Test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri”’ (2006) 17(2) *Am. Rev. Int’l Arb.* 155, at Section II(A).

<sup>114</sup> *Smith Ltd v H & S International* [1991] 2 Lloyd’s Rep. 127, 130 (per Steyn, J.). See also F. A. Mann, *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Oxford, Clarendon Press, 1992), 10 (defining ‘lex arbitri’ as the ‘lex fori of the arbitration’); Mistelis, fn. 113, at Section II(C).

<sup>115</sup> See C.H. Brower, II, ‘The Place of Arbitration’ in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Toedt Weiler, ed., London, Cameron May, 2005), 151.

<sup>116</sup> See generally at Chapter 2, Section 4 (on internationalized tribunals). Cf. E. Lauterpacht, ‘The World Bank Convention on the Settlement of International Investment Disputes’, *Recueil d’Etudes de Droit International en Hommage à Paul Guggenheim* (Genève, Tribune, 1968) 642, at 649 (‘If an arbitration is held in England it is subject to control by English law. This is so even if one of the parties to the arbitration is a foreign State, and is only not so in the case of a strictly international arbitration where both parties are States’).

<sup>117</sup> See, e.g., UNCTAD, *Scope and Definition: Second UNCTAD Series on Issues in International Investment Agreements* (9 March 2011). See also Chapter 2, Section 4.2 (on ICSID tribunals).

<sup>118</sup> Cf. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, 5 February [1970] ICJ Rep. 3, at para. 71 (Canada was the home State of the company, as it was ‘not disputed that the company was incorporated in Canada and has its registered office in that country’).

<sup>119</sup> Cf. ASEAN Agreement for the Promotion and Protection of Investments (1987), art. 1(6) (‘The term “host country” shall mean the Contracting Party wherein the investment is made’); Petrochilos, fn. 17, at 246 (referring to the host State as the ‘investment-recipient state’).

<sup>120</sup> See C.H. Schreuer, *What is a Legal Dispute* TDM (December 2007). See also Chapter 2, Section 4.2 (on ICSID tribunals).

investor and the host state relating to the particular investment made by the former in the territory of the latter.<sup>121</sup> For the term ‘arbitration agreement’, the English Arbitration Act offers a useful definition: ‘any agreement to submit to arbitration present or future disputes (whether they are contractual or not)’.<sup>122</sup>

Lastly, it is noted that an effort was made to include relevant material available by 1 May 2012; although it has been possible to include some later developments.

### **3. The Method and Plan of the Study**

As a necessary first step, we will seek to determine the nature of the arbitral tribunals; and more specifically whether the arbitrators may be seen to be agents of solely the parties, or whether they (also) receive their mandate from either a national or the international legal order. For that purpose, **Chapter 2** begins with a brief description of the arbitral process, which is followed by a discussion of the delocalization theory and the seat theory. The analysis will be based on both scholarship and practice; the latter including national arbitration laws, arbitration rules, the ICSID Convention, and the Iran–United States Claims Settlement Declaration. It concludes by characterizing arbitral tribunals as either ‘territorialized’ or ‘internationalized’.

The remainder of the study is dedicated to choice-of-law methodology in investment arbitration as it pertains to the application of national and/or international law. **Chapter 3** discusses the implications of the territorialized or internationalized nature of investment tribunals for their choice-of-law methodology. To this end, it examines choice-of-law rules as reflected in national arbitration laws, arbitration rules, the ICSID Convention, the Iran–United States Claims Settlement Declaration, together with jurisprudence and legal scholarship on the applicable law. It demonstrates the high degree of freedom that the parties to the dispute and the arbitrators enjoy when ascertaining the substantive applicable law, and thereby the *prima facie* applicability of national and international law in arbitration proceedings between investors and host states.

**Chapter 4** deals with the jurisdiction of investment tribunals as provided for in the arbitration agreement. As we will see, arbitration agreements differ in scope as to the extent to which they allow the disputing parties to bring claims and counterclaims of a national and/or an international nature. The chapter also introduces the choice-of-law technique of characterization, which assists a tribunal in determining the nature and possible exclusion of the various claims and counterclaims brought before it, and thereby also the relevance of national and/or international law to the dispute at hand.

In **Chapters 5 to 7**, we analyse arbitral practice with respect to the interplay between national and international law. As with all studies, there were various options as to how best to organize the material, including that of focusing on each type of tribunal, or rather on the law applied. While the former approach might have been more consistent with the chronology of my own examination, in the end, the latter approach was adopted. This may be explained on the basis that a cross-cutting analysis better corresponds to the choice-of-law methodology of the tribunals, in that they often draw from and rely on each other’s reasoning, regardless of the law/rules/treaty

<sup>121</sup> See Douglas, fn. 43, at 189 (‘Rule 23. The economic materialisation of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return’); UNCTAD, fn. 117. See also Chapter 2, Section 4.2 (on ICSID tribunals).

<sup>122</sup> English Arbitration Act (1996), s. 6(1).

pursuant to which they operate. Indeed, an important observation made in the course of the study is the recurrent consistency and cross-fertilization that takes place between different tribunals in this respect. Such practice also constitutes a practical reason for the present structure: as the tribunals regularly adopt similar choice-of-law methodology, a division according to the nature of the tribunal would lead to much repetition. For the same reason, it is hoped that the structuring of the material according to the applicable law (being national or international, or both) will prove to be more reader-friendly. It is emphasized that the analysis of arbitral practice does not intend to represent an exhaustive review of all awards of relevance to the topic at hand.

**Chapter 5** is dedicated to an analysis of awards and scholarship on the situations in which it has been held and argued that national law should be primarily applied to the merits of the dispute. In particular, we will examine the factors of party autonomy, considerations of host state sovereignty, and the national nature of the claim.

**Chapter 6** examines situations where international law could, or has been held to, be the primarily applicable law. Reasons that have been offered in this respect include party autonomy, the international nature of the claim, and the superiority of international law vis-à-vis national law.

In **Chapter 7**, we will see that tribunals may also refer to consistency between the relevant national and international norms, and settle the dispute by reference to both legal orders.

Each chapter includes interim and general conclusions. **Chapter 8** offers concluding observations.

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# 2

## Territorialized and Internationalized Arbitration Tribunals

The relevance of the place of arbitration and the tendency to deregulation are not necessarily contradictory. From a theoretical point of view, one might argue that deregulation of international commercial arbitration is to a large extent based upon the law of the place of arbitration which provides for deregulation and sets forth its conditions and limits.<sup>1</sup>

### 1. Introduction

In order to determine the applicable law in any given arbitral proceeding, one must first establish the tribunals' source of authority to render awards. This issue, which is intrinsically linked to the nature of the tribunals, has given rise to different theories, the most prominent of which are the seat theory and the delocalization theory. Following an assessment of these theories in light of state practice in the form of national arbitration laws, treaties, and jurisprudence, together with arbitration rules, awards, and scholarship, we will conclude that the tribunals may be divided into two categories. Based on the international principle of territorial sovereignty, coupled with considerations of due process, finality, and consistency, the tribunals' mandate may generally be said to stem from the state in which the tribunal is seated. Most types of investment tribunals may therefore be classified as 'territorialized'.<sup>2</sup> However, and by way of exception, states may relinquish their sovereign right to regulate activities taking place on their territory; and in the area of investment arbitration, this is the case with respect to tribunals established pursuant to the (ICSID) Convention on the Settlement of Disputes between States and Nationals of Other States,<sup>3</sup> and the Iran–United States Claims Tribunal, set up on the basis of the Algiers Accords.<sup>4</sup> These latter tribunals,

<sup>1</sup> F. De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 *Nw. J. Int'l L. & Bus.* 48, 69.

<sup>2</sup> In terms of numbers of arbitrations, however, these territorialized tribunals are probably in the minority. It is difficult, if not impossible, to give an exact percentage, as arbitrations conducted outside the ICSID framework are not always registered. Yet, there are some estimates. See S. Wittich, 'The Limits of Party Autonomy in Investment Arbitration' in *Investment and Commercial Arbitration: Similarities and Divergences* (C. Knahr, ed., Utrecht, Eleven International Publishing, 2010), 47, 48 ('With 63.5 per cent of the known investment disputes, ICSID clearly holds the leading position in investment, especially treaty-based arbitration' [references omitted]). Another difficulty is that references to ICSID often include the ICSID Additional Facility Rules. See UNCTAD, 'Latest Developments in Investor–State Dispute Settlement' *IIA Monitor* No. 1 (April 2012), at 1.

<sup>3</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (hereinafter ICSID/Washington Convention).

<sup>4</sup> For the text of the Algiers Accords (1981), including the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), see 1 Iran–U.S. C.T.R. 3 (1981–2).

whose mandate is founded in the international legal order, will be referred to as ‘internationalized’.

As to the structure of our analysis, we will first observe some special features of the arbitral process (**Section 2**). In **Section 3**, we will proceed to examine the delocalization theory and the seat theory, respectively. In brief, adherents of the delocalization theory advocate the view that the arbitral process is—or at least should be—self-contained, with little or no interaction with a particular national legal order. Contrariwise, according to the seat theory, arbitral proceedings are subject to the law of the state in which the award is rendered—also referred to as the tribunals’ juridical seat. While emphasizing the considerable influence that the delocalization theory has had on state practice, it will be concluded that the same state practice supports the seat theory, at least as concerns territorialized tribunals. In **Section 4**, we will discuss separately the internationalized nature of tribunals operating pursuant to a treaty regime—the Iran–United States Claims Tribunal and ICSID tribunals—before reaching general conclusions in **Section 5**.

## 2. Features of the Arbitral Process

An inherent feature of and requirement in arbitration is consent. In other words, it is up to both parties to the dispute to agree to settle it through arbitration.<sup>5</sup> The arbitral process thus differs from national litigation in that the jurisdiction of domestic courts does not depend on the consent of the respondent.<sup>6</sup> The process is rather more akin to that before international courts and tribunals, as the latter do require the consent of both states parties in order to render a judgment or an award.<sup>7</sup>

In investment arbitration, the parties’ consent is provided for in their arbitration agreement, which may refer to an existing dispute (*compromis*); or, more commonly, it may be contained in an arbitration clause concerning future disputes (*clause compromissoire*).<sup>8</sup> The latter may be found in an investment contract entered into by the disputing parties; or it may be included in the national legislation of the host state, or in a bi- or multilateral investment treaty to which the host state and the investor’s home state are parties.<sup>9</sup> Since the mid-1980s, numerous awards have been rendered on the basis of host state consent provided in investment laws; or especially in recent years, investment treaties, adopted or entered into by the host state with regard to disputes arising out of investments made in its territory.<sup>10</sup> The term ‘arbitration without privity’ has been used to describe this mode of arbitrating, whereby the host state makes its

<sup>5</sup> See generally C. Schreuer, ‘Consent to Arbitration’ in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 830. But see A.M. Steingruber, *Consent in International Arbitration* (Oxford, Oxford University Press, 2012), 1 ([T]he certainty that “arbitration is consensual by nature” or that “arbitration is a creature of contract” has begun to be questioned).

<sup>6</sup> See G. Biehler, *Procedures in International Law* (Berlin, Springer, 2008), 35.

<sup>7</sup> See *Status of Eastern Carelia Case (Fin. v USSR)*, 1923 PCIJ (Ser. B) No. 5, at 27 (Advisory Opinion of 23 July).

<sup>8</sup> United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006, with Explanatory Note) (hereinafter UNCITRAL Model Law), Explanatory Note, para. 18.

<sup>9</sup> Cf. *Salini Construtorri S.p.A. and Italstrade S.p.A. v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (R. Briner, B. Cremades, I. Fadlallah, arbs), para. 27.

<sup>10</sup> See A.R. Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment’ (1997) 12(2) *ICSID Rev-FILJ* 287. See also Chapter 1, Sections 2–3 (on motivations for the study and the scope of and terminology used in the study); Chapter 4, Section 3.2 (on arbitration without privity).

offer to arbitrate disputes with foreign investors, and it is up to the investor to accept the offer by instituting proceedings against the host state.<sup>11</sup> As stated in *El Paso Energy International Company v Argentine Republic* (2006):

[An ICSID tribunal] can only have jurisdiction if there is mutual consent. It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State [...], and that the filing of a request by the investor is considered to be the latter's consent.<sup>12</sup>

The instruments that provide for consent will to a greater or lesser extent set out the framework for the arbitration. The parties may formulate their own rules in this respect,<sup>13</sup> but most often they refer to a standard set of arbitration rules. These rules may provide for either non-institutionalized (ad hoc) or institutionalized arbitration. The former is illustrated by the UNCITRAL Arbitration Rules<sup>14</sup> and the latter by the rules promulgated by (private) institutions across the world, such as the International Chamber of Commerce (ICC),<sup>15</sup> the London Court of International Arbitration (LCIA),<sup>16</sup> the Stockholm Chamber of Commerce (SCC),<sup>17</sup> the American Arbitration Association (AAA),<sup>18</sup> the Cairo Regional Centre for International Commercial Arbitration (CRCICA),<sup>19</sup> the China Council for the Promotion of International Trade/China Chamber of International Commerce (CIETAC),<sup>20</sup> the Netherlands Arbitration Institute (NAI),<sup>21</sup> the Dubai International Arbitration Centre,<sup>22</sup> and the World Bank.<sup>23</sup>

<sup>11</sup> J. Paulsson, 'Arbitration Without Privity' (1995) 10(2) *ICSID Rev.-FILJ* 232. See also V. Heiskanen, 'Forbidding Dépeçage: Law Governing Investment Treaty Arbitration' (2009) 32 *Suffolk Transnat'l L. Rev.* 367, 373 ('In such a legal construction, the agreement to arbitrate is not part and parcel of an arm's length transaction. It is expressed in two independent consents—or an "offer" and an "acceptance"—that remain separated by the invisible sovereign veil of the state, which is never pierced by the handshake of the parties. But this strange transnational transaction is not only separated in terms of jurisdictional space. It is also separated in terms of time, since at the time when the foreign investor accepts the state's offer to arbitrate, the dispute between the parties has already arisen').

<sup>12</sup> *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (L. Caflisch, B. Stern, P. Bernardini, arbs), para. 25.

<sup>13</sup> See UNCITRAL, *Notes on Organizing Arbitral Proceedings*, XXVII UNCITRAL Y.B. (1996), at para. 16.

<sup>14</sup> UNCITRAL Arbitration Rules (as revised in 2010). See also J.D. Franchini, 'International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement' (1994) 62 *Fordham L. Rev.* 2223, 2226–7 (the UNCITRAL Arbitration Rules may also be used by tribunals set up under institutions such as the ICC, in which case the parties stipulate that the UNCITRAL Rules will substitute for the institution's rules).

<sup>15</sup> Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012) (hereinafter ICC Rules).

<sup>16</sup> London Court of International Arbitration (LCIA) Arbitration Rules (effective 1 January 1998) (hereinafter LCIA Rules).

<sup>17</sup> Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (as in force as from 1 January 2010) (hereinafter SCC Rules).

<sup>18</sup> American Arbitration Association, International Center for Dispute Resolution (ICDR) International Dispute Resolution Procedures (Arbitration Rules amended and effective 1 June 2009).

<sup>19</sup> Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules (in force as from 1 March 2011) (hereinafter CRCICA Rules).

<sup>20</sup> China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (effective 1 May 2012).

<sup>21</sup> Netherlands Arbitration Institute (NAI) Arbitration Rules (effective 1 January 2010) (hereinafter NAI Rules).

<sup>22</sup> Dubai International Arbitration Centre (DIAC) Arbitration Rules (effective 7 May 2007).

<sup>23</sup> See ICSID Convention; ICSID Additional Facility Rules (as amended and in effect from 10 April 2006).

Whereas ad hoc arbitration gives the parties the utmost control over the procedure, institutionalized arbitration adds the comfort element of knowing that the institution has experience in the way it handles arbitral proceedings; and often, their secretariat comprises counsel to whom the parties and arbitrators may turn for advice.<sup>24</sup> Also, the institutions may fulfil a more stringent supervisory role than each tribunal in isolation. The work of ICC arbitral tribunals, for instance, is monitored by the ICC International Court of Arbitration, which oversees the arbitration process from the initial request to the final award.<sup>25</sup>

Apart from neutrality,<sup>26</sup> one reason for resorting to arbitration is the comparative flexibility it provides to parties and arbitrators as opposed to court litigation. Arbitration rules allow the disputing parties much freedom in tailoring the proceedings to suit their special wishes; and they provide default provisions that apply in case the parties have not agreed otherwise. Such procedural freedom is illustrated by the UNCITRAL Arbitration Rules, which state that disputes shall be settled in accordance with these Rules ‘subject to such modification as the parties may agree’.<sup>27</sup> Further, it is often explicitly mentioned that the parties may agree on such matters as the identity of the arbitrator(s) or an appointing authority;<sup>28</sup> the place of arbitration;<sup>29</sup> and, as will be amply demonstrated in the subsequent chapters, the law applicable to the merits of the dispute.<sup>30</sup> Some rules, however, are mandatory in nature, such as the requirement that the parties must be treated with equality and be given a reasonable opportunity of presenting their case.<sup>31</sup>

Other noteworthy features of the arbitral process include first, the doctrine of *Kompetenz/Kompetenz*, by virtue of which tribunals may rule on their own jurisdiction.<sup>32</sup> Secondly, arbitrators may render an award despite the fact that a party does not appear or otherwise frustrates the proceedings.<sup>33</sup> A last characteristic is the final and binding nature of the award. The SCC Rules, for instance, provide that ‘[a]n award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay.’<sup>34</sup>

<sup>24</sup> See U. Onwuamaegbu, ‘International Dispute Settlement Mechanisms—Choosing Between Institutionally Supported and Ad Hoc’; and ‘Between Institutions’ in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 63, 64.

<sup>25</sup> See ICC Rules (2012), arts 1, 33. See also J.P. Gaffney, *The Liberty of Decision of the Arbitral Tribunal*, TDM (6 June 2008).

<sup>26</sup> Cf. I. Alvik, *Contracting with Sovereignty* (Oxford, Hart, 2011), 44 ([T]he foreign investors are sceptical towards litigation in national courts. This is not necessarily only because it is believed that the courts will be corrupt or unreliable or openly partisan as such. Even the most impartial national court may show greater understanding for the concerns of its home government than a neutral and detached international judge’).

<sup>27</sup> UNCITRAL Arbitration Rules (2010), art. 1(1). See also ICSID Convention (1965), art. 44.

<sup>28</sup> See UNCITRAL Arbitration Rules (2010), arts 6–7; ICSID Convention (1965), art. 37(2).

<sup>29</sup> See UNCITRAL Arbitration Rules (2010), art. 18; ICSID Convention (1965), arts 62–3.

<sup>30</sup> See generally Chapter 3, Section 3.1 (on party agreement on the applicable law). See also Chapter 5, Section 2.1 (on party agreement on the application of national law); Chapter 6, Section 2.1 (on party agreement on the application of international law).

<sup>31</sup> See UNCITRAL Arbitration Rules (2010), art. 17(1). Reference is also made to the impartiality and independence of the arbitrators. See SCC Rules (2010), art. 14; ICSID Convention (1965), art. 14.

<sup>32</sup> See, e.g., LCIA Rules (1998), art. 23.1; ICSID Convention (1965), art. 41(1). See also *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. (TOPCO/CALASIATIC) v Gov’t of the Libyan Arab Republic*, Decision on Jurisdiction, 27 November 1975 (Dupuy sole Arb.), 53 I.L.R. 389, 407 (1979).

<sup>33</sup> See SCC Rules (2010), art. 30; ICSID Convention (1965), art. 45(2).

<sup>34</sup> SCC Rules (2010), art. 40; ICSID Convention (1965), art. 53(1); Iran–US Claims Settlement Declaration (1981), art. IV(1).

Several sets of arbitration rules stipulate that the parties to the proceedings waive any form of recourse against the award.<sup>35</sup>

### 3. Territorialized Tribunals

With the aim of identifying the origin of the mandate of arbitral tribunals, we will in what follows examine the delocalization theory and the seat theory.<sup>36</sup> It will be demonstrated that the former theory has had much impact as to the extent to which states regulate arbitration proceedings. In particular, this is illustrated by the degree of procedural freedom and flexibility that national arbitration laws grant the disputing parties and the arbitrators. Nevertheless, the same state practice confirms the seat theory in that it uniformly lays down requirements for the arbitral process. While the delocalization theory thus has had a strong normative impact on the way in which states regulate arbitration, empirically, the seat theory is better suited to explain the regulation that in fact takes place. As the mandate of the tribunals therefore must be said to stem at least partly<sup>37</sup> from the national legal order in which they are seated, the nature of the tribunals will be characterized as ‘territorialized’. It is noted at the outset that this designation does not apply to the Iran–United States Claims Tribunal and ICSID tribunals, which by virtue of the treaties establishing them are insulated from the application of the national law of their seat. For that reason, their legal framework is separately in Section 4.

#### 3.1. The delocalization theory

The features of the arbitral process explored in Section 2 have led certain scholars to conclude that the tribunals are, or—at the very least—should be, characterized as delocalized, a-national, or supranational.<sup>38</sup> In short, this body of scholarship argues that the parties ought to be able to agree to have their dispute settled in accordance with their arbitration agreement and the arbitration rules to which it may refer, without or with minimal interference from any national legal order.<sup>39</sup> According to Lew,

<sup>35</sup> See, e.g., ICC Rules (2012), art. 34(6); LCIA Rules (1998), art. 26.9. Both instruments add the important condition that such waivers must be ‘validly made’. See also art. 29.2.

<sup>36</sup> According to Paulsson, there are ‘four more or less competing propositions. The first is that any arbitration is perforce national, and lives or dies according to the law of the place of arbitration. This might be called the *territorial* thesis. The second is that arbitration may be given effect by more than one legal order, none of them inevitably essential. This is the *pluralistic* thesis. The third is that arbitration is the product of *an autonomous legal order accepted as such by arbitrators and judges*. The fourth is that arbitration may be fully effective pursuant to *conventional arrangements that do not depend on national law or judges at all*’. J. Paulsson, ‘Arbitration in Three Dimensions’ (2011) 60(2) *Int'l & Comp. L.Q.* 291, 292 (emphasis in original). See also E. Gaillard, ‘The Representations of International Arbitration’ (2010) 1(2) *J. Int'l Disp. Settlement* 1, 9 (referring to the ‘monolocal’, ‘multilocal’, and ‘transnational’ approach); E. Gaillard, *Legal Theory of International Arbitration* (Leiden, Nijhoff, 2010).

<sup>37</sup> That is, next to the parties’ arbitration agreement. See fn. 77 (on the hybrid theory).

<sup>38</sup> See, e.g., J. Paulsson, ‘Arbitration Unbound: An Award Detached from the Law of its Country of Origin’ (1981) 30 *Int'l & Comp. L.Q.* 358; P. Lalivé, ‘Les Règles de Conflit de Lois Appliquées au Fond du Litige par l’Arbitre International Siegent en Suisse’ (1976) *Rev. de l’arbitrage* 155.

<sup>39</sup> Cf. N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 188. (The authors explain the delocalization theory as ‘the idea being that instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control—that of the place of enforcement. In this way, the whole world (or most of it) would be available for international commercial arbitrations; and international commercial arbitration itself would be “supra-national”, “a-national”, “transnational”, “delocalised”, or even “expatriate”. More poetically, such an arbitration would be a “floating arbitration”, resulting in a “floating award”’)

The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognised and given effect, with little or no complication or review, by national courts.<sup>40</sup>

More forcefully, Goldman concludes: ‘Unless one adopts the irrational and unjustifiable system of attaching the arbitral process to its seat [...] any search for a way of grounding the arbitration in some system leads one unavoidably to the need for an autonomous non-national system.’<sup>41</sup> And in 1989, the Institute of International Law adopted a resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises,<sup>42</sup> in which it explicitly rejects juridical and philosophical objections to a-national or denationalized arbitration.<sup>43</sup>

Various considerations of both a theoretical and practical nature have been put forward in favour of the delocalization theory. Foremost of these, its proponents emphasize the parties’ underlying arbitration agreement, which, they point out, constitutes the foundation for the establishment of the tribunals. Von Mehren, for instance, in his function as rapporteur to the aforementioned resolution of the Institute of International Law, refers to the primacy of the arbitration agreement as the arbitration’s ‘charter’.<sup>44</sup> In addition to the fact that the state has no influence or control over the decision of the parties to agree to submit their disputes to arbitration, a further and related argument concerns the inherent differences between arbitrators and national judges. Whereas the latter derive their authority from the state, the former—it is contended—do not owe allegiance to any state; and consequently, they are not responsible for upholding their laws.<sup>45</sup> Combined, these considerations have given rise to what has been termed the contractual theory.<sup>46</sup>

Arbitration frequently takes place in a state different from the home state of any of the parties to the proceedings.<sup>47</sup> With this in mind, the supporters of the delocalization

[references omitted]). See also Paulsson, fn. 36, at 298 (“So-called “delocalised awards” are *not* thought to be independent of any legal order. “Delocalisation” refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it. “Plurilocalisation” would perhaps have been more accurate” [emphasis in original, references omitted]).

<sup>40</sup> J.D.M. Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) 22(2) *Arb. Int’l* 179.

<sup>41</sup> B. Goldman, ‘Les Conflits de Lois dans l’Arbitrage International de Droit Privé’ (1963 II) 109 *Recueil des Cours* 351, 379–80 (translation into English by W.W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford, Oxford University Press, 2006), 16, at fn. 78).

<sup>42</sup> Institute of International Law (IIL), ‘Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises’ 12 September 1989, 63-I *Yearbook* (1989), 31–201 (hereinafter IIL Resolution).

<sup>43</sup> IIL Resolution, Explanatory Note by A.T. von Mehren.

<sup>44</sup> IIL Resolution (referring to the doctrine of *pactum facit arbitrum*). See also art. 1; A.T. von Mehren, ‘Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law’s Santiago de Compostela Resolution’ (1990) 5(1) *ICSID Rev-FILJ* 54.

<sup>45</sup> See Lalive, fn. 38, at 159, quoted in Paulsson, *Arbitration Unbound*, fn. 38, at 362 (the arbitrator’s mission, conferred by the parties’ consent, is one of a private nature, ‘and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration’).

<sup>46</sup> See J.D.M. Lew et al., *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), 77–9.

<sup>47</sup> See P. Read, ‘Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium?’ (1999) 10 *Am. Rev. Int’l Arb.* 177, 178. But see *ADF Group Inc. v United States*, ICSID Case No. ARB (AF)/00/1, Procedural Order No. 2 (C.B. Lamm, A. de Mestral, F.P. Feliciano, arbs), para. 21. See also M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel, Helbing und Lichtenhahn, 1999), 210 (A ‘clearly noticeable trend’ is that host countries for large investment or infrastructure projects will not only impose their own national laws, but also their own

theory point to the transnational nature of the arbitration, and challenge the burden placed upon it by the law of the tribunal's seat.<sup>48</sup> While national courts and purely domestic arbitral tribunals have intrinsic connections with the seat, arbitral tribunals resolving disputes involving parties from different states are often chosen for reasons of convenience; and in case the parties cannot agree on the place of arbitration, the seat may be selected by the tribunal and/or the arbitral institution.<sup>49</sup> It has therefore been argued that arbitrators should not seek guidance from the law of the tribunal's seat, especially as this law is not drafted to tailor to the needs of international commercial arbitration.<sup>50</sup>

It has further been pointed out that an important reason why the parties to a transnational dispute agree to submit a dispute to arbitration is that they aim to place their relationship on a non-national plane, so as to avoid all national (courts of) law(s).<sup>51</sup> This view has been advanced in particular for investment arbitration on the basis that a state party to arbitral proceedings must be presumed not to have intended to expose itself to the laws of another state. In this vein, the tribunal in *Saudi Arabia v Arabian American Oil Company (Aramco)* (1958) held that the jurisdictional immunity of states 'excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases'.<sup>52</sup>

While arbitration has been described as a form of non-national, private justice system,<sup>53</sup> some have gone beyond the sole rejection of any link to a national legal order and have sought to ground the arbitral process in the international legal order. For instance, the tribunal in *Aramco* concluded that 'the arbitration, as such, can only be governed by international law', rather than the law of the seat, Geneva, Switzerland.<sup>54</sup> Also, sole Arbitrator Dupuy in *Texaco Overseas Petroleum Company and California Asiatic Oil Company (Topco/CALASIATIC) v Government of the Libyan Arab Republic* (1977) stated that '[o]ne cannot accept that the institution of arbitration should escape the reach of all legal systems and be somehow suspended in vacuo', and that therefore, the arbitration was 'directly governed by international law'.<sup>55</sup> A final example here is the decision by sole Arbitrator Mahmassani, sitting in Geneva, who, in the case of *Liamco v Libya*, determined that 'in his procedure [he] shall be guided as much as possible by the general principles contained in the [Model Rules] on Arbitral Procedure of the International Law Commission'.<sup>56</sup> In the final award, he offered the following reason for this decision: 'It is an accepted principle of international law that the arbitral rules of procedure shall be

dispute resolution mechanism, such as arbitration in Taipei under the Taiwanese Arbitration Act of 1961/1986 or the China International Economic and Trade Arbitration Commission (CIETAC).).

<sup>48</sup> See, e.g., J. Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *Intl & Comp. L.Q.* 53, 59.

<sup>49</sup> See, e.g., ICC Rules (2012), art. 12.

<sup>50</sup> See, e.g., Paulsson, *Arbitration Unbound*, fn. 38, at 369 (referring to practice freeing transnational contracts from 'national Procrustean beds').

<sup>51</sup> See Lew, fn. 40, at 180–1; C.N. Fragistas, 'Arbitrage étranger et arbitrage international en droit privé' (1960) *Rev. Crit.* 1, 17.

<sup>52</sup> *Saudi Arabia v Arabian American Oil Co. (Aramco)*, Award, 23 August 1958 (Sauser-Hall, Badawi/M. Hassan, Habachy, arbs.), 27 I.L.R. 117, 136, 154–5 (1963) (hereinafter ARAMCO).

<sup>53</sup> See R. David, *L'arbitrage dans le commerce international* (Paris, Economica, 1982), at para. 85. See also *Dell Computer Corp. v Union des consommateurs*, Supreme Court of Canada, 13 July 2007, 2007 SCC 34, at paras 131–3.

<sup>54</sup> ARAMCO, fn. 52, Award, 27 I.L.R. 117, 154–6.

<sup>55</sup> TOPCO/CALASIATIC, fn. 32, Award, 19 January 1977 (Dupuy, sole arb.), at para. 16.

<sup>56</sup> *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award, 12 April 1977 (S. Mahmassani, sole arb.), 20 I.L.M. 1 (1981).

determined by the agreement of the parties, or in default of such agreement, by decision of the Arbitral Tribunal, independently of the [...] law of the seat.<sup>57</sup>

Speaking of international commercial arbitration in general, Lalive suggests:

While he is clearly not an organ of the State, the international arbitrator is not acting in a legal vacuum and is not called upon to decide, so to speak, as if he did not belong to this world! The question may be raised here, in passing [...] whether the arbitrator is not, perhaps, the organ of the international community, be it the community of States or the ‘international community of businessmen’ (in which more and more States and State organs appear to be active) or both international communities.<sup>58</sup>

This suggestion was taken up by the Institute of International Law in its 1989 Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises.<sup>59</sup> In the Explanatory Note to this Resolution, Rapporteur von Mehren states that the tribunal’s authority originates in an international order resting ‘on a broad consensus to the effect that those engaged in international commercial and economic intercourse are entitled to establish a dispute-resolution process—and to stipulate for its use a body of substantive rules and principles—that exists and operates independently of national legal orders’.<sup>60</sup> In a similar sense, Gaillard describes a ‘transnational’ ‘representation of international arbitration’ according to which ‘the legally binding nature of arbitration is rooted in a distinct, trans-national legal order, that could be labelled as the “arbitral legal order”’.<sup>61</sup> In this ‘representation’, he states, the arbitrator is analogized with an international judge; and the award is seen as a ‘decision of international justice, just as would be a decision rendered by a permanent international court established by the international community. It is neither national nor Stateless; it is international’.<sup>62</sup>

Indicative of the view that arbitral tribunals have an international *lex arbitri* is also the statement by the UNCITRAL Tribunal in *Methanex v United States* (2005), according to which the tribunal finds itself bound by ‘international constitutional law’:

[T]he Tribunal agrees with the implication of Methanex’s submission with respect to the obligations of an international tribunal—that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties’ choices of law that are inconsistent with such principles.<sup>63</sup>

As will be demonstrated later, the delocalization theory has had much influence on state practice in that states have adopted flexible arbitration laws tailored to the needs of the

<sup>57</sup> LIAMCO, 20 I.L.M. 1, 42 (1981).

<sup>58</sup> P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series No. 3 (1986), para. 44. See also Fragistas, fn. 51, at 14–15 (‘[L]’arbitrage supranational doit donc être un arbitrage international, c’est-à-dire un arbitrage qui échappe à l’emprise de tout droit national pour être soumis directement au droit international’).

<sup>59</sup> IIL Resolution, fn. 42.

<sup>60</sup> IIL Resolution, Explanatory Note by von Mehren. See also J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, NY, Oceana Publications, 1978), 540 (Lew refers to arbitrators as ‘the guardians of the international commercial order’). The resolution does not cover arbitration conducted pursuant to treaties, such as the ICSID Convention; and consequently it does not apply to the Iran–United States Claims Tribunal and ICSID tribunals. Resolution, at Preamble (the ‘Resolution is without prejudice to applicable provisions of international treaties’).

<sup>61</sup> Gaillard, *The Representations of International Arbitration*, fn. 36, at 9.

<sup>62</sup> Gaillard, *The Representations of International Arbitration*, at 9.

<sup>63</sup> *Methanex v United States*, Final Award, 3 August 2005 (J.W.F. Rowley, W.M. Reisman, V.V. Veeder, arbs), at Part IV, Chapter C, p. 11, para. 24.

business community. While at first glance it might seem reasonable to construe such practice so as to indicate a belief—or *opinio juris*—that the arbitration process is indeed grounded in the international legal order, it is our view that this theory of internationalization falls short of explaining the practice that has given rise to the seat theory, and that will be examined in what follows.

### 3.2. The seat theory

As highlighted earlier in the section devoted to the arbitral process,<sup>64</sup> there are important differences between national courts and arbitral tribunals. Contrary to litigation, arbitration is voluntary as it depends upon the existence of an arbitration agreement. Further, and in line with this agreement, it is generally the parties—not the state in which the arbitration is held—that appoint the arbitrators. Accordingly, arbitral tribunals do not fit the mould of state organs.<sup>65</sup>

This conclusion does not, however, carry with it the inference that the tribunals are not subject to the law of the state in which they are seated. States have the inherent right to regulate all persons and things on their territory, as long as such regulation is not inconsistent with international law.<sup>66</sup> While admittedly, the links between the arbitral process and the designated seat are often tenuous,<sup>67</sup> states have—in what constitutes important state practice—positively exercised this right of regulation by enacting laws that impose requirements and possible sanctions on proceedings conducted and awards rendered on their territory.<sup>68</sup> Such practice, which receives direct or indirect support in arbitration rules, arbitration awards, and the (New York) Convention on the Recognition and Enforcement on Foreign Arbitral Awards,<sup>69</sup> may explain the observation that ‘[i]n the absence of an international treaty that sanctions [delocalization], such a system has not become a reality, thus far existing only in “academic dreamland”’.<sup>70</sup> It also explains why von Mehren, in his Explanatory Note to the Resolution by the Institute of International Law, includes the important caveat that the resolution ‘does not address

<sup>64</sup> See Section 2 (on features of the arbitral process).

<sup>65</sup> Cf. *Gordian Runoff Limited v Westport Insurance Corporation*, 1 April 2010 [2010] NSWCA 57, para. 216; *Salini Costruttori S.p.A. v Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Award, 7 December 2001, ICC Case No. 10623, discussed in J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, Thomson Sweet & Maxwell, 2007), 116–17; Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG* [1982] ECR 1095.

<sup>66</sup> See E. Lauterpacht, ‘The World Bank Convention on the Settlement of International Investment Disputes’ in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Genève, Tribune, 1968), 642, 649 ([T]here does not appear to be any rule of customary international law (except perhaps the possible application of the rules relating to State immunity to the State party to the arbitration) which prescribes an obligation of restraint by the “host” State in relation to such arbitration’ [references omitted]); K.-H. Böckstiegel, ‘The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules’ (1984) 1(3) *J. Int’l Arb.* 223, 230.

<sup>67</sup> Cf. G. Petrochilos, *Procedural Law in International Arbitration* (Oxford, Oxford University Press, 2004), at 23–4.

<sup>68</sup> See D.G. Terez (Reporter), ‘International Commercial Arbitration and International Public Policy’ (1987) 81 *Am. Soc’y Int’l L. Proc.* 372, 373 (Comment by A. Redfern: ‘[N]ations do not and will not relinquish easily their influence in the resolution of disputes taking place on their territories’).

<sup>69</sup> See Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

<sup>70</sup> R.Y. Chan, ‘The Enforceability of Annulled Foreign Arbitral Awards in the United States: a critique of Chromalloy’ (1999) 17 *B.U. Int’l L.J.* 141 (referring to A.J. van den Berg, ‘Annulment of Awards in International Arbitration’ in *Arbitration in the 21st Century* (R. Lillich and C. Brower, eds, 1994), 133, 134).

the kind or degree of control exercised by national legal systems over arbitrations'.<sup>71</sup> In fact, a prominent member of the Institute criticized the resolution, partly on the basis of the 'undue extent to which it minimizes the importance of the law of the seat of arbitration'.<sup>72</sup>

As will be shown, the role of the tribunal's juridical seat does not only reflect state practice; a rooting of the arbitral process in a legal system may safeguard due process.<sup>73</sup> Moreover, it is desirable from a practical point of view.<sup>74</sup> In this vein, and while otherwise advocating 'full procedural autonomy' for the arbitral process, Blessing observes:

[T]he parties expect the arbitration law applicable at the seat of the arbitral tribunal to contain those statutory provisions which are necessary in order to ensure that an arbitral tribunal can *validly be constituted* and can be 'kept alive' until an arbitral award is handed down, and thereby that there is a *reliable local court system* in existence to provide support (to the extent necessary) in the appointment, challenging or replacement of arbitrators. [...] The parties also expect a national judiciary to provide other judicial support (if necessary), e.g. in relation to the taking of evidence or in the pronouncement of, or assistance in, interim measures.<sup>75</sup>

The foregoing considerations form the basis for the seat theory,<sup>76</sup> which deems arbitral tribunals to be subject to the national legal order in which they are juridically seated, and that consequently considers the tribunals' mandate to stem at least partly<sup>77</sup> from national law.<sup>78</sup>

<sup>71</sup> IIL Resolution, fn. 42, Explanatory Note by von Mehren.

<sup>72</sup> I.F.I. Shihata, 'The Institute of International Law's Resolution on Arbitration between States and Foreign Enterprises—A Comment' (1990) 5(1) *ICSID Rev.-FILJ* 65, 66, at fn. 3. See also at 65 ('While the Resolution as a whole was adopted by a large majority [...], some of its provisions were opposed by many members and associates of the Institute, including this writer').

<sup>73</sup> See Section 3.2.4 (on considerations of due process, finality, and consistency).

<sup>74</sup> See Section 3.2.4. See also Petrochilos, fn. 67, at 26 (for Petrochilos, not territoriality as such, but rather considerations of effectiveness and speak in favour of the territorial thesis).

<sup>75</sup> Blessing, fn. 47, at 159 (emphasis in original). See also Blackaby et al., fn. 39, at 438 ('Arbitration is dependent on the underlying support of the courts which alone have the power to rescue the system when one party seeks to sabotage it').

<sup>76</sup> For other terminology, see, e.g., L.J. Bouchez, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises' in *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1988–1987)* (A.H.A. Soons, ed., Dordrecht, Martinus Nijhoff, 1990), 109, 127 (referring to the 'territorial principle'); Gaillard, *The Representations of International Arbitration*, fn. 36, at 9 (referring to the 'monolocal' approach); Petrochilos, fn. 67, at 20 (referring to the 'localization' school); V. Danilowicz, 'The Choice of Applicable Law in International Arbitration' (1986) 9 *Hastings Int'l & Comp. L. Rev.* 235, 243 (referring to the 'territorial (or jurisdictional) approach'); H.L. Yu and L. Shore, 'Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives' (2003) 52 *Int'l & Comp. L.Q.* 935 (The authors adhere to the 'concessionary theory', which implies that 'the State, not the parties and not the arbitrators, controls the arbitral process. It is only the State that can cede powers to the parties and to the arbitrators').

<sup>77</sup> A theoretical underpinning that has been offered in favour of the seat theory is the *hybrid theory*, which acknowledges the fact that the mandate of the tribunals concurrently stems from the arbitration agreement and the state that gives effect to that agreement, the arbitral proceedings, and the binding award, i.e., the tribunal's seat. See G. Sauser-Hall, 'Report to the Institut de Droit International' (1957) 47-II *Annuaire de l'Institut de Droit International* 394, 399 (the contractual and jurisdictional elements of arbitration are 'indissolubly intertwined'). Cf. W.W. Park, 'Judicial Controls in the Arbitral Process' (1989) 5(3) *Arb. Int'l* 230, 237 ('The authority of an arbitrator [...] derives not only from the consent of the parties, but also from the several legal systems that support the arbitral process: the law that enforces the agreement to arbitrate, the forum called on to recognise and enforce the award, and the law of the place of the proceedings').

<sup>78</sup> See C. McLachlan et al., *International Investment Arbitration* (Oxford, Oxford University Press, 2007), at Section 3.33; F.A. Mann, 'Lex Facit Arbitrum' in *International Arbitration: Liber Amicorum for Martin Domke* (P. Sanders, ed., The Hague, Martinus Nijhoff, 1967), 157, 160; W.W. Park, The *Lex Locis Arbitrii* and International Commercial Arbitration (1983) 32 *Int'l and Comp. L.Q.* 21. Cf.

Of course, it is open to states to sign away their sovereign right to regulate arbitration taking place on their territory; and this is the case for the States Claims Tribunal and ICSID tribunals. They truly operate in the international legal order; and for that reason, they will be examined separately in Section 4.

### 3.2.1. National arbitration laws

As concerns state practice, we note in particular the 1985 UNCITRAL Model Law on International Commercial Arbitration, which establishes a national procedural framework for arbitration in those states that adopt it as part of their national law.<sup>79</sup> As indicated by its title, the Model Law concerns ‘international commercial arbitration’, as opposed to purely domestic arbitration;<sup>80</sup> and it applies to arbitration whether or not administered by a permanent arbitration institution.<sup>81</sup> In the words of the UNCITRAL Secretariat, the Model Law ‘reflects a worldwide consensus on the principles and important issues of international arbitration practice’.<sup>82</sup> With its objective of harmonizing the treatment of international commercial arbitration in the various states,<sup>83</sup> it has so far been quite successful as it is increasingly being adopted by developed and developing states alike.<sup>84</sup> For that reason, it is appropriate to use the Model Law to illustrate state practice in the area of national arbitration laws.

#### 3.2.1.1. The territorial criterion and the nationality of awards

An important feature of the UNCITRAL Model Law is that it applies a strict territorial criterion. That is, with a few exceptions, it applies to arbitration conducted on the territory of the given state, the tribunal’s juridical seat: ‘The provisions of this Law, except articles [...], apply only if the place of arbitration is in the territory of this state.’<sup>85</sup> Under the UNCITRAL Model Law, the parties are free to incorporate into their arbitration agreement procedural provisions of a ‘foreign’ law, provided there is no conflict with the few mandatory provisions of the Model Law.<sup>86</sup> Still, by virtue of the territorial criterion, awards rendered in a Model Law state will have that state’s

*Bank Mellat v Helleniki Techniki S.A.* [1984] QB 291, 301 (‘Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any other municipal system of law’).

<sup>79</sup> UNCITRAL Model Law 2006.

<sup>80</sup> UNCITRAL Model Law, art. 1. See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>81</sup> UNCITRAL Model Law (2006), art. 2(a). Since the term ‘commercial’ is given a broad definition, the Model Law also applies to mixed arbitration proceedings between a foreign investor and a host State. See art. I, fn. \*\*.

<sup>82</sup> UNCITRAL, Explanatory Note, fn. 8, at para. 2.

<sup>83</sup> See United Nations General Assembly, Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, Resolution 40/72 of 11 December 1985.

<sup>84</sup> As of 1 May 2012, 66 countries (including certain federal jurisdictions) have enacted legislation based on the Model Law, see UNCITRAL, *Status: 1985—UNCITRAL Model Law on International Commercial Arbitration*, available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_Status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_Status.html)> (last visited 1 May 2012).

<sup>85</sup> UNCITRAL Model Law (2006), art. 1(2). The exceptions relate to recognition of arbitration agreements (art. 8), interim measures of protection (art. 9), and recognition and enforcement of interim measures and arbitral awards (arts 17, 35–66), all of which are given a global scope.

<sup>86</sup> See UNCITRAL, Explanatory Note, fn. 8, at para. 14.

'nationality',<sup>87</sup> and consequently be subject to the requirements of the Model Law as incorporated by that state.<sup>88</sup>

The law of the seat does not only apply to proceedings between two private parties; contrary to the holding of the *Aramco* tribunal,<sup>89</sup> it also applies in disputes involving a state party. As Luzzatto states:

In principle, there can be little doubt, if any, that international arbitration arising from a dispute between States and foreign subjects, under a contractual relationship between the parties, should be put on the same level as arbitrations between two private parties, and not as arbitrations between States, which are governed as such by public international law [...]. The practice of courts and arbitral tribunals confirms this assumption.<sup>90</sup>

Thus, in *Sapphire International Petroleum Ltd v National Iranian Oil Co.* (1963), sole Arbitrator Cavin held that the arbitral decision 'should be subject to the supervision of a State authority, such as the judicial sovereignty of a State', and that '[t]herefore, as far as procedure is concerned, it is subject to the binding rules of the Code of Civil Procedure of Vaud [...]', the place where the tribunal was seated.<sup>91</sup> And the UNCITRAL Tribunal in *Wintershall A.G. et al v Government of Qatar* (1989), seated in the Netherlands, noted that the UNCITRAL Arbitration Rules were subject to any mandatory provisions of the Netherlands Arbitration Law, which would prevail in the event of any conflict.<sup>92</sup> The applicability of the law of the tribunal's juridical seat in investor-state arbitration has been confirmed more recently by the SCC Tribunal in *Petrobart Limited v Kyrgyz Republic* (2005), the latter holding that 'procedural questions which have not been determined by the Treaty will be decided both in accordance with the institutional Rules of the SCC Institute and in accordance with the law of the seat of arbitration, namely Swedish arbitration law'.<sup>93</sup> The applicability of the Swedish Arbitration Act to arbitration proceedings between a private party and a state when the tribunal is seated in Sweden was confirmed by the Swedish Supreme Court in *Rosinvest Co v Russian Federation* (2010):

Pursuant to Section 46, the Act applies to arbitral proceedings which take place in Sweden even where the dispute has an international connection. Also in such proceedings, Swedish courts may be called upon to appoint arbitrators, hear witnesses under oath, rule on arbitrators' fees and hear challenge and invalidation claims in respect of arbitral awards.<sup>94</sup>

<sup>87</sup> C. Söderlund, *The Titan Corporation v Alcatel CIT SA, Decision by the Svea Court of Appeal in Sweden, Case No T 1038–0, 2005*, Stockholm International Arbitration Review (2005:2) (observations).

<sup>88</sup> Cf. Indian Arbitration and Conciliation Act (No. 26 of 1996), section 2(2) (hereinafter Indian Arbitration Act) ('This Part shall apply where the place of arbitration is in India'); G. Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 *V. and J. Transnat'l L.* 1313, 1315.

<sup>89</sup> See Section 3.1 (on the delocalization theory).

<sup>90</sup> R. Luzzatto, 'International Commercial Arbitration and the Municipal Law of States' (1977) 157 *Recueil des Cours* 87–8 (1977). See also G.R. Delaume, 'State Contracts and Transnational Arbitration' (1981) 75 *Am. J. Int'l L.* 784; Lauterpacht, fn. 66, at 649.

<sup>91</sup> *Sapphire Int'l Petroleum Ltd v National Iranian Oil Co.*, Award, 15 March 1963 (Cavin, sole arb.), 35 I.L.R. 136, 169 (1963).

<sup>92</sup> *Wintershall A.G. v Government of Qatar*, Partial Award, February 5, 1988; Final Award, 31 May 1988 (J.R. Stevenson, I. Brownlie, B.M. Cremades, arbs), 28 I.L.M. 795, 801 (1989).

<sup>93</sup> *Petrobart v Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005 (H. Danelius, O. Bring, J. Smets, arbs), p. 23.

<sup>94</sup> *Rosinvest Co v Russian Federation*, Supreme Court of Sweden, Case No. Ö 2301–09, Decision, 12 November 2010, para. 3.

According to the Court, the parties' agreement to hold the proceedings in Sweden was determinative; if this is the case, 'it is irrelevant if the parties or the arbitrators have decided to hold hearings in other countries, if the arbitrators are not from Sweden, if their duties have been carried out in another country or if the dispute concerns a contract which otherwise has no connection to Sweden [...]'.<sup>95</sup> To the same effect, the English Court of Appeals in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta* (2006) held: 'The arbitration leading to the first award took place in Denmark in accordance with the parties' agreement and we think there can be little doubt that the curial law of the proceedings was Danish law.'<sup>96</sup>

A final example is the award in *Jan Oostergel and Theodora Laurentius v Slovak Republic* (2012), in which the UNCITRAL Tribunal confirmed the applicability of the law of its seat, Switzerland: '[T]hese proceedings are governed by the arbitration law of the seat, i.e., by Chapter 12 [Swiss Private International Law Act 1987] PILA and, as provided in Article 8(5) of the BIT, by the UNCITRAL Arbitration Rules (1976).'<sup>97</sup>

### 3.2.1.2. Annulment as an exercise of control

Perhaps the strongest indication that arbitral proceedings are subject to the law of the tribunal's seat is the fact that the national courts of the seat may sanction 'flawed' awards with annulment.<sup>98</sup> According to the UNCITRAL Model Law, annulment may occur in the following situations: first, when a party was under some incapacity, or unable to present its case;<sup>99</sup> secondly, when the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the tribunal's seat;<sup>100</sup> thirdly, the award deals with a dispute, or contains decisions on matters not falling within the arbitration agreement;<sup>101</sup> fourthly, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,<sup>102</sup> or, failing such agreement, was not in accordance with the Model Law as adopted by the seat;<sup>103</sup> fifthly, the subject-matter of the dispute is not capable of

<sup>95</sup> *Rosinvest v Russian Federation*, at para. 4. See also at paras 2, 6.

<sup>96</sup> *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta*, Court of Appeals, Judgment, 13 November 2006 [2006] EWCA Civ 1529, para. 93.

<sup>97</sup> *Jan Oostergel and Theodora Laurentius v Slovak Republic*, Final Award, 23 April 2012 (G. Kaufmann-Kohler, M. Wladimiross, V. Trapl, arbs), para. 142. See also *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010 (K.-H. Böckstiegel, C.N. Brower, A.J. van den Berg, arbs), para. 158; *ADF Group Inc. v United States*, fn. 47, Award, 9 January 2003, para. 31; *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova*, SCC Institute, Award, 22 September 2005, (G. Cordero Moss, sole arb.), Section 2.2.1; *Austrian Airlines v Slovak Republic*, Final Award and Dissenting Opinion (redacted version), 20 October 2009 (G. Kaufmann-Kohler, C.N. Brower, V. Trapl, arbs), para. 81.

<sup>98</sup> See J. Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26(1) *ICSID Rev-FILJ* 128, 132. But see Case No. 2004-10-01, Judgment, Riga, 17 January 2005, Republic of Latvia Constitutional Court, para. 9.1 ('In difference from the greatest number of states, in Latvia [...] the law does not envisage the possibility to raise objection to the arbitrator or request abrogation of the arbitral award. Therefore the control of arbitration courts is concentrated on the stage of issuance of the writ of execution'); R. Chapaev and V. Bradatanu, 'International Commercial Arbitration in the CIS and Mongolia' (2006) 17 *Am. Rev. Int'l Arb.* 411, 442 (on Kyrgyz and Tajik law).

<sup>99</sup> UNCITRAL Model Law (2006), art. 34(2)(a)(i) and (ii).

<sup>100</sup> UNCITRAL Model Law, art. 34(2)(a)(i).

<sup>101</sup> UNCITRAL Model Law, art. 34(2)(a)(iii) (adding that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the latter will be set aside).

<sup>102</sup> UNCITRAL Model Law, art. 34(a)(iv) (unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate).

<sup>103</sup> UNCITRAL Model Law, art. 34(a)(iv).

settlement by arbitration according to the law of the seat;<sup>104</sup> or sixthly, the award is in conflict with the public policy of the seat.<sup>105</sup>

In view of our focus on the applicable law, it should be pointed out that the references to the parties' agreement and to public policy may entail a check to the substantive law applied by the arbitral tribunals.<sup>106</sup> Thus, noted the Swedish Court of Appeal in *Czech Republic v CME Czech Republic B.V.* (2003): 'Where it is evident that the arbitrators have applied the law of a different country in violation of such an agreement [on the applicable law], [...] the award may be set aside on the ground that the arbitrators have exceeded their mandate.'<sup>107</sup> The possibility to annul awards on this basis is explicitly stipulated in the Egyptian Law Concerning Arbitration in Civil and Commercial Matters: 'An action to procure the nullity of the arbitral award is admissible only in the following cases: [...] (d) If the arbitral award fails to apply the law agreed to by the parties to the subject matter of the dispute [...].'<sup>108</sup>

We also note here that in the absence of an agreement by the parties to the contrary, the English Arbitration Act allows for an appeal to the court on a point of law.<sup>109</sup> Held the Court in *Sinclair v Woods of Winchester Ltd (No. 2)* (2006): 'if there is a point of law on which the Arbitrator was obviously wrong, it would be just and proper for the Court to intervene'.<sup>110</sup> While this possibility of relief only applies to questions pertaining to the law of England, Wales, or Northern Ireland,<sup>111</sup> it may be asked whether such law may also be seen to encompass questions of international law. A strong argument can be made that it would at least encompass questions of customary international law, as it is part of the 'law of the land'.<sup>112</sup>

The right of national courts to review and annul awards rendered on their territory is confirmed by judicial practice and in scholarship.<sup>113</sup> As held by national courts in, for instance, Sweden,<sup>114</sup> Denmark,<sup>115</sup> Belgium,<sup>116</sup> Canada,<sup>117</sup>

<sup>104</sup> UNCITRAL Model Law, art. 34(2)(b)(i). On the topic of arbitrability, see generally L.A. Mistelis and S.L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2009).

<sup>105</sup> UNCITRAL Model Law, art. 34(2)(b)(ii). It should be noted that state practice differs as to the grounds for annulment. See Chapaev and Bradautan, fn. 98, at 441.

<sup>106</sup> On the limits of this check, see Section 3.3 (on the influence on the delocalization theory on state practice); Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>107</sup> *Czech Republic v CME Czech Republic B.V.*, Svea Court of Appeal, 15 May 2003, 42 I.L.M. 919, 963 (2003).

<sup>108</sup> Egyptian Law No. 27/1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (as last amended by Law No. 8/2000), art. 53(1) (hereinafter Egyptian Arbitration Law). See also Arbitration Law of Jordan, Law No. 31/2001, 14 June 2001, art. 49(a)(4).

<sup>109</sup> See English Arbitration Act (1996), sections 45, 69. See also New Zealand Arbitration Act (1996), Second Schedule, section 5 (appeals on questions of law). Cf. Park, fn. 41, at 14, 18–20.

<sup>110</sup> *Sinclair v Woods of Winchester Ltd (No. 2)* [2006] EWHC 3003 (TCC), para. 13.

<sup>111</sup> See English Arbitration Act (1996), section 82(1).

<sup>112</sup> See Chapter 5, Section 3.1.1 (on international law as part of the 'law of the land').

<sup>113</sup> See, e.g., C. McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer, 2009), 95, 140; Park, fn. 77, at 232. See also Section 3.2.4 (on considerations of due process, finality, and consistency).

<sup>114</sup> See *Czech Republic v CME Czech Republic B.V.*, fn. 107.

<sup>115</sup> See *Swembalt v Latvia*, Review by the Maritime and Commercial Court, Copenhagen, 7 January 2003, 2003:2 Stockholm Arb. Rep.

<sup>116</sup> See *Eureko B.V. v Republic of Poland*, Judgment of Court of First Instance of Brussels, 23 November 2006.

<sup>117</sup> See *Metalclad Corporation v Mexico*, British Columbia Supreme Court, Statutory Review, 2 May 2001.

Switzerland,<sup>118</sup> France,<sup>119</sup> and the United States,<sup>120</sup> such state practice also extends to arbitration set up pursuant to an investment treaty.<sup>121</sup> In fact, ever more frequently unsuccessful respondents seek to challenge investment arbitration awards in the national courts of the tribunal's juridical seat.<sup>122</sup> One example is Ecuador's request for annulment of the award rendered against it in *Occidental Exploration and Production Company v Ecuador* (2004).<sup>123</sup> The English High Court of Justice accepted jurisdiction on the basis that investors are 'Municipal law entities' and that therefore, the procedural law governing the arbitration is also 'Municipal':

Some of the rights created by the BIT, which is a treaty between the USA and Ecuador on the plane of international law, are rights that are given to a class of entities which exist on the plane of Municipal law, i.e. 'investors'. In particular, the right to arbitrate 'investment disputes' as defined in Article VI.1 [of the BIT] is given to Municipal law entities. That right can be exercised in an arbitral tribunal (set up under UNCITRAL arbitration rules) that will be subject to procedural laws (UNCITRAL arbitration rules and, if the seat is in England, the 1996 [Arbitration] Act), which exist on the 'Municipal' or 'private' or 'domestic' law plane. So, although the rights have their origin in international law, they are rights that are intended to be exercised by Municipal law entities in a tribunal that is subject to control under Municipal laws. [...] In this case, Occidental and Ecuador have agreed that rights with their origin in international law will be considered by a tribunal whose procedure is subject to Municipal law.<sup>124</sup>

This position was upheld by the English Court of Appeal in the same case: 'we see no incongruity in a conclusion that the consensual arbitration intended under the Treaty carries with it the usual procedural and supervisory remedies provided under English law as the relevant procedural law'.<sup>125</sup> The Court stated that it had not been shown any authorities to contrary effect.<sup>126</sup> A similar observation has been made by Crawford with

<sup>118</sup> See, e.g., *La République du Liban v France Télécom Mobiles International S.A., et FTML S.A.L.*, Swiss Federal Tribunal Decision I, 10 November 2005; Swiss Federal Tribunal Decision II, 10 November 2005.

<sup>119</sup> See, e.g., *PrenNreka v Czech Republic*, Recours en Annulation, Court d'Appel de Paris, Judgment, 25 September 2008.

<sup>120</sup> See, e.g., *Republic of Argentina v BG Group PLC*, US Court of Appeals for the District of Columbia, No 11-7021, 17 January 2012 (per Judge Rogers).

<sup>121</sup> See K. Hobé and N. Eliasson, 'Review of Investment Treaty Awards by Municipal Courts' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 635, 668.

<sup>122</sup> See N. Rubins, *Observations on the CME Svea Court Opinion*, Stockholm Arb. Rep. 195 (2003:2), at section 4 ('The ever-more frequent challenges of investment arbitration awards in national courts by defeated State respondents underlines the continuing role of the arbitral situs in international arbitration' [references omitted]). See also A. Reinisch and L. Malintoppi, 'Methods of Dispute Resolution' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 691, 719.

<sup>123</sup> Cf. *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004.

<sup>124</sup> *Republic of Ecuador v Occidental Exploration and Production Company*, High Court of Justice, Queen's Bench Division, Commercial Court, 29 April 2005 [2005] EWHC 774 (Comm) (per Mr Justice Aikens), para. 73. See also at para. 64.

<sup>125</sup> *Republic of Ecuador*, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, 9 September 2005 [2005] EWCA Civ 1116 (Lord Phillips of Worth Matravers MR, Clarke, Mance LJ), para. 55.

<sup>126</sup> *Republic of Ecuador*. See also *Czech Republic v European Media Ventures SA*, Decision on Annulment [2007] EWHC 2851 (Comm). But see G. Sacerdoti, *Case T 8735-01-77, The Czech Republic v CME Czech Republic B.V.*, Svea Court of Appeal (expert legal opinion for CME), TDM 2(5) (2005), at 31–2 ('The courts of the place of arbitration are especially constrained by BITs in their examination of a challenge against an international award based on such a treaty. [...] The limits imposed on the Swedish courts in this respect would stem from the general principle of respect of foreign States sovereignty: "par in parem non habet jurisdictionem"').

respect to tribunals set up pursuant to NAFTA Chapter Eleven: while they are not part of the judicial systems of the contracting states, ‘this does not mean that they are legal Alsatias, beyond any form of jurisdictional control’.<sup>127</sup> Indeed, he points out, it is open to respondent governments to challenge any adverse decision in the same way as any other international arbitral award can be challenged by a party to it, i.e., by proceedings before the courts of the place of arbitration.<sup>128</sup> To the same effect, the NAFTA Tribunal in *Waste Management Inc. v Mexico* (2001) stated:

Unlike arbitration under the ICSID Convention, arbitration under the Arbitration (Additional Facility) Rules is not quarantined from legal supervision under the law of the place of arbitration. The possible requirements of that law are specifically referred to in the Arbitration (Additional Facility) Rules (see Articles 1, 53 (3), (4)). Thus the determination of the place of an Additional Facility arbitration can have important consequences in terms of the applicability of the arbitration law of that place.<sup>129</sup>

By way of conclusion on this point, we refer to the recent award in *Saipem S.p.A. v The People's Republic of Bangladesh* (2009).<sup>130</sup> At issue was the legality of the decision by Bangladesh courts to annul an ICC award rendered in Dhaka against Bangladesh Oil Gas and Mineral Corporation (Petrobangla) in the favour of Saipem, for breach of contract.<sup>131</sup> Specifically, Saipem argued that by declaring the ICC award non-existent, Bangladesh had deprived it of the compensation for the expropriation of its investment, in contravention of Bangladesh's obligations pursuant to the BIT entered into with Italy, Saipem's home state.<sup>132</sup> While upholding the claim, the tribunal emphasized Bangladesh's right of supervisory jurisdiction over the arbitration process: ‘There is no question that, under most legal systems including the Bangladeshi one, by choosing the seat of the arbitration the parties submit to the jurisdiction of the courts at the seat, which jurisdiction can be exercised in aid and in control of the arbitration process.’<sup>133</sup> This is also the case, stated the tribunal, when the parties have agreed to arbitrate the dispute pursuant to the ICC Arbitration Rules:

[W]hile binding on the parties, the ICC Rules are not binding upon national courts. Hence, the Tribunal fails to see how the assertion of jurisdiction by the courts of Bangladesh can be deemed illegal on this ground. Indeed, it is generally accepted that national arbitration law can provide for a solution which is different from the ICC Rules. For instance, as mentioned by both parties, Dutch arbitration law provides that the local courts have mandatory jurisdiction over a challenge and revocation of the authority of arbitrators and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator.<sup>134</sup>

The claimant still prevailed on the basis that Bangladeshi courts had abused their right of supervisory jurisdiction over the arbitration process, in a way that constituted illegal

<sup>127</sup> *Council of Canadians, CUPW and the Charter Committee on Poverty Issues v the Attorney General of Canada*, Ontario Superior Court of Justice, Affidavit of J. Crawford, 15 July 2004 (reply to M. Sornarajah), paras 16–17.

<sup>128</sup> *Council of Canadians*. Cf. H.C. Alvarez, ‘Arbitration Under the North American Free Trade Agreement’ (2000) 16(4) *Arb. Int'l* 393, 418.

<sup>129</sup> *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)00/3, Decision on Venue of the Arbitration, 26 September 2001 (J. Crawford, G. Aguilar Alvarez, B.R. Civiletti, arbs), para. 5.

<sup>130</sup> *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (G. Kaufmann-Kohler, C.H. Schreuer, P. Otton, arbs).

<sup>131</sup> *Saipem v Bangladesh*, at para. 84.

<sup>132</sup> *Saipem v Bangladesh*, at para. 84.

<sup>133</sup> *Saipem v Bangladesh*, at para. 187. See also at paras 101, 115.

<sup>134</sup> *Saipem v Bangladesh*, at para. 138.

expropriation: '[T]he Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.'<sup>135</sup> In so holding, it quoted from Poudret and Besson: 'We believe that the *lex arbitri* constitutes the primary legal basis for the effectiveness of the arbitration agreement and the arbitrators do not have a discretionary power to disregard injunctions issued by the courts at the seat of the arbitration. To the contrary, they should obey such decision, unless they are manifestly abusive.'<sup>136</sup>

In sum, in emphasizing the potentially important role played by the national law of the tribunal's juridical seat, the foregoing remarks also demonstrate the desirability of the arbitrators, as well as counsel of the disputing parties, familiarizing themselves with and heeding national requirements imposed on the arbitral process by the tribunal's juridical seat.<sup>137</sup>

### 3.2.2. Arbitration rules

Next to national arbitration laws, arbitration rules promulgated by (private) institutions also support the seat theory, at least indirectly. The UNCITRAL Arbitration Rules, for instance, provide in article 18(1) that the awards 'shall be deemed to have been made at the place of arbitration',<sup>138</sup> and in article 1(3) that in case any of its provisions 'is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail'.<sup>139</sup> Böckstiegel notes that the latter provision is of general validity:

Article 1(2) [now article 1(3)] in no way newly creates that principle, but is only declaratory of a limit to arbitration agreements and arbitration proceedings existing independently of this recognition in the UNCITRAL Rules. On the contrary, even if the UNCITRAL Rules did not contain such an article, mandatory provisions of national law, if they were applicable, would still have to be respected. This is exactly what makes them mandatory.<sup>140</sup>

Commenting on the recent modifications of the UNCITRAL Arbitration Rules, Daly and Smith find it significant that this language was kept intact in the 2010 version, especially because investment arbitration was in the minds of the UNCITRAL Working Group: 'Specifically, there [was] no discussion of changing Art. 1(2), which appears to indicate that mandatory rules of the *lex arbitri* prevail over the UNCITRAL Rules.'<sup>141</sup>

<sup>135</sup> *Saipem v Bangladesh*, at para. 161.

<sup>136</sup> *Saipem v Bangladesh*, at para. 160 (referring to Poudret and Besson, fn. 65, at 117 [emphasis in original]). Cf. Petrochilos, fn. 36, at 247–8 (Petrochilos comments on *Himpurna California Energy Ltd v Indonesia*, Interim Award, 26 September 1999 (J. Paulsson, A.A. de Fina, H.P. Abdurrahyid, arbs) 2000 XXV Y.B. Comm'l Arb. 11). See also fn. 66 (states have the inherent right to regulate all persons and things on their territory, as long as such regulation is not inconsistent with international law).

<sup>137</sup> Cf. Rubins, fn. 122, at section 4; Lauterpacht, fn. 66, at 649.

<sup>138</sup> UNCITRAL Arbitration Rules (2010), art. 18(1). Cf. ICSID Additional Facility Rules (2006), art. 20(3).

<sup>139</sup> UNCITRAL Arbitration Rules (2010), art. 1(3).

<sup>140</sup> Böckstiegel, fn. 66, at 229 (referring to the same provision in the 1976 UNCITRAL Arbitration Rules). See also at 224.

<sup>141</sup> B.W. Daly and F.C. Smith, 'Comment on the Differing Legal Framework of Investment Treaty Arbitration as Seen through Precedent, Annulment, and Procedural Rules' in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer, 2009), 151, 161. See also at 163.

Also the LCIA Arbitration Rules give explicit endorsement to the importance of the law of the tribunal's seat: 'The law applicable to the arbitration (if any) shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat.'<sup>142</sup>

The ICC Arbitration Rules have changed during the years with respect to the importance placed on the law of the tribunal's juridical seat. The 1955 ICC Rules provided that where the Rules were silent and the parties had not chosen a law of procedure, the arbitrator was to look to 'the law of the country in which the arbitrator holds the proceedings'.<sup>143</sup> In what has been described as a 'revolutionary innovation',<sup>144</sup> the Rules were revised in 1975 in order to separate the arbitration, to the extent possible, from local procedural law.<sup>145</sup> Accordingly, the arbitrators were authorized to decide procedural issues without reference to any national law.<sup>146</sup> This detachment from the law of the seat continues to characterize the present 2012 Rules. According to article 15(1), the proceedings before the ICC tribunals 'shall be governed by these Rules, and, where these Rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.<sup>147</sup>

Although this provision admittedly gives strong support to the delocalization theory, it would be incorrect to characterize tribunals operating pursuant to the ICC Rules as a-national. Indeed, according to the Secretariat of the ICC International Court of Arbitration, a failure by the parties and the arbitral tribunal to respect mandatory rules of procedure at the place of arbitration may lead to the award being set aside.<sup>148</sup> We further note that the Internal Rules of the International Court of Arbitration of the ICC direct the Court, when scrutinizing an award, to consider, 'to the extent practicable, the requirements of mandatory law at the place of arbitration'.<sup>149</sup>

### *3.2.3. The (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

The enforcement of awards is facilitated in particular by the 1958 United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>150</sup> This Convention corroborates the territorial criterion of the seat theory, as

<sup>142</sup> LCIA Rules (1998), art. 16.3. See also art. 26.2.

<sup>143</sup> Y. Derains and E.A. Schwartz, *A Guide to the ICC Rules of Arbitration* (The Hague, Kluwer Law International, 2005), 233 (quoting art. 16 of the 1955 ICC Arbitration Rules).

<sup>144</sup> F. Eisemann, 'The Court of Arbitration: Outline of its Changes from Inception to the Present Day' in *60 Years of ICC Arbitration: A Look at the Future* (International Chamber of Commerce, ed., Paris, International Chamber of Commerce, 1984), 391, 398.

<sup>145</sup> Derains and Schwartz, fn. 143, at 223.

<sup>146</sup> Derains and Schwartz (referring to article 11 of the 1975 ICC Arbitration Rules).

<sup>147</sup> See ICC Rules (2012), art. 15(1) (emphasis added).

<sup>148</sup> J. Fry et al., *The Secretariat's Guide to ICC Arbitration* (Paris, International Chamber of Commerce, 2012), para. 3–721. See also Derains and Schwartz, fn. 143, at 228.

<sup>149</sup> ICC Rules (2012), Appendix II, Internal Rules of the International Court of Arbitration, art. 6.

<sup>150</sup> See (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (hereinafter New York Convention). As of 1 May 2012, there are 146 contracting parties. See UNCITRAL, Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> (last visited 1 May 2012). Other instruments that deal with the recognition and enforcement of arbitral awards include the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); European Convention on International Commercial

it makes several references to the state in which the award was ‘made’, or rendered. As Söderlund states:

In this world of global expansion of arbitration it has been quite natural to speculate about the advent of the truly international award. Such award would not be attached to any national legal system. It would, as it were, unfold in a realm of its own. Many times such awards have been called ‘transnational,’ ‘a-national,’ or ‘floating awards’ when discussed in legal writings. Irrespective of whether such a truly international award will materialise in the future, one thing is certain and that is that it does not exist today. Today an arbitral award—despite its international character—is of a particular nationality. In fact, the entire world order, when it comes to arbitral agreements and awards, evolves around the fact that the 1958 New York Convention attaches decisive importance to the fact that arbitral awards are rendered in a particular jurisdiction.<sup>151</sup>

More specifically, the Convention applies to ‘arbitral awards *made in the territory of a State* other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal’,<sup>152</sup> including states.<sup>153</sup> Whereas it also applies to awards ‘not considered domestic awards in the State where their recognition and enforcement are sought’,<sup>154</sup> a contracting state may declare that it will, on the basis of reciprocity, exclude awards not ‘*made in the territory of another Contracting State*’.<sup>155</sup> Only a handful of states have refrained from making such a declaration,<sup>156</sup> a practice that could be seen to lend implicit support to the seat theory.

References to the tribunal’s juridical seat are also included in several of the permissible<sup>157</sup> grounds listed in the Convention for refusal of recognition and enforcement of awards: the award ‘has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made’;<sup>158</sup> the parties ‘were, under the law applicable to them, under some incapacity, or the said agreement

Arbitration (1961); Inter-American (Panama) Convention on International Commercial Arbitration (1975).

<sup>151</sup> Söderlund, fn. 87 (references omitted). See also Park, fn. 77, at 237.

<sup>152</sup> New York Convention (1958), art. I (1) (emphasis added). Cf. P. Sanders, *Importance of the Seat of Arbitration*, ICCA: Souvenirs of the Development of International Commercial Arbitration, available at <<http://www.arbitration-icca.org/media/0/12741827220440/011.pdf>> (last visited 1 May 2012).

<sup>153</sup> G.R. Delaume, ‘Recognition and Enforcement of State Contract Awards in the United States: A Restatement’ (1997) 91 *Am. J. Int’l L.* 476, 477. But see P. Sanders, ‘New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (January 1959) VI *Nederlandstijdschrift voor internationaal recht* (‘In so far as States participate in this normal international business, buying or selling goods, I have no doubt the Convention also applies to these contracts. My doubts begin where the State acts in a way not to be compared with private business, e.g. granting an oil concession. Here the solution might be the explicit statement, in the contract, that the New York Convention is applicable. Failing such a provision I would be of the opinion that such is not the case’).

<sup>154</sup> New York Convention (1958), art. I(1).

<sup>155</sup> New York Convention (1958), art. I(3) (emphasis added).

<sup>156</sup> See United Nations, Status of Treaties, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at <<http://treaties.un.org/>> (last visited 1 May 2012). See also M. Pryles, ‘Foreign Awards and the New York Convention’ (1993) 9(3) *Arb. Int’l* 259, fn. 2.

<sup>157</sup> The scope of discretion enjoyed by courts in applying the New York Convention, art. V is disputed. Cf. H. Smit, ‘A-National Arbitration’ (1989) 63 *Tulane Law Review* 629, 641; J. Paulsson, ‘May or Must under the New York Convention: An Exercise in Syntax and Linguistics’ (1998) 14 *Arb. Int’l* 227; A. Giardina, ‘The International Recognition and Enforcement of Arbitral Awards Nullified in the Country of Origin’ in *Law of International Business and Dispute Settlement in the 21st Century* (R. Briner et al., eds, Köln etc., Heymann, 2001) 205, 210, at fn. 21. See also fn. 163 (on enforcing awards annulled at the tribunal’s jurisdictional seat).

<sup>158</sup> New York Convention (1958), art. V(1)(e) (emphasis added).

is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the *law of the country where the award was made*<sup>159</sup> and ‘the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the *law of the country where the arbitration took place*’.<sup>160</sup>

These grounds for non-enforcement demonstrate the control a tribunal’s juridical seat may exert over the award, also at the enforcement stage. Illustrative in this respect is *Termo Rio S.A. E.S.P. & Leaseco Group, LLC v Electranta S.P.* (2007), in which a US court of appeal denied enforcement of an award rendered by an ICC tribunal in Columbia on the basis that it had been set aside by Colombian courts.<sup>161</sup> The Court held:

‘The [New York] Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.’ [...] This means that a primary State necessarily may set aside an award on grounds that are not consistent with the laws and policies of a secondary Contracting State. The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to ‘competent authority’ to ‘set aside’ an arbitration award made in its country.<sup>162</sup>

In accordance with the arbitration agreement, arbitrators arguably have a duty to attempt to render enforceable awards.<sup>163</sup> While there are some notable examples of awards being enforced despite annulment at the tribunal’s juridical seat,<sup>164</sup> arbitrators ought therefore to be conscious of the fact that a failure to abide by the law of the seat of arbitration may have the price of non-enforcement of awards.<sup>165</sup> In fact, according to

<sup>159</sup> New York Convention (1958), art. V(1)(a) (emphasis added).

<sup>160</sup> New York Convention (1958), art. V(1)(d) (emphasis added). Other reasons for refusing recognition and enforcement of awards include those listed in article V(2) ('The subject matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition and enforcement is sought]; or [...] [t]he recognition or enforcement of the award would be contrary to the public policy of that country'). Cf. UNCITRAL Model Law (2006), art. 36.

<sup>161</sup> *Termo Rio S.A. E.S.P. & Leaseco Group, LLC v Electranta S.P.*, 487 F.3d 928, 376 U.S. App. D. C. 242 (D.C. Cir. 2007).

<sup>162</sup> *Termo Rio*, at 937 (citing *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)). See also *Société Européenne d'Etudes et d'Entreprises v République Fédérative de Yougoslavie*, Decision of 7 November 1975, Dutch Supreme Court (Hoge Raad), translated in G. Gaja, *International Commercial Arbitration: New York Convention* (Dobbs Ferry, NY, Oceana Publications, 1978), pt. V, 35.2–3.

<sup>163</sup> See ICC Rules (2012), art. 41 ('[T]he Court and the arbitral tribunal [...] shall make every effort to make sure that the award is enforceable at law'); LCIA Rules (1998), art. 32.2; M. Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20(3) *J. Int'l Arb.* 307. But see G.R. Delaume, 'State Contracts and Transnational Arbitration' (1981) 75 *Am. J. Int'l L.* 784, 792–3. See also Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>164</sup> See, e.g., *Société PT Putrabali Adyamulia v Société Rena Holding*, French Cass. Civ., 29 June 2007, Nos 05-18053 and 06-13293, 24 *Arb. Int'l* 293, 295 (2008); *In re Chromalloy Aerosservices Inc. v Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996); *Hilmarton Ltd v Omnium de Traitement et de Valorisation*, Decision No. 484, French *Cour de Cassation*, First Civil Chamber (1994), Revue de l'arbitrage 327 (1994), XX Y.B. Comm'l Arb. 663 (1995) (English excerpts); Yukos, Gerechtshof Amsterdam, 28 April 2009, LJN: BI2451, 200.005.269/01. But see Park, fn. 41, at 17 ('[O]utside of France, [a] resurrection of dead awards has received a less enthusiastic reception [...]']. See generally C. Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Frankfurt am Main etc., Lang, 2010). See also fn. 157 (on the discretion courts enjoy in applying article V of the New York Convention).

<sup>165</sup> Delaume, fn. 163, at 813; D.D. Caron, 'The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 *Am. J. Int'l L.* 104, 119; Fry et al., fn. 148, at para. 3–721.

Sanders, one of the ‘founding fathers’ of the New York Convention, if an award is set aside at the seat of the arbitration, the ‘Courts [...] will refuse the enforcement as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement’.<sup>166</sup> Such concerns about enforceability were explicitly heeded in *British Petroleum Exploration Co. (Libya) Limited (BP) v Government of the Libyan Arab Republic* (1973).<sup>167</sup> Sole Arbitrator Lagergren observed that ‘the attachment to a developed legal system is both convenient and constructive’.<sup>168</sup> As the seat was fixed at Copenhagen, and ‘having particular regard to the wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law’, he concluded that the procedural law of the arbitration was Danish law and that the award would be Danish.<sup>169</sup> Importantly, and keeping in mind that states in which enforcement is sought may require that the award is legally rendered in particular state, he based his conclusion partly on the fact that the parties must have intended an effective remedy: ‘effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality’.<sup>170</sup>

### 3.2.4. Considerations of due process, finality, and consistency

Next to national arbitration laws, arbitration rules, and the New York Convention, the attachment of arbitral proceedings to one national legal order is supported by considerations of due process, finality, and consistency. Most arbitration rules oblige the arbitrators to render awards in accordance with the arbitration agreement, to be impartial, and to respect the parties’ right to due process.<sup>171</sup> It is conceivable, however, that arbitrators exceed, or in other ways act contrary to, their mandate, for instance, by applying a different law to the merits than that upon which the parties agreed, or by accepting bribes that influence the outcome of the dispute. In such a case, the possibility of annulment of the award is not only an inherent right of tribunal’s juridical seat, but also necessary in terms of due process and desirable for the arbitration process in general.

Importantly, arbitration affects not only winners and losers, but often society at large as well; and national review serves as an imperative control mechanism on the legal accuracy of the arbitration. Blackaby et al. state: ‘it would be unusual for a State to support arbitral tribunals operating within its jurisdiction without claiming some degree of control over the conduct of those arbitral tribunals—if only to ensure that certain minimum standards of justice are met, particularly in procedural

<sup>166</sup> P. Sanders, ‘New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1959) 6 *Neth. I.L.R.* 43, 55. Cf. A.J. van den Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009’ (2010) 27 (2) *J. Int'l Arb.* 179, 187 (2010).

<sup>167</sup> *British Petroleum Exploration Co. (BP) v Libyan Arab Republic*, Award, 10 October 1973, 53 *I.L.R.* 297 (1979) (Lagergren, sole arb.).

<sup>168</sup> *BP v Libya*, at 309.

<sup>169</sup> *BP v Libya*, at 309. See also Second Award, 1 August 1974, 5 *Y.B. Com. Arb.*, 147, 158–61 (1980) (Basing himself on Danish law, Lagergren denied the application for a reopening of the award).

<sup>170</sup> *BP v Libya*, Award, at 309. Cf. J.G. Wetter, *II The International Arbitral Process: Public and Private* (Dobbs Ferry, NY, Oceana Publications, 1979), 409 (“The desirability to localise an award, for the purpose of making it enforceable is the main reason for, and consequence of, preferring the *BP* doctrine”).

<sup>171</sup> See Section 2 (on features of the arbitral process).

matters.<sup>172</sup> Such a ‘safety net’ has additional value in case of disputes involving a state, whose general population may be affected by a biased or unsound award. As noted by the English Court of Appeal in *Occidental Exploration & Production Company v Ecuador* (2005): ‘recourse to a court, when and if permissible, would (one hopes) be likely to correct any error in interpretation, rather than to perpetuate or introduce one.’<sup>173</sup> In addition, it has been observed that the mere existence of the possibility of review may in and of itself increase the quality of awards.<sup>174</sup>

Finally, and while also the New York Convention may operate as a safeguard against incompetence and bias at the enforcement stage,<sup>175</sup> the possibility to seek annulment at the tribunal’s jurisdictional seat has the advantage of allowing the unsuccessful party to litigate such issues in one state rather than in all the states in which it may have assets and enforcement is sought. The US Court of Appeals stated in *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd* (1999):

If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary ‘with enforcement actions from country to country until a court is found, if any, which grants the enforcement.’<sup>176</sup>

As such, the delocalization theory, in advocating ‘floating awards’,<sup>177</sup> may also be criticized on the basis that it may produce conflicting judgments. As Goode puts it:

The territorial approach, in insisting that the validity of an arbitral award is governed by the *lex loci arbitri*, has the great merit of subjecting the question of validity to a single decision at the court of origin. By contrast, denial of the function of a *lex loci arbitri* may involve litigation in every country in which the respondent has assets, and even within a single country may entail the case being taken up through a two-tier or even three-tier hierarchical chain and then, where the highest court acts as a court of cassation, being sent back again to a new lower court for a fresh determination. [...] As more than one commentator has pointed out, this is not delocalization, it is multilocalization.<sup>178</sup>

<sup>172</sup> Blackaby et al., fn. 39, at 68. See also at 109 (‘It seems that the movement in favour of total delocalisation, in the sense of freeing an international arbitration from control by the *lex arbitri*, has run into the ground. As the Belgian experiment showed, delocalisation is only possible to the extent that it is permitted by the *lex arbitri*; and parties to an arbitration may well prefer an arbitral tribunal which is subject to some legal control, rather than risk a runaway tribunal’). Cf. F.A. Mann, ‘Private Arbitration and Public Policy’ (1985) 4 *Civ. Just. Q.* 257, 267; W.W. Park, ‘Why Courts Review Arbitral Awards’ in *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (R. Briner et al., eds., Köln, Berlin, Munich, Carl Heymanns Verlag KG, 2001), 595.

<sup>173</sup> *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 125, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, para. 27. Cf. *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, 12 November 1991, Dissenting Opinion of Judge Weeramantry [1991] ICJ Rep. 53, at 152–3.

<sup>174</sup> See J.J. Coe Jr, ‘Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA?’ (2002) 19(3) *J. Int’l Arb.* 185, section II(C). Cf. Park, fn. 77, at 233 (‘The dark side of delocalised arbitration is that arbitrators will find it easier to exceed their powers in jurisdictions that provide no control over the arbitration’s procedural fairness’).

<sup>175</sup> Cf. Park, fn. 41, at 144; Chan, fn. 70, at 145–6.

<sup>176</sup> *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd*, 191 F.3d 194, 197 (2d Cir. 1999), at fn. 2 (quoting A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague, Asser, 1981), 355. See also *C v D* [2007] EWCA Civ 1282, para. 16; M.D. Slater, ‘On Annulled Arbitral Awards and the Death of Chromalloy’ (2009) 25(2) *Arb. Int’l* 271, 292.

<sup>177</sup> Cf. Smit, fn. 157, at 629 (describing a-national arbitration as a ‘floating and stateless arbitration and arbitral awards’ that ‘does not owe its existence, validity, or effectiveness to a particular national law’).

<sup>178</sup> R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* (2001) 17(1) *Arb. Int’l* 19, 34 (references omitted).

### 3.3. The influence of the delocalization theory on state practice

Although the premise behind the delocalization theory and the seat theory is fundamentally different, it is essential to note that the practical differences between them have become limited as states grant increasing degrees of procedural autonomy to the arbitration process, and especially arbitration of a transnational nature.<sup>179</sup> This stems from the recognition by states, long highlighted by adherents to the delocalization theory, that their national procedural rules are not well-suited for arbitration between parties from different states.<sup>180</sup> A related explanation offered for this development is that arbitration has become a ‘business’, and states compete for a greater share of the fees paid to arbitrators and attorneys by reforming their arbitration laws in line with the business community’s demand for greater flexibility.<sup>181</sup> In this way, states also indirectly promote economic activity.<sup>182</sup>

In line with this pro-arbitration trend, national arbitration laws limit court involvement in the arbitral process.<sup>183</sup> As noted by the US Supreme Court, ‘we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution’.<sup>184</sup> Further, national arbitration laws give the disputing parties and arbitrators much freedom in tailoring the proceedings to suit their particular needs and wishes. To this end, the UNCITRAL Model Law provides that ‘[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings’.<sup>185</sup> Another significant factor is that the parties may generally agree to let the arbitration be conducted in accordance with arbitration rules, such as the UNCITRAL Arbitration Rules. As explicitly provided in the German Arbitration Law: ‘subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules’.<sup>186</sup> The number of such mandatory rules is limited.<sup>187</sup>

The scope and extent of judicial review is also restricted. The US District Court held in *Thunderbird Gaming Corporation v Mexico* (2007): ‘Courts have long recognized that judicial review of an arbitration award is extremely limited. [...] Thunderbird bears the heavy burden of establishing that vacatur of the arbitration award is appropriate. [...] [I]n the absence of a legal basis to vacate, this court has no discretion but to

<sup>179</sup> See UNCITRAL, *Notes on Organizing Arbitral Proceedings*, fn. 13, at para. 4 (‘Laws governing the arbitral procedure [...] typically allow the arbitral tribunal broad discretion and flexibility in the conduct of the proceedings’ [references omitted]); C.N. Brower and J.K. Sharpe, ‘International Arbitration and the Islamic World: The Third Phase’ (2003) 97(3) *Am. J. Int’l L.* 643, 647.

<sup>180</sup> See Derains and Schwartz, fn. 143, at 226–7.

<sup>181</sup> De Ly, fn. 1, at 48–9. See also Caron, fn. 165, at 119, at fn. 64.

<sup>182</sup> See Danilowicz, fn. 76, at 237 (‘The sovereign also has an interest in the development of international arbitration as a means of promoting trade and commerce’).

<sup>183</sup> See G. Herrmann, ‘The Role of the Courts under the UNCITRAL Model Law Script’ in *Contemporary Problems in International Arbitration* (J.D.M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 164.

<sup>184</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626–7 (1985). See also Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 3055, para. 35; *Bayview Irrigation District et al. v Mexico*, Ontario Superior Court of Justice, Application for Set Aside, 5 May 2008, para. 62.

<sup>185</sup> UNCITRAL Model Law (2006), art. 19(1). See also Indian Arbitration Act (1996), section 19; English Arbitration Act (1996), section 34(1).

<sup>186</sup> German Arbitration Act (1998), section 1042(3). See also UNCITRAL Model Law (2006), art. 2(e).

<sup>187</sup> See J.G. Frick, *Arbitration and Complex International Contracts with Special Emphasis on the Determination of the Applicable Substantive Law and on the Adaptation of Contracts to Changed Circumstances* (The Hague, Kluwer Law International; Zürich, Schulthess, 2001), 53.

confirm the award.<sup>188</sup> In fact, in certain jurisdictions, such as France, Belgium, Switzerland, and Sweden, the parties to the proceedings may by agreement exclude the possibility of seeking annulment.<sup>189</sup> According to the Supreme Court of Switzerland, this possibility is in conformity with article 6 of the European Convention on Human Rights and Fundamental Freedoms:

La controverse porte, en l'espèce, sur la question de savoir s'il est possible de renoncer à recourir contre une sentence arbitrale à venir sans violer l'art. 6 par. 1 CEDH. Cette question doit être tranchée par l'affirmative [...] Il n'y a, dès lors, pas de raison de priver les parties aptes à assumer les conséquences d'une renonciation au recours de la possibilité que leur offre cette disposition – incarnation procédurale du principe d'autonomie de la volonté – d'échapper à toute intervention étatique susceptible de porter atteinte à la confidentialité de l'arbitrage ou de disposer rapidement d'une décision exécutoire mettant fin au différend [The controversy in this case is whether it is possible to waive recourse against an arbitral award in the future without violating article 6(1) of the ECHR. This question must be answered in the affirmative [...] There is therefore no reason to deprive the parties able to bear the consequences of a waiver of the use of the possibility offered by this provision—the procedural embodiment of the principle of party autonomy—to escape any state intervention which could undermine the confidentiality of the arbitration or to quickly have a binding decision ending the dispute] [...].<sup>190</sup>

Importantly, and as will be demonstrated in the next chapter, this ‘hands off’ approach encompasses the law applicable to the merits in that national arbitration laws grant the parties and the tribunals considerable freedom with respect to the substantive applicable law. Of further significance is the fact that the limited possibility to seek annulment extends to the tribunal’s decision as to the applicable law: the courts of the juridical seat will as a rule not allow judicial review of the choice-of-law methodology applied by the arbitrators.<sup>191</sup> This is so even in situations where the parties have stipulated the applicable law. According to the Swedish Court of Appeal, ‘an excess of mandate may be involved only where the arbitrators’ interpretation of the choice of law clause proves to be baseless such that their assessment may be equated with the

<sup>188</sup> *International Thunderbird Gaming Corporation v Mexico*, Judgment of the US District Court for the District of Columbia on petition to set aside the award, 14 February 2007, at 3, section II(A). Cf. J.-P. Beraudo, ‘Egregious Error of Law as Grounds for Setting Aside an Arbitral Award’ (2006) 23(4) *J. Int'l Arb.* 351, 351–3.

<sup>189</sup> See French Arbitration Law (2011), art. 1522; Belgian Judicial Code (1972, as amended in 1998), art. 1717(4); Swedish Arbitration Act (1999), section 51; Switzerland’s Federal Code on Private International Law (1987), art. 192(1). Cf. *Rosinvest Co v Russian Federation*, fn. 94, at para. 5; *La République du Liban v France Télécom*, fn. 118, Decision I, at 4.2.

<sup>190</sup> *X v Z SA*, Swiss Supreme Court, 4A\_238/2011, 4 January 2012. See also European Convention on Human Rights, art. 6. Yet, there is evidence that states have certain, albeit limited, duties to provide a safety-net, at least to private parties. See A. Jaksic, ‘Procedural Guarantees of Human Rights in Arbitration Proceedings: A Still Unsettled Problem’ (2007) 24(2) *J. Int'l Arb.* 159, 171; R. Briner and F. Von Schlabrendorff, ‘Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration’ in *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Briner et al., eds, Köln, Berlin, Munich, Carl Heymanns Verlag KG, 2001), 89, 99. See generally Petrochilos, fn. 67, at 109–65 (on human rights law requirements in international arbitration).

<sup>191</sup> See G.A. Born, *International Commercial Arbitration* (Ardsley, NY, Transnational Publisher; The Hague, Kluwer Law International, 2001). But see G.C. Moss, ‘Is the Arbitral Tribunal Bound by the Parties’ Factual and Legal Pleadings’ (2006) 3 *Stockholm Int'l Arb. Rev.* 1, 10 (Moss suggests a more stringent standard of review for treaty arbitration: ‘This is because the error in question would be made in connection not with the decision on the merits (which is beyond the scope of control that a court may exercise on an award), but with the establishment of the tribunal’s jurisdiction or of its duties in the conduct of the proceedings, as determined by the applicable arbitration law or investment treaty (which is within the scope of the judicial control)’).

arbitrators almost having ignored a provision regarding applicable law.<sup>192</sup> Thus, it held, '[t]here is no excess of mandate where the arbitrators have applied the designated law incorrectly. Nor can there hardly be any excess of mandate where the arbitrators have been required to interpret the parties' designation of applicable law, and in so doing, have interpreted the designation incorrectly.'<sup>193</sup>

The aforementioned practice leads us to conclude that at least one of the concerns presented by the delocalization theory, namely that of 'peculiar and unexpected local norms',<sup>194</sup> is to a large degree resolved.<sup>195</sup> As noted by Kaufmann-Kohler: 'One of the main purposes of de-localization, as it was then discussed, was to eliminate the unintended effects of certain arbitration-hostile features of the law of the place where the arbitration was held. The choice of an arbitration-friendly fictional seat fully services that purpose.'<sup>196</sup> Consequently, she states, 'the issue of de-localization becomes moot.'<sup>197</sup>

### 3.4. Interim conclusions

We saw that the existence of any links between arbitral tribunals and national legal orders is discouraged and/or toned down by scholars who argue that the arbitral process is—or at least should be—removed from control by any state and should therefore be viewed as delocalized, supranational, a-national, or international. We also noted the influence such awards and scholarship have had on state practice, in that national arbitration laws grant the parties and arbitrators procedural freedom and limit court involvement to a minimum.

Still, such state practice does not invalidate the soundness of the seat theory.<sup>198</sup> Symptomatic of the strength of this theory, the vast majority of states continue to subject arbitration proceedings taking place on their territory to various mandatory, albeit limited, requirements, which again are heeded by third states at the enforcement stage. Such exercise of control, including the sanction of annulment, not only stems from the principle of territorial sovereignty, it is conducive to finality, and it constitutes a healthy 'check' on the system of arbitration as a whole. We may thus conclude that a tribunal's mandate to render awards does not solely stem from the parties, but

<sup>192</sup> *Czech Republic v CME Czech Republic B.V.*, fn. 107, 42 I.L.M. 919, 964 (2003).

<sup>193</sup> *Czech Republic v CME*.

<sup>194</sup> Paulsson, *Arbitration Unbound*, fn. 38, at 385.

<sup>195</sup> See Caron, fn. 165, at 119. But see Petrochilos, fn. 67, at 10 ('However, national particularities are still to be found in the arbitration laws of a number of states [...]. For the time being it seems that an arbitrator has to find his way through the web of potentially relevant laws and jurisdictions by carefully juggling them').

<sup>196</sup> Kaufmann-Kohler, fn. 88, at 1319–20 (references omitted).

<sup>197</sup> Kaufmann-Kohler, at 1320. See also J. Paulsson, 'The Extent of Independence of International Arbitration from the Law of the *Situs*' in *Contemporary Problems in International Arbitration* (J.D. M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 141 (while Paulsson believes that 'there is still any life in the once-hot debate over the concept of arbitral awards detached from the legal system of the country where they were rendered [...] I am quite willing to allow that the delocalisation of the international arbitral process is not the wave of the future. The need to delocalise is felt in few cases, and, happily, it may reasonably be predicted that those instances will become even rarer in the future'); Terez, fn. 68, at 380 (Caron believed that 'delocalized arbitrations were and would become increasingly an intellectually interesting but rare oddity').

<sup>198</sup> Cf. F.A. Mann, 'English Procedural Law and Foreign Arbitrations' (1970) 19(4) *Int'l & Comp. L.* Q. 693, 695 ('Is it open to the parties to choose as their *lex arbitri* a law other than that prevailing at the arbitration tribunal's seat? [...] It is submitted that the parties' freedom of choice is by no means unlimited, but exists only if and to such extent as it is granted by the law of the arbitration tribunal's seat'); Alvik, fn. 26, at 29.

also—and more importantly—from a national legal order: the tribunal's juridical seat. Accordingly, arbitral proceedings between an investor and a host state are neither a-national, nor international, but rather subject to a national legal order.

For our purposes, we will characterize arbitral tribunals subject to the national law of their juridical seat as 'territorialized', a term that seeks to differentiate them from domestic arbitration tribunals, as well as the 'internationalized' tribunals that will be analysed in the following section.

#### **4. Internationalized Tribunals**

Scholars have offered various factors for the purpose of characterizing a court or tribunal as 'international'.<sup>199</sup> Several of these factors are over- or under-inclusive; and there does not appear to be one 'litmus test'.<sup>200</sup> For instance, it has been stated that the application of international law is an intrinsic characteristic of international courts and tribunals.<sup>201</sup> While it is true that international law constitutes the main applicable source of law for international courts and tribunals,<sup>202</sup> national courts too apply international law;<sup>203</sup> and as will be demonstrated in the following chapters, the application of national law is not reserved to territorialized tribunals. To the contrary, national law is frequently applied by both ICSID tribunals and the Iran–United States Claims Tribunal. We agree, thus, with Amerasinghe when he discards the application of international law as a criterion for internationalization:

In principle that a tribunal adjudicates on disputes which are based on violations of national laws does not make it any less an international tribunal, if it falls into that category, because it satisfies the requirements. Thus ICSID [...] tribunals and the Iran–US Claims Tribunal are international, although in a given case they may deal with what are purely alleged violations of national laws. In this respect international tribunals may sometimes deal with disputes that are not 'international' in the true sense.<sup>204</sup>

In the same context, it is difficult to assess whether certain of the criteria offered for characterization purposes are inherent in the international nature of the tribunals; or

<sup>199</sup> See, e.g., M. Mohebi, *The International Law Character of the Iran–United States Claims Tribunal* (The Hague, Kluwer Law International, 1999), 29–31; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, Oxford University Press, 2003), 12, fn. 44; R. P. 'Federal Courts, International Tribunals, and the Continuum of Deference' (2003) *Virg. J. Int'l L.* 675, 680–1; and at 782, at fns 18–19.

<sup>200</sup> Cf. Alford, fn. 199, at 679 (Alford refers to 'the absence of any canonical definition of what constitutes an international tribunal. Depending on the criteria one employs, the universe of international tribunals is extremely broad or narrow. [...]').

<sup>201</sup> See C. Tomuschat, 'International Courts and Tribunals' *Max Planck Encyclopedia of Public International Law*, at para. 4; M.O. Hudson, *International Tribunals* (Washington, DC, Carnegie Endowment for International Peace and Brookings Institution, 1944), 67–8, 99; A. Pellet, 'Art. 38' in *The Statute of the International Court of Justice: A Commentary* (A. Zimmermann et al., eds, Oxford, Oxford University Press, 2006), 677, 696.

<sup>202</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>203</sup> See Biehler, fn. 6, at 37 ('[T]here are national courts which determine, apply and enforce international law which even from the international law perspective may be accepted at least as state practice and *opinio iuris* of the forum state'); P.A. Nollkaemper, 'Internationalisering van nationale rechtspraak' in *Praedivezen. Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (P.A. Nollkaemper, J.W.A. Fleuren, J. Wouters, and D. van Eeckhoutte, eds, The Hague, T.M.C. Asser) 1–67.

<sup>204</sup> C.F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague, Kluwer Law International, 2003), 10–11. See also Alford, fn. 199, at 682, fn. 18; Petrochilos, fn. 67, at 235; A. Mourí, *The International Law of Expropriation as Reflected in the Work of the Iran–United States Claims Tribunal* (Dordrecht, Nijhoff, 1994), 25.

whether they follow as a result of such nature. In brief, there is the classical problem of ‘the chicken and the egg’. Thus, while to some, internationalization is indicated by insulation from the law of the tribunal’s seat and the internationally binding nature of the decisions rendered,<sup>205</sup> according to Mohebi, these features follow rather from the tribunal’s international nature, once established:

Once it is decided that a tribunal possesses true international character it follows, inevitably, that as such it pertains to [sic] international order, rather than any municipal law system either that of its creating States or of its eventual or actual seat. Among practical consequences of this conviction is that the arbitral process before such international tribunal is detached from any *lex fori*, and its arbitral award will have international quality the enforcement of which is subject to international rules and principles; and more importantly the non-compliance with the terms of such international award will cause international responsibility for the refusing party.<sup>206</sup>

For the purposes of this study, we will characterize ‘internationalized’<sup>207</sup> tribunals by three interrelated criteria: first, they operate pursuant to a treaty, from which stems their mandate to render awards.<sup>208</sup> Secondly, the state in which they are seated has relinquished its right to regulate their activities, so that they are insulated from the application of the law of the seat.<sup>209</sup> Thirdly, the state party to the dispute is treaty-bound to respect the tribunal’s decisions; and consequently, recognition and enforcement of the award do not depend on instruments such as the New York Convention.<sup>210</sup> In combination, these features make the arbitration proceedings operate in the international legal order, with the result that the tribunals’ *lex arbitri* is international law.

Before proceeding to examine the Iran–United States Claims Tribunal and ICSID tribunals on the basis of these criteria,<sup>211</sup> a clarification should be made as concerns investment treaty arbitration. As noted previously, arbitration proceedings are commonly set up pursuant to an investment treaty entered into between the host state and the investor’s home state.<sup>212</sup> Despite the fact that the arbitration agreement entered into between the investor and the host state in such cases originates in an offer set out in a treaty, this does not, in and of itself, make the arbitration tribunal international in nature. The conclusion remains that investment treaty tribunals applying, as they often do, the UNCITRAL Arbitration Rules, the ICSID Additional Facility Rules, or the Arbitration Rules of the Stockholm Chamber of Commerce are subject to control by the state in which they are seated.<sup>213</sup> Neither does internationalization of the arbitral proceedings follow from the fact that the host state, by virtue

<sup>205</sup> See, e.g., F.A. Mann, ‘State Contracts and International Arbitration’ (1967) 42 *Brit. Y.B. Int’l L.* 1, 13; Lauterpacht, fn. 66, at 651.

<sup>206</sup> Mohebi, fn. 199, at 31.

<sup>207</sup> For the use of the term ‘internationalized’ versus ‘international,’ see Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>208</sup> Cf. Amerasinghe, fn. 204, at 10–11; F. Rigaux, ‘Les situations juridiques individuelles dans un système de relativité générale’ (1989, I) 213 *Recueil des Cours*, para. 83.

<sup>209</sup> Cf. Petrochilos, fn. 67, at 298.

<sup>210</sup> Cf. Petrochilos, at 247–8.

<sup>211</sup> Reference should also be had to the Unified Agreement for the Investment of Arab Capital in the Arab States, setting up the Arab Investment Court. Based on the criteria listed in this Part, arbitration conducted under this Court’s auspices may also be characterized as internationalized. See generally *Unified Agreement for the Investment of Arab Capital in the Arab States*, TDM 1(4) (2004); W. Ben Hamida, ‘The First Arab Investment Court Decision’ (2006) 7(5) *Journal of World Investment and Trade* 699.

<sup>212</sup> See Section 2 (on features of the arbitral process).

<sup>213</sup> See Section 3.2.1.2 (on annulment as an exercise of control).

of the treaty, is internationally bound to respect awards rendered against it. This obligation flows from the investment treaty in question, rather than arbitral process as such. The difference in bindingness is illustrated by the fact that article 26 of the Energy Charger Treaty includes the stipulation that any arbitration arising under the investor-to-state dispute provisions shall, at the request of any party to the dispute, be held in a state that is a party to the New York Convention.<sup>214</sup> Petrochilos confirms the non-existence of a link between treaty arbitration and internationalization of proceedings:

[T]he important point here is that arbitration provided for by treaty is not necessarily arbitration proceeding under international law. The practical purpose of the dispute resolution provisions in BITs has little to do with submitting to international law the arbitration proceedings there provided for. A primary objective is to give the option of a neutral forum to the foreign investor. Thus, to ensure that the signatory states will give effect to the agreed arbitration mechanism, provisions may be contained to: (a) create ipso facto consent to arbitration without need for subsequent agreement between the investor and the host state; [and] (b) formally render such consent equivalent to an agreement in writing for the purposes, notably, of Article II of the New York Convention [...]. In this sense, a BIT is only a vehicle for some type of arbitration, whose legal nature is not in principle affected or determined by the BIT.<sup>215</sup>

#### **4.1. The Iran–United States Claims Tribunal**

The Iran–United States Claims Tribunal was established pursuant to the 1981 Algiers Accords, which include, in particular, the Claims Settlement Declaration.<sup>216</sup> Due to the political tension between the two states,<sup>217</sup> the Government of Algeria functioned as an intermediary; and instead of the United States and Iran signing the proposed Accords, Algeria announced that it had received formal adherences from the two states.<sup>218</sup>

The tribunal is seated in the Netherlands,<sup>219</sup> and it is comprised of nine members, also referred to as arbitrators or judges.<sup>220</sup> Its jurisdiction can be divided into two

<sup>214</sup> See Energy Charter Treaty (ECT), art. 26. See also North American Free Trade Agreement (NAFTA), art. 1130. But see Amerasinghe, fn. 204, at 11 (Tribunals ‘created under the NAFTA would qualify as international tribunals’); see at 5.

<sup>215</sup> Petrochilos, fn. 67, at 247–9 (emphasis in original; references omitted). See also at 298. Cf. Heiskanen, fn. 11, at 399, at fn. 89 (Heiskanen characterizes investment treaty tribunals as “‘quasi-international’ or ‘transnational’ in the sense that the consent to arbitrate of one of the parties—the investor—is subject to the personal law (i.e. domestic law) of that party”).

<sup>216</sup> See C. Pinto, ‘Iran–United States Claims Tribunal’ *Max Planck Encyclopedia of Public International Law*, available at <<http://www.mpepl.com/home>> (last visited 1 May 2012).

<sup>217</sup> The adoption of the Algiers Accords put an end to a diplomatic stalemate between the United States of America and the Islamic Republic of Iran, which started with the seizure and detention of employees of the US Embassy in Tehran, and was intensified when the United States blocked Iranian assets. As stated in the Preamble to the General Declaration (1981), the Accords were to serve as a ‘mutually acceptable resolution of the crisis’ in the relations of the United States and Iran ‘arising out of the detention of the 52 United States Nationals in Iran’ and registered ‘the commitments which each is willing to make in order to resolve the crisis’.

<sup>218</sup> R. Briner, ‘The Iran–United States Claims Tribunal and Disputes Involving Sovereigns’ (2002) 18(3) *Arb. Int'l* 299, 300. See also *Islamic Republic of Iran and United States of America*, Decision No. DEC 134-A3/A8/A9/A14/B61-FT (Decision ruling on Request for Revision by the Islamic Republic of Iran), 1 July 2011, para. 62.

<sup>219</sup> Iran–US Claims Tribunal, Claims Settlement Declaration (1981), art. VI(1).

<sup>220</sup> Claims Settlement Declaration (1981), art. III (three of the members are appointed by the US; three by Iran; and three by party-appointed members acting jointly or, in absence of agreement, by an

categories: first, claims between a private party and the United States or Iran; and second, interstate claims between the two Governments.<sup>221</sup> To the former category, which will be examined in our study, belong claims of US nationals against Iran and claims of Iranian nationals against the United States,<sup>222</sup> as well as any counterclaim by the United States or Iran that ‘arises out of the same contract, transaction or occurrence that constitutes the subject matter of the national’s claim’.<sup>223</sup> Further limiting the tribunal’s jurisdiction, the Claims Settlement Declaration requires such claims and counterclaims to ‘arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights’.<sup>224</sup> As of 31 March 2009, the total number of cases finalized

appointing authority). See also J. Seifi, ‘Procedural Remedies against Awards of Iran–United States Claims Tribunal’ (1992) 8(1) *Arb. Int’l* 41 (‘Generally speaking, the Tribunal conducts its work in chambers of three and only interpretative disputes and certain other cases are decided by the full panel of nine’ [references omitted]); R.M. Mosk, ‘Lessons from the Hague: An Update of the Iran–United States Claims Tribunal’ (1987) 14 *Pepperdine L. Rev.* 821 (‘Although the Tribunal has been referred to as an arbitral body because of its caseload, it more nearly resembles a judicial system. [...] The arbitrators are often referred to as judges’). See generally C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998), 125–81.

<sup>221</sup> To this category belong, first, ‘official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services’. Claims Settlement Declaration (1981), art. I(2). Secondly, it includes disputes as to the interpretation or performance of any provision of the Declaration of the Government of Algeria of 19 January 1981. See Claims Settlement Declaration (1981), arts I(2) and VI(4). See also General Declaration (1981), paras 16–17. An additional subcategory are claims by the Governments’ respective nationals for less than \$250,000, in which case the national’s claim is espoused and presented by its government. See Claims Settlement Declaration (1981), art. III(3).

<sup>222</sup> Claims Settlement Declaration (1981), art. I(1). The term ‘national’ includes both natural and juridical persons. A juridical person is defined as ‘a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock’. See Claims Settlement Declaration (1981), art. VII(1)(b). See also D.D. Caron, ‘International Tribunals and the Role of the Host Country’ in *The Iran–United States Claims Tribunal and the Process of International Claims Resolution* (D.D. Caron and J.R. Crook, eds, Ardsley, NY, Transnational Publishers, 2000), 27, 31 (‘The vast bulk of the Tribunal’s docket involved the claims of nationals of the United States’).

<sup>223</sup> Claims Settlement Declaration (1981), art. I(1). See also A. Avanessian, *The Iran–United States Claims Tribunal in Action* (London etc., Graham & Trotman/Martinus Nijhoff, 1993), 2–3; Iran Code of Civil Procedure, art. 284.

<sup>224</sup> Claims Settlement Declaration (1981), art. II(1). Claims must be ‘outstanding on the date of [the Claims Settlement Declaration], whether or not filed with any court’. See also Chapter 4, Section 3.2 (on arbitration without privity). Specifically excluded from the tribunal’s jurisdiction are, one, claims that relate to (a) the seizure of 52 US nationals on 4 November 1979; (b) their subsequent detention; (c) injury to US property or property of the US nationals within the US Embassy compound in Tehran after 3 November 1979; and (d) injury to US nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. Two, the tribunal may not entertain claims ‘arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position’. General Declaration (1981), at para. 11; Claims Settlement Declaration (1981), art. II(1). Upon filing, the claim is excluded from the jurisdiction of any other court or forum. See Claims Settlement Declaration (1981), art. VII(2). See generally, T.L. Stein, ‘Jurisprudence and Jurists’ Prudence: The Iranian-Forum Clause Decisions of the Iran–U.S. Claims Tribunal’ (1984) 78(1) *Am. J. Int’l L.* 1. The period for filing new private claims against Iran expired on 19 January 1982. See Claims Settlement Declaration (1981), art. III(4). By then, 3,836/3,952 cases had been lodged, ninety of which were interstate claims or interpretational cases. See Iran–United States Claims Tribunal, *Annual Report: Period Ending 30 June 1983* (1983).

by award, decision, or order was 3,936.<sup>225</sup> The last case involving a private party and the US or Iranian Government was decided in 2003.<sup>226</sup>

With respect to the criterion that the tribunal be set up pursuant to a treaty, we note that despite the unusual negotiations behind the Algiers Accords, their international validity is generally accepted, and consequently also the tribunal's treaty origin.<sup>227</sup> Indeed, on several occasions, the tribunal has interpreted the Algiers Accords in accordance with the Vienna Convention on the Law of Treaties.<sup>228</sup> When we add the fact that the Claims Settlement Declaration explicitly denominates the tribunal as 'international',<sup>229</sup> it may appear that the tribunal's mandate is indeed grounded in the international legal order. This conclusion is supported by the tribunal itself: 'This Tribunal has not been instituted by a contractual agreement between the Parties and does not derive its authority from their will. It has been instituted by an inter-governmental agreement having the status of an international treaty and it is subject to international law.'<sup>230</sup> And the tribunal held in *Iran v United States* (Case A/27):

The Tribunal was established by an international agreement concluded between Iran and the United States. The States Parties empowered it to decide intergovernmental claims as well as claims by nationals of one State Party against the government of the other State Party. Under contemporary international law, the fact that an individual or a private entity is party to proceedings before a forum created by an international agreement does not deprive that forum and its proceedings of their international legal nature. The Tribunal is 'clearly an international tribunal,' [...] and 'it is subject to international law.'<sup>231</sup>

In the following subsections, we will first examine whether the tribunal is in fact insulated from the law of its seat, i.e., the Netherlands; and second, we will consider the nature of the states parties' obligation to enforce awards rendered by the tribunal.

#### *4.1.1. The tribunal's insulation from the Law of the Seat*

As concerns the first inquiry concerning the subjection or otherwise of the Iran–United States Claims Tribunal to Dutch law, there is some controversy.<sup>232</sup> This may be explained in part by the special circumstances attendant on its creation:

<sup>225</sup> See Iran–United States Claims Tribunal, *Communiqué No. 09/2*, April 22, 2009 (statistics up to and including 31 March 2009); A.Z. Marossi, 'Iran–United States Claims Tribunal: Claims, Counter-claims, Dual Nationality, and Enforcement' (2006) 23–6 *J. Int'l Arb.* 493.

<sup>226</sup> See A. Redfern et al., *Law and Practice of International Commercial Arbitration* (London, Sweet & Maxwell, 2004), 72, at fn. 52.

<sup>227</sup> See D.L. Jones, 'The Iran–United States Claims Tribunal: Private Rights and State Responsibility' (1984) 24(2) *Virg. J. Int'l L.* 259, 268.

<sup>228</sup> See *Iran v United States*, Case No. A/18, Decision No. DEC 32-A18-FT, 6 April 1984; Marossi, fn. 225, at 497.

<sup>229</sup> Claims Settlement Declaration (1981), art. II(1).

<sup>230</sup> *Anaconda-Iran, Inc. v Government of the Islamic Republic of Iran and National Iranian Copper Industries Company*, Case No. 167, Award No. ITL 65-167-3, Interlocutory Award, 10 December 1986, 13 Iran–U.S. C.T.R. 199, para. 98. For other arguments advanced in support of and against the international nature of the tribunal, see Seifi, fn. 220, at section (b).

<sup>231</sup> *Islamic Republic of Iran and United States of America*, Case No. A/27, Award No. 586-A27-FT, 5 June (1998), para. 58 (citing Case No. A/18, fn. 228, 5 Iran–U.S. C.T.R. 251, 261; *Anaconda-Iran*, fn. 230, Interlocutory Award, at para. 97).

<sup>232</sup> Cf. D.D. Caron et al., *The UNCITRAL Arbitration Rules: A Commentary* (Oxford, Oxford University Press, 2006), 38 ('The status of the arbitral proceedings before the Iran–US Claims Tribunal, and their relation to the local (i.e., Dutch) law, is not easily characterized').

Because the Tribunal was created by a document rapidly and secretly negotiated to end a political and diplomatic crisis, details of the Netherlands's role were not fully explored before January 20, 1981, nor could they have been in the way that normally occurs with the siting of an international organization. Instead, matters of concern to the host state had to be discussed while the organization was being created.<sup>233</sup>

A conclusion in favour of subjection to Dutch law has been drawn by reference to the fact that the parties to the Claims Settlement Declaration opted for the UNCITRAL Arbitration Rules intended for use in international commercial arbitration, rather than, for instance, the United Nations Draft Convention on Arbitral Procedure designed for use in interstate arbitration.<sup>234</sup> As recalled from our discussion of territorialized tribunals, the UNCITRAL Arbitration Rules make explicit or implicit reference to an applicable national law, such as article 18(1), providing that the awards 'shall be deemed to have been made at the place of arbitration',<sup>235</sup> and article 1(3): 'These Rules shall govern the arbitration except that where any of the Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.'<sup>236</sup> Partly on the basis that the United States and Iran left these provisions unmodified, Caron concludes that their presumed intent was the application of non-derogable provisions of Dutch procedural law, and the possibility of review by Dutch courts.<sup>237</sup> He further refers to a statement by Mr Feldman, a lawyer with the US State Department during the negotiation of the Accords, that his Government acted on the assumption that proceedings would be governed by Dutch law.<sup>238</sup> In fact, in the case *Carolina Brass, Inc. v Iran* (1986), the United States argued that the tribunal should find guidance in Dutch law as to the question of prescription: 'The Netherlands [...], whose law the Claimant argues is applicable due to the seat of this Tribunal in The Hague, has adopted the Hague Rules and embodied the one year

<sup>233</sup> Caron, fn. 222, at 27. See also at 31 ('As far as this author can ascertain, neither State Party fully anticipated or appreciated the possibility of Dutch supervision at the time the Accords were drafted. For the first several years of the Tribunal's existence, there continued to be some uncertainty as to the views of the two governments even as the Tribunal itself preserved the possibility of, and the Netherlands indicated its willingness to see, Dutch courts exercising some degree of supervision over Tribunal awards involving the claims of nationals' [references omitted]).

<sup>234</sup> See Claims Settlement Declaration (1981), art. III(2); Iran-US Claims Tribunal, Tribunal Rules of Procedure (1983), art. 1(2). Cf. G. Sacerdoti, 'Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19(1) *ICSID Rev.-FILJ* 1, 13, at fn. 27; Caron, fn. 165, at 138–9.

<sup>235</sup> UNCITRAL Arbitration Rules (2010), art. 18(1).

<sup>236</sup> UNCITRAL Arbitration Rules (2010), art. 1(3).

<sup>237</sup> Caron, fn. 165, at 139. See also A.J. van den Berg, 'Proposed Dutch Law on the Iran–United States Claims Settlement Declaration, A Reaction to Mr Hardenberg's Article' (1984) *Int'l Bus. Law* 341 (the proceedings of the tribunal qualify as 'arbitration' within the meaning of Dutch law).

<sup>238</sup> Caron, fn. 165, at 142, at fn. 172 (referring to M. Feldman, 'Implementation of the Iranian Claims Settlement Agreement—Status, Issues and Lessons: View from Government's Perspective' in *Private Investors Abroad: Problems and Solutions in International Business* (J. Moss, ed., 1981), 75, 97–8). But see D.D. Caron, 'International Tribunals and the Role of the Host Country', fn. 222, at 32, at fn. 20 ('At a Symposium at the University of Miami Law School on April 14, 1981, Mark Feldman, a lawyer with the U.S. State Department during the negotiations of the Accords, discussed the debate internal to the State Department [...] [and] stated his personal preference for a process in which national courts would not interfere. "I can only speak for myself. ... We are at a stage which raises a very complicated question concerning the law applicable to the proceedings. ... It is a subtle and difficult thing. We are struggling with it right now. ... One of the things we have to try and decide is how to keep the courts of the Netherlands or of England out of these cases."); G. Petrochilos, fn. 67, at 239 ("The most appropriate interpretation of Article 1(2) would be, it is suggested, that the "law applicable" is in fact the constitutive instruments of the Tribunal, that is, the Algiers Declarations and, subject to those Declarations, general international law").

time limitation in its domestic legislation.<sup>239</sup> In that case, the tribunal refrained from answering the question as to the applicability of Dutch law:

The Tribunal need not decide whether the law of the Islamic Republic of Iran, the United States, India, or the Netherlands should apply to this particular Case in order to establish that the time limitation contained in Article 3(6) of the Hague Rules and in Paragraph 21 of the Bills of Lading is applicable in this Case, since the law in each of these countries is similar, and all are in conformity with the widespread practice reflected in the Hague Rules.<sup>240</sup>

As additional evidence in support of his view that awards rendered by the tribunal are governed by Dutch law, Caron points to the fact that the tribunal decided on 3 May 1982 to register its awards at a Dutch court in accordance with article 639(1) of the Dutch Code of Civil Procedure, later superseded by the 1986 Netherlands Arbitration Act, included in Book 4 of the Dutch Code of Civil Procedure.<sup>241</sup> Article 1058(1)(b) provides: ‘The arbitral tribunal shall ensure that without delay [...] the original of the final or partial final award is deposited with the Registry of the District Court within whose district the place of arbitration is located.’<sup>242</sup>

It appears, however, that the awards rendered by the tribunal do not meet certain procedural requirements for valid arbitral awards under the Dutch Civil Code. In this respect, the Explanatory Note of the Dutch Ministry of Foreign Affairs, attached to the Dutch ‘Bill Regarding the Applicability of Dutch law to the Awards of the Tribunal Sitting in the Hague to Hear Claims Between Iran and the United States’, emphasizes the lack of an arbitration agreement between the parties in each case, in addition to the international nature of the agreement between states underlying the arbitration.<sup>243</sup> According to the Dutch Government, absent special legislation ‘it is by no means clear that the decisions and the awards of the tribunal concerning private claims would be characterized by Dutch courts as arbitral decisions or awards under the relevant provisions of the Dutch Code of Civil Procedure’.<sup>244</sup> Consequently, it continues, it would be necessary to enact special legislation, declaring *expressis verbis* that the awards are to be considered arbitral awards under Dutch law.<sup>245</sup> The bill was never enacted.<sup>246</sup>

Whereas Dutch courts have not ruled on their mandate to review awards rendered by the Iran–United States Claims Tribunal,<sup>247</sup> the perceived need for and lack of special legislation make us doubt whether the awards possess Dutch nationality, and to deduce

<sup>239</sup> *Carolina Brass, Inc. v Iran*, Award, 12 September 1986, Award No. 252-10035-2, 12 Iran–U.S. C.T.R. 139 (1986 III), para. 20 (a claim of less than US \$250,000, presented by the US) (references omitted).

<sup>240</sup> *Carolina Brass*, at para. 21.

<sup>241</sup> Caron, fn. 165, at 143, at fn. 177 (Caron refers to the Manual of the Registry of the Iran–United States Claims Tribunal.). See also Caron et al., fn. 232, at 38 (referring to the ‘practice according to which the Tribunal deposits its awards with the District Court of The Hague’).

<sup>242</sup> Netherlands Arbitration Act (1986), art. 1058(1)(b).

<sup>243</sup> Bill on Applicability of Dutch Law to the Awards of the Tribunal sitting in The Hague to hear Claims between Iran and the United States (1983), reprinted in 4 Iran–U.S. C.T.R. 306. See also Aide Memoire and Explanatory Notes attached to the Draft Legislation by the Dutch Government, reprinted in 4 Iran–U.S. C.T.R. 305, 308–16.

<sup>244</sup> Bill on Applicability of Dutch Law; Aide Memoire and Explanatory Notes.

<sup>245</sup> Bill on Applicability of Dutch Law; Aide Memoire and Explanatory Notes.

<sup>246</sup> The Dutch Government ceased consideration of the legislation in 1984. See Petrochilos, fn. 67, at 245; Caron, fn. 222, at 32; Annual Report 1984/85 of the Tribunal, at p. 17; Annual Report 1986/87 of the Tribunal, at pp. 16–17.

<sup>247</sup> See G. Lagergren, ‘The Formative Years of the Iran–United States Claims Tribunal’ (1997) 66 *Nordic J. Int'l Law* 23, 31; Seifi, fn. 220, at section (b) (noting how several applications for review were withdrawn by the Applicant Iranian Government). See also Caron, fn. 165, at 144–5; and fn. 222, at 32–3.

that they rather belong to the international legal order.<sup>248</sup> This conclusion finds support in the tribunal's award in *Anaconda-Iran* (1986): 'As concerns the Tribunal's jurisdiction, procedure, and more generally its constitution and its functioning, the Tribunal is governed *exclusively* by the rules derived from the Algiers Accords and, pursuant to Article III, paragraph 2, of the [Claims Settlement Declaration], from the UNCITRAL Arbitration Rules as modified by these Accords or by the Tribunal.'<sup>249</sup> The internationalized nature of the Iran–United States Claims Tribunal was also endorsed by an English court in the case of *Dallal v Bank of Mellal* (1986), in which the plaintiff sought to relitigate in England matters which had been decided by the tribunal, or which she had omitted to raise before it.<sup>250</sup> According to Justice Hobhouse, the tribunal derived its competence from international law, and based on international comity, English courts were required to recognize its decisions.<sup>251</sup>

The Host State Agreement—the Exchange of Notes between the Dutch Government and the tribunal—gives substance to the international nature of the tribunal by granting the latter immunity.<sup>252</sup> According to the Dutch Government, this immunity also exists as a matter of general international law. Pending the conclusion of this Host State Agreement, the Secretary-General of the Ministry of Foreign Affairs of the Netherlands wrote a letter to the tribunal concerning its immunity from the jurisdiction of Dutch courts, stating, *inter alia*: 'The rule that the Tribunal in its capacity as a body established under public international law enjoys certain immunities and privileges in the country where it has its seat is, in general terms, derived direct(l)y from the generally accepted principles of international law.'<sup>253</sup> This interpretation was sustained by the Dutch Supreme Court in a dispute between the Iran–United States Tribunal and one of its employees. Quoting verbatim the Dutch Parliamentary Report II 1982–83, the Court held that the tribunal is 'entitled in the Netherlands "to the usual immunity of jurisdiction of international organizations based on international public law, which is necessary for the performance of their tasks for which they have been established"'.<sup>254</sup> The European Commission on Human Rights reached the same

<sup>248</sup> See L. Hardenberg, 'The Awards of the Iran–US Claims Tribunal Seen in Connection with the Law of the Netherlands' (1984) *Int'l Bus. Law* 337, 388 (the arbitration by the Iran–US Claims Tribunal 'lacks certain fundamental requirements of Dutch arbitration law'); Avanessian, fn. 223, at 272; Delaume, fn. 153, at 478; W.T. Lake and J.T. Dana, 'Judicial Review of Awards of the Iran–United States Claims Tribunal: Are the Tribunal's Awards Dutch?' (1984) 16 *L. & Pol'y Int'l Bus.* 755.

<sup>249</sup> *Anaconda-Iran*, fn. 230, Interlocutory Award, at para. 102 (emphasis added). See also *Amman & Whitney and Ministry of Housing and Urban Development (Khuzestan Department of Housing and Urban Development)*, Case No. 198, Chamber One, Order, 30 January 1984, cited in Caron et al., fn. 230, at 52 ('The conduct of proceedings before this Tribunal is governed by the Tribunal Rules and by no national procedural system'); and at 39 ('These statements clearly reflect an understanding that the arbitration before the Tribunal is in no way controlled by Dutch law').

<sup>250</sup> *Mark Dallal v Bank Mellat* (per Hobhouse J.) [1986] 1 QB 441, 2 WLR 745, 1 All ER 239.

<sup>251</sup> *Mark Dallal*, at pp. 461H–462A. See also *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 124, High Court of Justice, Queen's Bench Division, Commercial Court, para. 42.

<sup>252</sup> Exchange of Notes Between the Government of The Netherlands and the President of the Iran–United States Claims Tribunal Concerning the Privileges and Immunities of the Tribunal, 1990 Tractatenblad No. 150. See also A.S. Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague etc., Kluwer Law International, 1995), 49 ('[I]t was not until September 1990 that a host agreement was concluded with the Dutch government').

<sup>253</sup> *Spaans v Netherlands*, European Commission of Human Rights, Application No. 12516/86, 12 December (1988).

<sup>254</sup> *Spaans v Iran–US Claims Tribunal* (Dist. Ct The Hague, 9 July 1984), overruling decision of the *Kantonrechter* (County Ct Judge) (The Hague, 8 June 1983), 18 Neth. Y.B. Int'l L. 357 (1987). See also Caron, fn. 222, at 30; Seifi, fn. 220, at 58.

conclusion.<sup>255</sup> These decisions support the tribunal's insulation from Dutch law and its subjection to international law as its *lex arbitri*.

Hence, the registering of the tribunal's awards at the Hague District Court may be seen more as a precautionary measure taken by the tribunal in its early days of existence to ensure the awards' enforceability.<sup>256</sup> Indeed, according to Lagergren, former President of the tribunal, the decision by the tribunal to deposit its awards at the Court 'has no bearing upon the yet unsolved question whether the Tribunal's awards can be successfully challenged in Dutch courts'.<sup>257</sup> In his view, 'the Tribunal possesses the character of an international tribunal, governed by public international law [...].'<sup>258</sup>

#### *4.1.2. The states parties' international obligation to comply with and enforce the awards*

Iran and the United States are treaty-bound, by virtue of the Claims Settlement Declaration, to give effect to the tribunal's awards within their national legal orders.<sup>259</sup> The international obligation of the states parties in this respect was confirmed in *Iran v United States* (Case A27) (1998):

By virtue of the refusal by the United States Court of Appeals for the Second Circuit to enforce the Avco award, the United States has violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States.<sup>260</sup>

In reaching that decision, it stated the general principle that '[b]y definition, international arbitral awards, if final, are binding'.<sup>261</sup> As concerned awards rendered by the Iran–United States Claims Tribunal in particular, the tribunal referred to article IV(1) of the Claims Settlement Declaration, which provides that '[a]ll decisions and awards of the Tribunal shall be final and binding'.<sup>262</sup> In its view, that provision 'rules out the possibility of readjudication of the merits of Tribunal awards by a municipal court, either under the guise of [...] the New York Convention or by any other means'.<sup>263</sup> Whereas the tribunal recognized that no tribunal can declare itself immune from error, it added that in such a hypothetical case, only the tribunal itself could revise the award.<sup>264</sup>

<sup>255</sup> *Spaans v The Netherlands*, fn. 253, 58 Eur. Comm'n H.R. Dec. & Rep. 119, 122 (1988) (The case was found inadmissible).

<sup>256</sup> See Pinto, fn. 216, at para. 52; Petrochilos, fn. 67, at 244.

<sup>257</sup> Lagergren, fn. 247, at 31 (referring to D.J. Bederman, 'Case Note (Ministry of Defense of the Islamic Republic of Iran v Gould Inc.)' (1990) 84 *Am. J. Int'l L.* 556, fn. 17).

<sup>258</sup> G. Lagergren, 'United States Claims Tribunal' (1990) 13 *Dalhousie Law Journal* 505, 512. See also Brower and Brueschke, fn. 220, at 16; Petrochilos, fn. 36, at 243–6; Rigaux, fn. 208, at para. 86 (see, in particular, the reference to scholarship in fn. 58).

<sup>259</sup> See Claims Settlement Declaration (1981), art. IV(3) ('Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws').

<sup>260</sup> Case No. A/27, fn. 231, at para. 83.

<sup>261</sup> Case No. A/27, at para. 63.

<sup>262</sup> Case No. A/27. See also *Anaconda-Iran*, fn. 230, Interlocutory Award, at para. 104 ('[D]ue to the provisions establishing the Security Account, a settlement by this Tribunal gives successful United States' claimants the additional benefit of a guaranteed execution of the awards').

<sup>263</sup> Case No. A/27. See also at paras 64, 70. See also *Islamic Republic of Iran and United States of America*, Case A/21, Decision No. DEC. 62-A21-FT, 4 May 1987, 14 Iran–U.S. C.T.R. 324, 330, para. 14.

<sup>264</sup> See Case No. A/27, fn. 231, at para. 64, fn. 6. Cf. *Ram International Industries, Inc., et al. and Air Force of the Islamic Republic of Iran*, Decision No. DEC 118-148-1, para. 20 (28 December 1993), 29 Iran–U.S. C.T.R. 383, 390; Seifi, fn. 220, at 43. But see *Islamic Republic of Iran and United States*

The fact that the awards receive their validity in the international legal order and cannot be reviewed by national courts at the enforcement stage contributes to the international character of the tribunal.

#### 4.1.3. Interim conclusion

The Iran–United States Claims Tribunal operates pursuant to a treaty, the Claims Settlement Declaration. The conclusion that the arbitrators' mandate stems from the international legal order is buttressed by our findings that Dutch arbitration law does not govern the tribunal's proceedings, and that the awards are international in nature. Accordingly, we may infer that its *lex arbitri* for all purposes is international law.

### 4.2. ICSID tribunals

In 1965, the World Bank<sup>265</sup> promulgated the ICSID Convention in an attempt to remove legal and political obstacles to the flow of foreign investment, particularly to developing states.<sup>266</sup> For this purpose, the Convention provides for an International Centre for the Settlement of Investment Disputes (ICSID), facilitating the peaceful settlement of investment disputes between foreign investors and host states through arbitration.<sup>267</sup> It is noted that the Convention is procedural in character; it does not contain any substantive rules to be applied to the merits of disputes brought before it.<sup>268</sup>

The jurisdiction of ICSID tribunals<sup>269</sup> is revealed by the name of the Convention itself: 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States'. Article 25 adds that the dispute must be of a 'legal' nature,<sup>270</sup> 'arising directly out of an investment',<sup>271</sup> that the host state may agree to

*of America*, fn. 218, at para. 64 ('[T]he Tribunal is not prepared to hold that it has an inherent power to revise a final and binding award').

<sup>265</sup> The International Bank for Reconstruction and Development (IBRD) was established pursuant to the 1944 IBRD Articles of Agreement of the International Bank for Reconstruction and Development (as amended effective 16 February 1989).

<sup>266</sup> See IBRD Articles of Agreement, at Preamble. See also A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours* 331; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-1, at pp. 4, 475 (hereinafter History of the ICSID Convention); *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, 29 April 2004, Dissenting Opinion by Professor Prosper Weil (President), para. 3.

<sup>267</sup> The convention also provides for conciliation. See ICSID Convention (1965), arts 28–35; Rules of Procedure for Conciliation Proceedings (Conciliation Rules).

<sup>268</sup> See Chapter 3, Section 3.2.2.1 (on the ICSID Convention).

<sup>269</sup> See generally C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 71–347; G. Zeiler, 'Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 76.

<sup>270</sup> Report of the Executive Directors of the International Bank of Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 ICSID Rep. 28, at para. 26; *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006 (G. Sacerdoti, V.V. Veeder, M. Nader, arbs), para. 66; G.R. Delaume, 'ICSID Arbitration: Practical Considerations' (1984) 1 *J. Int'l Arb.* 101, 116–17.

<sup>271</sup> The definition of 'investment' has caused controversy in arbitral practice and scholarship. See, e.g., *Global Trading Resource Corp. and Globex International, Inc. v Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (F. Berman, E. Gaillard, J.C. Thomas, arbs), para. 55; E. Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 403; J.D. Mortenson, 'The Meaning of "Investment": ICSID's Travaux

include certain state subdivisions and agencies for the purposes of constituting both claimant and respondent;<sup>272</sup> and that both the host state and the home state of the ‘national’ must be parties to the ICSID Convention.<sup>273</sup>

For an investor to have standing, it must be a ‘national of another Contracting State’,<sup>274</sup> which includes both natural and juridical persons.<sup>275</sup> During the drafting of the Convention, a problem was foreseen with regard to this nationality requirement. Some states namely require that in order to invest on their territory, foreign investors must be organized under their laws. In that case, the investor would technically have the nationality of the host state, and the tribunal would consequently not have jurisdiction. For that reason, the Convention provides that juridical persons would have standing if ‘because of foreign control, the parties have agreed that they should be treated as a national of another Contracting State for the purposes of this Convention’.<sup>276</sup>

Similar to territorialized tribunals, the consent of both parties constitutes an additional jurisdictional requirement. As explicitly provided in the ICSID Convention, ‘no Contracting State shall by the mere fact of its ratification,<sup>277</sup> acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to [...] arbitration.’<sup>278</sup> The Convention further stipulates that once a host state has given its consent to arbitrate a particular dispute, such consent may not be withdrawn unilaterally.<sup>279</sup>

and the Domain of International Investment Law’ (Winter 2010) 51(1) *Harvard Int'l L.J.* 257; D.A. R. Williams and S. Foote, ‘Recent Developments in the Approach to Identifying an “Investment” Pursuant to Article 25(1) of the ICSID Convention’ in *Evolution in Investment Treaty Law and Arbitration* (C. Brown and K. Miles, eds, Cambridge, Cambridge University Press, 2011), 42.

<sup>272</sup> See Schreuer et al., fn. 269, at 230–67.

<sup>273</sup> See ICSID Convention (1965), art. 25(1). See also *Banro American Resources, Inc. and Société Aufière du Kivu et du Maniema S.A.R.L. v Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000 (P. Weil, A. Diagne, C.H. Geach, arbs), *ICSID Rev.-FILJ* 382 (2002), at section II.

<sup>274</sup> ICSID Convention (1965), art. 36(1) (emphasis added).

<sup>275</sup> See ICSID Convention (1965), art. 25(2). See also C.F. Amerasinghe, ‘Jurisdiction Rationae Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1974) 47 *Brit. Y.B. Int'l L.* 227; Československá Obchodní Banka (CSOB) *v Slovák Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (T. Buergenthal, P. Bernardini, A. Bucher, arbs), 14 *ICSID Rev.-FILJ* 251, 257–61 (1999) (juridical persons may also encompass wholly or partly government-controlled companies acting in a commercial capacity).

<sup>276</sup> ICSID Convention (1965), art. 25(2) (b). See also History of the ICSID Convention, fn. 266, Vol. II-1, at pp. 579–82; Broches, fn. 266, at 358–9. For the term ‘foreign control’, see M.L. Moreland, ‘“Foreign Control” and “Agreement” under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organized Subsidiaries against Host States’ (2000) 9 *Currents Int'l Trade L.J.* 18; TSA *Spectrum de Argentina S.A. v Argentina Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (H. Danielius, G. Abi-Saab, G.D. Aldonas, arbs), paras 134 *et seq.*

<sup>277</sup> In order for states to ratify the ICSID Convention, they must first be members of the International Bank for Reconstruction and Development (World Bank). See ICSID Convention (1965), art. 67. The World Bank has 188 member states, 148 of which have ratified the convention. See World Bank, available at <<http://www.worldbank.org/>> (last visited 1 May 2012) (under ‘About’ and ‘Member Countries’); ICSID, *List of Contracting States and other Signatories of the Convention*, available at <<http://icsid.worldbank.org/>> (last visited 1 May 2012). Note that article 67 of the ICSID Convention provides that it is also open for States not members of the Bank, but which are parties to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention. ICSID Convention (1965), art. 67 (footnote not in original).

<sup>278</sup> ICSID Convention (1965), at Preamble, para. 7. See also Reinisch and Malintoppi, fn. 122, at 699.

<sup>279</sup> See ICSID Convention (1965), art. 25(1).

#### 4.2.1. The tribunals' insulation from the law of the seat

In addition to the treaty nature of ICSID tribunals,<sup>280</sup> the most important reason why they should be seen to operate within the international legal order is that by virtue of the ICSID Convention, their activities are not controlled by the states parties to the Convention. First, the Centre has full international legal personality,<sup>281</sup> and enjoys immunity from all legal process in the territories of all states parties.<sup>282</sup> Such immunity extends to persons acting as arbitrators or appearing in the proceedings as parties, agents, counsel, advocates, witnesses, or experts, as long as the immunity relates to acts performed by them in the exercise of their functions.<sup>283</sup> Secondly, the Convention explicitly provides that arbitration shall be conducted in accordance with the Convention and the Arbitration Rules of the Centre.<sup>284</sup> Thirdly, it specifies that awards shall not be subject to any appeal or any other remedy except those provided for in the Convention itself;<sup>285</sup> and fourthly, the Convention provides that '[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories'.<sup>286</sup> Combined, these features imply that a state party to the ICSID Convention cannot impose its own law on the proceedings taking place in its territory.<sup>287</sup> Accordingly, and in order to shield ICSID awards from interference by national courts, the ICSID Convention provides that unless the arbitration is held at ICSID, in Washington DC or the Permanent Court of Arbitration, the Netherlands (the US and the Netherlands being parties to the ICSID Convention), the tribunal must approve the place of arbitration after consultation with the Secretary-General.<sup>288</sup> The insulation of ICSID tribunals from national law is referred to by the ICSID tribunal in *Mihaly International Corp v Democratic Socialist Republic of Sri Lanka* (2002):

The Tribunal maintains that the jurisdiction of the Centre for Settlement of Investment Disputes (ICSID) and of this Tribunal is based on the ICSID Convention and the rules of general international law. It does not operate under any national law in particular, and certainly not under the law of the State of California or the law of the Province of Ontario.<sup>289</sup>

<sup>280</sup> Cf. Blackaby et al., fn. 39, at 64 ('Because it is governed by an international treaty, rather than by a national law, an ICSID arbitration is truly delocalised or denationalised').

<sup>281</sup> See ICSID Convention (1965), art. 18.

<sup>282</sup> See ICSID Convention (1965), art. 20.

<sup>283</sup> See ICSID Convention (1965), arts 21–22. Arbitrators and other persons involved in the proceedings before territorialized tribunals also enjoy a large degree of immunity, but this is a question of national law. On this issue, see, e.g., Yu and Shore, fn. 76, at 935.

<sup>284</sup> ICSID Convention (1965), art. 44. See also Petrochilos, fn. 67, at 252.

<sup>285</sup> ICSID Convention (1965), art. 53(1).

<sup>286</sup> ICSID Convention (1965), art. 69.

<sup>287</sup> See Lauterpacht, fn. 66, at 651; Heiskanen, fn. 11, at 396–7; *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, Case No. ARB/84/4, Decision on Annulment, 2 December 1989 (S. Sucharitkul, A. Broches, K. Mbaye, committee members), 5 ICSID Rev-FILJ 95 (1990); *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 125, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, at para. 38. But see Chapter 5, Section 3.2.2.1 (on the corrective function of international law when the parties have agreed to the sole application of national law) (concerning the possibility that ICSID awards might be annulled when they are contrary to fundamental rules of international law).

<sup>288</sup> See ICSID Convention (1965), art. 63. Cf. Lauterpacht, fn. 66, at 652 ('It may be assumed that a decision to hold proceedings in a place not within the territory of one of the Contracting States would be dependent upon the absence of any risk that the local law could have any influence upon the conduct or validity of the proceedings').

<sup>289</sup> *Mihaly International Corporation v Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (S. Sucharitkul, A. Rogers, D. Suratgar, arbs), para. 19. See also *Abaclat and Others (Case formerly*

The lack of control by the jurisdictional seat is compensated by a review mechanism within the ICSID system itself.<sup>290</sup> According to article 52 of the ICSID Convention, either party to the dispute may request that an ad hoc committee, appointed by the Chairman of ICSID's Administrative Council, annul the award 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; and/or (e) that the award has failed to state the reasons on which it is based.<sup>291</sup> The ad hoc committee may not amend or replace the award by its own decision on the merits; and a request for annulment must therefore be distinguished from an appeal: 'An annulment committee [...] cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one.'<sup>292</sup> So far, ICSID has registered more than forty requests for annulment.<sup>293</sup>

The clause on excess of powers<sup>294</sup> has been interpreted to include failure to apply the proper law, one of the grounds for annulment of awards rendered by territorialized tribunals.<sup>295</sup> During the drafting of the Convention, Broches, Chairman and World Bank General Counsel,<sup>296</sup> stated that while a mistake in applying the law would not be a valid ground for annulment, applying a law different from that agreed by the parties would lead to an award that could properly be challenged on the ground that the arbitrators had gone against the terms of the  *compromis*.<sup>297</sup> This interpretation has been sustained in practice. The ad hoc committee held in *Soufraki v United Arab Emirates* (2007): 'Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply

*known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5 (P. Tercier, S. Torres Bernández, A.J. van den Berg, arbs), Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011, para. 6.

<sup>290</sup> Cf. Lauterpacht, fn. 66, at 651 (the annulment provision 'clearly indicate[s] the intention was that the system established by the Convention should be self-contained and independent of the local legal system').

<sup>291</sup> See ICSID Convention (1965), art. 52(1); C.H. Schreuer et al., fn. 269, at 899 ('Under the Convention, Art. 52 is the only way of having the award set aside. In particular, domestic courts have no power of review over ICSID awards. During the Convention's drafting [...] the proposal to maintain the system embodied in the draft, providing for purely internal review, was carried with no opposition').

<sup>292</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (G. Guillaume, J. Crawford, S.O. Noriega, committee members), para. 54; G. Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?' in *Annulment of ICSID Awards* (E. Gaillard and Y. Banifatemi, eds, New York, Juris Publishing, 2004), 189, at section I(A).

<sup>293</sup> See International Centre for Settlement of Investment Disputes (ICSID), *The ICSID Caseload—Statistics, Issue 2012–1* (based on cases registered or administered by ICSID as of December 2011) available at <<http://icsid.worldbank.org/>> (last visited 1 May 2012). See also K. Yannaca-Small, 'Annulment of ICSID Awards: Limited Scope but is there Potential?' in *Arbitration under International Investment Agreements: a Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 603, 605 ('[T]here is a growing trend for the losing party to submit the award for annulment').

<sup>294</sup> ICSID Convention (1965), art. 52(1)(b).

<sup>295</sup> For territorialized tribunals, see Section 3.2.1.2 (on annulment as an exercise of control); Section 3.3 (on the influence of the delocalization theory on state practice).

<sup>296</sup> See Petrochilos, fn. 67, at 252 (referring to Dr Broches as 'the spiritual father of the ICSID system').

<sup>297</sup> History of the ICSID Convention, fn. 266, Vol. II-1, at pp. 517–18.

the proper law.<sup>298</sup> Thus, according to the ad hoc committee in *Azurix v Argentine Republic* (2009): ‘while non-application by the tribunal of the law applicable under Article 42 may be a ground for annulment, the incorrect application by the tribunal of the applicable law is not.’<sup>299</sup>

Some more recent ad hoc committees have given a wider interpretation of the grounds for annulment, so that ‘failure to apply the proper law is becoming increasingly indistinguishable from an error in the application of the law’.<sup>300</sup> In an article entitled ‘From ICSID Annulment to Appeal: Half Way Down the Slippery Slope’, Schreuer criticizes this development:

[I]f one is to take the annulments in *Sempra* and *Enron* as an indication of current practice, an ad hoc committee can annul an award whenever it disagrees with the way a tribunal interprets an applicable rule. In other words, failure to apply the proper law as a form of excess of powers has undergone two permutations: first the proper law became the proper rule. Second, the rule’s application became its correct application.<sup>301</sup>

Several of the requests for annulment have been initiated by the host state for failure to apply provisions of their national law.<sup>302</sup> The decisions, many of which will be examined more fully in subsequent chapters, demonstrate the controversy regarding the applicable law in ICSID proceedings and the important role it plays for the resolution of the dispute and for the disputing parties.

#### *4.2.2. States parties’ international obligation to comply with and enforce the awards*

In addition to their treaty nature and their insulation from the law of the seat, a third feature that adds to the international character of ICSID tribunals concerns the recognition and enforcement of their awards.<sup>303</sup> Whereas ICSID—like the Iran–United States Claims Tribunal—does not have the ultimate means of enforcement and thus must rely on national courts,<sup>304</sup> the ICSID Convention eliminates several of

<sup>298</sup> *Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007 (F.P. Feliciano, O. Nabulsi, B. Stern, committee members), para. 86.

<sup>299</sup> *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009 (G. Griffith, B. Ajibola, M. Hwang, committee members), para. 137. See also *MTD Equity v Chile*, fn. 292, Decision on Annulment, at paras 47, 75; *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009 (D. Hascher, H. Danelius, P. Tomka, committee members), para. 42.

<sup>300</sup> C. Schreuer, ‘From ICSID Annulment to Appeal: Half Way Down the Slippery Slope (2011) 10 *Law and Practice of International Courts and Tribunals* 211, 225.

<sup>301</sup> Schreuer, ‘From ICSID Annulment to Appeal’, at 221. See also *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (C. Söderlund, D.A.O. Edward, A.J. Jacovides, committee members), para. 164 (‘As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers’).

<sup>302</sup> See C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int’l & Eur. L.* 147 (‘Over the last twenty years a number of attempts have been made to challenge arbitral awards in investment disputes on the ground that they were not based on the applicable law. ICSID ad hoc committees as well as domestic courts have dealt with these challenges in widely differing decisions’); Schreuer et al., fn. 269, at 554.

<sup>303</sup> See generally S.A. Alexandrov, ‘Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention’ in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 322.

<sup>304</sup> See A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face’ (2004) 17 *N.Y. Int’l L. Rev.* 53, 65.

the obstacles a winning party faces in respect of awards rendered by the territorialized tribunals examined earlier. First, once an award is issued, the host state—as a contracting party to the ICSID Convention—is under an international obligation to comply with it.<sup>305</sup> Secondly, pursuant to article 54, an ICSID award shall be recognized as binding by all states parties to the ICSID Convention, and the pecuniary obligations imposed by the award shall be imposed as if it were a final judgment of a court in that state.<sup>306</sup> As Justice Aikens explained in *AIG v Kazakhstan* (2005):

A party to an ICSID arbitration has the right, by virtue of the *1966 Act*, to enforce an ICSID Award as a judgment of the English court. Execution of that judgment is an integral part of the ‘trial’ because it is part of the overall process of the ICSID arbitration procedure that was set up by the Washington Convention to which the UK is a party. The *1966 Act* was passed to give effect to the Washington Convention in the UK and so as to assist in effective enforcement of ICSID arbitration awards in the UK.<sup>307</sup>

No defence can be raised against the recognition and enforcement of ICSID awards based on the nature of the award or of the underlying transaction, or even public policy.<sup>308</sup> Thirdly, Article 54 of the Convention makes the procedure for recognition and enforcement as simple as possible. The successful party need only furnish the competent court or authority designated in advance by each contracting state with a copy of the award certified by the Secretary-General of ICSID.<sup>309</sup> In combination, these provisions contribute to the tribunals’ international character.<sup>310</sup>

<sup>305</sup> ICSID Convention (1965), art. 53(1) ('The award shall be binding on the parties'). See also art. 27(1) (The right to diplomatic protection revives if a host State does not comply with its obligation to enforce the award).

<sup>306</sup> ICSID Convention (1965), art. 54(1).

<sup>307</sup> *AIG v Kazakhstan*, Decision of the High Court of Justice, 20 October 2005 (per Justice Aikens) [2005] EWHC 2239 (Comm), para. 71 (emphasis in original). See also *Republic of Ecuador v Occidental Exploration and Production Company*, fn. 125, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, at para. 38 ('The ICSID scheme also differs in having its own enforcement mechanism, so that the New York Convention is inapplicable').

<sup>308</sup> See *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Request for Stay of Enforcement, 5 March 2009 (C. Söderlund, D.A.O. Edward, A.J. Jacovides, committee members), paras 40–41; E. Baldwin et al., 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *J. Int'l Arb.* 1 (there have been three decisions challenging the enforcement and execution of ICSID awards in national courts, and one case challenging only execution of the award. 'All of the enforcement challenges have been unsuccessful, whereas challenges to execution of the award against particular sovereign assets have been more successful'). Cf. ICSID Convention (1965), art. 55 ('[N]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'). See also Chapter 5, Section 3.2.2.1 (on the corrective role of international law when the parties have agreed on the sole application of national law) (on the possibility of non-enforcement of ICSID awards contrary to fundamental rules of international law).

<sup>309</sup> See ICSID Convention (1965), art. 54(2); *Benvenuti & Bonfanti Company v The Government of the People's Republic of Congo, Court of Appeals of Paris, France*, Judgment, 6 June 1981, 20 I.L.M. 877, 881 (1981). If recognition and enforcement is sought in a state not party to the ICSID Convention, a successful claimant may have to rely on, e.g., the New York Convention. See A.J. van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2 *ICSID Rev.-FIL* 439.

<sup>310</sup> Cf. *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986 (I. Seidl-Hohenveldern, F.P. Feliciano, A. Giardina, committee members), 25 I.L.M. 1439, 1446 (1986). See also Chapter 5, Section 3.2.2 (on the supervening role of international law).

#### 4.2.3. *Interim conclusion*

By reason of the fact that the jurisdiction of ICSID tribunals rests on a treaty; that states parties to the ICSID Convention have relinquished their sovereign right to exercise control over the activities of ICSID tribunals in their territory, and that ICSID awards receive their validity in their international legal order, we can conclude that their *lex arbitri* is international law.<sup>311</sup>

### 5. General Conclusions

Based on the foregoing, we conclude that the delocalization theory—with its de-emphasis of the role of national legal orders in the arbitral process—has had much influence on national arbitration laws. This is evidenced by the large degree of procedural freedom provided to the disputing parties and the arbitrators alike. Nevertheless, these laws—by continuing to subject arbitral proceedings and the subsequent awards to various, albeit limited, requirements—give testimony to the strength of the seat theory. State practice thereby corroborates that the mandate of such ‘territorialized’ tribunals partly stems from a national legal order, giving effect to the parties’ arbitration agreement.

States may also surrender the sovereign right of control over tribunals operating within their jurisdiction. When they do so by virtue of a bi- or multilateral treaty, according to which the awards become binding on the international level, the arbitral tribunals are not delocalized or a-national, but they operate in and are subject to the rules of the international legal order. These tribunals, which include the Iran–United States Claims Tribunal and ICSID tribunals, may thus be characterized as ‘internationalized’.

In the ensuing analysis of choice-of-law rules, we will examine the extent to which such grounding in the national or the international legal order influences the arbitrators’ choice-of-law methodology.

<sup>311</sup> Cf. Mann, fn. 205, at 13–14; Rigaux, fn. 208, at para. 85; Petrochilos, fn. 67, at 256.

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# 3

## Choice-of-Law Rules

[T]he conflict of laws has in mind the localisation of legal relationships and [...] therefore, the conflict rule normally refers to a locally defined legal system. But this is no more than a form of words from which no dogma should be derived.<sup>1</sup>

### 1. Introduction

In the previous chapter, it was concluded that arbitral tribunals are either grounded in the national legal order of their juridical seat or in the international legal order and that they therefore may be characterized as territorialized and internationalized, respectively. In this chapter dedicated to a discussion of choice-of-law rules, we will examine the implications this conclusion has for their choice-of-law methodology.

In **Section 2**, it will be demonstrated that internationalized tribunals need to apply choice-of-law rules belonging to the international legal order; and that territorialized tribunals must look to the national arbitration law of the state in which they are seated. Still, in view of the fact that choice-of-law rules contained in national arbitration laws are generally considered to be of a non-mandatory nature, territorialized tribunals will need to heed choice-of-law rules provided for in the parties' arbitration agreement. Such choice-of-law rules include those set out in arbitration rules that the parties have agreed will govern the arbitral proceedings, for example, the UNCITRAL Arbitration Rules<sup>2</sup> or the ICSID Additional Facility Rules.<sup>3</sup>

In the analysis of choice-of-law rules in **Section 3**, we will see that choice-of-law provisions in all relevant instruments —national arbitration laws, arbitration rules, the Iran–United States Claims Settlement Declaration,<sup>4</sup> and the ICSID Convention<sup>5</sup>—grant disputing parties and arbitral tribunals much freedom with respect to the applicable law. Specifically, the parties may generally agree to the application of both national and/or international law (**Section 3.1**). Further, in the absence of party agreement, the arbitrators have much flexibility in applying either national and/or international law to the dispute (**Section 3.2**). This freedom, combined with the potential impact of fundamental national and international norms (**Section 3.3**), creates a fertile ground for interplay between national and international law in arbitral proceedings before territorialized and internationalized tribunals alike.

<sup>1</sup> F.A. Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 *Brit. Y.B. Int'l L.* 34, 46.

<sup>2</sup> UNCITRAL Arbitration Rules (as revised in 2010).

<sup>3</sup> ICSID Additional Facility Rules (as amended effective 10 April 2006).

<sup>4</sup> For the text of the Algiers Accords, including the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), see 1 Iran–U.S. C.T.R. 3 (1981–2).

<sup>5</sup> The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965 (hereinafter ICSID/Washington Convention).

## 2. The Linkage Between *Lex Arbitri* and Choice-of-Law Methodology

It is generally accepted that internationalized tribunals, by function of their international *lex arbitri*, should apply choice-of-law rules belonging to the international legal order. In this sense, their choice-of-law methodology is akin to that of international courts and tribunals.<sup>6</sup> Indeed, in no case has the Iran–United States Claims Tribunal applied the conflict of law rules of the Netherlands; and ICSID tribunals have never found guidance in the national law of the state in which they were seated when deciding on the applicable law.<sup>7</sup> Commenting on the insulation of the Iran–United States Claims Tribunal from national law, former President Lagergren states: ‘the Tribunal has avoided to apply any national conflict of laws rules, but instead applied general principles of conflict of laws’.<sup>8</sup> And as Judge Bahrami Ahmadi noted in the case *FMC Corporation v Iran* (1987), the tribunal: ‘cannot, as an international forum, apply the choice of law rules of that state in which it has been convened, even in commercial claims, whereby the two Governments deemed it necessary to lay down rules for selecting the applicable law’.<sup>9</sup> The same reasoning may be applied to the choice-of-law methodology of ICSID tribunals. Schreuer explains: ‘Arbitration under the ICSID Convention is truly international and free from the interference of national rules. The choice of an ICSID tribunal’s place or places of proceedings is purely a matter of convenience and has no impact on the applicable law’.<sup>10</sup>

As concerns territorialized tribunals, the linkage between the national *lex arbitri* and choice-of-law methodology is more complex and also more controversial. According to scholars adhering to the seat theory, these tribunals should find guidance in the national legal framework provided by their juridical seat. One of the strongest proponents of this view was Mann: ‘Just as the judge has to apply the private international law of the forum, so the arbitrator has to apply the private international law of the arbitration tribunal’s seat, the *lex arbitri*.<sup>11</sup> Others explicitly reject this approach in the spirit of the delocalization theory.<sup>12</sup> Lalive states:

The arbitrator exercises a private mission, conferred contractually, and it is only by a rather artificial interpretation that one can say that his powers arise from—and even then very indirectly

<sup>6</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>7</sup> ICSID tribunals may, however, need to apply national choice-of-law rules as a function of the ICSID Convention itself. ICSID Convention, art. 42(1), second sentence ('In the absence of [party] 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' [emphasis added]). See also fns 166, 209.

<sup>8</sup> G. Lagergren, ‘The Formative Years of the Iran–United States Claims Tribunal’ (1997) 66(1) *Nordic J. Int'l Law* 23, 31, fn. 12. Cf. J.R. Crook, ‘Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience’ (1989) 83 *Am. J. Int'l L.* 278, 297. See also Section 3.2.2.2 (on the Iran–United States Claims Settlement Declaration).

<sup>9</sup> *FMC Corporation v Ministry of National Defence et al.*, Award, 12 February 1987, Dissenting Opinion, Judge Ahmadi, at section B(1).

<sup>10</sup> C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 638.

<sup>11</sup> F.A. Mann, ‘Lex Facit Arbitrum’ in *International Arbitration: Liber Amicorum for Martin Domke* (P. Sanders, ed., The Hague, Martinus Nijhoff, 1967), 157, 167 (references omitted). See also F.E. Klein, ‘The Law to be Applied by the Arbitrators to the Substance of the Dispute’ in *The Art of Arbitration, Essays on International Commercial Arbitration: Liber Amicorum Pieter Sanders* (Jan C. Schultz, Albert Jan van den Berg, eds, Deventer, Boston, Kluwer Law and Taxation Publishers, 1982), 189. Cf. Institute of International Law, Arbitration in Private International Law, Resolution, art. 11 (Amsterdam, 1957), Institut de Droit International, Tableau des Résolutions Adoptées (1957–1991) 236, 243 (1992), art. 11.

<sup>12</sup> See Chapter 2, Section 3.1 (on the delocalization theory).

—a tolerance of the State of the place of arbitration, or rather of the various States involved (States of the parties, of the *siege*, of the probable places of execution of the award), which accept the institution of arbitration, or of the community of nations, notably those which have ratified international treaties in the matter. Would it not be to force the bed if he were assimilated to a State judge, who is imperatively bound to the system of private international law of the country where he sits and from which he derives his power of decision?<sup>13</sup>

Similarly, and while concluding in *Sapphire Int'l Petroleum Ltd v National Iranian Oil Co.* (1963) that the arbitration was 'as far as procedure is concerned', subject to the binding rules of the tribunal's seat (Vaud, Switzerland),<sup>14</sup> Arbitrator Cavin found persuasive 'the view of some eminent specialists in Private International law [...] [that] since the arbitrator has been invested with his powers as a result of the common intention of the parties he is not bound by the rules of conflict in force at the forum of arbitration'.<sup>15</sup> To his mind, 'the parties cannot be presumed to have agreed upon the choice of a conflict rule by their common choice of the forum'.<sup>16</sup>

In our examination of choice-of-law rules in **Section 3** of this chapter, it will be demonstrated that in the main, the disputing parties and arbitral tribunals enjoy a considerable amount of freedom with respect to the applicable law. According to the present author, and consistent with conclusions reached in **Chapter 2**,<sup>17</sup> such freedom may more accurately be seen to reflect the normative impact of the delocalization theory<sup>18</sup> rather than any confirmation of an *a priori* detachment of the choice-of-law methodology of territorialized tribunals from their juridical seat. This is because an agreement by the parties alone cannot legitimate the autonomy of the arbitrators to decide between potentially applicable conflict rules.<sup>19</sup> As correctly observed by Poudret and Besson:

To justify the freedom granted to arbitrators to choose the rules which they deem appropriate, legal scholars like to emphasize that 'an arbitrator does not have a forum', by which they mean that arbitrators are not bound by the rules of conflict of the seat, that there is no national law which binds them and in consequence there is no 'foreign law' for an arbitrator. In fact, it is the *lex arbitri* in force at the seat which grants and/or limits the freedom of the parties and of the

<sup>13</sup> P. Lalive, 'Les Règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse' in *L'Arbitrage international privé et la Suisse* 77, reprinted in (1976) *Rev. Arb.* 155, as translated in G.A. Born, *International Commercial Arbitration* (Ardsley, NY, Transnational Publishers, 2001), 539. See also W. Craig et al., *International Chamber of Commerce Arbitration* (New York, NY, Oceana Publications, 1990), 285; E. Gaillard, 'The Role of the Arbitrator in Determining the Applicable Law' in *The Leading Arbitrators' Guide to International Arbitration* (L.W. Newman and R.D. Hill, eds, Huntington, NY, Juris Publishing, 2004), 185, 191.

<sup>14</sup> *Sapphire Int'l Petroleum Ltd v National Iranian Oil Co.*, Award, 15 March 1963 (Cavin, sole arb.), 35 I.L.R. 136, 169 (1963).

<sup>15</sup> *Sapphire v National Iranian*, at 170.

<sup>16</sup> *Sapphire v National Iranian*. See also ICC Case No. 8113 (1995) ('The Swiss rules of conflict of laws would not be the appropriate rules of conflict for this dispute. Not only is the Tribunal, sitting in Zurich, not bound to apply the Swiss rules of conflict of laws, but the application of such rules to the dispute would not be appropriate or justifiable since the contractual relationship between the parties has no connection whatsoever with Switzerland').

<sup>17</sup> See Chapter 2, Section 3.4 (interim conclusions).

<sup>18</sup> Cf. M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel, Helbing und Lichtenhahn, 1999), 222.

<sup>19</sup> See J.G. Frick, *Arbitration and Complex International Contracts: With Special Emphasis on the Determination of the Applicable Substantive Law and on the Adaptation of Contracts to Changed Circumstances* (The Hague, Kluwer Law International, 2001), 52; F. De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 *Nw. J. Int'l L. & Bus.* 48, 68.

arbitrators to choose the law or the rules of law applicable to the merits of the dispute and which establish rules of conflict peculiar to the arbitrations conducted thereunder.<sup>20</sup>

By way of example, we may refer to the Arbitration and Conciliation Act of India (1996), which under the heading ‘Rules applicable to substance of dispute’, expressly differentiates between domestic and international commercial arbitration taking place on Indian territory: ‘in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.’<sup>21</sup> The application of Indian law is not, however, required in ‘international commercial arbitration’.<sup>22</sup> In this latter case:

- (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute; [...]
- (iii) failing any designation of the law under sub-clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute [...].<sup>23</sup>

Like a large number of states, India has thus explicitly ‘freed’ arbitral tribunals from applying the choice-of-law methodology normally used by domestic courts and by domestic arbitral tribunals.<sup>24</sup> This freedom should not be seen to stem from the contractual nature of arbitration; but instead, in case of tribunals seated in India, from the applicability of the Indian Arbitration and Conciliation Act.

This linkage between the national *lex arbitri* of territorialized tribunals and their choice-of-law methodology was made by Arbitrator Lagergren in *British Petroleum Exploration Co. (Libya) Limited (BP) v Government of the Libyan Arab Republic* (1973), albeit on the basis of what appear to be pragmatic rather than legal reasons.<sup>25</sup> In deciding to apply the law agreed to by the parties, he applied Danish choice-of-law rules, which—he noted—‘provide a wide leeway for the free exercise of party autonomy’.<sup>26</sup> Indeed, the same conclusion could have been reached by Cavin in the *Sapphire*

<sup>20</sup> J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, Thomson Sweet & Maxwell, 2007), 573 (references omitted). See also I. Alvik, *Contracting with Sovereignty* (Oxford, Hart Publishing, 2011), 29.

<sup>21</sup> The Arbitration and Conciliation Act of India (No. 26 of 1996), 16 August 1996, art. 28(1)(a) (hereinafter Indian Arbitration Act (1996)).

<sup>22</sup> Indian Arbitration Act (1996), art. 28(1)(a).

<sup>23</sup> Indian Arbitration Act (1996), art. 28(1)(b).

<sup>24</sup> Cf. Lithuanian Law on Commercial Arbitration, 2 April 1996, Law No. I-1274, art. 31(2); A. Chantara-opakorn, ‘Dealing with Conflict of Laws in International Commercial Arbitration under the ICC Arbitration Rules and the Arbitration Act of Thailand’ (January 2007) *Asian Dispute Review* 5, 6.

<sup>25</sup> *British Petroleum Exploration Co. (BP) v Libyan Arab Republic*, Award, 10 October 1973, 53 I.L.R. 297, 308–9 (1979) (Lagergren, sole arb.).

<sup>26</sup> *BP v Libya*, at 326. See also at 327 (‘As stated earlier, the Tribunal deems Danish conflicts of law rules to be applicable’); and at 326 (‘In contradistinction to all national courts, the ad hoc international arbitral tribunal created under an agreement between a State and an alien, such as the present Tribunal, at least initially has no *lex fori* which, in the form of conflicts of law rules or otherwise, provides it with the framework of an established legal system under which it is constituted and to which it may have ultimate resort. With respect to the law of the arbitration, the attachment to a designated national jurisdiction is restricted to what, broadly speaking, constitute procedural matters and does not extend to the legal issues of substance. It is erroneous to assume, as has been done doctrinally, on the basis of the territorial sovereignty of the State where the physical seat of an international arbitral tribunal is located, that the *lex arbitri* necessarily governs the applicable conflicts of law rules. [...] Even less does it necessarily constitute the proper law of the contract. Instead, if the parties to the agreement have not provided otherwise, such an arbitral tribunal is at liberty to choose the conflicts of law rules that it deems applicable, having regard to all the circumstances of the case’ [references omitted]).

arbitration referred to earlier.<sup>27</sup> While seemingly anchoring the rule of party autonomy in the international legal order, he added that the application of Swiss choice-of-law rules would have led to the same result: ‘According to Swiss case law and doctrine it is in fact the intention of the parties, express or implied, which primarily determines the law applicable in questions of contract.’<sup>28</sup>

While on the basis of the foregoing, national arbitration laws constitute the point of departure for territorialized tribunals in deciding on their choice-of-law methodology, it must however be emphasized that arbitration rules also play an important role. This is because choice-of-law provisions contained in national arbitration laws are generally not considered to be mandatory; and accordingly, the parties are free to make their own provisions in this respect, *inter alia*, by reference to a set of arbitration rules.<sup>29</sup> Hence, when the parties—as so often—have agreed to have their dispute settled according to, for instance, the UNCITRAL Arbitration Rules, the tribunal will need to apply the choice-of-law rules contained in this set of Rules when deciding whether to apply national and/or international law to the merits. As Blessing explains: ‘[I am] not aware of any country where the opinion has been expressed that the provision dealing with the applicable law was supposed to be of a mandatory character. Thus, if the parties choose institutional arbitration rules, the arbitral tribunal will have to take guidance from those rules.’<sup>30</sup> This is explicitly set forth for in the Arbitration Law of Panama (1999): ‘If the arbitration were of an international commercial nature [...] [i]n *de jure* arbitration the arbitral tribunal shall decide according to the law selected by the parties or pursuant to the applicable rules of an arbitral institution.’<sup>31</sup>

A further implication of the non-mandatory nature of choice-of-law rules is that, as a rule, the juridical seat of territorialized tribunals will not allow judicial review of the choice-of-law methodology applied by the arbitrators, unless the latter manifestly disregarded the applicable law.<sup>32</sup> While in terms of practice, this means that the arbitrators’ decision as to the applicable law is generally insulated from sanction, in terms of theory, it does not imply an automatic severing of the tribunals’ choice-of-law methodology from national law. Our conclusion stands that at all times territorialized tribunals remain bound by, or are freed by, the national law of their juridical seat.<sup>33</sup>

<sup>27</sup> *Sapphire v National Iranian*, at fn. 14, Award.

<sup>28</sup> *Sapphire v National Iranian*, Award, at 171. See also ICC Case No. 4237, Award, 17 February 1984, Y.B. Com. Arb. 52, 55 (1985) (Malberg, sole arb.) (‘The question of the law applicable to the substance of the dispute poses the preliminary question which conflict of laws rules are to be applied in order to determine this law. Claimants relied on Syrian conflict of laws rules under argument (a) above (i.e., application of Syrian law because contract was signed in Syria). However, Claimants overlook the fact that this arbitration is expressly subjected to French International Arbitration Law, which Law, as rightly pointed out by Defendants, contains conflict rules for determining the law applicable to the substance of the dispute. The Arbitrator notes that it is controverted in literature whether an international arbitrator should apply the conflict rules of the law applicable to the arbitration, but since the new French Law itself contains conflict rules the Arbitrator feels himself obliged to follow these rules. Art. 1496 of the Law provides: [...]’).

<sup>29</sup> See Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice).

<sup>30</sup> Blessing, fn. 18, at 219, at para. 627. See also Frick, fn. 19, at 134 (‘Conflict of law rules are not part of the *ordre public*’); Born, fn. 13, at 539; J. Hill, ‘Some Private International Law Aspects of the Arbitration Act 1996’ (1997) 46 *Int'l Comp. L. Quart.* 274, 299.

<sup>31</sup> Panama, Decree-Law No. 5, 8 July 1999, art. 43(3) (hereinafter Panamanian Arbitration Law).

<sup>32</sup> See Chapter 2, Section 3.2.1.2 (on annulment as an exercise of control); Section 3.3 (on the influence of the delocalization theory on state practice).

<sup>33</sup> Cf. J.F. Poudret and S. Besson, *Droit comparé de l’arbitrage international* (Zürich, Schulthess; Paris, L.G.D.J., Bruxelles, Bruylant, 2002), 688; J.-M. Jacquet, *International Commercial Arbitration: Law Governing the Merits of the Dispute*, at 3, UNCTAD Course on Dispute Settlement, Module 5.5., UNCTAD/EDM/Misc.232/Add.40 (2005).

That states are in fact and consider themselves to be competent to regulate the substantive law to be applied by arbitral tribunals seated in their territory is corroborated by the variation in such regulation. Just as the choice-of-law rules applied by domestic courts vary from state to state,<sup>34</sup> so do those contained in national arbitration laws. Consequently, and quoting Blackaby et al., '[w]hen it comes to determining how an arbitral tribunal should proceed to its decision, then once again (as so often in international commercial arbitration) no universal rule can be identified.'<sup>35</sup> In fact, some national systems of law provide that an arbitral tribunal should follow the choice-of-law rules generally applied by the national courts of the juridical seat. One example of this traditional approach is the Norwegian Arbitration Act (2004): 'Failing any designation [of the applicable law] by the parties, the arbitral tribunal shall apply Norwegian conflict of laws rules.'<sup>36</sup> It is also the case that in some states, the application of local substantive law is required.<sup>37</sup>

Additionally, and as a matter of practice, we note that even where the national arbitration law allows the tribunal to apply a choice-of-law methodology different from that applied by its national courts, arbitrators may still find guidance in the private international law rules of the *lex arbitri*. A Stockholm Chamber of Commerce (SCC) tribunal reasoned thus in 2001:

The Swedish Arbitration Act does not contain any provision on applicable law to a dispute under an international contract in Swedish arbitrations. The Rules of the Arbitration Institute, however, stipulate in Article 24(1) that the tribunal, in the absence of an agreement between the parties, shall apply the law or rules of law which the tribunal considers to be most appropriate [...]. However, this does not mean that the Swedish conflict rules [...] can be disregarded out of hand. Therefore, the Tribunal will first investigate whether there are Swedish conflict rules that will effectively designate the applicable law for the present dispute.<sup>38</sup>

Indeed, the reliance on the choice-of-law rules of the seat of arbitration has been advocated by Moss on the basis that it enhances predictability: 'private international law is not an anachronistic or redundant heritage of old fashioned, national sovereignty-obsessed lawyers without understanding for international business transactions.'<sup>39</sup> To her, 'rules of choice of law contained in national laws are relevant to international arbitration: deleting from arbitration rules any reference to private international law may create unpredictable results and is therefore not necessarily the optimal solution for business transactions.'<sup>40</sup> As we will see, her suggestion may be helpful in the context of

<sup>34</sup> *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ, Ser. A, No. 20, 1929 (Judgment No. 14, 12 July 1929), 41 (The Court refers to 'that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law').

<sup>35</sup> N. Blackaby et al., *Redfern and Hunter on International Arbitration* (2009), 235. See also G.C. Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8(3) *Global Jurist* 41.

<sup>36</sup> Norwegian Arbitration Act (2004), section 31. See also R. Chapaev and v Bradautanu, 'International Commercial Arbitration in the CIS and Mongolia' (2006) 17 *Am. Rev. Int'l Arb.* 411, 439 (on Kazakh law).

<sup>37</sup> See Born, fn. 13, at 528.

<sup>38</sup> SCC Case 117/1999, Separate Arbitral Award, 2001, Stockholm Arb. Rep. 59 (2002:1) (with observations by H. Kronke and J. Fernández-Armesto). See also ICC Case No. 5551 (1988), 7–1 *ICC Bulletin*, at 82 (1996); G.C. Petrochilos, 'Arbitration Conflict of Laws Rules and the 1980 International Sales Convention' (1999) 52 *Revue Hellenique de Droit International* 191, at section I.

<sup>39</sup> Moss, fn. 35, at 1.

<sup>40</sup> Moss, at 1. See also Poudret and Besson, *Comparative Law*, fn. 20, at 573.

determining the relevance and content of international public policy rules, especially with respect to mandatory rules of third states.<sup>41</sup>

By way of summation and comparison, the national law of their juridical seat constitutes the starting point for the choice-of-law methodology of territorialized tribunals. Since the freedom to determine the law applicable to the merits is granted to the disputing parties and arbitrators by virtue of the national arbitration law, it is this law that one must first examine for any guidance in this respect. However, in light of the possibility of *renvoi* by the national arbitration law to arbitration rules, it is also necessary to include arbitration rules in our subsequent examination of choice-of-law rules. As concerns internationalized tribunals, in view of the fact that the Iran–United States Claims Tribunal and ICSID tribunals operate outside the national legal framework of their seat, we will for applicable choice-of-law rules examine their constitutive instruments, the Claims Settlement Declaration and the ICSID Convention, as well as more general international choice-of-law rules.

### 3. Choice-of-Law Rules

The *raison d'être* of choice-of-law rules<sup>42</sup> lies in the recognition that an issue before a court (or tribunal) may be appropriately decided by reference to laws that do not belong to the legal order of that court. At the same time, their existence testifies to the fact that separate legal orders may regulate the same matter differently. More specifically, certain conduct may be wrongful according to one state, but not another;<sup>43</sup> and one state may consider particular acts justified, whereas the international legal order not. The fact that this other legal order has adopted norms that differ from those of the forum does not, in and of itself, furnish a reason why a court should decline to apply the foreign law; '[o]n the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no "conflict" of laws.'<sup>44</sup> Indeed, the significance of choice-of-law issues comes to the forefront when there is a conflict between the relevant norms, and the application of a particular law will constitute a 'maker' or a 'breaker' for either the applicant or the respondent.<sup>45</sup>

It will be seen that for both territorialized and internationalized tribunals choice-of-law rules often involve striking a balance between, on the one hand, the private interests of the parties, and, on the other, the public interests of a particular national or the international legal order.<sup>46</sup> To this effect, they differ between three situations: where

<sup>41</sup> See Section 3.3.1 (on public policy and mandatory rules: international public policy); Chapter 6, Section 3.2.2 (on the supervening role of national law).

<sup>42</sup> For a definition of the term 'choice-of-law rules' and the use of this term in this study, see Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>43</sup> Cf. *Loucks v Std. Oil Co.*, 224 N.Y. 99, 110–11, 120 N.E. 198, 201 (1918) (Cardozo, J.) ('We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home').

<sup>44</sup> Cf. *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)* [2002] UKHL 10, 2 AC 883, para. 15. See also W.M. Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration' in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series No. 13, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 849, 852.

<sup>45</sup> Cf. Y. Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 191, 192.

<sup>46</sup> Cf. C.M.V. Clarkson and J. Hill, *Jaffey on the Conflict of Laws* (London, Butterworths LexisNexis 2002), 575; E. Hey, International Public Law, *International Law FORUM du droit international* (2004),

the parties have agreed on the law to be applied to the merits of the dispute (Section 2.1); where there is no such choice (Section 2.2); and where the generally applicable law should be set aside by virtue of fundamental rules of a national or international nature (Section 2.3).

### 3.1. Party agreement on the applicable law

The principle of party autonomy reflects the private dimension of choice-of-law rules in that it allows the parties to agree on the legal system(s) according to which their conduct will be assessed in the event of a dispute.<sup>47</sup> The principle is advocated mainly on the basis that it enhances legal certainty. The United States Supreme Court stated in *Scherk v Alberto-Culver Co.* (1974) that party autonomy is ‘an almost indispensable precondition to achievement of the orderliness and predictability essential to any business transaction’.<sup>48</sup> Indeed, the choice-of-law rules of virtually all national arbitration laws respect the principle of party autonomy, at least in cases of a transnational nature. Thus, the UNCITRAL Model Law, which has been adopted in more than sixty jurisdictions,<sup>49</sup> provides that ‘[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute [...].’<sup>50</sup> It is also universally provided for in arbitration rules to which the parties may refer.<sup>51</sup> The UNCITRAL Arbitration Rules state: ‘The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute [...].’<sup>52</sup> It is therefore to be expected, and it will indeed be demonstrated, that

<sup>47</sup> 149 (referring to the development of ‘international public law’ as law that seeks to address common interests of the international community, instead of law aimed at addressing the interests that states share).

<sup>48</sup> Cf. Moss, fn. 35, at 5; S. Wittich, ‘The Limits of Party Autonomy in Investment Arbitration’ in *Investment and Commercial Arbitration: Similarities and Divergences* (C. Knahr, ed., Utrecht, Eleven International, 2010), 47, 49.

<sup>49</sup> *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). See also J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, NY, Oceana Publications, 1978), 80; F.A. Mann, ‘State Contracts and State Responsibility’ in *Studies in International Law* (Oxford, Clarendon Press, 1973), 302, 315. But see O. Bordukh, *Choice of Law in State Contracts in Economic Development Sector: Is there Party Autonomy?* (2008), 5 (thesis submitted at Bond University School of Law in partial fulfilment of the requirements for the degree of Doctor of Legal Science), available at <<http://epublications.bond.edu.au/context/theses/article/1045/index/1/type/native/viewcontent/>> (last visited 1 May 2012) (‘[T]he thesis argues that arbitral tribunals resolving disputes between a state and a foreign private individual should abandon the party autonomy approach because contractual freedom to choose the law of the contract would disregard the objectives which host states normally pursue through economic regulations such as development, environment and human rights concerns of foreign investment’).

<sup>50</sup> See Chapter 2, Section 3.2.1 (on national arbitration laws).

<sup>51</sup> United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006, with Explanatory Note), art. 28(1) (hereinafter UNCITRAL Model Law). See also Norwegian Arbitration Act (2004), section 31; Lithuanian Law on Commercial Arbitration (1996), art. 31(1); Netherlands Arbitration Act (1986), art. 1054(2); English Arbitration Act (1996), section 46(1); French Arbitration Law (Décret n° 2011-48 du 13 janvier 2011 portant réforme de l’arbitrage), art. 1511; Indian Arbitration Act (1996), section 28(1)(b); Switzerland’s Federal Code on Private International Law (1987), art. 187(1); Egyptian Law No. 27/1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (as last amended by Law No. 8/2000) (hereinafter Egyptian Arbitration Law), art. 39(1).

<sup>52</sup> See C.F. Dugan et al., *Investor-State Arbitration* (New York, Oxford University Press, 2008), 201.

<sup>53</sup> UNCITRAL Arbitration Rules (2010), art. 35(1). See also Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012), art. 21 (hereinafter ICC Arbitration Rules); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (as in force as from 1 January 2010), art. 22(1) (hereinafter SCC Arbitration Rules); ICSID Additional Facility Rules (2006), art. 54(1); (London Court of International Arbitration) LCIA Arbitration Rules (1998), art. 22.3 (hereinafter LCIA Rules).

territorialized tribunals heed the parties' choice of law when deciding the dispute on the merits. The tribunal in *Texaco Overseas Petroleum Company (Topco) and California Asiatic Oil Company (Calasiatic) v Government of the Libyan Arab Republic* (1977) answered the question whether the parties had the right to choose the law or the system of law which was to govern their contract as follows:

The answer to this [...] question is beyond any doubt: all legal systems, whatever they are, apply the principle of the autonomy of the will of the parties to international contracts. As regards the merits, all legal systems confirm this principle which appears therefore as universally accepted, even though it may not always have the same meaning or the same scope [...].<sup>53</sup>

The same practice is to be expected from internationalized tribunals. As provided in the ICSID Convention: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.'<sup>54</sup> The Iran–United States Claims Settlement Declaration does not explicitly refer to the principle of party autonomy.<sup>55</sup> It is suggested, however, that the reference in article V to 'choice of law rules' and 'contract provisions'<sup>56</sup> supports the inference that the tribunal should heed choice-of-law agreements entered into by the disputing parties, especially when considering that the principle of party autonomy has been stated to constitute a general principle of international law.<sup>57</sup> Such respect for the rule of party autonomy has received a certain degree of support by the tribunal and legal scholars. As held in *Anaconda-Iran, Inc. v Iran* (1986), '[t]he Tribunal is of course required to take seriously into consideration the pertinent contractual choice of law rules.'<sup>58</sup>

<sup>53</sup> *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. (TOPCO/CALASIATIC) v Gov't of the Libyan Arab Republic*, Award, 19 January 1977 (Dupuy, sole arb.), para. 16. See also *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award, 12 April 1977 (S. Mahmassani, sole arb.), VI Y.B. Com. Arb. 89, 91.

<sup>54</sup> ICSID Convention (1965), art. 42(1), first sentence; art. 42(3). See also Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-1, at p. 5, para. 17 (hereinafter History of the ICSID Convention); also at pp. 9, 79, 110, 266–7, 330, 419, 502, 514, 569–70; Vol. II-2, 803, 984, 1082; Note by the General Counsel transmitted to the Executive Directors, Sec M 62–17 (19 January 1962). Cf. ICSID Model Clauses, Doc. ICSID/5/Rev. 2 (1 February 1993), V, A. But see History of the ICSID Convention, Vol. II-2, at p. 803 (The representative from Panama objected to the principle which allowed the parties to agree on the applicable law); and at p. 801 (intervention by the Brazilian delegate).

<sup>55</sup> Iran-US Claims Settlement Declaration (1981), art. V ('The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances').

<sup>56</sup> Claims Settlement Declaration (1981). Cf. M. Mohebi, *The International Law Character of the Iran–United States Claims Tribunal* (The Hague, Kluwer Law International, 1999), 368 ('The "usages of trade, contract provisions and changed circumstances" are supposed to be considered in the course of determining the proper law in each case. They are not, therefore, applicable as independent sources of law').

<sup>57</sup> See A.F.M. Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12(2) *Eur. J. Int'l L.* 309, 322.

<sup>58</sup> *Anaconda-Iran, Inc. v Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, Interlocutory Award, 10 December 1986, para. 131. See also *FMC Corporation v Ministry of National Defence*, fn. 9, Award, Dissenting Opinion of Judge Ahmadi, at section B.1; A. Moura, *The International Law of Expropriation as Reflected in the Work of the Iran–United States Claims Tribunal* (Dordrecht, Nijhoff, 1994), 30; A. Avanessian, *The Iran–United States Claims Tribunal in Action* (London, Graham & Trotman/Martinus Nijhoff, 1993), 240. But see *Anaconda-Iran v Iran*, Interlocutory Award, para. 132 ('The Tribunal is of course required to take seriously into consideration the pertinent contractual choice of law rules, but it is not obliged to apply these if it considers it has good reasons not to do so'); *American Bell International Inc. v Government of the Islamic Republic of Iran et al.*, Interlocutory Award, 11 June 1984, Concurring and Dissenting Opinion by R.M. Mosk, at Issue h; Crook, fn. 8, at 286.

### 3.1.1. The parties may stipulate the application of national and/or international law

The extent to which the parties may agree to the application of national and/or international law necessarily has much bearing on the existence of any interplay between these various sources in investment arbitration. While the rule of party autonomy is reflected in choice-of-law rules applied by both national courts<sup>59</sup> and international courts and tribunals,<sup>60</sup> the scope of the rule is comparatively broader in arbitration.<sup>61</sup> According to a resolution by the Institute of International Law, the freedom to choose the substantive applicable law should be characterized in terms of ‘full autonomy’.<sup>62</sup> As we will see in this section, disputing parties before both territorialized and internationalized tribunals generally enjoy autonomy to agree to the application of national law<sup>63</sup> (including that of a third, unrelated state)<sup>64</sup> or international law.<sup>65</sup> We do observe, though, that certain national arbitration laws and arbitration rules indirectly limit the possibility for the parties to stipulate the application of rules of more than one legal system of law, such as national *and* international law. According to the UNCITRAL Secretariat, this may depend on whether the applicable national arbitration law or arbitration rules refer to ‘rules of law’, rather than ‘law’: ‘The term “rules of law” is understood to be wider than the term “law”, allowing the parties “to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level”’.<sup>66</sup>

<sup>59</sup> See C. Croff, ‘The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?’ (1982) 16 *Int'l Law* 613, 615 (the principle of party autonomy is widely recognized in both common and civil law).

<sup>60</sup> See C.H. Brower II, ‘Arbitration’ in *Max Planck Encyclopedia of Public International Law*, at para. 65, available at <<http://www.mpepl.com/>> (last visited 1 May 2012); F. Rigaux, ‘Les Situations Juridiques Individuelles dans un Système de Relativité Générale’ (1989–I) 213 *Recueil des Cours* 207. Cf. *US v Iran*, Case No. B36, Award, 3 December 1996, at para. 64 (The parties had agreed to the application of the laws of the District of Columbia, US); *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of the Chamber, 22 December [1986] ICJ. Rep. 554, at 575.

<sup>61</sup> See UNCITRAL Secretariat, *Explanatory Note on the Model Law on International Commercial Arbitration*, para. 35 (the freedom to choose the applicable substantive law in the Model Law ‘is important in view of the fact that a number of national laws do not clearly or fully recognize that right’).

<sup>62</sup> Institute of International Law, Resolution on Arbitration Between States, States Enterprises or State Entities, and Foreign Enterprises (Santiago de Compostela, 12 September 1989), art. 6, 5 ICSID Rev.-FILJ 139 (1990) (hereinafter IIL, Santiago de Compostela Resolution).

<sup>63</sup> IIL, Santiago de Compostela Resolution, art. 6.

<sup>64</sup> See O. Lando, ‘The Law Applicable to the Merits of the Dispute’ in *Essays on International Commercial Arbitration* (Sarcevic, ed., London, Graham & Trotman, 1989), 129, 134 (‘No case is known in which an arbitrator has set aside the parties’ express choice of law on the ground of lack of connection with the intended legal system’); C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int'l & Eur. L.* 147, 149 (‘The choice of the law of the investor’s home country or of the law of a third State is rare, but it sometimes occurs in the context of loan contracts’ [references omitted]); Poudret and Besson, *Droit comparé*, fn. 33, at 677.

<sup>65</sup> See F.A. Mann et al., ‘Contrats entre Etats et personnes privées étrangères’ (1975) 11 *R bel DI* 564–5 (‘Nothing prevents a contract between the German state and a Dutch firm to be submitted to French law. Similarly, the fact that one party is not a state should not prevent the contract from being submitted to international law’); Schreuer et al., fn. 10, at 580. This contrasts with the approach advocated by Calvo. See Chapter 5, at Section 2.2.

<sup>66</sup> A.R. Parra, ‘Applicable Law in Investor–State Arbitration’ TDM, at 4 (November 2007). See also *Autopista Concesionada de Venezuela, C.A. (‘Aucoven’) v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003 (G. Kaufmann-Kohler, K.-H. Böckstiegel, B.M. Cremades, arbs), para. 96.

The UNCITRAL Arbitration Rules of 1976 directed the tribunal to ‘apply the law designated by the parties as applicable to the substance of the dispute [...].’<sup>67</sup> In order to give the arbitrators more freedom with respect to the applicable law, the UNCITRAL Secretariat suggested to the UNCITRAL Working Group on Arbitration that they might wish to consider using the term ‘rules of law’ in a revised version of the UNCITRAL Arbitration Rules.<sup>68</sup> This suggestion was taken up in the 2010 Rules, and is in line with the many investment treaties that provide for the application of both international and national law.<sup>69</sup> There are also several examples of choice-of-law clauses in contracts entered into between investors and host states that refer both to the law of the contracting state (or to principles which are common to both contracting parties) and to (general principles of) international law.<sup>70</sup>

Under the ICSID Convention, the parties are specifically authorized to agree to the combined application of national and international law.<sup>71</sup> The broad formulation of the applicable law clause in the Iran–United States Claims Settlement Declaration would—*ex hypothesi*<sup>72</sup>—allow the tribunal to give effect to such choice-of-law agreements as well.<sup>73</sup>

### 3.1.2. Express and implied choice of law

In this section, we will see that the parties’ choice of the substantive applicable law may be (i) express or (ii) implied from the circumstances of each case. It will be argued that a tribunal should only imply a choice of law in those situations where it is reasonably certain that the parties in fact implicitly *agreed* to the application of the norms in question.

First, for both territorialized and internationalized tribunals, the parties’ choice on the applicable law may be expressly stipulated, whether in the investment contract,<sup>74</sup> in the investment law of the host state,<sup>75</sup> in a bi- and multilateral investment treaty,<sup>76</sup> or in a subsequent agreement between the parties.<sup>77</sup> There has been a marked increase in

<sup>67</sup> UNCITRAL Arbitration Rules (1976), art. 33(1) (emphasis added). See also *Chantara-opakorn*, fn. 24, at 6.

<sup>68</sup> UNCITRAL Working Group II (Arbitration), Note by the Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, forty-fifth session, Vienna, 11–15 September (2006), A/CN.9/WG.II/WP.143/Add.1, at para. 30. See also J. Paulsson and G. Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, Commissioned by the UNCITRAL Secretariat, at 138, available at <[http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf)> (last visited 1 May 2012).

<sup>69</sup> UNCITRAL Arbitration Rules (2010), art. 35(1). See also Chapter 1, Section 1 (on motivations for the study).

<sup>70</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>71</sup> See ICSID Model Clauses, fn. 54, V, A; Parra, fn. 66, at 4. Cf. *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (G. Kaufmann-Kohler, E.G. Pinzón, A.J. van den Berg, arbs), para. 196 (“The Tribunal finds that the parties’ choice of law is clear: both Ecuadorian law and the principles of international law should apply”).

<sup>72</sup> Most contracts seemingly provided for the application of only national law. Cf. Avanessian, fn. 58, at 239, at fn. 19.

<sup>73</sup> See Iran-US Claims Settlement Declaration (1981), art. V.

<sup>74</sup> See History of the ICSID Convention, fn. 54, Vol. II-1, at p. 267; *AGIP S.p.A. v People’s Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 20 November 1979.

<sup>75</sup> See History of the ICSID Convention, fn. 54, Vol. I-1, at p. 267.

<sup>76</sup> See History of the ICSID Convention, at Vol. I-1, at p. 267; *Antoine Goetz, and others v Republic of Burundi*, ICSID Case No. ARB/95/3, Award (embodying the parties’ Settlement Agreement), 10 February 1999 (P. Weil, M. Bedjaoui, J.-D. Bredin, arbs), para. 94.

<sup>77</sup> See T. Begic, *Applicable Law in International Investment Disputes* (Utrecht, Eleven International, 2005), 81; *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011

the number of arbitration proceedings based upon an arbitration offer provided by the host state in its investment laws, or particularly in bi- or multilateral investment treaties that it has concluded with the home state of the investor.<sup>78</sup> Such arbitrations have been referred to as ‘arbitration without privity’.<sup>79</sup> As several of these legal instruments also contain provisions on the applicable law, we may in an analogous fashion characterize such a choice of law as one ‘without privity’. Again, the foreign investor may be said to ‘accept’ the unilateral ‘offer’ concerning the applicable law by resorting to arbitration. The ICSID Tribunal held in *Siemens A.G. v Argentine Republic* (2007):

Under Article 42(1) of the [ICSID] Convention, the Tribunal is obliged to apply the rules of law agreed by the parties. The [BIT] provides that a tribunal established under the Treaty shall decide on ‘the basis of this Treaty, and, as the case may be, on the basis of other treaties in force between the Contracting Parties, the internal law of the Contracting Party in whose territory the investment was made, including its rules of private international law, and on the general principles of international law.’ By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.<sup>80</sup>

Secondly, in case the parties have not made an express choice of law, we can distinguish between the ‘objective’ and the ‘subjective’ approaches of ascertaining the applicable law. Whereas the former method signifies a finding that there is no choice of law, the latter requires the tribunal first to research the hypothetical will of the parties in an attempt to establish an implicit choice of law.<sup>81</sup> As one commentator observes:

Where parties have not made an explicit choice of law in their contract, is it necessary, appropriate or totally unnecessary for an arbitral tribunal to ask itself (as well as possibly the parties) why no such choice or determination of the applicable law had been made? In England, for instance, such a question would not be asked, and many other common law jurisdictions

(A. Giardina, M. Reisman, B. Hanotiau, arbs), paras 306–307 (‘At the first session of the Arbitral Tribunal held on May 4, 2007, the Parties agreed that Romanian law would govern the substantive merits of the dispute and that the BIT would be treated as part of Romanian law [...] Article 9(4) of the BIT provides that: “*The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law (...).*”’ [emphasis in original]).

<sup>78</sup> See Chapter 1, Sections 1–2 (on motivations for the study and the scope of and terminology used in the study); Chapter 2, Section 2 (on features of the arbitral process).

<sup>79</sup> J. Paulsson, ‘Arbitration Without Privity’ (1995) 10(2) *ICSID Rev.-FILJ* 232.

<sup>80</sup> *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (A.R. Sureda, C.N. Brower, D.B. Janeiro, arbs), at para. 76. See also *Goetz v Burundi*, fn. 76, Award, at para. 94. Cf. History of the ICSID Convention, fn. 54, Vol. II, at p. 267 (‘Chairman [Broches] remarked that [...] it was likewise open to the parties to prescribe the law applicable to the dispute. [Such] stipulation could be included [...] in a bilateral agreement with another State, or even in a unilateral offer to all investors, such as might be made through investment legislation’); Banifatemi, fn. 45, at 194–5. But see G. Sacerdoti, Case T 8735–01–77, *The Czech Republic v CME Czech Republic B.V.*, Svea Court of Appeal (expert legal opinion for CME), TDM 2(5) (2005), at 30 (‘[O]n the one hand, the applicable law provisions [in BITs] “preempt” any choice of law that the parties to the dispute could have otherwise made (a choice that would be difficult to make since there is most often no separate arbitration agreement); on the other hand, they indicate to the arbitrators the applicable law(s) in the absence of choice by the parties, instead of having them follow the otherwise applicable arbitration rules in this respect’); Sacerdoti, ‘Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards’ (2004) 19(1) *ICSID Rev.-FILJ* 1, 15.

<sup>81</sup> See Blackaby et al., fn. 35, at 230 (‘In the absence of an express choice of law, the arbitral tribunal will usually look first for the law that the parties are presumed to have intended to choose. This is often referred to as a *tacit* choice of law. It may also be known as an implied, inferred or implicit choice’ [emphasis in original]); M. Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Dordrecht, Nijhoff, 1993), 117 (on the subjective and objective approach).

might take the same view. Thus, the English arbitrator is likely to simply notice the absence of an explicit choice of law made by the parties and he would then proceed to determine himself the applicable law (in the sense of the ‘objective’ approach [...]). [This] is not the attitude on the European Continent.<sup>82</sup>

One of the advocates of the subjective approach is Blessing.<sup>83</sup> To him, the absence of an explicit choice of law in an international contract is always striking; and as a presiding arbitrator, he would ‘naturally be interested to know why this was’.<sup>84</sup> Indeed, he contends, the ‘international arbitrator’ has a ‘distinctive and noble duty’ to try, to the extent possible, to discern the parties’ intentions, ‘whether positively expressed, expressed impliedly, or tacitly, or through constructive behavior’.<sup>85</sup>

This approach is illustrated by *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.* (1996), which involved a series of contracts between Iran and the US corporation Westinghouse, concerning the supply of military radars to be installed in Iran.<sup>86</sup> The decision to use the subjective approach was based partly on the fact that the parties did not operate within the same environment and legal culture; that they did not have a long history of cooperating together; and because the contract did not contain extensive provisions, addressing all possible eventualities.<sup>87</sup> Thus, the tribunal held:

In other words, if a contract such as Contract No. 1 does not contain a choice of law provision, then this must be viewed as a ‘shouting silence’, at least an ‘alarming silence’, ‘un silence inquiétant’; thus, a silence which must ring a bell and requires the Tribunal to look ‘behind’ so as to understand why the Parties have failed to include ‘the obvious’.<sup>88</sup>

The tribunal concluded that the absence of a choice-of-law clause ‘must be understood as a so-called “implied negative choice” of the Parties [...] in the sense that none of the Parties’ national laws should be imposed on any of the Parties’.<sup>89</sup> Having found that neither Iranian law, nor the law of the United States or Maryland was applicable, the tribunal chose to apply the ‘de-nationalized solution’, according to which it would ‘decide legal issues by having regard to the terms of the Contract and, where necessary or appropriate, by applying truly international standards as reflected in, and forming part of, the so-called “general principles of law”’.<sup>90</sup>

<sup>82</sup> Blessing, fn. 18, at 213. See also M. Reimann, ‘Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century’ (1999) 39 *Va. J. Int’l L.* 571, 579–80.

<sup>83</sup> Blessing, fn. 18, at 213.

<sup>84</sup> Blessing, at 213.

<sup>85</sup> Blessing, at 213. Cf. R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press; New York, Oxford University Press, 1994), 141 (‘At the same time, the purpose of the reference to international arbitration certainly merits examination. Was it because the local courts are not trusted or because a different system of law was to be applied?’). But see Blackaby et al., fn. 35, at 230 (‘There is a certain artificiality involved in selecting a substantive law for the parties and attributing it to their *tacit* choice, where (as often happens in practice) it is apparent that the parties themselves have given little or no thought to the question of the substantive law which is applicable to their contract’ [emphasis in original]).

<sup>86</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, ICC Award No. 7375, 5 June 1996 (M. Blessing, P. Bernardini, A. Movahed arbs.) at section III.

<sup>87</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, fn 86, at section III.

<sup>88</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, fn 86, at section III.

<sup>89</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, fn 86, at section III.

<sup>90</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, fn 86, at section III. See also *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (J. Fernández-Armesto, J. Paulsson, J. Voss, arbs), para. 111 (‘Given the parties’ implied negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles’).

While practice and scholarship thus support the possibility that arbitration tribunals may discern a choice on the basis of words or acts by the parties that manifest their intention and expectation that a particular law governs their relation,<sup>91</sup> we submit that the existence of an implied choice of law should not be too readily made.<sup>92</sup> This will become apparent from the following discussion of the various factors that have been relied upon in this respect.

One factor is the juridical seat of territorialized tribunals. In accordance with the maxim *qui eligit judicem eligit jus*,<sup>93</sup> it has been argued and held that a choice of seat implies a choice of the application of that state's law as the substantive applicable law.<sup>94</sup> Nowadays, this approach is rarely adhered to, as there may be other reasons why the parties select a particular forum; and therefore, it should not automatically follow that they intend that the substantive law of the tribunal's juridical seat will govern their relationship. As stated by an SCC tribunal in 2001:

[I]t is highly debatable whether a preferred choice of the situs of the arbitration is sufficient to indicate a choice of governing law. There has for several years been a distinct tendency in international arbitration to disregard this element, chiefly on the ground that the choice of the place of arbitration may be influenced by a number of practical considerations that have no bearing on the issue of applicable law.<sup>95</sup>

The need to differ between the law of the forum and the substantive applicable law is also recognized by the (Mexico) Inter-American Convention on the Law Applicable to International Contracts: 'Selection of a certain forum by the parties does not necessarily entail selection of the applicable law'.<sup>96</sup>

A second possibility that has been advocated is to infer an agreement for the application of international law from the very fact that the parties have agreed to arbitrate their dispute. Jaenicke, for instance, states that 'the reference of a dispute to an international tribunal carries with it the expectation of both parties that the tribunal will recognize the applicable principles and rules of international law unless the parties have expressly excluded the recourse to international law'.<sup>97</sup> This approach was

<sup>91</sup> See Begic, fn. 77, at 57–80; J.D.M. Lew et al., *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), 415, at para. 17–13. Cf. Serbian Loans case, fn. 34, at 41.

<sup>92</sup> See I.F.I Shihata and A.R. Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' (1994) 9(2) *ICSID Rev-FILJ* 183, 190 (the authors suggest that the test for finding an implicit agreement may be embodied in the European Convention on the Law Applicable to Contractual Obligations, i.e., that an implied choice of law must be demonstrated with reasonable certainty by the circumstances of the case); *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (L.Y. Fortier, E. Lauterpacht, P. Weil, arbs), paras 63–64 (the tribunal was unable to conclude that the parties ever reached a 'clear and unequivocal agreement' as to the applicable law); Banifatemi, fn. 45, at 198. See also *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ, Judgment, 23 May 2008, Dissenting Opinion by Judge ad hoc J. Dugard, at paras 38–39.

<sup>93</sup> Choosing a forum means choosing a law.

<sup>94</sup> See Blackaby et al., fn. 35, at 231; Poudret and Besson, *Droit comparé*, fn. 33, at 677.

<sup>95</sup> SCC Case 117/1999, fn. 38. See also ICC Case No. 1422, Award, 1966 ('It is appropriate to eliminate forthwith the law of the forum, whose connection with the case is purely fortuitous').

<sup>96</sup> Inter-American (Mexico) Convention on the Law Applicable to International Contracts (1994), art. 7. Cf. De Ly, fn. 19, at 61, at fn. 49.

<sup>97</sup> G. Jaenicke, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises: Comments on a Paper by Professor L.J. Bouchez' in *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888–1987)* (A.H.A. Soons, ed., Dordrecht, Martinus Nijhoff, 1990), 155, 158. Cf. O. Spiermann, 'Applicable Law' in *Oxford Handbook of International Investment Law* (P. Muchlinski

followed by the tribunal in *TOPCO/Calasiatic* (1977): '[One] process for the internationalization of a contract consists in inserting a clause providing that possible differences which may arise in respect of the interpretation and the performance of the contract shall be submitted to arbitration.'<sup>98</sup> We also note the award in *Sapphire Int'l Petroleum Ltd v National Iranian Oil Co.* (1963).<sup>99</sup> Faced with an absence of a clear choice-of-law clause, the tribunal stated:

[I]f no positive implication can be made from the arbitral clause, it is possible to find there a negative intention, namely to reject the application of Iranian law. If in fact the parties had intended to submit their agreement to Iranian law and if the only significance of the arbitral clause was to deprive the Iranian authorities of jurisdiction in case of any dispute, the authors of the agreement, whom one must suppose were competent lawyers, would almost certainly not have failed to negative, by an express clause, any significance which such an arbitral clause normally carries as a connecting factor according to general doctrine.<sup>100</sup>

On this basis, the tribunal went on to apply international law.<sup>101</sup> Also this method of finding the applicable law, which reminds us of that employed in *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.* (1996),<sup>102</sup> must be met with scepticism. Standing alone, an arbitration agreement ought to be seen to afford the parties a neutral forum in which to bring their dispute, not an agreement by extension to the application of international law on the merits.<sup>103</sup>

A third suggested method is to deduce a choice of law from a reference to a particular law in the parties' contract. In the case of *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (1992), the ICSID Tribunal's jurisdiction was established on the basis of an offer to arbitrate investment disputes as set out in Egypt's foreign investment law.<sup>104</sup> According to the host state, the parties had made an implicit choice for the application of Egyptian law:

The Respondent contends that the Parties have implicitly agreed, in accordance with the first sentence of Article 42(1) [ICSID Convention], to apply Egyptian law. It points out that the Parties' agreement with respect to the choice of law need not be express, and argues that in this case the choice of Egyptian law results from the preamble of the Heads of Agreement, which refers to Egyptian Laws No. 1 and No. 2 of 1973 and Law No. 43 of 1974. Pointing out that Law No. 43 provides that '[m]atters not covered by this Law are subject to the applicable laws and regulations', the Respondent argues that, according to this provision, 'aucun autre droit que le

et al., eds, Oxford, Oxford University Press, 2008), 89, 93 ('At an early point, the choice of international arbitration was seen by many as a reason in itself for internationalizing applicable law [...]') [references omitted]).

<sup>98</sup> *TOPCO/CALASIATIC*, fn. 53, Award on the Merits, 19 January 1977, at para. 44.

<sup>99</sup> *Sapphire v National Iranian*, fn. 14, Award.

<sup>100</sup> *Sapphire v National Iranian*, at 172.

<sup>101</sup> *Sapphire v National Iranian*, at 173 (the arbitrator found evidence that the parties did not intend to apply the strict rules of a particular system but, rather, 'to rely upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them'). See also Chapter 6, Section 2.1.1 (on express or implied 'internationalization' of investment contracts).

<sup>102</sup> See fn. 89.

<sup>103</sup> See R.D. Bishop et al., *Foreign Investment Disputes* (The Hague, Kluwer Law International, 2005), 685; D. Di Pietro, 'Applicable Law under Article 42 of the ICSID Convention: The Case of Amco v Indonesia' in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 223, 231; Poudret and Besson, *Comparative Law*, fn. 20, at 577.

<sup>104</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988 (E. Jimenez de Arechaga, M.A.E. El Mahdi, R.F. Pietrowski, arbs).

droit égyptien n'a été choisi par les parties' [no other law than Egyptian law has been selected by the parties.] [...].<sup>105</sup>

The tribunal found no need to decide whether there had been an implied choice of Egyptian law. In its view, the parties' disagreement on this point had 'very little, if any, practical significance', since national and international law should be applied to the merits regardless of an implicit choice for Egyptian law.<sup>106</sup> While the precise reasoning of the tribunal has rightly been questioned,<sup>107</sup> its decision not to rely solely on national law may be justified on the basis that a general reference in the contract to Egyptian law is too weak an indication that the parties had agreed to its application in the event of a dispute.<sup>108</sup>

For the same reason, words of caution have been articulated with respect to the apparent finding of an implicit choice of law in *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia* (1986).<sup>109</sup> In that case, the opening paragraph of the investment contract stated that it was made under the General Business Law of Liberia.<sup>110</sup> According to the ICSID Tribunal, such language seemed 'to indicate an express choice by the parties of the Law of Liberia as the law governing the Concession Agreement'.<sup>111</sup> In any event, and as in *SPP v Egypt*, the tribunal examined the merits of the dispute also pursuant to international law.<sup>112</sup>

The need for a more careful approach in finding an implicit choice of law is confirmed by the award in *Autopista Concesionada de Venezuela, C.A. ('Aucoven') v Bolivarian Republic of Venezuela* (2003), in which the Preamble of the Concession Agreement stated that it was to be governed by certain specified Venezuelan decrees 'and the provisions of any other laws, regulations, or other documents as may be

<sup>105</sup> *Southern Pacific Properties*, Award, 20 May 1992, at para. 75. See also at para. 34.

<sup>106</sup> *SPP v Egypt*, fn. 104, ICSID Award, at para. 78. See also Chapter 5, Section 3.2.1 (on the complementary role of international law). Cf. ICSID Convention (1965), art. 42(1), second sentence. See further Section 3.2.2.1 (on the ICSID Convention).

<sup>107</sup> See *SPP v Egypt*, Dissenting Opinion of El Mahdi, at section III(3)(i) ('[I]t is mandatory to decide upon the issue of whether or not the parties to the present dispute agreed upon the choice of the Applicable Law [...]. [T]he plain language of article (42/1) first sentence [ICSID Convention], does not give room but to the exclusive application of the law that the parties have chosen as the applicable law to govern their relationship'); G.R. Delaume, 'L'affaire du Plateau des Pyramides et le CIRDI. Considérations sur le droit applicable' (1994) 1 *Revue de l'Arbitrage* 39, 48.

<sup>108</sup> See Schreuer et al., fn. 10, at 570–1 ('Reference in a direct agreement between the parties to an item in the host State's legislation is [...] not a reliable indication of an intention to choose the host State's entire legal system'). But see *SPP v Egypt*, fn. 104, ICSID Award, Dissenting Opinion of El Mahdi, at section III(3)(iv) ('To assert, therefore that law No 43 is by itself a declared intention of Egypt as to the law applicable to the investment in the frame work of the said law, seems to be an evident, logical conclusion').

<sup>109</sup> *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986 (B.M. Cremades, J.G. Pereira, D.A. Redfern, arbs). Cf. Schreuer et al., fn. 10, at 570–1; G.R. Delaume, 'The Pyramids Stand: The Pharaohs Can Rest in Peace' (1993) 8 *ICSID Rev.-FILJ* 231; Begic, fn. 77, at 65.

<sup>110</sup> *LETCO v Liberia*, fn. 109, Award, at section II(2) ('The Concession Agreement of 12 May 1970 made between the Government of Liberia and LETCO states in its opening paragraph that the Concession Agreement is made "under the General Business Law, Title 15 of the Liberian Code of Laws of 1956"').

<sup>111</sup> *LETCO v Liberia*, at 358. See also at 358 (while the claimant, at one stage, stated that there was no express choice of law, it later said that Liberian law was 'probably applicable'). See also at 371 (in its decision on damages, the tribunal stated: 'The Tribunal, once again, returns to the law of the Republic of Liberia as the law applicable in this case and therefore determinative of the nature of damages to be awarded'). Cf. Aucoven, fn. 66, Award, at para. 97; *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (J. Crawford, B.R. Civiletti, E.M. Gómez, arbs), para. 73.

<sup>112</sup> *LETCO v Liberia*, at 358–9. See also Chapter 7, Section 2.1 (on the concurrent application of national and international law and reference to consistency).

applicable'.<sup>113</sup> On this basis, Venezuela submitted that the parties had agreed to the application of Venezuelan law.<sup>114</sup> The ICSID Tribunal disagreed, pointing out that the parties could easily have adopted language showing their common intent for a general choice of Venezuelan law.<sup>115</sup> Thus, failing any indication on the record, the tribunal held that—apart from the specific Venezuelan decrees—there was no party agreement on the applicable law.<sup>116</sup>

Fourthly, it has been claimed that the fact that a tribunal's jurisdiction is derived from an investment treaty indicates a choice for international law.<sup>117</sup> This position was rightly rejected by the ICSID Tribunal in *LG&E Energy Corp. et al. v Argentine Republic* (2006):

It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the treaty, thus presumably choosing the treaty and the general international law as the applicable law for this dispute. Nevertheless, these elements do not suffice to say that there is an implicit agreement by the parties as to the applicable law, a decision requiring more decisive actions. Consequently, the dispute shall be settled in accordance with the second part of Article 42(1) [of the ICSID Convention, which applies in case there is no party agreement on the applicable law].<sup>118</sup>

In *LG&E*, the possibility of applying international law did not depend on a finding by the tribunal of an implicit choice of law; international law was namely applicable by virtue of the second sentence of article 42(1) of the ICSID Convention, which applies in case the parties have not reached an agreement on the applicable law.<sup>119</sup> However, as we will see, contrary to the ICSID Convention, certain national arbitration laws and arbitration rules direct tribunals to apply national law—to the exclusion of international law—in the absence of an agreement by the parties.<sup>120</sup> This is arguably the case for the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration, for instance.<sup>121</sup> Where the investor bases its claim on a provision of an

<sup>113</sup> *Aucoven*, fn. 66, Award, at para. 94. See also at para. 94 ('Clause 5 provided that the Agreement shall be governed by Decree Law 138; Executive Decree Nr. 502; by the Clauses and Annexes of the Concession Agreement; by the terms set forth in the Bid submitted by Aucoven; and by the conditions set forth in the Bid Documents').

<sup>114</sup> *Aucoven*, at para. 95.

<sup>115</sup> *Aucoven*, at paras 98, 100.

<sup>116</sup> *Aucoven*, at para. 100. Accordingly, the default provision on applicable law would apply. See ICSID Convention (1965), art. 42(1), second sentence. See further Section 3.2.2.1 (on the ICSID Convention).

<sup>117</sup> See, e.g., *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (R.E. Vinuesa, B.J. Greenberg, J. Irarrázabal, arbs), para. 214 ('The Claimants contend that the only law applicable in the present case is international law. They argue that the BIT includes an implicit agreement on the applicability of international law, and that the first part of Article 42(1) of the ICSID Convention must therefore be respected [...]']).

<sup>118</sup> *LG&E Energy Corp. et al. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (T.B. de Maekelt, F. Rezek, A.J. van den Berg, arbs), para. 85. See also *M.C.I. Power Group v Ecuador*, fn. 117, Award, at para. 217.

<sup>119</sup> ICSID Convention (1965), art. 42 (In the absence of party agreement on the applicable law, ICSID tribunals 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>120</sup> See Section 3.2.2 (on the (non-) applicability of national and international law) (the wording 'conflict of laws rules' is generally interpreted to require the application of national law to the exclusion of international law).

<sup>121</sup> Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules (in force as from 1 March 2011) (hereinafter Cairo Arbitration Rules), art. 33(1); English Arbitration Act (1996), section 46(3).

investment treaty, it would—for a tribunal operating pursuant to these Rules—be both legally impossible and contrary to the intentions of the states parties to the treaty for the tribunal to apply national law to establish an international wrongful act on the part of the host state. Indeed, an international claim requires the application of international law.<sup>122</sup> As Spiermann explains: '[E]ven in the absence of a specific treaty provision, it is necessary to resolve treaty claims on the basis of international law. Claimants bringing such treaty claims obviously rely on international law, and there is no way for a competent arbitral tribunal but to apply international law.'<sup>123</sup> On that basis, it is submitted that a tribunal applying an arbitration law or arbitration rules with similar choice-of-of-law rules, should find an implied choice for international law when deciding on treaty claims.

Finally, a choice of law may be implied by the fact that the parties argue their case on the basis of the same law.<sup>124</sup> In *Biloune and Marine Drive Complex Ltd (MDC) v Ghana Investments Centre (GIC) and the Government of Ghana* (1989–90), the foreign investor alleged that the respondents had expropriated the assets in MDC.<sup>125</sup> The contract between the parties required the tribunal to “construe” the contract “according to the laws of Ghana”.<sup>126</sup> Still, the UNCITRAL Tribunal applied customary international law to the merits, seemingly because of an implicit choice of law:

The provisions of Ghanaian law which have been brought to the Tribunal's attention do not relate to the construction of the Agreement. Neither Party pleaded the particulars of the legal principles or provisions of the law of Ghana that should guide the Tribunal's decision on the main contractual issues and, in particular, it was not argued how any provision of the Agreement should be construed in accordance with the law of Ghana. Specifically, neither Party brought to the attention of the Tribunal any interpretation of the GIC Agreement, or of the Parties' rights and obligations under the Agreement, including the prohibition of expropriation, peculiar to the law of Ghana. Moreover, there is no indication that Ghanaian law diverges on the central issue of expropriation from customary principles of international law. On the contrary, both Parties explicitly treated those principles as governing the issue of expropriation.<sup>127</sup>

An implicit agreement in favour of the application of international law was also found by the ICSID Tribunal in *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka* (1990), the first time an ICSID tribunal's jurisdiction stemmed from an investment treaty.<sup>128</sup> The treaty did not contain an explicit provision on the applicable law. ‘Consequently,’ held the tribunal, ‘the Parties in dispute have had no opportunity to exercise their right to choose in advance the applicable law

<sup>122</sup> See Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>123</sup> Spiermann, fn. 97, at 103.

<sup>124</sup> Cf. *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)*, Judgment, 16 March 2001, Dissenting Opinion, Bernárdez [2001] ICJ Rep. 40, 264, at para. 7 ('The proposition that the dispute taken as a whole is essentially to be decided in accordance with general international law is, furthermore, confirmed by the manner in which the Parties themselves have pleaded their respective cases'); *The Abeiyi Arbitration (Government of Sudan v The Sudan People's Liberation Movement/Army)*, Award, 22 July 2009, at para. 432.

<sup>125</sup> *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, at section I.

<sup>126</sup> *Biloune*, at section VI.

<sup>127</sup> *Biloune* (emphasis added). See also Award on Damages and Costs, 30 June 1990, at section F.

<sup>128</sup> *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (A.S. El-Kosheri, B. Goldman, S.K.B. Asante, arbs), 4 ICSID Rep. 246 (1997). See also Chapter 6, Section 2.1.2 (on express or implied agreement on the application of international law in investment treaties).

determining the rules governing the various aspects of their eventual disputes.<sup>129</sup> In such a case, the tribunal continued, ‘the choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.’<sup>130</sup> Based on the parties’ written and oral pleadings, the tribunal concluded that the parties had acted in a manner that demonstrated their mutual agreement to consider the BIT as being the primary source of the applicable legal rules.<sup>131</sup>

The reliance by the tribunal on the parties’ reference to international law was criticized in the Dissenting Opinion of Arbitrator Asante on the basis that the respondent had no choice but to respond to the treaty arguments presented by the claimant, and that such a response did not necessarily imply that the parties had agreed on the application of the treaty as the primary source of law. To his mind, ‘it was to be expected that the Respondent would address those particular points and *vice versa*; for, the party which ignores this course of action may ultimately find that it has lost the opportunity to present its views on individual issues to the Tribunal.’<sup>132</sup> Further, stated Asante:

[I]t seems somewhat unrealistic to say that there was mutual agreement by subsequent conduct when, as a matter of record, both parties have adopted divergent positions on this point. [...] [T]he Respondent, though willing to apply International Law and, in particular, the provisions of the Treaty, maintained that this could be done only because the relevant rules of International Law had become part of the law of Sri Lanka.<sup>133</sup>

Although the legislative history of the ICSID Convention and awards support the possibility of an implied choice of law,<sup>134</sup> the criticism by Asante is persuasive.<sup>135</sup> For that reason, it would have been preferable if the tribunal had found that the parties had not agreed on the applicable law, for so to have had recourse to the second sentence of the article 42(1) of the ICSID Convention, stipulating the applicability of both Sri Lankan and international law.

<sup>129</sup> *Asian Agricultural Products*, at 256, para. 19.

<sup>130</sup> *Asian Agricultural Products*, at 256, para. 20.

<sup>131</sup> *Asian Agricultural Products*, at 246, 250, 256. See also at para. 38 (‘From the above-stated summary of the arguments advanced by each of the two Parties to sustain his position, it becomes clear that the only point on which they agree is the applicability of the Sri Lanka/U.K. Bilateral Investment Treaty as the primary source of law’).

<sup>132</sup> *Asian Agricultural Products*, Dissenting Opinion by Asante, 4 ICSID Rep. 246, at 299.

<sup>133</sup> *Asian Agricultural Products*. Cf. V.C. Igobkwe, ‘Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations’ (2006) 23(4) *J. Int’l Arb.* 267, 282. See also Chapter 5, Section 3.1.1 (on the possibility of applying international law indirectly when international law is part of the ‘law of the land’).

<sup>134</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 418 (Comment by the French representative); also at 570 (an ICSID tribunal may also be bound by ‘an implicit agreement which could be deduced from the facts and circumstances of the relationship between the parties’); *Santa Elena v Republic of Costa Rica*, fn. 92, Award, at paras 63–64 (‘Article 42(1) of the Convention does not require that the parties’ agreement as to the applicable law be in writing or even that it be stated expressly’).

<sup>135</sup> Cf. E. Gaillard, ‘Observations on the AAPL Award’ (1992) 119 *Journal du droit international* 217, 227–9, reproduced in E. Gaillard, *La jurisprudence du CIRDI* (Paris, Pedone, 2004), 336–8; M.N. Kinnear, ‘Treaties as Agreements to Arbitrate: International Law as the Governing Law’ in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Volume 13, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International 2007), 401, 413; Schreuer et al., fn. 10, at 574 (Schreuer notes, however, that ‘[i]n the absence of a published detailed record of the proceedings, it is impossible to form a definitive opinion as to whether the parties’ behaviour did, in fact, demonstrate an agreement on international law as the applicable law’).

### *3.1.3. Interim conclusions*

The right of the investor and the host state to agree on the law applicable to the dispute reflects the private dimension of choice-of-law rules in that it takes into account their particular interests and ensures legal certainty. This rule of party autonomy applies to both territorialized and internationalized tribunals.

An agreement by the parties on the applicable law may refer to either national law or international law; and if the governing national arbitration law or arbitration rules refer to ‘rules of law’, also to both national and international law in combination.

Provisions on the applicable law may be found in the investment contract, in the investment law of the host state, in an investment treaty to which the host state and the investor’s home state are parties, or in a subsequent agreement between the parties. A tribunal may also find an implicit agreement on the applicable law, but such resort to the ‘subjective’ method must be limited to cases in which such an agreement can be ascertained with reasonable certainty.

## **3.2. Absence of party agreement on the applicable law**

Frequently, the parties to an investment dispute cannot be deemed to have agreed on the application of a particular law.<sup>136</sup> In those cases, arbitral tribunals are guided by choice-of-law rules set out in national arbitration laws, arbitration rules, the Iran–United States Claims Settlement Declaration, or the ICSID Convention. The pertinent issue to be discussed in this section is whether arbitrators are competent to apply national and/or international law to the dispute at hand in the absence of an agreement by the parties. As will be demonstrated, the relevant instruments vary in this respect. While one may on this basis discern a schism between territorialized and internationalized tribunals, it is becoming increasingly difficult to differentiate between the two categories of tribunals in light of the trend in favour of the applicability of both national and international law. We will also discuss the centre-of-gravity test, which supports the private dimension of choice-of-law rules.

### *3.2.1. The indirect and direct method of ascertaining the applicable law*

Provisions on how to ascertain the applicable law in the absence of party agreement vary according to whether the tribunal should determine the applicable law indirectly by applying certain choice-of-law rules (*voie indirecte*); or directly without necessarily

<sup>136</sup> See Kinnear, fn. 135, at 407 ('Numerous treaties fail to state a governing law. Treaties in this category are often older treaties; those concluded more recently tend to state the governing law expressly' [references omitted]); Banifatemi, fn. 45, at 197; A.F.M. Maniruzzaman, 'Conflict of Laws Issues in International Arbitration: Practice and Trends' (1993) 9(4) *Arb. Int'l* 371 ('The parties to an international contract sometimes fail to reach an agreement as to the substantive law applicable to any dispute that may arise during the course of their contractual relationship. This phenomenon is noticed more often than not in the context of state contracts, especially natural resource investment agreements between a state and a foreign private party' [references omitted]). See also Blessing, fn. 18, at 214 (discussing possible reasons for not specifying the applicable law); Judgment of the Judicial Collegium for Civil Cases of the Supreme Court of Kazakhstan Rendered in 2004, Resolution No. 3A–121/2–04, 1 *Stockholm Int'l Arb. Rev.* (2005) (absence of reference to the applicable law, or to the rules of appointment of arbitrators is no flaw in the parties' intention to choose to arbitrate disputes arising out of the contract).

applying any such rules (*voie directe*).<sup>137</sup> The indirect, and more traditional, method is illustrated by the UNCITRAL Model Law, which provides that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.<sup>138</sup> This language mirrors that of, for instance, the English Arbitration Act,<sup>139</sup> and the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration.<sup>140</sup>

The direct method is an innovative feature of arbitration that reflects the influence of the delocalization theory on the arbitral process.<sup>141</sup> Frick explains that while the arbitrator, for his or her internal thinking process, will certainly apply some notion of private international law, under the *voie directe*, he or she will be under no obligation to explain on what legal grounds the applicable law or rules of law have been determined.<sup>142</sup> This method is illustrated by the Netherlands Arbitration Act, which directs the tribunal to 'make its award in accordance with the rules of law which it considers appropriate'.<sup>143</sup> In even more explicit terms, the Panama Arbitration Act states that failing party agreement, 'the arbitral tribunal shall decide according to the law freely determined by the arbitrators, whether or not pursuant to a conflict rule, without distorting the intent of the parties. [...]'<sup>144</sup> The method is also indirectly reflected in the Swedish Arbitration Act, as it does not contain any rules as to the national or international norms that should apply to the merits.<sup>145</sup> The Svea Court of Appeal explained: 'In light of the desire to restrict the possibilities of appeal, in favor of the finality of an arbitration award, there exist predominant reasons against the implementation of any rule as to the legal premises on which a dispute shall be determined.'<sup>146</sup>

The direct method is also provided for in several sets of arbitration rules, such as those promulgated for the Stockholm Chamber of Commerce,<sup>147</sup> the International Chamber of Commerce,<sup>148</sup> the London Court of International Arbitration,<sup>149</sup>

<sup>137</sup> See generally F. Osman and S. Salama, 'Les méthodes de détermination du droit applicable par l'arbitre: vers un rattachement de la "voie directe" à la méthode conflictuelle' (2003) 21(2) *ASA Bulletin* 272; Frick, fn. 19, at 54 *et seq.*

<sup>138</sup> UNCITRAL Model Law (2006), art. 28(2).

<sup>139</sup> English Arbitration Act (1996), section 46(3). See also European Convention on International Commercial Arbitration, 21 April 1961, art. VII(1).

<sup>140</sup> Cairo Arbitration Rules (2011), art. 33(1). See also Rules of Procedure of the Inter-American Arbitration Commission, art. 33(1).

<sup>141</sup> See Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice); Y. Derains and E.A. Schwarz, *A Guide to the ICC Rules of Arbitration* (The Hague, Kluwer Law International, 2005), 221 (the adoption in the 1998 ICC Arbitration Rules of the direct method 'is consistent with recent trends in international arbitration that are now widely accepted. It is also the culmination of a gradual evolution in international thinking on this subject' [references omitted]).

<sup>142</sup> Frick, fn. 19, at 54 (references omitted).

<sup>143</sup> Netherlands Arbitration Act (1986), art. 1054(2).

<sup>144</sup> Panamanian Arbitration Law (1999), art. 43(3). See also Indian Arbitration Act (1996), art. 28(1)(b)(iii); French Arbitration Law (2011), art. 1511.

<sup>145</sup> Swedish Arbitration Act (1999).

<sup>146</sup> *Czech Republic v CME Czech Republic B.V.*, Case No. T 8735–01, Svea Court of Appeal, Sweden, 15 May 2003, at pp. 90–1. See also at 90 (the Court noted that according to the legislative history of the Swedish Arbitration Act, 'such a rule may be dispensed with'); C. Söderlund, 'A Comparative Overview of Arbitration Laws: Swedish Arbitration Act 1999, English Arbitration Act 1996 and Russian Federal Law on International Commercial Arbitration' (2004) 20(1) *Arb. Int'l* 82.

<sup>147</sup> SCC Arbitration Rules (2010) (the tribunal shall apply 'the law or rules of law which it considers to be most appropriate'). Cf. SCC Case 117/1999, fn. 38.

<sup>148</sup> ICC Arbitration Rules (2012), art. 17(1) (the tribunal shall apply 'the rules of law which it determines to be appropriate'). See also Derains and Schwarz, fn. 141, at 240–1.

<sup>149</sup> LCIA Rules (1998), art. 22.3 (the tribunal 'shall apply the law(s) or rules of law which it considers appropriate').

the Netherlands Arbitration Institute,<sup>150</sup> and the Dubai International Arbitration Centre.<sup>151</sup>

Although the direct method does not compel a tribunal to identify any choice-of-law rule, it is submitted that the tribunal ought nevertheless to explain its reasons for selecting and applying a particular law. As Heiskanen states: ‘the *voie directe* approach remains a conflict-of-laws approach in the sense that it results in a choice of law and accordingly the arbitrators must provide reasons for their (contextual) choice of law.’<sup>152</sup> This would not only be in the interest of the parties, who will know the basis for the decision reached; it would also make the award less vulnerable for annulment and non-enforcement.<sup>153</sup> Indeed, rarely does a tribunal omit such references.<sup>154</sup>

### *3.2.2. The (non-) applicability of national and international law*

Where the parties have not reached an agreement on the applicable law, the relevant instruments differ as to the governing law. In what follows, we will see that while territorialized and internationalized tribunals alike may apply national law in the absence of choice, the same is not necessarily the case for international law. This latter source remains applicable for internationalized tribunals, but not always for territorialized tribunals.

National law plays an obvious role in investor-state arbitration,<sup>155</sup> and its applicability in the absence of a party agreement is clearly allowed pursuant to both the indirect and the direct method. When directed to discern the applicable law on the basis of applicable ‘conflict of laws rules’ or without any reference to such rules, arbitrators could seek guidance in the choice-of-law rules of the tribunal’s juridical seat;<sup>156</sup> or they may have recourse to what has been referred to as general principles of private international law.<sup>157</sup> Such principles may be distilled from international

<sup>150</sup> Arbitration Rules of the Netherlands Arbitration Institute (2001), art. 46 (the tribunal ‘shall make its award in accordance with the rules of law which it considers appropriate’).

<sup>151</sup> Dubai International Arbitration Centre (DIAC) Arbitration Rules (2007), art. 33(1) (‘If and to the extent that the Tribunal determines that the parties have made no such choice [as to the applicable law], the Tribunal shall apply the law(s) or rules of law which it considers to be most appropriate’).

<sup>152</sup> V. Heiskanen, ‘And/Or: The Problem of Qualification in International Arbitration’ (2010) 26(4) *Arb. Int’l* 441, fn. 27 (referring to H.G. Naón, ‘Choice-of-Law Problems in International Commercial Arbitration’ (2001) 289 *Recueil des Cours* 377). See also Derains and Schwarz, fn. 141, at 242; B. Wortmann, ‘Choice of Law by Arbitrators: The Applicable Conflict of Laws System’ (1998) 14(2) *Arb. Int’l* 97, 101; Poudret and Besson, *Comparative Law*, fn. 20, at 588. Cf. *Eureko B.V. v Republic of Poland*, Judgment of Court of First Instance of Brussels on setting aside of award, at section IV, 23 November 2006 (‘The motivation of an arbitral award (Art. 1701, 6, C.J.) must have the same quality as the one that is required for judicial decisions; it must be complete, precise, clear and adequate’).

<sup>153</sup> See D. Goldberg, *Observations*, Stockholm Arbitration Report (2002).

<sup>154</sup> See Osman & Salama, fn. 133, at 285; Frick, fn. 19, at 54.

<sup>155</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>156</sup> See Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>157</sup> See, e.g., G. Sacerdoti, ‘State Contracts and International Law: A Reappraisal’ (1986–87) VII *Italian Y.B. Int’l L.* 26, 33. Cf. *LIAMCO*, fn. 53, Award, 20 I.L.M. 1, 32 (1977) (‘[I]n a case involving a foreign litigant, the tribunal to which it is submitted has to refer for guidance to the general principles governing the conflict of laws in private international law’); *Saudi Arabia v Arabian American Oil Co. (Aramco)*, Award, 23 August 1958 (Sauer-Hall, Badawi/M. Hassan, Habachy, arbs.), 27 I.L.R. 117, 156–7 (1963). But see S.J. Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge, Grotius, 1990), 51 ([P]urporting to choose the conflict laws rules of international law is, in reality, nothing more than a veiled attempt to allow the arbitrators to choose any substantive law they wish, for international law can provide no real guidance’ in this regard); Mohebi, fn. 56, at 105.

conventions, or instruments and rules that have attained general recognition by virtue of a common acceptance or universal practice.<sup>158</sup> One of these principles has been referred to as the ‘centre-of-gravity’ test or ‘closest connection’ rule, which leads to the application of the law of the state to which the dispute is most closely connected. As an ICC tribunal observed in 1996: ‘The conflict rule which, beyond doubt, has received, on an [sic] worldwide basis, the strongest support, is the so-called “closest connection rule” which indeed is common to most (national) conflict of laws system.’<sup>159</sup> Depending on the nature of the claim, the centre-of-gravity test reflects general principles such as *lex loci contractus*, *lex loci solutionis*, *lex loci delicti*, *lex loci actus*, *lex situs*, and *lex domicilii*.<sup>160</sup> Some arbitration laws, such as the Egyptian Arbitration Law, explicitly provide for the application of this test: ‘If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral panel shall apply the substantive rules of the law it considers most closely connected to the dispute.’<sup>161</sup>

As for the determination of which national system of law should apply to the dispute in the absence of party agreement, it will—in investment arbitration—generally be that of the host state. In the words of Bouchez, in practice, ‘the conflict of laws rules will in the event of disputes between states and foreign enterprises often (but not always) result in applying the law of the state involved because of the closeness of connection of the contract giving rise to the dispute with the state in question.’<sup>162</sup> And, as the ICC Tribunal stated in *SPP (Middle East) Ltd v Arab Republic of Egypt* (1983): ‘May we observe, *ad abundantiam*, that failing contractual designation of the governing law the same result (i.e. reference to the law of the host country) would also normally be achieved by applying the ordinary principles on conflict of laws.’<sup>163</sup> Accordingly, the centre-of-gravity test is also indirectly reflected in article 42(1), second sentence, of the ICSID Convention, which provides for the application of the law of the host state and international law.<sup>164</sup> The national law most closely connected to an investment dispute is namely almost<sup>165</sup> always that of the host state. Parra notes:

<sup>158</sup> See Lew, fn. 48, at 286–7.

<sup>159</sup> *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.* (1996), fn. 89, at Section III; J.D.M. Lew, ‘Proof of Applicable Law in International Commercial Arbitration’ in *Festschrift für Otto Sandrock zum 70. Geburtstag* (K.P. Berger et al., eds, Heidelberg, Recht und Wirtschaft, 2000), 581, 591 (“[P]ractice suggests that arbitral tribunals prefer the “closest connections” test. Such practice is so widespread that it is now arguable that private international law has developed to encompass this principle, or at least that it is in the process of being so developed”); K. Hobér, ‘In Search for the Centre of Gravity: Applicable Law in International Arbitrations in Sweden’ *Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce* (Stockholm, Juris, 1994), 7.

<sup>160</sup> The law of the place where the contract was formed; the law of the place of performance; the law of the place where the tort took place; the law of the place where the legal act took place; the law of the place where the object is situated; the law of the place of domicile, respectively. See J.G. Collier, *Conflict of Laws* (Cambridge University Press, 2001), 7.

<sup>161</sup> Egyptian Arbitration Law (2000), art. 39(2). See also Arbitration Law of Jordan, Law No. 31/2001, 14 June 2001, art. 36(b); Switzerland’s Federal Code on Private International Law (1987), art. 187(1).

<sup>162</sup> L.J. Bouchez, ‘The Prospects for International Arbitration: Disputes Between States and Private Enterprises’ in *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888–1987)* (J.H. Verzijl and A.H.A. Soons, eds, Dordrecht, Martinus Nijhoff, 1990), 109, 137 (references omitted).

<sup>163</sup> *SPP (Middle East) Ltd v Arab Rep. of Egypt*, ICC Award No. 3493, Award, 16 February 1983 (G. Bernini, M. Littman, A. Elghatit, arbs), para. 49.

<sup>164</sup> ICSID Convention (1965), art. 42(1), second sentence (‘In the absence of [party] 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>165</sup> See ICSID Convention (1965) (providing for the possibility of *renvoi* to a more closely connected legal system by including a reference to the choice-of-law rules of the host state).

As regards the applicable domestic law, [article 42(1), second sentence, ICSID Convention] may in practical terms differ little from its UNCITRAL counterparts. In the case of a typical foreign investment—a natural resources concession contract, for instance—normal conflict of laws analysis will usually point to the application of the substantive law of the host State of the investment.<sup>166</sup>

Also the Iran–United States Claims Tribunal has applied the centre-of-gravity test in determining the national law applicable to the merits.<sup>167</sup>

Turning then to international law, its application in the absence of an agreement by the disputing parties depends on the precise wording of the instrument at hand, be it a national arbitration law, a set of arbitration rules, or a treaty. It is in this context that the difference between the direct and indirect methods may take on significance. Where the arbitration law and arbitration rules reflect the direct method, the application of international law is necessarily allowed by virtue of the full freedom that is granted the tribunal with respect to the applicable law in the absence of party agreement. The question arises whether this is also the case for the indirect method, with its reference to ‘conflict of laws rules’. On the one hand, as was noted in the introductory chapter, this term traditionally refers to which *national* system of law applies to the merits.<sup>168</sup> The inference that the indirect method would thereby only allow for the application of national law to the exclusion of international law finds implicit support in the reference in the ICSID Additional Facility Rules to the combined application of ‘(a) the law determined by the conflict of laws rules [...] and (b) such rules of international law as the Tribunal considers applicable’.<sup>169</sup> Also, when the parties to the Iran–United States Claims Settlement Declaration decided to use the 1976 UNCITRAL Arbitration Rules as their framework, they found it necessary to change the language so as to refer specifically to international law in addition to choice-of-law rules.<sup>170</sup> It may be reasoned that the purported need separately to list international law means that the term ‘conflict of laws rules’ only refers to national law.

On the other hand, it could be argued that the term ‘conflict of laws rules’, including the centre-of-gravity test, could also be extended to allow for the application of international law. Thus, not only when a tribunal is directed to apply the ‘rules of law which it considers appropriate’<sup>171</sup> or the ‘law with which the action is most closely

<sup>166</sup> Parra, fn. 66, at 5. See also G. Elombi, ‘ICSID Awards and the Denial of Host State Laws’ (1994) 11 *J. Int’l Arb.* 61, 67. Cf. *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (B. Goldman, I. Foighel, E.W. Rubin, arbs), para. 148 (it was not necessary to enter into a discussion on the rules of conflict, inasmuch as the parties made constant references to the law of the state party in the dispute, and moreover in ‘the dispute before the Tribunal relating to an investment in Indonesia, there is no doubt that the substantive municipal rules of law to be applied by the Tribunal are to draw from Indonesia Law’).

<sup>167</sup> See, e.g., *Economy Forms Corporation v Government of the Islamic Republic of Iran et al.*, Award No. 55–165–1, 3 I. U.S.C.T.R. 42, at section III(1) ([T]he Tribunal holds that United States law governs the contract, since the centre of gravity of these business dealings was in the United States, that being the test under general principles of conflicts of law); *Harnischfeger Corp. v Ministry of Roads & Transportation*, Partial Award, 13 July 1984, 7 Iran–U.S. C.T.R. 90, 99. Cf. Lagergren, fn. 8, at 31, at fn. 12.

<sup>168</sup> See Chapter 1, Section 2 (on the scope of and terminology used in the study). Cf. US Restatement (Second), Conflict of Laws §188 (1971) (directing the court to apply the law of ‘the state’ whose contacts and policies are relevant to the particular issue, i.e. the State of the ‘most significant relationship’).

<sup>169</sup> ICSID Additional Facility Rules (2006), art. 54(1) (emphasis added).

<sup>170</sup> See Iran-US Claims Settlement Declaration (1981), art. V; United States Claims Tribunal, Tribunal Rules of Procedure (1983), art. 33; H.M. Holtzmann, ‘Drafting the Rules of the Tribunal’ in *The Iran–United States Claims Tribunal and the Process of International Claims Resolution* (D.D. Caron and J.R. Crook, eds, Ardsley, NY, Transnational Publishers, 2000), 75, 82.

<sup>171</sup> Netherlands Arbitration Act (1986), art. 1054(2). Cf. Indian Arbitration Act (1996), art. 28(1)(b)(iii).

connected’,<sup>172</sup> but also when applying ‘conflict of laws rules’, it could decide that the particular claim ‘centres’—as one may say—in the international legal order and that therefore international law should apply. In Mann’s vision:

[T]he conflict of laws has in mind the localisation legal relationships and [...] therefore, the conflict rule normally refers to a locally defined legal system. But this is no more than a form of words from which no dogma should be derived. When Savigny uses the well-known metaphor of the ‘seat of the legal relation’, he certainly contemplates territorially defined systems of law. But an all too literal interpretation would not be in harmony with his genius. Von Bar’s phrase of the ‘nature of the thing’, Gierke’s formulate of the centre of gravity, and especially Westlake’s figure of the law with which a contract has the most real connection no longer maintain the idea of localisation and prove that the reference to a legal system which is not territorially defined is fully reconcilable with the traditional doctrine of the conflict of laws. In any event, it must be emphasised, considerations of a conceptualist character cannot be decisive.<sup>173</sup>

In this context, reference should also be made to the observation by the English Court in *Raiffeisen Zentralbank Österreich AG v Give Star General Trading LLC* (2001) that the various legal categories recognized by the law are ‘man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. [...] [T]he conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.’<sup>174</sup> In accordance with these statements, an extension of the term ‘conflict of law rules’ so that the centre-of-gravity test allows for the application of international law would be especially fitting in investment arbitration in light of the relevance of international law to the investor-state relationship.<sup>175</sup>

Nevertheless, the Explanatory Note to the UNCITRAL Model Law explicitly endorses the conclusion that the reference to conflict of laws rules excludes the application of international law: Whereas the parties are free to decide on the application of international law, ‘[t]he power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, *i.e.* the national law, determined by the conflict of laws rules which it considers applicable.’<sup>176</sup> This restriction against the application of international law should be seen in light of the fact that arbitration laws and rules were

<sup>172</sup> Switzerland’s Federal Code on Private International Law (1987), art. 187(1). Cf. Blessing, fn. 18, at 199 ([T]he Swiss Arbitration Act, by adopting the closest connection rule, does not go quite so far as to allow the so-called *voie directe* in the sense of Article 1496 (1) of the French Nouveau Code de procédure civile; but this can be stated without regret, because the closest connection test leaves a sufficiently broad freedom to the arbitral tribunal. [...] ] The term “rules of law” makes it clear that the arbitral tribunal is not bound to determine the applicability of one specific national law, but has the freedom to base its award on “rules of law” (including a-national or transnational rules of law, general principles of law, principles of public international law, *lex mercatoria*, commercial practices, provisions from international Conventions or, more recently, the 1994 *UNIDROIT Principles*)’ [emphasis in original]).

<sup>173</sup> Mann, fn. 1, at 46). See also B. Goldman, ‘1 Arbitrage (Droit international privé)’ in *Répertoire de droit international* (P. Franscakis, ed., Paris, Jurisprudence générale Dalloz, 1968–1969), 131–2; Lalive, fn. 13 (Goldman and Lalive suggest that the European Convention on International Commercial Arbitration opens up the possibility of applying non-national legal standards).

<sup>174</sup> *Raiffeisen Zentralbank Österreich AG v Give Star General Trading LLC* [2001] EWCA Civ 68, 825, 840–1. Cf. Clarkson & Hill, fn. 46, at 532–3.

<sup>175</sup> See Chapter 1, Section 1 (on the motivations for the study).

<sup>176</sup> UNCITRAL Secretariat, fn. 61, at para. 35 (emphasis added). See also Hill, fn. 30, at 301–3; Bouchez, fn. 162, at 136–7. Cf. UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, Vienna, 10–14 September 2007, 25 September 2007, A/CN.9/641, para. 110 (The reference to conflict-of-laws rules ‘could only result in the application of national law [...]’).

designed not solely for investor-state arbitration, but also—or primarily—for the private-private relationship to which international law plays less of a role.<sup>177</sup>

The more narrow interpretation of the term ‘conflict of laws rules’ gives support to the schism between the national and the international legal order. Indeed, such schism is expressly reflected in certain national arbitration laws that explicitly limit the applicability of international law in cases of no party agreement. The German Arbitration Act, for example, provides that in the absence of an agreement by the parties, the tribunal shall apply ‘the law of the State with which the subject-matter of the proceedings is most closely connected’.<sup>178</sup> It can be reasoned that the same result would prevail pursuant to the Arbitration and Conciliation Act of Nigeria (1990): ‘Where the *laws of the country* to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of the law rules which it considers applicable.’<sup>179</sup>

While the majority of laws and several sets of arbitration rules considered by Poudret and Besson in their treatise on international arbitration ‘only authorize arbitrators to choose a law and not rules of law of a different nature’,<sup>180</sup> we do observe a trend in the direction of allowing tribunals to apply also international law in the absence of a party agreement to this effect.<sup>181</sup> Here we are reminded of the current 2010 UNCITRAL Rules which reflect the proposed change to the 1976 Arbitration Rules by the UNCITRAL Working Group on Arbitration and Conciliation in favour of more freedom for the arbitrators:

A proposal was made [...] to provide the arbitral tribunal with a broader discretion in the determination of the applicable law by adopting wording along the lines of article 17 of the ICC Rules as follows: ‘In the absence of any such agreement, the Arbitration Tribunal shall apply the rules of law which it determines to be appropriate.’<sup>182</sup>

It is further noted that the exclusion in certain national arbitration laws of the applicability of international law in the absence of party agreement is mitigated by the fact that these laws generally allow the parties to agree on the application of arbitration rules that use the direct method and thereby allow for the default application of international law.<sup>183</sup>

<sup>177</sup> See Chapter 1, Section 2 (on the scope of and terminology used in the study); C. Reiner and C. Schreuer, ‘Human Rights and International Investment Arbitration’ in *Human Rights in International Investment Law and Arbitration* (P.-M. Dupuy et al., eds, Oxford University Press, 2009), 82, 85.

<sup>178</sup> German Arbitration Act (1998), section 1051(2) (providing for the application of ‘the law of the State with which the subject-matter of the proceedings is most closely connected’). Cf. ‘Arbitration in Germany: The Model Law in Practice’ in K.-H. Böckstiegel et al., *Germany as a Place for International and Domestic Arbitrations: General Overview* (Alphen aan den Rijn, Kluwer Law International, 2007), 47–8.

<sup>179</sup> Arbitration and Conciliation Act of Nigeria (1990), section 47(3) (emphasis added). See also Turkish International Arbitration Law (2001), art. 12(c)(2); Arbitration Rules of the German Institution of Arbitration 1998 (Deutsche Institution für Schiedsgerichtsbarkeit (DIS)), section 23.2. Cf. Inter-American (Mexico) Convention on the Law Applicable to International Contracts (1994), art. 9.

<sup>180</sup> Poudret and Besson, *Comparative Law*, fn. 20, at 581.

<sup>181</sup> Cf. Jacquet, fn. 33, at 19; Derains and Schwarz, fn. 141, at 240.

<sup>182</sup> UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, Vienna, 10–14 September 2007, 25 September 2007, A/CN.9/641, para. 111. See also at para. 112. Cf. Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session, Vienna, 11–15 September 2006, para. 123; United Nations Commission on International Trade Law, Working Group II (Arbitration), Forty-sixth Session, New York, 5–9 February (2007), Note by the Secretariat (6 December 2006), A/CN.9/WG.II/WP.145/Add.1, para. 38.

<sup>183</sup> See Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice); Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

From a larger perspective, and to conclude on this point, we saw that the principle of party autonomy reflects the notion of legal certainty, and thus the private dimension of choice-of-law rules. The same may be said to apply to the centre-of-gravity test, as its connecting factors would most likely lead to the application of the law of the host state, with which both parties can be presumed to be familiar.<sup>184</sup> As noted by Nygh, '[i]n many cases the closest connection will be clearly centred in one particular country and the application of its laws will most readily meet the expectations of the parties.'<sup>185</sup> Moreover, it also benefits the state that is likely to have the greater interest in the outcome of the dispute.<sup>186</sup> The same conclusion is warranted when the centre-of-gravity test—and in Mann's and our view 'conflict of laws' rules—would lead to the application of international law. In that case, the foreign investor would generally have relied on the rights it enjoys under international law vis-à-vis the host state; and the latter should certainly be familiar with the corresponding obligations that it owes the investor, its home state, and/or the international community as a whole.

### 3.2.2.1. The ICSID Convention

The ICSID Convention provides a procedural framework for the settlement of investment disputes; it does not contain any substantive rules on foreign investment law. During the negotiations, some state representatives suggested including such rules.<sup>187</sup> However, that idea was discarded, partly due to differences in opinion on their content.<sup>188</sup> Instead, the arbitrators are to select the applicable norms in accordance with article 42 of the Convention. The drafting of what was to become the second sentence of article 42(1) of the ICSID Convention concerning the law to be applied in the absence of party agreement was not without contention,<sup>189</sup> and the exact meaning of this provision is debated to this day.<sup>190</sup> For that reason, we will examine in more detail its terms and the negotiating history that led to its adoption.

The provisions in earlier drafts were intended to give ICSID tribunals considerable flexibility with respect to whether to apply national or international law. Broches, World Bank General Counsel and Chairman of the preparatory meetings, first stated that the Convention 'would give the arbitral tribunal the power to determine the applicable law'.<sup>191</sup> This power was later expressed in various ways: 'the text under discussion left the whole question of the substantive rules of law to the tribunal';<sup>192</sup> 'the arbitrators would have to choose the national or international law to be applied';<sup>193</sup> the Convention 'left it to the Tribunal [...] to decide whether a claim was subject to national or international law';<sup>194</sup> the tribunal 'would look into all the legal aspects [...]

<sup>184</sup> See Clarkson and Hill, fn. 46, at 7.

<sup>185</sup> P.E. Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 252 *Recueil des Cours* 269, 332.

<sup>186</sup> Cf. Clarkson & Hill, fn. 46, at 198.

<sup>187</sup> See History of the ICSID Convention, fn. 54, Vol. II-1, at p. 418 *et seq.*; also at p. 570. See also Schreuer et al., fn. 10, at 550.

<sup>188</sup> See History of the ICSID Convention, fn. 54, Vol. II-1, at pp. 6, 109, 472; Di Pietro, fn. 103, at 235.

<sup>189</sup> See A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Dordrecht, Nijhoff, 1995), 227.

<sup>190</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>191</sup> Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole, SID/63-2 (18 February 1963), in History of the ICSID Convention, fn. 57, Vol. II-1, at p. 71.

<sup>192</sup> History of the ICSID Convention, Vol. II-1, at p. 419 (statement by A. Broches).

<sup>193</sup> History of the ICSID Convention, Vol. II-1, at p. 110 (statement by Mr. Meijia).

<sup>194</sup> History of the ICSID Convention, Vol. II-1, at p. 259 (statement by A. Broches).

from the viewpoint not only of domestic, but also of international law';<sup>195</sup> it 'could look to municipal law as well as international law';<sup>196</sup> and 'the Tribunal would itself be responsible for deciding whether to apply a particular domestic or international law as it found most appropriate'.<sup>197</sup> Consistent with this language, earlier drafts of what was to become article 42(1), second sentence, provided that the tribunal 'shall decide the dispute submitted to it in accordance with such rules of law, *whether national or international*, as it shall determine to be applicable'.<sup>198</sup>

During the discussions leading to the final adoption of article 42(1), it became clear that state representatives or delegates<sup>199</sup> desired more specification with regard to the applicable law.<sup>200</sup> In this vein, the French representative suggested that the words 'whether national or international' should be amended to read 'national *and* international',<sup>201</sup> a proposal that was adopted. The final text of the second sentence of article 42(1) provides that in the absence of an agreement by the parties on the applicable law, '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>202</sup>

The wording of the second sentence of article 42(1) of the ICSID Convention can be seen as a compromise between those advocating a role for national or international law respectively.<sup>203</sup> The explicit reference to the law of the host state was inserted by demands of several delegates. The representative from Spain, for instance, agreed that the tribunal must have the power to apply international law, 'but where national law was concerned, it was not admissible that any municipal law other than that of the host State should be invoked'.<sup>204</sup> Also the Turkish representative sought a clarification of the

<sup>195</sup> History of the ICSID Convention, Vol. II-1, at p. 267 (statement by A. Broches).

<sup>196</sup> History of the ICSID Convention, Vol. II-1, at p. 268 (statement by A. Broches).

<sup>197</sup> History of the ICSID Convention, Vol. II-1, at p. 330 (statement by A. Broches).

<sup>198</sup> History of the ICSID Convention, Vol. II-1, at p. 190 (emphasis added).

<sup>199</sup> As for the correct designation, see A. Broches, 'Hirsch, Moshe: The Arbitration Mechanism of the International Centre for Settlement of Investment Disputes' (1995) 10(1) *ICSID Rev.-FILJ* 162, 163, at fn. 2 ('[The] initial round of discussion of a preliminary draft convention [...] [took place] in regional consultative meetings of legal experts who were designated by governments but did not represent them. After the Bank's Executive Directors had concluded, in the light of the consultations in Africa, Latin America, Europe and Asia that it would be desirable to establish the institutional facilities, they were instructed by the (plenary) Board of Governors to formulate a text that could be accepted by the largest number of governments. The Bank then invited its members to appoint *representatives* to a Legal Committee which was to advise the Executive Directors' [emphasis in original]).

<sup>200</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 469 (the delegate from Israel noted: 'The Convention empowered an arbitral tribunal to decide a dispute [...] in accordance with such rules of law as it determined to be applicable. The principle by which these rules of law would be determined required more precise definition'). See also Vol. II-2, at p. 669 (the representative from Vietnam asked whether the words 'national law' should be understood as meaning the national law of the country of the investor or the national law of the state where the investment is made).

<sup>201</sup> History of the ICSID Convention, Vol. II-1, at p. 421 (emphasis added). See also at p. 421 (the Austrian delegate supported the mentioning of both national and international law 'since both were clearly involved').

<sup>202</sup> ICSID Convention (1965), art. 42(1), second sentence.

<sup>203</sup> See History of the ICSID Convention, fn. 54, Vol. II-2, at p. 986 (Broches stated that 'Article 42(1) had been the result of a long and thorough discussion in the Legal Committee and, speaking as the Bank's General Counsel, he found it satisfactory from the points of view both of capital-importing countries and capital-exporting countries'); Delaume, fn. 107, at 62–3.

<sup>204</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 419. Cf. p. 466 (the delegate from Thailand pointed to general principles of private international law, and opined that the national law 'could and should mean none other than the internal law of the State party to the dispute'); and p. 501 (the delegate from Ceylon noted that 'the law to be applied should still be local law and not international law').

term ‘municipal law’, as it could be construed as referring to the municipal law of the capital-exporting State, whereas in his view, ‘only the municipal law of the capital-importing country applied’.<sup>205</sup> Likewise, the Chinese delegate found it obvious to assume that ‘the act of making an investment in the host country would imply that the investor had consented to the jurisdiction and application of the law of the host State in all respects, unless there was a written and explicit declaration to the contrary’.<sup>206</sup>

Chairman Broches explained that the reference to national law ought not to be specifically restricted to the law of the host state ‘because the rule of conflict of laws might sometimes bring a different law into operation’.<sup>207</sup> Still, he observed that in most cases the application of normal conflict of laws rules or private international law would indeed lead to the application of the national law of the host state.<sup>208</sup> Thus, a compromise was reached, in which the law of the host state was specifically inserted in article 42(1), second sentence, including the possible *renvoi* to a law different to that of this state, cf. the language ‘including its rules on the conflict of laws’.<sup>209</sup> This provision was approved by a majority of 24 to 6.<sup>210</sup>

The specific reference to international law was favoured by several of the state representatives, as well as Chairman Broches: ‘it is reasonable to provide that an international tribunal will have the power to apply international law.’<sup>211</sup> The German

<sup>205</sup> History of the ICSID Convention, fn. 57, Vol. II-1, at p. 418. See also at p. 571; Vol. II-2, at p. 660 (comment by delegate from Thailand); at p. 800 (comment by delegate from the Philippines) and also (the Chinese delegate stated that ‘in the absence of an agreement the national law of the host State and not another national law or international law would be the first law to apply’); and at p. 801 (the representative from China stated that while he was not for the total exclusion of international law, ‘the national law of the host State should be the first to apply’); and also (the delegate from Turkey stated that ‘national law’ should be limited by reference to the law of the host state in which the investment was made); and (according to the Spanish delegate, provision should be made for the application of the national law of the country where the investment takes place).

<sup>206</sup> History of the ICSID Convention, Vol. II-1, at p. 513. See also at p. 514; Vol. II-2, at p. 800 (suggesting that the Preamble to the Convention should state that a foreign investment implies reliance by the investor on the laws of the host state). See also Vol. II-1, at p. 515 (the representative from India observed that in the majority of cases most of the aspects of the investment were intended to be governed by the law of the state where the investment was located, and in that case ‘the national law of that State should prevail’); also at p. 505 (the delegate from India stated that ‘it should be made clear [...] that the foreign investor must comply with the national law of the host State and that the law to be applied was that national law’); also at p. 506.

<sup>207</sup> History of the ICSID Convention, Vol. II-2, at p. 800. See also Vol. II-1, at p. 418 (Broches referred to licensing and know-how agreements,); also at pp. 506, 514, 570–1, 267 (the Nigerian delegate stated that the problem of ascertaining the appropriate law was similar to that in the case of a ‘conflict of laws’, where the court was to decide which law was proper to the contract in question (e.g. the place with which the contract had the closest connection)).

<sup>208</sup> See History of the ICSID Convention, Vol. II-1, at p. 418.

<sup>209</sup> ICSID Convention (1965), art. 42(1), second sentence. See also *LG&E Energy Corp. v Argentina*, fn. 118, Decision on Liability, at para. 87 (‘As to the reference to the private international law, the Tribunal has not found in the ICSID records any case in which the Arbitral Tribunal has resorted to the rules of conflict of law of the State party to the dispute’).

<sup>210</sup> See History of the ICSID Convention, fn. 54, Vol. II-2, at p. 804. Cf. A. Masood, ‘Law Applicable in Arbitration of Investment Disputes under the World Bank Convention’ (1973) 15(2) *J. Indian L. Inst.* 311, 314–15 (‘(i) The first sentence was approved by a majority of 35 to 1. (ii) The first part of the second sentence referring to the law of the host state was approved by a majority of 31 to 1. A Chinese proposal to institute the word “first” in the sentence for emphasizing that international law would be applied only after the national law had been enquired into was not pressed for voting. (iii) The final part relating to international law was adopted by a majority of 24 to 6. A Dahomean proposal to replace this final part with the words “with due regard to the general principles of international law”, was defeated by a majority of 4 to 2. An Indian proposal to limit the application of international law to cases where the law of the host state was silent on a particular question was defeated by a majority of 19 to 7’).

<sup>211</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 571.

delegate found it ‘most important to mention international law [...] since it provided additional protection for the private investor and since developments were tending towards the application of international law regarding those types of contracts’.<sup>212</sup> In this vein, he pointed to the practice of many states whose courts must apply national as well as international law, and in his view, ‘it would seem strange if a tribunal which was admittedly international would be precluded from the application of international law.’<sup>213</sup>

Whereas the relevance of international law to the investor–state relationship is currently well established,<sup>214</sup> it should be noted that at the time of the drafting, the default application of ‘international rules’ was more controversial. In fact, the Yugoslavian representative rejected the application of international law altogether on the basis that a tribunal should not be authorized to review the domestic legislation of sovereign states.<sup>215</sup> Also the representative from Brazil objected to the application of ‘any law other than the law of the State in which the investment was made’, even in the face of an express agreement to the contrary.<sup>216</sup> Advocating the viewpoint of newly independent states, the representative from Ceylon pointed out that although these states were always willing to accept and abide by the principles of public international law, they had persistently demanded the modification of principles that had been ‘created solely to protect the interests of the industrial and colonial powers’.<sup>217</sup> In his view, it would run counter to the doctrine of state sovereignty that the actions of a state of a purely domestic nature would be tested by an uncertain set of principles.<sup>218</sup> His rejection of the application of international law thus stemmed from his refusal to affirm the present system, in which tribunals would apply the existing law with its imperfections.<sup>219</sup>

While not rejecting the application of international law, other representatives expressed concerns about its scope. Attempting to remedy the view that ‘many aspects of international law, particularly in the field of foreign investment, were not yet settled’, the South African delegate proposed that the tribunals could be granted by the United Nations General Assembly a status equivalent to that of the specialized agencies so as to enable them to seek advisory opinions from the International Court of Justice.<sup>220</sup> And the Italian delegate found it desirable for the Convention to specify the fundamental principles of international law to be applied, such as protection against discriminatory treatment and the obligation to act in good faith.<sup>221</sup>

<sup>212</sup> History of the ICSID Convention, at p. 421.

<sup>213</sup> History of the ICSID Convention, Vol. II-2, at p. 801. See also at p. 802 (representative from Dahomey opined that ‘one should not deny international [...] arbitrators the possibility of taking international law into account’).

<sup>214</sup> See Chapter 1, Section 1 (on motivations for the study). See also Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>215</sup> See History of the ICSID Convention, fn. 54, Vol. II-2, at p. 801.

<sup>216</sup> History of the ICSID Convention. See also at p. 984 (Mr Rajan stated that ‘no reference should be made to international law and that the only law which should be applied to the dispute was that of the Contracting State party to the dispute’).

<sup>217</sup> History of the ICSID Convention, Vol. II-2, at pp. 801–2.

<sup>218</sup> History of the ICSID Convention, at p. 802.

<sup>219</sup> History of the ICSID Convention, at p. 802.

<sup>220</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 420. See also at p. 420 (A. Broches replied that he doubted whether the tribunals would be authorized to seek the court’s advisory opinions). Cf. Vol. II-2, at pp. 802–3 (the Indian representative expressed concern about the application of international law since the arbitrators would probably not be experienced in this field); and also (Peruvian delegate).

<sup>221</sup> See History of the ICSID Convention, Vol. II-1, at p. 419. See also at pp. 418–19 (the representative from France suggested that the tribunals be guided by a general code of conduct for both the investor and the host country); and at p. 570; Vol. II-2, at p. 800 (the delegate from the

These suggestions were rejected, in the words of Chairman Broches, ‘out of a desire to maintain flexibility in view of the great variety of cases that might be submitted to arbitration under the Convention’.<sup>222</sup> Still, in the final stage of the drafting, the understanding was reported to the Executive Directors of the World Bank that the reference to international law in article 42(1), second sentence, comprised, apart from treaty law, ‘only such principles as that of good faith and the principle that one ought to abide by agreements voluntarily made and ought to carry them out in good faith’.<sup>223</sup> Yet, the subsequent Report of the Executive Directors, explains that ‘[t]he term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice [...].’<sup>224</sup> In fact, one of the earlier drafts of article 42(1) included a specific reference to article 38(1).<sup>225</sup> We can therefore conclude, and the subsequent analysis of practice will demonstrate, that ICSID tribunals may have recourse to treaties, customary international law, and general principles of law as primary sources; and jurisprudence and legal scholarship as subsidiary means for the determination of rules of law.

The Report of the Executive Directors adds the qualification that allowance shall be made of the fact that ‘Article 38 was designed to apply to interstate disputes’.<sup>226</sup> In the view of Broches, the additional words ‘allowance shall be made [...]’ represented a slight change, and he found no need further to elaborate on them.<sup>227</sup> Some explanation is still due as the language relates to—at the time—controversial debate whether private parties are true subjects and enjoy rights pursuant to international law. Some state representatives expressed their concern about the application of international law for precisely that reason. The delegate from the United Kingdom pointed out that the tribunals would be ‘faced with the difficult problem in establishing the extent to which international law would be applicable in a case involving a non-State party’.<sup>228</sup> The Indian representative stated that international law governed relations between states and could not deal with relations between a state and a foreign private individual.<sup>229</sup>

Philippines suggested that international law would only apply in cases of alleged discrimination against the investor).

<sup>222</sup> History of the ICSID Convention, Vol. II-1, at p. 419. See also at p. 420 (A. Broches noted that ‘arbitrators would naturally have the power to seek advice from experts, including legal experts’); see also at p. 570.

<sup>223</sup> History of the ICSID Convention, Vol. II-2, p. 985 (statement by A. Broches). See also Shihata and Parra, fn. 92, at 194–5.

<sup>224</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Bank for Reconstruction and Development, 18 March 1965, Doc. ICSID/2, para. 40. The text of article 38(1) is set out in a footnote in the Report.

<sup>225</sup> See History of the ICSID Convention, fn. 54, Vol. II-1, at pp. 418, 630; see also at p. 330 (A. Broches stated that ‘he had no objection to the inclusion of some explanation as to the meaning of the term “international law”’). See also at p. 984 (according to A. Broches, the deletion of such reference in the final article 42(1) ‘did not imply any change in the substance of the provision’). See also N. Nassar, ‘Internationalization of State Contracts: ICSID, The Last Citadel’ (1997) 14(3) *J. Int'l Arb.* 185, 204–5.

<sup>226</sup> Report of the Executive Directors, fn. 224, at para. 40.

<sup>227</sup> See A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure’ in *International Arbitration, Liber Amicorum for Martin Domke* (P. Sanders, ed., The Hague, Martinus Nijhoff, 1967), 12, fn. 9.

<sup>228</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 420.

<sup>229</sup> History of the ICSID Convention, at p. 494. See also at p. 378 (the representative from South Africa wondered whether it was a sound principle to elevate the individual to the status of a subject of international law).

During the drafting, these concerns were countered by statements that a foreign investor would have the same rights before an ICSID tribunal as if its government had espoused its case and brought an international claim.<sup>230</sup> Importantly, article 27 of the Convention prevents the home state of the investor from invoking the responsibility of the host state through the exercise of diplomatic protection in case its national, the foreign investor, institutes proceedings under the Convention.<sup>231</sup> On that ground, it was argued that it would only be fair that the foreign investor would be able to invoke the same international claims before an ICSID tribunal as its home state would when exercising diplomatic protection.<sup>232</sup> In the words of the South African delegate: ‘the essential advantage of setting the proposed tribunal would be the right it gave individuals [...] to have access to international adjudication, on the same footing as his State would have had, had it espoused his case’.<sup>233</sup> In similar language, the Legal Advisor to the US State Department, when expressing his support for the Convention before a US Congressional Committee, stated that the growth of international law, which he expected would follow from the Convention, ‘will be free from the restriction of the traditional principle that only states and not private parties are the subject of international law’.<sup>234</sup>

As will be shown, ICSID awards give ample evidence of the applicability of international law in ICSID proceedings. Still, not all rules of international law are applicable to the investor–state relationship. In light of this, the statement in the Report of the Executive Directors that allowance shall be made for the fact that article 38 of the Statute of the ICJ was designed to apply to interstate disputes,<sup>235</sup> should be interpreted in concert with the phrase ‘as may be applicable’ in the second sentence of article 42(1) to concern the precise nature of the rule at hand. More specifically, it concerns the question whether the rule is intended to bestow the parties to the proceedings with certain rights or obligations.<sup>236</sup> In this vein, we refer to the following observation by the ICSID Tribunal in *LG&E Energy Corp. et al. v Argentina* (2006):

[The reference] to the language ‘as may be applicable’ [...] should not be understood as if it were in some way conditioning application of international law. Rather, it should be understood as making reference, within international law, to the competent rules to govern the dispute at issue.

<sup>230</sup> History of the ICSID Convention, at pp. 259, 267, 378, 406, 420.

<sup>231</sup> See ICSID Convention (1965), art. 27(1) ('No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute').

<sup>232</sup> See History of the ICSID Convention, fn. 54, Vol. II-1, at pp. 259, 406, 803; E. Lauterpacht, ‘The World Bank Convention’ in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Genève Tribune, 1968), 642, 655–6; Schreuer et al., fn. 10, at 613; *Amco Asia v Indonesia*, fn. 166, Decision on Annulment, 16 May 1986 (I. Seidl-Hohenveldern, F.P. Feliciano, A. Giardina, Committee Members), 1 ICSID Rep. 509, 515 (1993).

<sup>233</sup> History of the ICSID Convention, fn. 54, Vol. II-1, at p. 420.

<sup>234</sup> United States Department of State, Statement of A.F. Lowenfeld, Deputy Legal Adviser [Regarding ICSID], 28 June 1966 before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives, reprinted in 5 I.L.M. 821, 822 (1966).

<sup>235</sup> Report of the Executive Directors, fn. 224, at para. 40.

<sup>236</sup> Cf. Report of the Executive Directors, at para. 26 ('The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation'); ICSID Convention (1965), art. 25(1) (the dispute must be a 'legal dispute arising directly out of an investment'). See also Schreuer et al., fn. 10, at 613.

This interpretation could find support in the ICSID Convention's French version that refers to the rules of international law 'en la matière'.<sup>237</sup>

### 3.2.2.2. The Iran–United States Claims Settlement Declaration

With respect to the choice-of-law methodology of the Iran–United States Claims Tribunal, article V of the Claims Settlement Declaration provides as follows: 'The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.'<sup>238</sup>

We note at the outset that the tribunal has much freedom in ascertaining the applicable law in the absence of an agreement by the parties. As stated in *CMI International, Inc. v Ministry of Roads and Transportation and Iran* (1983), '[i]t is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it.'<sup>239</sup> Notably, it is clear that the tribunal can apply both national law—as determined by choice-of-law rules—and international law to the dispute.<sup>240</sup>

As to the intended relationship between national and international law; contrary to the ICSID Convention, the preparatory work does not offer much guidance. This is due to the fact that the Declarations were not concluded through direct negotiations.<sup>241</sup> Recourse must therefore be had to a textual interpretation of article V of the Claims Settlement Declaration. From the terminology 'applicable' 'choice of law rules' and 'principles of international law', read in conjunction with the requirement that 'the Tribunal shall decide all cases on the basis of respect for law', it would seem to follow that the tribunal should designate the applicable law by reference to objective legal considerations. Comparing the language of article V of the Claims Settlement

<sup>237</sup> *LG&E Energy Corp. v Argentina*, fn. 118, Decision on Liability, at para. 88.

<sup>238</sup> See Iran-US Claims Settlement Declaration (1981), art. V. This wording was subsequently incorporated as paragraph (1) in the Tribunal Rules of Procedure as article 33, which adds the following second paragraph: '(2) The arbitral tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so.' This is a modified version of article 33 of the UNCITRAL Rules. No case has been decided by the tribunal on such basis. See C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998), 632.

<sup>239</sup> *CMI International, Inc. v Ministry of Roads and Transportation, Iran*, 27 December 1983, 4 Iran–U.S. C.T.R. 263. Cf. *Harnischfeger Corp. v Ministry of Roads & Transportation*, fn. 170, Final Award, 26 April 1985, Dissenting Opinion by Judge Mosk, 8 Iran–U.S. C.T.R. 119 ('The Tribunal is not bound by particular choice-of-law principles, but rather can apply whatever law it deems most appropriate' [references omitted]); Brower and Brueschke, fn. 238, at 632; A.F.M. Maniruzzaman, 'International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements' (1993) 40(2) *Netherlands International Law Review* 201, 227; Crook, fn. 8, at 282.

<sup>240</sup> Cf. M.N. Kinnear, 'Treaties as Agreements to Arbitrate: International Law as the Governing Law' in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Volume 13, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 401, 406. See further Chapter 4, Section 3.2 (on arbitration without privity). But see Mohebi, fn. 56, at 111 ('[T]he qualification "respect for law" as provided for in Article V of the Claims Settlement Declaration [...] was purported to mean only international law [...].'); see also at 368 ('[A]ny application of municipal law by the Tribunal is effected as a requirement of international law rather than direct applicability of such law').

<sup>241</sup> See Chapter 2, Section 4.1 (on the Iran–United States Claims Tribunal). See also Mohebi, fn. 56, at 113; Crook, fn. 8, at 281; G. Hanessian, 'General Principles of Law in the Iran–United States Claims Tribunal' (1989) 27 *Colum. J.T.L.* 309, 311; Mourí, fn. 59, at 29, at fn. 90.

Declaration with that of article 28 of the UNCITRAL Model Law on International Commercial Arbitration, Mouri states:

[No one] has interpreted these provisions as empowering the arbitrator(s) to disregard completely choice of law rules and contractual provisions. Such broad freedom in applying the law would be tantamount to giving the arbitral body the power to re-write the contract and/or the relationship of the parties in a way completely alien to what the latter had intended.<sup>242</sup>

This comment finds support in the award of *Anaconda-Iran, Inc. v Iran* (1986): the freedom regarding applicable norms ‘is not a discretionary freedom, [...] as the Tribunal is given a rather precise indication as to the factors which should guide its decision’;<sup>243</sup> and the award in *Mobile Oil Iran v Iran*: ‘in determining the choice of law in a given case, the Tribunal should examine relevant legal principles and rules as well as the specific factual and legal circumstances of the case.’<sup>244</sup> Still, the tribunal has often refrained from explaining its approach as to the law applicable to the merits.<sup>245</sup> As Judge Mosk stated in his dissenting opinion to the award *Harnischfeger Corp. v Ministry of Roads & Transport* (1985):

The majority’s opinion in this case [...] might be more comprehensible if it contained a discussion of the source of the law applied [...]. [T]here appear to be choice-of-law issues. Indeed, in the Partial Award, the Tribunal specifically discussed its choice of law with respect to transactions similar to those involved [...]. Yet, in the instant matter, the Tribunal gives little indication that it considered the possibility that different law might apply to different transactions and to different issues involved in the case. One cannot discern from the majority’s opinion how the majority derived whatever legal principles it invokes.<sup>246</sup>

The second phrase of article V of the Claims Settlement Declaration closely resembles the language of the ICSID Additional Facility Rules in that it refers both to choice-of-law rules and international law.<sup>247</sup> As noted earlier, the term choice-of-law rules generally refers to a national system of law.<sup>248</sup> In light of the internationalized nature of the tribunal, it could, however, be reasoned that the reference to choice-of-law rules in the Claims Settlement Declaration could also allow for the application of international law when the nature of the claim ‘centres’ on the international legal order.<sup>249</sup> In any event,

<sup>242</sup> Mouri, fn. 58, at 31.

<sup>243</sup> *Anaconda-Iran v Iran*, Interlocutory Award, fn. 58, 13 Iran–U.S. C.T.R. 199, 211–12, 232.

<sup>244</sup> *Mobile Oil Iran v Iran*, Award No. 311–74/76/81/150–3, 14 July 1987, at para. 72.

<sup>245</sup> See Crook, fn. 8, at 288 (‘Typically, the Tribunal has not articulated the rules or principles used to determine the law applied. Instead, it has resorted to its discretion to draw from three recurring sources: the contract, general principles of law and public international law. By far the most important source has been the contract’). See also Brower and Brueschke, fn. 238, at 640 (the authors suggest that the expression ‘on the basis of respect for law’ rather than ‘on the basis of law’, ‘may have been adopted to liberate the Tribunal from tedious conflict of laws issues’. Had it read ‘on the basis of law’, they state, it could ‘include rules of private international law, forcing the Tribunal to search for what rule must be applied rather than what rule should be applied. This concern is clearly expressed in Article V’s grant to the Tribunal of absolute freedom in choosing the applicable law’).

<sup>246</sup> *Harnischfeger Corp. v Ministry of Roads & Transport*, Final Award, Dissenting Opinion of Judge R.M. Mosk, fn. 239, at 141.

<sup>247</sup> See Iran-US Claims Settlement Declaration (1981), art. V, second phrase (‘applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable’); ICSID Additional Facility Rules (2006), art. 54(1) (The tribunal shall apply ‘(a) the law determined by the conflict of laws rules [...] and (b) such rules of international law as the Tribunal considers applicable’).

<sup>248</sup> See Section 3.2.2 (on the (non-) applicability of national and international law); Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>249</sup> See Section 3.2.2 (on the (non-) applicability of national and international law).

this question is moot, as the explicit mention in article V Claims Settlement Declaration of principles of international law expressly allows for this possibility.

Regarding the meaning of the term ‘principles of international law’,<sup>250</sup> the question may arise whether it has the same meaning as general principles of (international) law, or whether it rather/also refers to customary international law.<sup>251</sup> A likely interpretation is that it refers to both. As stated by Avanessian, it has been said that the expression ‘principles of law’ is of much wider scope than ‘general principles of law’, ‘because the latter contribute with other elements (international custom and practice which is accepted by the law of nations) to constitute what are called the “principles of international law.”’<sup>252</sup> This interpretation corresponds with the practice of the tribunal.<sup>253</sup> The term ‘principles of international law’ also encompasses provisions of treaties concluded between the United States and Iran, including the 1955 Treaty of Amity between the United States and Iran.<sup>254</sup> In *Phillips Petroleum Company Iran v Iran* (1989), the tribunal stated:

The Tribunal has recognized that the Treaty of Amity, whether or not it remains in force today between the two States, was in force in 1979 and 1980 and clearly was applicable to the investments at issue in these Cases at the times the claims arose. Therefore, the Treaty of Amity is the relevant source of law on which the Tribunal is justified in drawing in reaching its decision.<sup>255</sup>

### 3.2.3. Interim conclusions

National arbitration laws and arbitration rules developed for use by territorialized tribunals differ with respect to the applicability of international law to a dispute in the absence of party agreement. Some instruments use the traditional method and refer to ‘conflict of laws rules’, terminology which seemingly allows only for the application of national law in the absence of party agreement.

The trend, however, is to empower the tribunal to apply both national and international law. This approach—reflected in a significant number of national arbitration laws and arbitration rules—is preferred in light of the relevance of international law to the investor–state relationship. Undeniably, choice-of-law provisions that prevent the application of this source of law would be under-inclusive. Especially in treaty arbitration, the ‘centre of gravity’ of the dispute will often lie in the international legal order; and the arbitrators—taking into account both the nature of the claim and the expectations of the parties—must be able to have recourse to international law also when the parties have not reached an agreement on the applicable law. As for internationalized tribunals, the relevance of both sources of law is explicitly endorsed in the choice-of-law provisions of both the ICSID Convention and the Iran–United States Claims Settlement Declaration.

Whereas the respect for the parties’ choice of either national or international law is less remarkable in comparison with the practice of national and international courts, the default application of international and national law by territorialized and internationalized

<sup>250</sup> See Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>251</sup> Cf. Statute of the International Court of Justice, art. 38(1).

<sup>252</sup> Avanessian, fn. 58, at 242 (references omitted). See also Mohebi, fn. 56, at 123; Crook, fn. 8, at 288; Hanessian, fn. 241, at 318.

<sup>253</sup> See, e.g., *Vera-Jo Miller Aryeh et al. v Iran*, 22 May 1997, at para. 214 (and the cases mentioned in fn 45–46).

<sup>254</sup> Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (1955).

<sup>255</sup> *Phillips Petroleum Company Iran v Iran* (1989), at para. 103 (references omitted).

tribunals, respectively, is innovative. As noted in Chapter 1, national and international courts have the proclivity to restrict the application of international and national law respectively.<sup>256</sup> For many—if not most—of the territorialized tribunals, in contradistinction, the norms of both legal orders are in principle equally relevant. With greater force, the same conclusion is warranted for internationalized tribunals.

### 3.3. Fundamental national and international norms

As was seen, arbitrators will apply the law that best protects the disputing parties' intentions and expectations by adhering to the rule of party autonomy and by applying the centre-of-gravity test. This private dimension of choice-of-law rules is countered by a public dimension;<sup>257</sup> and these exceptions of public policy and mandatory or peremptory norms add yet another component to the interplay between national and international law in investor–state arbitration. As one commentator explains:

Assume that the parties had themselves designated the law governing their contractual relationship or, alternatively, assume that the governing law (or rules of law) has/have been determined by the Arbitral Tribunal: Is this then the complete answer as far as the applicable law is concerned? The answer is: no. Indeed, a substantial and growing percentage of cases is affected by the interference of mandatory rules of law which claim or demand to be respected or to be applied directly, irrespective of any law or rules of law chosen by the parties or determined by the arbitral tribunal.<sup>258</sup>

Before examining more closely the nature of these fundamental norms, we will consider why they may have an impact on the choice-of-law methodology of territorialized and internationalized tribunals. As for the former category of tribunals, the general freedom they enjoy with respect to the applicable law is countered<sup>259</sup> by the fact that a failure by them to respect the forum's public policy may be sanctioned with annulment.<sup>260</sup> The state in which enforcement of the award is sought may decline enforcement on similar grounds.<sup>261</sup> Accordingly, in order to ensure the enforceability of the award at hand,<sup>262</sup> territorialized tribunals may need to set aside an otherwise applicable provision of law when it is contrary to a fundamental norm of its juridical seat<sup>263</sup> or of the state in which enforcement is likely to be sought.<sup>264</sup>

<sup>256</sup> See Chapter 1, at Section 1 (on motivations for the study).

<sup>257</sup> Cf. H.-B. Schaefer and K. Lantermann, *Jurisdiction and Choice of Law in Economic Perspective*, German Working Papers in Law and Economics (2005), 28, also available at <<http://ssrn.com/abstract=999613>> (last visited 1 May 2012) ('In Europe the *lex fori*, the *lex loci delicti*, the *lex domicilii communis* are [...] clear rules. Judges opt out of these rules only in exceptional cases. They deviate either to keep up minimum standards of justice at the constitutional as well as the sub constitutional level (*ordre public*)'). See also Moss, fn. 35, at 40.

<sup>258</sup> Blessing, fn. 18, at 228 (emphasis in original). See also Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14(4) *J. Int'l Arb.* 23; Moss, fn. 35, at 5.

<sup>259</sup> Cf. B.M. Cremades and D.J.A. Cairnes, 'The Brave New World of Global Arbitration' (2002) 3 *J. World Investment* 173, 205 ('[D]elocalization of arbitral law has correspondingly increased the significance of public policy as a means of control by national courts of international arbitration').

<sup>260</sup> See Chapter 2, Section 3.2.1.2 (on annulment as exercise of control).

<sup>261</sup> See (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, art. V(2)(b) (hereinafter New York Convention); Born, fn. 13, at 542.

<sup>262</sup> On the possible duty of tribunals to attempt to render enforceable awards, see generally Chapter 2, Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

<sup>263</sup> See, e.g., Poudret and Besson, *Comparative Law*, fn. 20, at 609; Lew, fn. 48, at 536.

<sup>264</sup> See, e.g., ICC Case No. 5505, Preliminary Award, 1987, 13 Y.B. Com. Arb. 110, 112 (1988) (in order to fulfil its obligation under the ICC Rules to ensure that an award is legally enforceable, the

With respect to internationalized tribunals, they are in principle freed from any restrictions imposed by the public policy of their juridical seat or the state of enforcement. Instead, the international legal order in which the tribunals operate provides its own exception to the otherwise applicable choice-of-law rules examined earlier. According to Lipstein:

International tribunals have no *lex fori*, save their own. The public policy of any particular system of law is not the basis upon which international tribunals can properly proceed. There are express statements of the Mixed Arbitral Tribunals to the effect that they must not apply municipal public policy, that mandatory rules of municipal law may be disregarded and that they are guided solely by their own ‘ordre public international’.<sup>265</sup>

When the norms in question constitute *jus cogens*, they should be respected by internationalized tribunals not only because they form part of the *ordre public* of the international legal order;<sup>266</sup> but also on the basis that their disregard would endanger the award’s enforceability.<sup>267</sup> This is because the international obligation of states parties to the ICSID Convention and the Iran–United States Algiers Accords to facilitate the enforcement of awards rendered by ICSID tribunals and the Iran–United States Claims Tribunal, respectively,<sup>268</sup> could be set aside if the award would conflict with such peremptory norms.<sup>269</sup>

### 3.3.1. Public policy and mandatory rules: international public policy

In the national court context, the term *ordre public* possesses two distinct meanings: one is similar to that associated with the common law concept of ‘public policy’; in civil law

arbitrators ‘should probably also deviate from the law chosen by the parties if it would appear that such a choice, if applied by the arbitral tribunal, could prevent that the award be implemented’); P. Mayer, ‘Mandatory Rules of Law in International Arbitration’ (1986) 2 *Arb. Int’l* 274, 284–6. But see Poudret and Besson, *Droit comparé*, fn. 33, at 706 (‘Plus discutable nous semble être la prise en compte des lois de police du lieu où la sentence sera exécutée afin d’éviter un refus fondé sur l’ordre public de ce pays. En effet [...] ce lieu n’est pas toujours déterminable à l’avance, le droit applicable à l’arbitrage ne concorde pas nécessairement avec celui régissant l’exequatur et l’arbitre n’est pas garant de l’exécution, mais de la validité de sa sentence’ [It seems more questionable to take into account the mandatory rules of the place of enforcement so as to avoid that the award would not be enforced on the basis of the public policy rules of that state. Indeed, [...] this place is not always determined in advance, the law governing the arbitration is not necessarily consistent with the law governing the enforcement of the award, and the arbitrator does not guarantee the performance, but the validity of his or her award.] [references omitted]). Cf. H. Van Houtte, ‘The Application by Arbitrators of Articles 81 & 82 and their Relationship with the European Commission’ in *European Business Law Review Special Edition: Arbitrating Competition Law Issues* (G. Blanke, ed., Alphen aan den Rijn, Kluwer Law International, 2008), 63, 68.

<sup>265</sup> K. Lipstein, ‘Conflict of Laws before International Tribunals: A Study in the Relation Between International Law and Conflict of Laws’ (1941) 27 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read Before the Society in the Year 1941* 43, 157 (references omitted).

<sup>266</sup> Cf. Schreuer et al., fn. 10, at 566 (‘If any theoretical justification is needed for [the] conclusion that [ICSID tribunals must heed the public policy of the international community], it can be found in the fact that the Convention is rooted in international law which, in a wider sense, is the *lex fori* of ICSID arbitration’).

<sup>267</sup> On *jus cogens* norms, see Section 3.3.2 (on peremptory norms of international law).

<sup>268</sup> See Chapter 2, Section 4.1.2 (on the Iran–United States Claims Tribunal); Chapter 2, Section 4.2.2 (on ICSID tribunals).

<sup>269</sup> Cf. E. Baldwin et al., ‘Limits to Enforcement of ICSID Awards’ (2006) 23(1) *J. Int’l Arb.* 1, 18–20 (the authors suggest that ICSID member states could deny enforcement of ICSID awards based on an interpretation of the Vienna Convention on the Law of Treaties, arts 31(1)(c), 61, 62). But see Schreuer et al., fn. 10, at 1140–1 (the ‘finality of [ICSID] awards would also exclude any examination of their compliance with international public policy or international law in general’).

countries, the term also connotes legislative provisions that are mandatory or peremptory.<sup>270</sup> Public policy refers to provisions that either in themselves or as a result of their application would be manifestly repugnant to the forum's fundamental considerations of justice, fairness, and public morals.<sup>271</sup> This led, for instance, an English court to refuse to give effect to a 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality, and thereby their property.<sup>272</sup> Whereas public policy norms function as a 'shield', disapplying the otherwise applicable norms,<sup>273</sup> mandatory rules function as a 'sword'<sup>274</sup> in that they 'trump' or override the otherwise applicable norms.<sup>275</sup> As recognized in the Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), mandatory rules are not necessarily limited to those of the forum state:

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.<sup>276</sup>

In the context of arbitration, and especially as concerns the right of the tribunal's juridical seat to annul awards and of states to deny recognition and enforcement of awards, the terms public policy and mandatory rules have been referred to as 'international public policy'.<sup>277</sup> As expressly stated in the Panama Arbitration Act (1999): 'In case of an international commercial arbitration the public policy to be taken into account is international public policy'.<sup>278</sup> Whereas the term *international* public policy suggests that its origin is in some way supra-national, the expression is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law, foreign judgment, or foreign award.<sup>279</sup> In fact, the term is said to be no more than domestic public policy applied to (foreign) awards, and its content and application

<sup>270</sup> M. Forde, 'The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions' (1980) 29 *Int'l. & Comp. L. Quart.* 259.

<sup>271</sup> See A. Briggs, *Conflict of Laws* (Oxford, Oxford University Press, 2002), 44–5.

<sup>272</sup> See *Oppenheimer v Cattermole* [1976] AC 249, 278. See also *Loucks v Standard Oil Co of New York*, fn. 43, 120 NE 198, 202.

<sup>273</sup> K. Lipstein, 'The Hague Conventions on Private International Law, Public Law and Public Policy' (1959) 8(3) *Int'l & Comp. L. Quart.* 506, 522 ('the function of public policy in the conflict of laws [...] consists in the exclusion of the foreign private law which is normally applicable and in the substitution of the private law of the forum').

<sup>274</sup> Cf. A. Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield? A Note on Kuwait Airways Corp. v Iraq Airways Co. (Nos. 4 and 5)' (2002) 6 *Singapore Journal of International and Comparative Law* 953.

<sup>275</sup> See Mayer, fn. 364, at 275; C. Kessedjian, 'Mandatory Rules of Law in International Arbitration: What are Mandatory Rules?' (2007) 18 *Am. Rev. Int'l. Arb.* 147, 151–2.

<sup>276</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 9(3). Cf. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), art. 14(2); Moss, fn. 35, at 20, at fn. 27.

<sup>277</sup> See Sacerdoti, *Case T 8735-01-77*, fn. 803, at 28–9. There is, however, no unanimity as to the precise meaning of the concept. See K.-H. Böckstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) *Journal of Dispute Resolution* (Special Issue: The New York Convention—50 Years, 11th IBA Arbitration Day and United Nations New York Convention Day 123), at section 2.

<sup>278</sup> Panamanian Arbitration Law (1999), art. 43.

<sup>279</sup> See International Law Association, Committee on International Commercial Arbitration, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (New Delhi Session, 2002) (2002) 70 *Int'l. Ass'n Rep. Conf.* 352, para. 11 (hereinafter ILA New Delhi Report).

remain subjective to each state.<sup>280</sup> The term is, however, narrower in scope than that of *national* public policy.<sup>281</sup> Sacerdoti remarks:

These principles are not directly laid down by public international law—although some principles may be common with it, such as respect for fundamental human rights. Instead, the term ‘international’ underlines that these principles, while pertaining to the local national system, are those that may properly be invoked in the context of international relations and intercourse in order to prevent the application or recognition in the forum of decisions and rulings based on or carrying out principles repugnant to basic tenets of the local legal order. Therefore, the ‘international public order’ under consideration in review of arbitral awards is understood to be much narrower than ‘public order’ as generally invoked within a municipal system. The former is only a subset of the latter.<sup>282</sup>

The fact that international public policy is given effect by the tribunal’s juridical seat and the state of enforcement of the award explains the relativity of the concept: ‘What is considered to be part of public policy in one state may not be seen as a fundamental standard in another state with a different economic, political, religious or social, and therefore, legal system.’<sup>283</sup> The International Law Association (ILA) Committee on International Commercial Arbitration has sought to bring clarity to the concept by developing a definition enjoying wide consensus.<sup>284</sup> It defines ‘international public policy’ by referring to three categories.<sup>285</sup> The first category groups together the traditional concepts of public policy and mandatory rules.<sup>286</sup> These are defined as norms designed to serve the essential political, social, and economic interest of the state, such as anti-trust/competition law.<sup>287</sup> Secondly, it encompasses principles pertaining to justice or morality that the state wishes to protect even when it is not directly concerned.<sup>288</sup> As examples, the ILA Committee refers to the principles of good faith and *pacta sunt servanda*; and the prohibition against uncompensated expropriation, abuse of rights, discrimination; and activities that are *contra bonos mores*, such as the proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking

<sup>280</sup> *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 (G. Guillaume, A. Rogers, V.V. Veeder, arbs), para. 138. See also Blackaby et al., fn. 35, at 613–14.

<sup>281</sup> ILA Final Report, at para. 11.

<sup>282</sup> Sacerdoti, *Case T 8735–01–77*, fn. 80, at 20–1. See also at 27; A.J. van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague, T.M.C. Asser, 1981), 360; J.D.M. Lew, ‘Determination of Arbitrators’ Jurisdiction and the Public Policy Limitations on that Jurisdiction’ in *Contemporary Problems in International Arbitration* (J.D.M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 73, 82–3.

<sup>283</sup> Böckstiegel, fn. 277, at section 2.

<sup>284</sup> Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards (2003) 19(2) *Arb. Int’l* 213 (hereinafter ILA New Delhi Resolution); ILA New Delhi Report, fn. 279. See also Böckstiegel, fn. 277, at section 2.

<sup>285</sup> ILA New Delhi Resolution, fn. 284, art. 1(d); ILA new Delhi Report, fn. 279, at para. 25.

<sup>286</sup> For that reason, this study will include mandatory rules in the term ‘public policy’. For a discussion of mandatory rules investment arbitration, see *Mandatory Rules in International Arbitration* (G.A. Bermann and L. Mistelis, eds, Huntinton, NY, Juris Publishing, 2011) (A.K. Bjorklund, *Investment Arbitration* (Chapter 8) and D.F. Donovan, *Investment Treaty Arbitration* (Chapter 9)).

<sup>287</sup> ILA New Delhi Report, fn. 279, at para. 30; ILA New Delhi Resolution, fn. 284, art. 1 (d)–(e) (referring to these rules as ‘*lois de police*’ or ‘public policy rules’). See also art. 3(b) (recognition or enforcement of the award should only be denied where the tribunal’s disregard for the mandatory rule would *manifestly* disrupt the essential political, social or economic interests that it protects). Other examples include provisions currency controls; price fixing rules; environmental protection laws; measures of embargo, blockade or boycott; and tax laws. See S. Suvanto-Luomala, ‘Party Autonomy and the Mandatory Rules of Competition Law in International Commercial Arbitration’ TDM 1(3) (2004).

<sup>288</sup> ILA New Delhi Resolution, fn. 284, art. 1(d).

and paedophilia.<sup>289</sup> Thirdly, the international public policy of a state includes its duty to respect its international obligations, such as a United Nations resolution imposing sanctions.<sup>290</sup>

A second cause of relativity is the time factor: '[t]he values and standards of communities are not stable, they change and develop. So does public policy since it is derived therefrom'.<sup>291</sup> For instance, it has been posited that globalization, or rather the opposition thereto, may influence the content of international public policy:

[G]lobalization has affected notions of morality and justice, and thus the content of public policy [...]. Some nations may already, or may in the near future, consider minimum environmental standards to be part of their public policy. Similarly, the protection of public health or cultural sites forming part of the patrimony of humanity might in future achieve preference over *pacta sunt servanda* in the hierarchy of modern international public policy. [...] Further, it seems likely that human rights law will have a profound impact on the definition of public policy in future.<sup>292</sup>

The term 'international public policy' is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.<sup>293</sup> This concept has been referred to as 'transnational public policy' or 'truly international public policy'.<sup>294</sup> It is said that the existence of a rule of this nature may be identified through international conventions, comparative law, and arbitral awards;<sup>295</sup> and that it comprises fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by 'civilised nations'.<sup>296</sup> Support for the applicability of the concept is found in the 1989 Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises by the Institute of International Law.<sup>297</sup> Rapporteur Von Mehren observes: 'An international order resting on practice and consensus justifies not only the exercise by adjudicators of adjudicatory

<sup>289</sup> ILA New Delhi Resolution, art. 1(e); ILA New Delhi Report, fn. 279, at para. 28.

<sup>290</sup> ILA New Delhi Resolution, fn. 285, art. 1(d)–(e); ILA New Delhi Report, fn. 279, at para. 31.

See also Kessedjian, fn. 275, at 149 ('As far as content is concerned, whether it is protected via mandatory rules or public policy, we probably will agree that matters touching to corruption, fraud, bribery, money laundering, trafficking in human persons and body parts, and other activities abhorrent to human dignity are covered. But it may also be fair to say that norms in the field of consumer protection, labor, and perhaps some rules of agency and distributorship, may also be included in the meaning of mandatory rules and public policy [references omitted]). See also Schreuer et al., fn. 10, at 566 (referring to the prohibition of slavery; piracy; drug trade; terrorism and genocide; the protection of basic principles of human rights; and the prohibition on preparing and waging an aggressive war).

<sup>291</sup> Böckstiegel, fn. 277, at section 2. See also Moss, fn. 35, at 33.

<sup>292</sup> Cremades and Cairnes, fn. 259, at 205–6.

<sup>293</sup> *World Duty Free*, fn. 280, Award, at para. 139.

<sup>294</sup> *World Duty Free*, at paras 139–140 (referring to P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series n° 3 (1986), 257 and jurisprudence). See also D.G. Terez (Reporter), 'International Commercial Arbitration and International Public Policy' (8–11 April 1987) 81 *Am. Soc'y Int'l L. Proc.* 372, 379 (referring to three levels of public policy suggested by Kessedjian). P. Mayer, 'Effect of International Public Policy in International Arbitration?' in *Pervasive Problems in International Arbitration* (L.A. Mistelis and J.D.M. Lew, eds, The Hague, Kluwer Law International, 2006), 61; M. Pryles, 'Reflections on Transnational Public Policy' (2007) 24–1 *J. Int'l Arb.* 1.

<sup>295</sup> *World Duty Free*, fn. 280, at para. 140 (referring to E. Gaillard, 'Trente ans de Lex Mercatoria—Pour une application sélective de la méthode des principes généraux de droit' (1995) 122 *Journal du droit international* 5).

<sup>296</sup> See ILA New Delhi Report, fn. 279, at para. 43; Blessing, fn. 18, at 266; D.J.A. Cairns, 'Transnational Public Policy and the Internal Law of State Parties' (September 2007) 10 *Arab J. Arb.* 27.

<sup>297</sup> IIL, Santiago de Compostela Resolution, fn. 62.

authority that does not flow from a single identifiable sovereign but also the limitation on party autonomy contained in Article 2 of the resolution.<sup>298</sup> This article provides that '[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community'.<sup>299</sup> In 2002, however, the International Law Association noted that there appears to be little support amongst state courts for the application of the concept 'transnational public policy'.<sup>300</sup>

In Chapters 5 and 6, we will explore the potential impact of the international public policy of three types of states on the choice-of-law methodology of territorialized tribunals: (i) the state constituting their juridical seat; (ii) the state in which enforcement of awards is sought; and (iii) the host state, being the state most closely connected with the subject-matter of the dispute.<sup>301</sup> Also to be discussed is the possible relevance of these fundamental norms for internationalized tribunals.<sup>302</sup>

### 3.3.2. Peremptory norms of international law

In public international law, it is generally recognized that a norm that would normally be applicable to the dispute, be it international or national in nature, may be set aside or overruled by a peremptory rule of the international legal order, also called *jus cogens*.<sup>303</sup> This concept is linked to article 53 of the Vienna Convention on the Law of Treaties, which provides that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.<sup>304</sup> The same provision defines a *jus cogens* norm as one 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.<sup>305</sup>

<sup>298</sup> A.T. von Mehren, 'Arbitration between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution' (1990) 5(1) *ICSID Rev-FILJ* 54, 57.

<sup>299</sup> IIL, Santiago de Compostela Resolution, fn. 62, art. 2. See also I.F.I. Shihata, 'The Institute of International Law's Resolution on Arbitration between States and Foreign Enterprises—A Comment' (1990) 5(1) *ICSID Rev-FILJ* 65, 66 (preferring a reference to *jus cogens*).

<sup>300</sup> See ILA New Delhi Report, fn. 279, at para. 43. See also Pryles, fn. 294, at 7; Terez, fn. 294, at 379–80.

<sup>301</sup> See Chapter 5, Section 3.2.2 (on the supervening role of international law); Chapter 6, Section 3.2.2 (on the supervening role of national law). Cf. M. Blessing, *Mandatory Rules of law versus Party Autonomy in International Arbitration*, fn. 258, at 26–7 ('[T]he interfering mandatory rules may be of a very different character [...]. The interfering rules might pertain either: (i) to the proper law of the contract (*lex causae*); or (ii) to the law governing at the place of arbitration (*lex fori*); or (iii) to the legal order of a third country; or (iv) to a supranational order, such as e.g. resolutions of the UN Securities [sic] Council, EU competition laws, other norms pertaining to an international public policy; or (v) to the legal order governing at the potential place where enforcement of the award might have to be sought' [references omitted]).

<sup>302</sup> See Chapter 5, Section 3.2.2 (on the supervening role of international law); Chapter 6, Section 3.2.2 (on the supervening role of national law).

<sup>303</sup> See Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission at its 58th Session (finalized by M. Koskenniemi), 13 April 2006, A/CN.4/L.682, at paras 361 *et seq.*

<sup>304</sup> Vienna Convention on the Law of Treaties, 23 May 1969, art. 53. See also Report of the Proceedings of the Committee of the Whole, 21 May 1968, U.N. Doc. A/Conf. 39/11 at 471–2; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 21 March 1986, art. 53; A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006).

<sup>305</sup> Vienna Convention on the Law of Treaties (1969), art. 53. See also arts 64 and 71.

Article 53 reflects customary international law; and it does not only apply to conflicting treaty provisions, but also to other sources of international law.<sup>306</sup>

Although the precise concept and scope of *jus cogens* remain controversial,<sup>307</sup> its existence is commonly not questioned.<sup>308</sup> As to the rules it is said to comprise, they overlap to some extent with those of the term international public policy as it applies to territorialized tribunals:<sup>309</sup> the prohibition against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.<sup>310</sup>

In the context of hierarchically higher norms of international law, brief mention should also be made of article 103 of the United Nations Charter, which provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.<sup>311</sup> The potent role of UN resolutions is expressly recognized in the Canadian Model Investment Treaty: 'Nothing in this Agreement shall be construed [...] to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'.<sup>312</sup>

Peremptory norms of international law may influence the choice-of-law methodology of both territorialized and internationalized tribunals.<sup>313</sup> We will discuss this further in Chapter 5.<sup>314</sup>

<sup>306</sup> See Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. k (2) (1987); U. Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box Did You Ever Think about the Consequences?' (2007) 18 *Eur. J. Int'l L.* 853, 854.

<sup>307</sup> Cf. Linderfalk, fn. 306, at 854–5.

<sup>308</sup> See T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12(5) *Eur. J. Int'l L.* 917, 918 ('Since the adoption of the Vienna Convention on the Law of Treaties (1969), the existence of *jus cogens* has been unquestionable, even for positivists, but the nature and scope of this concept remain unclear').

<sup>309</sup> See Section 3.3.1 (on public policy and mandatory rules).

<sup>310</sup> See E. de Wet, 'The International Constitutional Order' (January 2006) 55 *ICLQ* 51, 59 ('Although the number of norms having achieved *jus cogens* status remains limited, most of those which are recognized as such, namely the prohibition of genocide, torture, slavery and racial discrimination, are human rights norms' [references omitted]); Restatement (Third) of the Foreign Relations Law of the United States § 102, Reporters Notes 6 (1987) (referring to the principles of the U.N. Charter prohibiting the use of force; as well as rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights). See also *Roach and Pinkerton v US*, Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L/V.II.71, doc. 9 rev. 1 (1987) (on the concept of regional *jus cogens*).

<sup>311</sup> United Nations Charter, art. 103. See also D. Shelton, 'International Law and "Relative Normativity" in *International Law*' (M.D. Evans, ed., Oxford, Oxford University Press, 2006), 159, 178 (article 103 of the UN Charter 'has been taken to suggest that the aims and purposes of the United Nations—maintenance of peace and security and promotion and protection of human rights—constitute an *international public order* to which other treaty regimes and the international organizations giving effect to them must conform' [emphasis added]); Study Group of the International Law Commission, fn. 303, at paras 328 *et seq.*; Study Group of the International Law Commission, 18 July 2006, UN Doc A/CN.4/L.702, at para. 35.

<sup>312</sup> Canadian Model Investment Treaty (2004), art. 10(4)(c). See also D.F. Donovan, 'The Relevance (or Lack Thereof) of the Notion of "Mandatory Rules of Law" to Investment Treaty Arbitration' (2007) 18(1/2) *Am. Rev. Int'l Arb.* 205, 208 ('While it is quite difficult to contrive a context in which a *jus cogens* norm would conflict with a state obligation under a BIT, it is a bit easier to come up with such a scenario for U.N. Charter obligations').

<sup>313</sup> Cf. M. Hirsch, 'Interactions Between Investment and Non-Investment Obligations' in *The Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 155, 157–9.

<sup>314</sup> See Chapter 5, Section 3.2.2.1 (on the supervening role of international law when the parties have agreed to the sole application of national law).

#### 4. General Conclusions

Based on the foregoing, it can be concluded that with respect to choice-of-law methodology, territorialized tribunals should look to the framework set out in the national law of their juridical seat. Yet, in light of the non-mandatory nature of choice-of-law rules stipulated in national arbitration laws, and as sometimes explicitly set forth in those laws, the arbitrators should apply the choice-of-law rules agreed to by the disputing parties, such as those included in arbitration rules to which the parties have referred. Contrariwise, internationalized tribunals are not bound to apply the choice-of-law rules of the seat; rather, they apply the provisions contained in their constituent document, i.e. the Iran–United States Claims Settlement Declaration and the ICSID Convention, supplemented by general rules of international law.

Having examined national arbitration laws, arbitration rules, the Iran–United States Claims Settlement Declaration, and the ICSID Convention, we found that these instruments give the parties and the arbitrators much freedom as concerns the law applicable to the merits of the dispute. Thus, the parties may agree to the application of national or international law; and frequently, a combination of both.

Moreover, the trend is to allow both territorialized and internationalized tribunals to apply either national and/or international law to the dispute in the absence of a choice-of-law agreement by the parties. It was also observed that the application of both sources of law may reflect the private dimension of choice-of-law rules by virtue of the adherence by arbitrators to the doctrine of party autonomy and the centre-of-gravity test.

Considering further that the freedom enjoyed by the arbitral tribunals is tempered by a public dimension through the concepts of public policy and mandatory and peremptory norms of both a national and an international nature, the stage is thereby set for a *sui generis* possibility for interplay between the national and the international legal orders. We will examine this interplay more fully in Chapters 5 to 7, dedicated to arbitral practice.

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# 4

## The Scope of the Arbitration Agreement: Claims and Counterclaims of a National and/or International Nature

The limits of this honorable commission are found and only found in the instrument which created it [...]. An arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits.<sup>1</sup>

### 1. Introduction

In the previous chapter, we saw that choice-of-law rules frequently allow for the application of national and international law to the merits of investment disputes between foreign investors and host states. As for the tribunals' choice-of-law methodology, we also observed that the doctrine of party autonomy may serve to limit the application of national or international law, depending on whether the parties have reached an agreement on the sole application of international or national law, respectively.

Another factor that influences the choice-of-law methodology of investment tribunals relates to the arbitration agreement entered into between the disputing parties. This agreement sets out the kind of disputes that the parties have agreed shall be settled by arbitration; and tribunals must act within the bounds of this agreement, on which rests its jurisdiction *ratione materiae*.<sup>2</sup> Otherwise, the award rendered runs the risk of annulment and non-enforcement,<sup>3</sup> which is consistent with the consensual nature of arbitration.<sup>4</sup> This chapter examines the consequences the arbitration agreement may have for the decision of tribunals to apply national or international law to the merits of the dispute. Briefly stated, this depends on whether the agreement in question allows for the bringing of claims of a national and/or international nature. The choice-of-law technique of characterization assists tribunals in classifying claims as national or international; and it will therefore be considered first (**Section 2**).

As will be demonstrated in **Section 3**, some arbitration agreements have a broad scope, extending the tribunals' jurisdiction to claims of both a national and an international nature. Other, more narrowly worded arbitration agreements encompass

<sup>1</sup> French Company of Venezuelan Railroads case (1905), Ralston's Report, p. 367, at p. 444, cited in B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), 259.

<sup>2</sup> See Chapter 2, Section 2 (on features of the arbitral process).

<sup>3</sup> See Chapter 2, at Section 3.2.1.2 (on annulment as an exercise of control); Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards); and Section 4.2.1 (on ICSID tribunals' insulation from the law of the seat).

<sup>4</sup> See N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 340.

solely national or international claims. In these latter cases, the power of the tribunal to apply national and/or international law will be restricted, in line with the nature of the claim(s) brought before it.

The jurisdiction and admissibility of host state counterclaims in investment (treaty) arbitration also influence the possibility of tribunals to settle claims of a national nature. We will discuss this topic separately in **Section 4**. In particular, we will consider whether the requirement of connexity between the counterclaim and the initial claim constitutes an obstacle for the host state to bring claims based in national law against investor claims based on alleged treaty violations.

## 2. Characterization: The National or International Nature of Claims

Characterization (or classification) refers to the process of assigning a factual situation to its proper legal category.<sup>5</sup> While it is beyond the scope of this study to analyse in detail the multiple and often controversial facets of characterization,<sup>6</sup> and before focusing on characterization in the context of investment arbitration, it is noted that the choice-of-law rules of many, if not all, states recognize that a decision to apply the law of either the forum state or a third state may depend on whether the issue at hand is one of contracts, torts, succession, property, etc. On the necessity for national courts to classify the cause of action, North and Fawcett state:

[H]aving satisfied itself that it possesses jurisdiction,<sup>7</sup> the court must next determine the juridical nature of the question that requires decision. Is it, for instance, a question of breach of contract or the commission of a tort? Until this is determined, it is obviously impossible to apply the appropriate rule for the choice of law and thus to ascertain the applicable law.<sup>8</sup>

<sup>5</sup> See American Law Institute, Restatement (Second) of Conflict of Laws § 7, Comment b (1971) ('Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may properly be applied'); S. Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge, Cambridge University Press, 2007), 125.

<sup>6</sup> Cf. C.M.V. Clarkson and J. Hill, *Jaffey on the Conflict of Laws* (2002), 523–4 ('Classification has been the subject of a great deal of academic discussion. There are various kinds of problems of classification which can arise, and, indeed, one of the main points of academic disagreement in a particular case may be over what it is that has to be characterised: the facts, the cause of action, the legal issue, rules of domestic law or rules of foreign law'); *Case Concerning Oil Platforms* (Iran v United States of America), Judgment, 6 November 2003, Declaration of Vice-President Ranjeva, at para. 6 [2003] ICJ Rep. 161, 221, at para. 6 ('Defining the "cause" of a claim—the underlying reason therefor—is a controversial issue in doctrine because of the notion's malleable character and metaphysical connotations'); F. Marrella, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts' (2003) 36 *Vand. J. Transnat'l L.* 1137, 1148 ('Arbitral case law has so far not offered sharp solutions to this classical problem and pragmatism of arbitrators has been used to escape from these complex issues').

<sup>7</sup> Characterization may also have jurisdictional implications. See e.g., M. Decker, 'Contract or Tort: A Conflict of Characterisation' (1993) 42–2 *Int'l & Comp. L.Q.* 366, 367 ('The distinction between contract and tort is also, of course, important for jurisdictional purposes. Under the Brussels and Lugano Conventions, jurisdiction in contract may be exercised by the courts of the place of performance of the obligation in question (Article 5(1)), and in matters relating to tort, by the courts of the place where the harmful event occurred (Article 5(3))') (footnote not in original).

<sup>8</sup> P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law* (London, Butterworths, 1996), 43.

In consequence, characterization may require resort to the choice-of-law technique of *dépeçage*, which allows a court or tribunal to apply, in one and the same case, norms stemming from different legal orders, depending on the nature of the issues at hand.<sup>9</sup>

It is also noted that the technique of characterization is also used by international courts and tribunals. The Permanent Court of International Justice stated in the *Case Concerning the Payment of Various Serbian Loans Issued in France* (1929): ‘the question whether it is French law which in this case governs the contractual obligations [...] is a question of private international law which the Court [...] must decide by reference to the actual *nature of the obligations in question* and to the circumstances attended upon their creation [...].’<sup>10</sup>

Whereas domestic courts frequently apply the rules of characterization provided by their *lex fori*,<sup>11</sup> arbitral tribunals are, as a rule, not so bound.<sup>12</sup> Rather, in case the parties have not entered into a choice-of-law agreement, territorialized tribunals are directed to apply, for instance, ‘the law determined by the conflict of laws rules which it considers applicable’<sup>13</sup> or ‘the rules of law which it determines to be appropriate’.<sup>14</sup> We recall from Chapter 3 that these formulations allow tribunals to seek guidance in what have been termed general principles of private international law;<sup>15</sup> and as a result, both territorialized tribunals and internationalized tribunals may resort to these general principles for characterization purposes.<sup>16</sup>

<sup>9</sup> Cf. V. Heiskanen, ‘Forbidding Dépeçage: Law Governing Investment Treaty Arbitration’ (2009) 32 *Suffolk Transnat'l L. Rev.* 367, 397 ([A] *dépeçage* of the governing law may also arise in the context of the merits of the claim. Indeed, this is implicit, for instance, in the language of Article 42(1) of the ICSID Convention, which sets out the substantive law applicable before an ICSID tribunal [...]’); Y. Banifatemi, ‘The Law Applicable in Investment Treaty Arbitration’ in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (K. Yannaca-Small, ed., Oxford, Oxford University Press, 2010), 191, 204. Cf. *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ, Ser. A., No. 20, 1929, Judgment No. 14, 12 July 1929, at 41 ([I]t should be observed that even apart from rules of public policy, it is quite possible that the same law may not govern all aspects of the obligation’); W.L.M. Reese, ‘Dépeçage: A Common Phenomenon in Choice of Law’ (1973) 73(1) *Columbia Law Review* 58.

<sup>10</sup> *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment No. 15, 12 July 1929, PCIJ, Ser. A., No. 21, 1929, at 121 (emphasis added). See also *Serbian Loans Case*, fn. 9, Judgment, at 41–2.

<sup>11</sup> See G.C. Moss, ‘International Arbitration and the Quest for the Applicable Law’ (2006) 8(3) *Global Jurist* 7. See also Marrella, fn. 6, at 1148–9 (for characterization purposes, domestic courts may also use the *lex causae* approach or they can resort to general principles of law); F. De Ly, ‘Concluding Remarks’ in *Interest, Auxiliary and Alternative Remedies in International Arbitration* (Dossier of the ICC Institute of World Business Law, 2008), 237, 239 (‘If one were to make a comparison with domestic courts, characterization may be operated in accordance with the *lex fori*, the *lex causae* or autonomously, with conflict of laws having a clear preference for characterization according to the local law of the court unless there is uniform law that may indicate a more autonomous approach’).

<sup>12</sup> See Chapter 3, Section 2 (on the absence of party agreement on the applicable law). Cf. B. Goldman, ‘Les conflits de lois dans l’arbitrage international de droit privé’ (1963-II) 109 *Recueil des Cours* 422.

<sup>13</sup> See, e.g., United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006, with Explanatory Note), art. 28(2).

<sup>14</sup> See, e.g., UNCITRAL Arbitration Rules (as revised in 2010), art. 35(1); Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012), art. 21 (hereinafter ICC Arbitration Rules), art. 17(1). See also Chapter 3, Section 3.2.1 (on the indirect and direct method of ascertaining the applicable law).

<sup>15</sup> See Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>16</sup> Cf. Moss, fn. 11, at 8; Marrella, fn. 6, at 1152; K. Lipstein, ‘Conflict of Laws Before International Tribunals: A Study in the Relation Between International Law and Conflict of Laws’ (1941) 27 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read Before the Society in the Year 1941* 143, 158–9.

A further difference with national courts is that the latter generally resort to characterization in order to determine which *national* law should be applied to the merits. In investment arbitration, the question is normally whether the national law of the host state or *international law* is applicable.<sup>17</sup> Characterization may assist investment tribunals in providing an answer to that question, and this is where it takes on significance in the context of this study.<sup>18</sup> In particular, the applicable law may depend on whether an issue or cause of action should be construed as contractual or non-contractual in nature.<sup>19</sup> In short, such classification is determined by the source of the right (and corresponding obligation) relied upon by the claimant (or counter-claimant) vis-à-vis the respondent (or claimant). When a claimant relies on a right set forth in a contract, the cause of action is contractual in nature. Contrariwise, where the right in question finds its source outside the contract, it should be characterized as non- or extra-contractual. For this reason, characterization is also referred to as ‘cause-of-action’ analysis.<sup>20</sup>

What is important for our purposes, and as will be discussed and illustrated in detail in Chapter 5 to 6, is that contractual claims (and counterclaims) often require the application of national law,<sup>21</sup> while non-contractual claims may be based in both national and international law.<sup>22</sup> For instance, a foreign investor whose property has been expropriated without compensation may rely on a provision in national law that requires compensation for expropriation; but the investor may also rely on a provision in an investment treaty or customary international law. In addition, it is possible that the contract at hand explicitly prohibits expropriation; and in such a case, the investor will be able to seek a contractual remedy.<sup>23</sup> Illustrative of the various rights that may be invoked (contractual and non-contractual claims of both a national and an international nature) is the following excerpt from *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador* (2008):

<sup>17</sup> Cf. C. McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in *50 Years of the New York Convention* (ICCA Congress Series no 14, A.J. van den Berg, ed., Kluwer, Alphen aan den Rijn, Kluwer Law International, 2009), 95, 114. See also Chapter 1, Section 2 (on the scope of and terminology used in the study); Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>18</sup> Cf. McLachlan, fn. 17, at 113 (‘The starting-point for the analysis, as in private international law, is the identification and characterization of the particular *issue* to which the legal rule is to be applied, and the selection of the legal system which properly applies to the determination of that issue’ [emphasis in original; references omitted]).

<sup>19</sup> Cf. *Maffezini v Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (F.O. Vicuña, T. Buergenthal, M. Wolf, arbs) (the tribunal applied international and Spanish law depending on the nature of the specific issue at hand, substantive or procedural).

<sup>20</sup> Cf. Z. Douglas, ‘Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex’ (2006) 22(1) *Arb. Int'l.* 27, 40.

<sup>21</sup> See Chapter 5, Section 2.3.1 (on contractual claims). It is noted that this is a general rule which is set aside where the parties have made an agreement to the contrary. See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law); Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>22</sup> See Chapter 5, Section 2.3.2 (on non-contractual claims); Chapter 6, Section 2.2 (on the international nature of the claim). Again, the parties may specifically agree to the application of national and/or international law. See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law).

<sup>23</sup> See B.M. Cremades and D.J.A. Cairns, ‘Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes’ in *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (N. Horn and S. Kröll, eds, The Hague, Kluwer Law International, 2004), 325, 328; *Bilouine and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989. See also Section 3.1 (on arbitration with privity); Chapter 1, Section 2 (on the scope of and terminology used in the study).

The Tribunal has found that [the host state] violated the [Power Purchase Agreements'] provisions and Ecuadorian law [...] [T]he Tribunal will [now] determine whether such violations, together with Ecuador's conduct in relation to the claims covered by the Arbitration Agreement, constitute breaches of the applicable principles of international law and, in particular, of the BIT standards.<sup>24</sup>

In light of the consequences that characterization may have for jurisdiction purposes as well as the applicable law,<sup>25</sup> an important question that arises is whether it is sufficient for the investor to characterize its claim in light of an international norm, such as wrongful expropriation contrary to the investment treaty at hand, or whether it falls upon the tribunal to ascertain the 'true' nature of the claim in accordance with objective criteria.<sup>26</sup> Arbitral tribunals and scholars have in this context generally focused on the difference between contract and treaty claims, the source of the right invoked being a contract or a treaty respectively.<sup>27</sup> As observed by the ICSID Tribunal in *PSEG Global, Inc. v Turkey* (2007), this issue is not without contention: 'The difference between contract-based claims and treaty-based claims has been discussed by various international arbitral tribunals [...]. Where to draw the line, however, is not easy in practice as has been evidenced by the discussion of these various cases.'<sup>28</sup> And, states Crawford: 'we do not have a *jurisprudence constante* in relation to [...] the relation between treaty and contract.'<sup>29</sup>

Still, some emerging trends are discernible. For instance, it is recognized that for purposes of jurisdiction, characterization is primarily for the claimant.<sup>30</sup> Nonetheless, the importance of applying objective criteria has been emphasized both in scholarship<sup>31</sup>

<sup>24</sup> *Duke Energy Electroquile Partners & Electroquile S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (G. Kaufmann-Kohler, E.G. Pinzón, A.J. van den Berg, arbs), para. 311.

<sup>25</sup> Cf. G. Sacerdoti, *Case T 8735-01-77, The Czech Republic v CME Czech Republic B.V.*, Svea Court of Appeal (expert legal opinion for CME) TDM 2(5) (2005), at 39 ('[T]he type of claim made (contractual right, right under the law of the host State or breach of the treaty) has a decisive influence as to the legal provisions (contractual, statutory or international) that must be resorted to by the arbitral tribunal in order to pass upon the claim and solve the dispute').

<sup>26</sup> See generally B.S. Vasani and T.L. Foden, 'Burden of Proof Regarding Jurisdiction' in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (M.H. Arsanjani et al., eds, Leiden, Nijhoff, 2011).

<sup>27</sup> See Cremades and Cairns, fn. 23, at 326; J.J. van Haersolte-van Hof and A.K. Hoffmann, 'The Relationship Between International Tribunals and Domestic Courts' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 962, 966; *Azurix v Argentina*, Decision on Jurisdiction, 8 December 2003 (A.R. Sureda, E. Lauterpacht, D. H. Martins, arbs), para. 79.

<sup>28</sup> *PSEG Global Inc., The North American Coal Corporation, and Konya İlgın Elektrik Üretim ve Ticaret Limited Şirketi*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2007 (F.O. Vicuña, L.Y. Fortier, G. Kaufmann-Kohler, arbs), paras 170–171.

<sup>29</sup> J. Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties' in *Precedent in International Arbitration* (E. Gaillard and Y. Banifatemi, eds, Huntington, NY, Juris Publishing, IAI Series No. 5, 2008), 97, at sentence preceding fn. 15 [references omitted]).

<sup>30</sup> See C. Schreuer, 'Investment Arbitration: A Voyage of Discovery' (2005) 71 *Arbitration* 73, 76 ('Most tribunals have held that, in principle, the characterisation of the claim for purposes of jurisdiction is undertaken by the claimant. The tribunal will decide on the accuracy of this provision characterisation in its decision on the merits'); *SGS Société Générale de Surveillance, S.A. v Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (F.P. Feliciano, A. Faurès, J.C. Thomas, arbs), para. 145.

<sup>31</sup> See Douglas, fn. 20, at 40; Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009), 263 (Rule 27); Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *Brit. Y.B. Int'l L.* 151, 236–89; C. Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims: The Vivendi I Case Considered' in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 281, 322.

and by arbitral tribunals. For example, the ICSID Tribunal in *Pan American Energy v Argentina* (2006) stated that whereas a claimant should demonstrate that *prima facie*<sup>32</sup> its claims, as formulated, fit into the jurisdictional parameters set out by the relevant instrument, ‘labelling is not enough. For, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them [...].’<sup>33</sup> As stated by a different tribunal: ‘[T]here comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract.’<sup>34</sup>

One test that has been used for characterization purposes is the ‘Vivendi test’,<sup>35</sup> named after the decision on annulment by the ICSID ad hoc committee in *Compañía de Aguas del Aconquija, SA and Vivendi Universal v Argentina* (2002), and which referred to the ‘essential’ or ‘fundamental basis’ of the claim.<sup>36</sup> While valuable, this test is not unambiguous. Sole Arbitrator Paulsson stated in *Pantechniki S.A. Contractors & Engineers v Republic of Albania* (2009):

Albania [...] has sought to synthesise the precedents to the effect that claims have the same ‘essential basis’ if they have the same factual predicates and request the same relief; it is not permissible merely to reformulate local contractual claims [...]. I am not persuaded that such generalities are helpful in deciding individual cases. The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source. But even this abstract statement may hardly be said to trace a bright line that would permit rapid decision. The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment.<sup>37</sup>

<sup>32</sup> See A. Sheppard, ‘The Jurisdictional Threshold of a Prima-facie Case’ in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 932, 960 (‘The *prima-facie* test is firmly established as the threshold test for establishing jurisdiction *ratione materiae* in investment treaty cases. The formulation of the approach and of the *prima-facie* test, which appears to find most favour, is the following: The tribunal should be satisfied that, if the facts alleged by the claimant ultimately prove true, they would be capable of falling within (or coming within) (or constituting a violation of) the provisions of the investment treaty’).

<sup>33</sup> *Pan American Energy LLC and BP Argentine Exploration Company v Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (L. Caflisch, B. Stern, A. J. van den Berg, arbs), para. 50. See also at para. 51 (‘[T]he claims made in the present case must be taken as they are by the Tribunal at this stage of the proceedings, whose only task it is, in the present phase of the proceedings, to determine whether, as formulated, they fit into the jurisdictional parameters set out by the relevant treaty instrument or instruments. This is so because in that phase, tribunals deal with the *nature and scope of claims* and not with the question of whether they are to succeed’ [emphasis added]).

<sup>34</sup> *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 (J. Paulsson, sole arb.), para. 64; see also at para. 61; *El Paso v Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (L. Caflisch, B. Stern, P. Bernardini, arbs), para. 60.

<sup>35</sup> Douglas, fn. 20, at 39.

<sup>36</sup> *Compañía de Aguas del Aconquija, SA and Vivendi Universal v Argentina*, ICSID Case ARB/97/3, Decision on Annulment, 3 July 2002 (L.Y. Fortier, J.R. Crawford, J.C.F. Rozas, arbs), para. 98. Cf. *Woodruff case*, American-Venezuelan Mixed Commission, 1903, IX Reports of International Arbitral Awards 213, 223 (1903–1905) (referring to the ‘fundamental basis of the claim’). See further Section 3.2 (on arbitration without privity). Cf. *Occidental Exploration and Production Company v the Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 57; *Gustav F W Hamster GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (B. Stern, B. Cremades, T. Landau, arbs), para. 329. See also van Haersolte-van Hof and Hoffmann, fn. 27, at 964–6.

<sup>37</sup> *Pantechniki v Albania*, fn. 34, at paras 61–62. See also M. Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (Utrecht, Eleven International, 2008), 53.

While the necessity of a case-by-case analysis should not be underestimated, we do note the following helpful criteria suggested by Cremades and Cairns in order to distinguish a treaty claim from a contract claim arising in the context of the same dispute.<sup>38</sup> First, and in line with Paulsson's suggestion,<sup>39</sup> they address the source of the right in question; and they rightly observe that 'while the basis (or "cause of action") of a treaty claim is a right established and defined in an investment treaty, [...] the basis of a contract claim is some right created and defined in a contract'.<sup>40</sup> Secondly, the authors rely on the content of the right:

The content of treaty and contract rights is normally quite distinct. The most familiar treaty rights established by BITs are of a generic nature and defined by international law (i.e., the rights to national treatment, most-favoured-nation treatment, non-discriminatory treatment, fair and equal treatment, and compensation in the event of expropriation [...]). In contrast, contract rights are normally specific to the investment and defined by the domestic law of the Host State.<sup>41</sup>

Thirdly, reference is made to the parties to the claim: the host state is always party to a treaty claim, but as to contract claims, the party could be a federal or regional unit of the state, or a state entity or agency.<sup>42</sup> Fourthly, Cremades and Cairns rely on the applicable law: whereas treaty claims are generally governed by international law, contract claims are likely to be determined according to the host state's law relating to administrative contracts.<sup>43</sup> Finally, they draw attention to the fact that while a successful treaty claim leads to state responsibility under international law, a successful contract claim results in state responsibility under the rules of the national law of the host state.<sup>44</sup> The criteria relating to the nature of the claim and the consequences for the applicable law will be discussed in more detail in the following section relating to the scope of the arbitration agreement, as well as in Chapters 5 and 6.<sup>45</sup>

<sup>38</sup> Cremades and Cairns, fn. 23, at 327–31.

<sup>39</sup> *Pantechniki v Albania*, fn. 34, at para. 62 ('What I believe to be necessary is to determine whether claimed entitlements have the same normative source').

<sup>40</sup> Cremades and Cairns, fn. 23, at 327. Cf. G. Santiago Tawil, 'The Distinction Between Contract Claims and Treaty Claims: An Overview' in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Volume 13, A.J. van den Berg, ed., Kluwer Law International, 2007), 492, 543 ('[T]he cause of action is the central tenet to distinguish a contract claim from a treaty claim. A contract claim alleges a breach of a contract while a treaty claim invokes a breach of the treaty').

<sup>41</sup> Cremades and Cairns, fn. 23, at 328.

<sup>42</sup> Cremades and Cairns, at 329–30.

<sup>43</sup> Cremades and Cairns, at 330.

<sup>44</sup> Cremades and Cairns, at 330. See also at 327 (while the first criterion is unique, the 'other four criteria normally will distinguish a treaty claim from a contract claim, but not without the possibility of overlapping in particular cases'). Another test is referred to as the 'triple identity test' See, e.g., *Joy Mining Machinery Ltd v Egypt*, ICSID Case ARB/03/11, Decision on Jurisdiction, 6 August 2004 (F.O. Vicuña, W.L. Craig, C.G. Weeramantry, arbs), para. 75 ('In part, the distinction between these different types of claims [contract versus treaty] has relied on the test of triple identity. To the extent that a dispute might involve the same parties, object and cause of action it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues [...]']). For criticism of this test, see van Haersolte-van Hof and Hoffmann, fn. 27, at 967–8.

<sup>45</sup> See Section 3 (on the scope of the arbitration agreement: national and/or international claims). See also Chapter 5, Section 2.3 (on the national nature of the claim); Chapter 6, Section 2.2 (on the international nature of the claim).

### 3. The Scope of the Arbitration Agreement: National and/or International Claims

Having seen how characterization assists tribunals in characterizing a claim as either national or international in nature, we will now consider the extent to which various arbitration agreements encompass both types or either type of claims. Arbitration is consensual in nature and the jurisdiction of arbitral tribunals is therefore a product of the intentions of the parties as reflected in their arbitration agreement.<sup>46</sup> These agreements differ in language; and the interpretation of the parties' intentions as to the scope of their agreement is not always an easy exercise.<sup>47</sup> It has been noted already that arbitration agreements can be included in an investment contract (arbitration with privity), or they can be based on the acceptance by the foreign investor of an offer to arbitrate provided by the host state in its national legislation or in an investment treaty to which the investor's home state is a party (arbitration without privity).<sup>48</sup> Consequently, a decision whether arbitration agreements include contractual and/or non-contractual claims or counterclaims is largely a matter of contract, national law, and/or treaty interpretation.<sup>49</sup>

By virtue of the principle *Kompetenz/Kompetenz*, tribunals may rule on their own jurisdiction.<sup>50</sup> Their decision is, however, subject to scrutiny by national courts or ICSID ad hoc committees, as one of the grounds for annulling or denying enforcement of an award is that it deals with a dispute, or contains decisions on matters not falling within the arbitration agreement.<sup>51</sup> National courts differ in their approach when resolving disputes over arbitral jurisdiction, some for being more 'pro-arbitration' than others.<sup>52</sup> As for investment tribunals, they often—albeit not always<sup>53</sup>—construe arbitration agreements in an inclusive manner.<sup>54</sup> Commenting on international commercial arbitration in general, Redfern and Hunter observe: 'arbitrators are likely to

<sup>46</sup> See Chapter 2, Section 2 (on features of the arbitral process); Section 1 (Introduction).

<sup>47</sup> See C. Schreuer, 'Consent to Arbitration' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 830, 866; A. Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2(1) *J. Int'l Disp. Settlement* 115.

<sup>48</sup> Chapter 2, Section 2 (on features of the arbitral process). See also ICSID, *ICSID Caseload—Statistics*, Issue 2012–1, at 10 (as concerns the basis of consent invoked to establish ICSID jurisdiction in cases registered under the ICSID Convention and Additional Facility Rules, chart number 5 shows that 63 per cent are based on a BIT; 20 per cent on an investment contract between the investor and the host state; 6 per cent on the investment law of the host state; and the rest on multilateral investment agreements and multilateral investment agreements, such as the Energy Charter Treaty and NAFTA).

<sup>49</sup> See Blackaby et al., fn. 4, at 108; Douglas, fn. 31, *The International Law of Investment Claims*, at 274 (Rule 6). In arbitration with privity, arbitration agreements are generally governed by the law of the tribunal's juridical seat, and again—where relevant—the ICSID Convention. See SCC Case 10/2005, Interlocutory Arbitral Award, 2006, at para. 6.1; Chapter 5, Section 3.2.2.1 (on the supervening role of international law when the parties have agreed to the sole application of national law); Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>50</sup> See Chapter 2, Section 2 (on features of the arbitration process).

<sup>51</sup> See Chapter 2, Section 3.2.1.2; Section 3.2.2; and Section 4.2.1. Cf. Blackaby et al., fn. 4, at 345.

<sup>52</sup> G.B. Born, *International Commercial Arbitration* (Ardsley, NY, Transnational Publishers, 2001), 298–9. See also Blackaby et al., fn. 4, at 107. On pro-arbitration attitudes of national courts, see also Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice).

<sup>53</sup> One more contentious issue, which is discussed in Section 3.2 of this Chapter (on arbitration without privity), concerns the interpretation of dispute settlement clauses inserted in investment treaties and that refer to 'all disputes'.

<sup>54</sup> For a discussion on the interpretation of arbitration agreements, see *Duke Energy v Ecuador*, fn. 24, Award, at paras 127–143; *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (H. van Houtte, P. Bernardini, A. Bucher, arbs), para. 35; Schreuer, fn. 47, at 861–4.

take a less restrictive approach than the courts. This is understandable. An arbitrator is likely to consider that as there *are* disputes between the parties, it would be sensible to try, so far as possible, to resolve them all in the same set of proceedings.<sup>55</sup> This practice enhances the likelihood that the tribunals have jurisdiction over claims and counter-claims of both a contractual and a non-contractual nature, which again increases the possibility that both national and international law will be applied to the merits of the dispute.

### 3.1. Arbitration with privity

Investment contracts often contain arbitration clauses referring to disputes ‘arising out of’, ‘in connection with’, or ‘relating to’ the contract at hand.<sup>56</sup> Other formulations include ‘all disputes relating to this Agreement, including any question regarding its existence, validity, breach or termination’ and ‘all disputes relating to this Agreement or the subject matter hereof’.<sup>57</sup> For instance, the Power Purchase Agreement (PPA) involved in the ICSID case *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited* (2001) stipulated:

[A]ny dispute arising out of or in connection with the PPA should be settled by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (the ‘ICSID Arbitration Rules’) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ‘ICSID Convention’).<sup>58</sup>

This clause and clauses of comparable language clearly encompass contractual claims. In the case of *SPP (Middle East) v Arab Republic of Egypt* (1983), Clause 20 of the parties’ agreement provided: ‘Any disputes relating to this Agreement shall be referred to the arbitration of the International Chamber of Commerce in Paris, France.’<sup>59</sup> According to the ICC Tribunal, [i]t follows [from Clause 20] that any disputes relating to the extent of the Government’s obligations assumed by its signature and as to whether there has been any breach of those obligations is within the scope of the

<sup>55</sup> Blackaby et al., fn. 4, at 107 (emphasis in original). See also A.M. Steingruber, *Consent in International Arbitration* (Oxford, Oxford University Press, 2012), 5.

<sup>56</sup> G.B. Born, *International Arbitration and Forum Selection Agreements; Drafting and Enforcing* (Alphen aan den Rijn, Kluwer Law International, 2006), 39.

<sup>57</sup> Born, at 39.

<sup>58</sup> *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Award, 12 July 2001 (K.S. Rokison, C.N. Brower, A. Rogers, arbs), para. 10 (emphasis added). See also *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Award, 13 March 2009 (V.V. Veeder, B. Audit, D.S. Berry, arbs), para. 213 (‘In its Request for Arbitration, the Claimant invoked the Arbitration Agreement (contained in Article 26.2 of the 1996 Agreement [...]). According to that provision [...] “all disputes with respect to any matter arising out of or relating to the Petroleum Agreement shall be referred to arbitration pursuant to Article 26.3.” Article 26.3 then provides that unresolved disputes shall be submitted for settlement by arbitration to ICSID’); *National Oil Corporation v Libyan Sun Oil Company*, ICC Case No. 4462, First Award (on *force majeure*), 31 May 1985, 29 I.L.M. 565, 577 (1990) (Article 232 of the Exploration and Production Sharing Agreement provided: ‘Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall, in the absence of an amicable arrangement between the Parties, be settled by arbitration, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, in Paris, France [...]’).

<sup>59</sup> *SPP (Middle East) Ltd v Arab Rep. of Egypt*, ICC Award No. 3493, Award, 16 February 1983 (G. Bernini, M. Littman, A. Elghatit, arbs), 22 I.L.M. 752, 769 (1983), at paras 16, 46.

arbitration clause.<sup>60</sup> In Chapter 5, we will see that as a rule and unless the parties have agreed otherwise, contractual claims are governed by national law.<sup>61</sup>

While less obvious,<sup>62</sup> scholars support and arbitral practice contains numerous examples of arbitrators construing similar arbitration clauses also to encompass non-contractual claims, the latter being amenable to the application of both national and international law. According to Douglas' Rule 29:

Where the host state party's consent to arbitration is stipulated in an investment agreement rather than in an investment treaty, then, subject to the terms of the arbitration clause, the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an international obligation on the treatment of foreign nationals and their property in general international law, an applicable investment treaty obligation, a contractual obligation, a tort, unjust enrichment or a public act of the host state party in respect of measures of the host state relating to the claimant's investment.<sup>63</sup>

As for arbitral practice, the arbitration clause in *Wintershall A.G. et al v Government of Qatar* (1987–89), which was contained in the parties' Exploration and Production Sharing Agreement (EPSA), referred to 'any doubt, difference or dispute [...] concerning the application, interpretation or performance of [the EPSA] or any other matter [t]herein contained, or in connection [t]herewith, or the rights and liabilities of either party [t]hereunder [...].'<sup>64</sup> On the merits, the UNCITRAL Tribunal determined not only that there had been no breach of the EPSA, but also that there had been no expropriation of the claimant's contractual rights and economic interests under the EPSA.<sup>65</sup>

A further example is the *Lena Goldfields* arbitration (1930), in which article 90(A) of the concession agreement provided: '[a]ll disputes and misunderstandings concerning the interpretation or performance of this agreement and all appendices thereto, on the declaration of either party, shall be examined and settled by an arbitration court.'<sup>66</sup> In that case, the tribunal held in favour of the claimant on the basis of unjust enrichment, a non-contractual cause of action.<sup>67</sup>

We also refer to the case *Libyan American Oil Co. (LIAMCO) v Libyan Arab Republic* (1977), in which the arbitration clause stipulated:

If at any time during or after the currency of this contract any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance of the provisions of this contract, or its annexes, or in connection with the rights and liabilities of either of the contracting parties hereunder, and if the parties should fail to settle such difference or

<sup>60</sup> *SPP v Egypt*, at paras 16, 46.

<sup>61</sup> See Chapter 5, Section 2.3.1 (on contractual claims).

<sup>62</sup> See Born, fn. 56, at 298 ('The most frequent, and important, issue that arises in the interpretation of international arbitration agreements relates to the "scope" of the parties' agreement; that is, what category of disputes or claims have the parties agreed to submit to arbitration? Disputes frequently arise concerning the application of arbitration agreements to particular contract claims or, even more commonly, non-contractual claims based upon tort or statutory protections' [references omitted]); M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel, Helbing und Lichtenhahn, 1999), 192.

<sup>63</sup> Douglas, fn. 31, *The International Law of Investment Claims*, at 277. See also Fouchard, *Gaillard, Goldman on International Commercial Arbitration* (E. Gaillard and J. Savage, eds, The Hague, Kluwer Law International, 1999), 307.

<sup>64</sup> *Wintershall A.G. v Government of Qatar*, Partial Award, 5 February 1988 and Final Award, 31 May 1988, 28 I.L.M. 795, 810 (1989) (J.R. Stevenson, I. Brownlie, B. Cremades, arbs).

<sup>65</sup> *Wintershall v Qatar*, at 812–13. See also Chapter 5, Section 2.3.1 (on contractual claims).

<sup>66</sup> V.V. Veeder, 'The *Lena Goldfields* Arbitration' (1998) 47 *Int'l & Comp. L.Q.* 747, 790. See also Chapter 6, Section 2.1.1 (on express or implied 'internationalization' of investment contracts).

<sup>67</sup> See Veeder, at 790.

dispute by agreement, the same shall, failing any agreement to settle it in any other way, be referred to two Arbitrators [...].<sup>68</sup>

In the ensuing arbitration, a foreign investor advanced claims of both a contractual and a non-contractual nature, relying on both national and international law. More specifically, the investor contended that the Libyan nationalization measures of 1973 and 1974, concerning LIAMCO's 25.5 per cent undivided interest in various concessions, were politically motivated, discriminatory, and confiscatory in nature; that the measures constituted a denial of justice, a wrongful taking and an unlawful breach of contract; and that the measures were illegal as contrary to the principles of the law of Libya common to the principles of international law.<sup>69</sup>

On the arbitrability of the dispute and the jurisdiction of the tribunal, sole Arbitrator Mahmassani first commented on the 'very wide' scope of the arbitration clause.<sup>70</sup> He went on to observe that the dispute at hand arose after the unilateral termination of the contract by the Libyan state in nationalizing all the property, assets, and concession rights of LIAMCO, and that it concerned the legality of that nationalization and LIAMCO's claims.<sup>71</sup> He concluded that his jurisdiction was broad enough to cover that dispute:

It is obvious that all these problems come under the heading of the interpretation and execution of the concession contracts and the rights and obligations of the parties therein. In other words, the nationalization, by stopping prematurely the performance of the contract, affects that performance and relates to the rights and obligations derived therefrom. Therefore, it comes within the terms of the arbitration clause, and consequently the dispute arising from that nationalization is obviously an arbitrable issue.<sup>72</sup>

Mahmassani was therefore able to give an award on the question whether Libya was liable for unlawful nationalization.<sup>73</sup>

Finally, reference is made to *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre (GIC) and the Government of Ghana* (1989).<sup>74</sup> In that case, the parties' contract stipulated that subject to the provisions of the Ghana Investment Code of 1985, 'no enterprise approved under the Code shall be expropriated by the Government' and that 'no person who owns, whether wholly or in part, the capital of an enterprise approved under the Code shall be compelled by law to cede his interest in the capital to any other person'.<sup>75</sup> As to the scope of the arbitration agreement, the UNCITRAL Tribunal stated:

The arbitration clause contained at Article 15 of the GIC Agreement is broad, providing for arbitration of '[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise'. The Agreement contains an explicit guarantee against expropriation by the Government. There can be no question that a claim that the Government has interfered with and expropriated the Claimants' interest in the venture with GTDC gives rise to a dispute 'in respect of an approved enterprise' under the Agreement.<sup>76</sup>

<sup>68</sup> *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award, 12 April 1977 (S. Mahmassani, sole arb.), 20 I.L.M. 1, 38 (1981) (referring to Clause 28(1); emphasis added). See also *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. (TOPCO/CALASATIC) v Gov't of the Libyan Arab Republic*, Decision on Jurisdiction, 27 November 1975 (Dupuy, sole arb.), 53 I.L.R. 389, 402–4 (1979).

<sup>69</sup> *LIAMCO v Libya*, fn. 68, Award, 20 I.L.M. 1, 28–9 (1977).

<sup>70</sup> *LIAMCO v Libya*, at 41. <sup>71</sup> *LIAMCO v Libya*, at 41.

<sup>72</sup> *LIAMCO v Libya*, at 41. <sup>73</sup> *LIAMCO v Libya*, at 61 *et seq.*, 85.

<sup>74</sup> *Biloune v Ghana*, fn. 23, Award. <sup>75</sup> *Biloune v Ghana*, at section IV(C).

<sup>76</sup> *Biloune v Ghana*, at section V(B).

The contract provided that it was to be construed ‘according to the laws of Ghana’.<sup>77</sup> Thus, any contractual claim for expropriation would seemingly be governed by national law. In the event, however, the tribunal applied international law to the investor’s expropriation claim.<sup>78</sup> This may be explained on the basis that the parties had reached an implicit agreement for the application of international law to contractual claims;<sup>79</sup> but it could also reflect a decision by the tribunal that a non-contractual expropriation claim, governed by international law, fell within the scope of the broadly worded arbitration agreement.

*Biloune* also exemplifies the possible rejection of non-contractual claims on the basis that they fall outside the scope of the arbitration agreement. The foreign investor alleged that the host state was liable for violations of international human rights.<sup>80</sup> The tribunal dismissed the claims for lack of jurisdiction:

This Tribunal’s competence is limited to commercial disputes arising under a contract entered into in the context of Ghana’s Investment Code. As noted, the Government agreed to arbitrate only disputes ‘in respect of’ the foreign investment. Thus, other matters—however compelling the claim or wrongful the alleged act—are outside this Tribunal’s jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.<sup>81</sup>

In other words, the arbitration agreement precluded the tribunal from applying international human rights law.<sup>82</sup>

A final important consideration is that choice-of-law clauses may offer evidence as concerns the proper construction of arbitration agreements inserted in investment contracts. Thus, a provision for the application of international law could support a finding that the parties to the contract also sought to settle claims in tort that could be based in international law. According to Lauterpacht:

[B]y selecting either ‘general principles of law’ or ‘international law’, or some combination of the two, as the governing law, a situation is created in which the tribunal empowered to settle disputes under the agreement may be enabled to perform a dual function: first, that of determining the compatibility of the conduct of the State party to the agreement with the terms of the agreement itself; and second, that of deciding whether the conduct of the State party is in conformity with its obligations under the public international law.<sup>83</sup>

Similar interplay between the applicable law clause and the scope of the arbitration agreement is found in investment treaties, which will be examined in the following subsection dedicated to arbitration proceedings without privity.

<sup>77</sup> *Biloune v Ghana*, at section VI.

<sup>78</sup> See Chapter 3, Section 3.1.2 (on express and implicit choice of law).

<sup>79</sup> See Chapter 3, Section 3.1.2 (on express and implicit choice of law).

<sup>80</sup> *Biloune v Ghana*, fn. 23, at section VI(B).

<sup>81</sup> *Biloune v Ghana*. See also C. Schreuer and C. Reiner, ‘Human Rights and International Investment Arbitration’ in *Human Rights in International Investment Law and Arbitration* (P.-M. Dupuy et al., eds, Oxford, Oxford University Press, 2009), 82, 83–4.

<sup>82</sup> For another case in which the tribunal decided against applying international human rights law, although on a different basis, see *Spyridon Rousalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 (A. Giardina, M. Reisman, B. Hanotiau, arbs), para. 310, 312.

<sup>83</sup> E. Lauterpacht, ‘The World Bank Convention on the Settlement of International Investment Disputes’ in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Genève, Tribune, 1968), 642, 654.

### 3.2. Arbitration without privity

As to arbitration agreements based on a unilateral arbitration offer set out by the host state in its national law, these may also extend to claims of both a national and an international nature.<sup>84</sup> One example is *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (1985/92), where the ICSID Tribunal's jurisdiction stemmed from an offer by Egypt in its national law to arbitrate investment disputes.<sup>85</sup> Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone provided in pertinent part:

*Investment disputes in respect of the implementation of the provisions of this Law shall be, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.*<sup>86</sup>

On the merits, the tribunal applied both national and international law when it found that the host state had expropriated SPP's investment relating to the development of certain tourist complexes.<sup>87</sup>

The ICSID case *Tradex Hellas S.A. v Albania* (1996/99) concerned an alleged expropriation of an agricultural joint venture.<sup>88</sup> Also in this case the foreign investor brought the dispute on the basis of the host state's consent to arbitration in its national law.<sup>89</sup> More precisely, the investor relied upon the 1993 Albanian Foreign Investment Law, article 8(2) of which stated:

[I]f the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and National of Other States, done at Washington, March 18, 1965 ('ICSID Convention').<sup>90</sup>

The parties had not agreed on the law to be applied to the merits, and the tribunal concluded that 'it is this 1993 Law which the Tribunal will examine as to whether Tradex' claim is justified on the merits'.<sup>91</sup> The tribunal thus construed the arbitration agreement in a more narrow fashion than the tribunal in *SPP v Egypt*, finding that it was prevented from examining the expropriation claim on bases other than this Law, such as other investment laws issued in Albania, the Bilateral Investment Treaty between

<sup>84</sup> See, e.g., Ghana Investment Promotion Centre Act 1994 (GIPC ACT 478), section 29 (referring to 'any dispute'); Togo Investment Code, Law 85-03, 29 January 1985, art. 4, referred to in J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (Oxford, Oxford University Press, 1999), 63 (referring to 'any dispute'). See generally A.R. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Treaties on Investment' (1987) 12(2) *ICSID Rev.-FLJ* 287.

<sup>85</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, (E. Jimenez de Arechaga, R.F. Pietrowski, M.A.E El Mahdi, arbs), Decision on Jurisdiction I, 27 November 1985, paras 70, 75; Award, 20 May 1992, para. 24.

<sup>86</sup> *Southern Pacific*, Decision on Jurisdiction, at para. 70 (emphasis added). See also at para. 116.

<sup>87</sup> *Southern Pacific*, Award, at para. 159. See generally Chapter 7, Section 2.2 (on reference to consistent national and international law).

<sup>88</sup> *Tradex Hellas S.A. v Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 (K.H. Böckstiegel, F.F. Fielding, A. Giardina, arbs); Final Award, 29 April 1999.

<sup>89</sup> *Tradex v Albania*, Decision on Jurisdiction, 5 ICSID Rep. 47, 54.

<sup>90</sup> *Tradex v Albania*, at 54.

<sup>91</sup> *Tradex v Albania*, at 54.

Albania and the investor's home state, as well as other sources of international law.<sup>92</sup> Still, the tribunal interpreted the relevant provisions of the Albanian Investment Law in light of international law.<sup>93</sup>

In investment treaty arbitration, the mandate of the tribunal to consider both national and international claims depends on the specific language of the treaty in question. Most investment treaties are broad and permit 'any' or 'all' disputes relating to investments to be submitted to arbitration.<sup>94</sup> One example is the Swedish Model BIT, which refers to '[a]ny dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party'.<sup>95</sup> Another example is the Morocco-Italy BIT, which in article 8 covers '[a]ll disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party [...].'<sup>96</sup>

While the issue remains controversial,<sup>97</sup> several tribunals have construed the latter and similarly broad dispute settlement provisions to extend to contractual and non-contractual claims based in both national and international law, as long as the claim at hand relates to the investment at hand.<sup>98</sup> For instance, article 9 of the Paraguay-Switzerland BIT at issue in *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (2012) provided for arbitration of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party' and the ICSID Tribunal found this clause to be broad enough for the investor to bring a claim for the breach of contract.<sup>99</sup> To the tribunal, there was no qualification or limitation in article 9 on the types of disputes that a foreign investor could bring against the host

<sup>92</sup> *Tradex v Albania*, Final Award, at para. 69.

<sup>93</sup> See Chapter 5, Section 3.1.2 (on international law as a source of interpretation).

<sup>94</sup> See A. Sinclair, 'Bridging the Contract/Treaty Divide' in *International Investment Law for the 21st Century* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 92, 92–3 (noting that this type of treaty dispute settlement provision is sometimes described as a 'generic' or 'broad' dispute settlement clause, and potential claims under it as 'purely' contractual claims); Douglas, fn. 31, *The International Law of Investment Claims*, at 234 (this dispute settlement clause is 'by far the most prevalent type of clause in BITs').

<sup>95</sup> Swedish Model BIT, art. 8(1).

<sup>96</sup> *Salini Construtorri S.p.A. and Italstrade S.p.A. v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (R. Briner, B. Cremades, I. Fadlallah, arbs), para. 59. See also New Zealand–China Free Trade Agreement, art. 152 (referring to '[a]ny legal dispute arising under this Chapter between an investor of one Party and the other Party, directly concerning an investment by that investor in the territory of that other Party'); Swiss-Pakistan BIT, art. 9(1).

<sup>97</sup> See UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking 26 (January, 2008). For a narrow interpretation see, e.g., E. Gaillard, 'International Arbitration Law' *N.Y. L. J.* (6 October 2005) ('Absent specific language to the contrary, it may seem odd to interpret a treaty as creating a jurisdictional basis for a treaty-based tribunal in cases where it is not called upon to rule on alleged violations of that treaty. There is always a danger in divorcing the jurisdictional provisions from the substantive terms of the same treaty in that this may suggest that the treaty-based tribunal has jurisdiction but is invited to rule on a vacuum'); *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 161. Cf. Y. Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims' (2005) 99(4) *Am. J. Int'l L.* 835, 844 (Shany characterizes the *SGS v Pakistan* decision as 'disintegrationist').

<sup>98</sup> See, e.g., *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 131 ('disputes with respect to investments'). See also Chapter 1, Section 2 (on the scope of and terminology used in the study); Chapter 2, Section 4.2 (on ICSID tribunals).

<sup>99</sup> *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012 (S.A. Alexandrov, D.F. Donovan, P.G. Mexía, arbs), para. 129.

state: ‘The ordinary meaning of Article 9 would appear to give this Tribunal jurisdiction to hear claims for violation of Claimant’s rights under the Contract—surely a dispute “with respect to” Claimant’s investment—should Claimant have chosen to bring them before us.’<sup>100</sup> And, concluded the SCC Tribunal in *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova* (2005):

Article 10(1) of the BIT extends the offer of arbitration to any disputes between a contracting state (in this case, the Republic of Moldova) and an investor of the other contracting state arising in connection with an investment. The language of article 10(1) permits to extend the jurisdiction of the Arbitral Tribunal to any dispute between qualified parties [...], as long as it arises in connection with an investment as defined in the BIT, and irrespective of whether the dispute is based on an alleged breach of the BIT, and alleged breach of a contract between the parties, or other alleged breach of obligation.<sup>101</sup>

In that case, the tribunal interpreted the phrase ‘other alleged breach of obligation’ to include non-contractual claims based in national law.<sup>102</sup> The UNCITRAL Tribunal in *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador* (2008) gave a similar interpretation, expressly allowing the bringing of claims based in customary international law and/or national law:

The Tribunal finds that Article VI(1)(a) does confer jurisdiction over customary international law claims. Article VI(1)(a), in contrast to Article VI(1)(c) and the wording of a large number of other BITs, is not limited to causes of action based on the treaty. Its language includes all disputes ‘arising out of or relating to’ investment agreements and this language is broad enough to allow the Tribunal to hear a denial of justice claim relating to the Concession Agreements. Thus, any limitation to BIT or domestic law causes of action, if it exists, must be found elsewhere in the BIT.<sup>103</sup>

This conclusion is supported by the ICSID Tribunal in *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (2004): The term ‘‘disputes with respect to investments’’ is not limited by reference to the *legal classification* of the claim that is made’.<sup>104</sup> As recognized by the same tribunal, allowing investors a choice of forum for resolution of investment disputes of ‘whatever character’ is consistent with the aim of the BIT at hand to promote and protect foreign investments.<sup>105</sup> A broad interpretation, which also has the benefit of facilitating procedural economy,<sup>106</sup> finds endorsement in

<sup>100</sup> *SGS v Paraguay*, at para. 129.

<sup>101</sup> *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova*, SCC Institute, Award, 22 September 2005 (G. Cordero Moss, sole arb.), at section 2.1 (references omitted).

<sup>102</sup> See Chapter 5, Section 2.3.2 (on non-contractual claims).

<sup>103</sup> *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador*, Interim Award, 1 December 2008 (K.-H. Böckstiegel, C.N. Brower, A.J. van den Berg, arbs), para. 109. See also *Vivendi v Argentina*, fn. 36, Decision on Annulment, at para. 55; *Salini v Morocco*, fn. 96, Decision on Jurisdiction, at para. 61.

<sup>104</sup> *SGS v Philippines*, fn. 98, Decision on Jurisdiction, at para. 131 (emphasis added). See also at para. 132 (the tribunal, referring to NAFTA, Chapter 11, stated: ‘In other investment protection agreements, when investor–State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under *national law*), this is stated expressly’ [emphasis added]); see also at para. 135 (‘In principle (and apart from the exclusive jurisdiction clause in the [Contract]) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration’).

<sup>105</sup> *SGS v Philippines*, at para. 132. Cf. Shany, fn. 97, at 844–5 ([T]he SGS v Philippines decision seems to stand for the diametric integrationist methodology’).

<sup>106</sup> See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008), 220 (‘The need to dissect cases into contract claims and treaty claims to be

scholarship. According to Schreuer, '[t]he view that a jurisdictional clause referring all investment disputes to international arbitration vests the tribunal also with competence over pure contract claims is clearly the better one. There is no reason in law or policy why this should not be possible or desirable.'<sup>107</sup> To him, '[t]he distinction between contract claims and BIT claims does not mean that these claims must be presented in different forums. In fact, an arrangement that leads to the adjudication of all claims arising from an investment dispute in one forum is clearly the preferable solution.'<sup>108</sup> Douglas expresses a similar view in his Rule 25:

In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an investment treaty obligation, a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of measures of the host contracting state party relating to the claimant's investment.<sup>109</sup>

This reasoning may receive indirect support by the applicable law provision of the investment treaty at hand, which in cases of broad jurisdictional clauses often specifically allows for the application of both national and international law. As Arbitrator Moss pointed out in *Bogdanov*, '[t]o evaluate the pleadings presented by the Claimant, the Arbitral Tribunal applies the BIT and the law of the Republic of Moldova. The law of the Republic of Moldova is applicable on the basis of the BIT [...].'<sup>110</sup>

In cases involving broad jurisdictional clauses, characterization takes on heightened significance where the underlying contract includes a different forum selection clause than that contained in the treaty at hand.<sup>111</sup> This is illustrated by the case of *Compañía de Aguas del Aconquija, SA and Vivendi Universal v Argentina* (2000/2002/2007), in which the contract at issue provided that '[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán'.<sup>112</sup> The first tribunal reasoned

dealt with by separate fora requires claim splitting and has the potential of leading to parallel proceedings. This is uneconomical and contrary to the goal of reaching final and comprehensive resolutions of disputes'); Sinclair, fn. 94, at 104. Cf. *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, 12 November 1991, Separate Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva (translation) [1991] ICJ Rep. 53, 120, para. 13.

<sup>107</sup> Schreuer, fn. 31, at 299.

<sup>108</sup> Schreuer, fn. 31, at 299. See also Schreuer, *A Decade of Increasing Awareness of Investment Arbitration and Intensive Activity: An Assessment*, Opening Address at a Symposium co-organized by ICSID, OECD and UNCTAD: Making the Most of International Investment Agreements: A Common Agenda, Paris, 12 December 2005, at 1, available at <[http://www.univie.ac.at/intlaw/pdf/cspubl\\_84.pdf](http://www.univie.ac.at/intlaw/pdf/cspubl_84.pdf)> (last visited 1 May 2012); C. Schreuer and U. Kriebaum, 'From Individual to Community Interest in International Investment Law' in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (U. Fastenrath et al., eds, Oxford, Oxford University Press, 2011), 1079, 1092.

<sup>109</sup> Douglas, fn. 31, *The International Law of Investment Claims*, at 274. See also Douglas, 'Hybrid Foundations', fn. 31, at 256; van Haersolte-van Hof and Hoffmann, fn. 27, at 969–70; C.F. Dugan et al., *Investor–State Arbitration* (New York, Oxford University Press, 2008), 239; J. Crawford, 'Treaty and Contract in Investment Arbitration' 2008) 24(3) *Arb. Int'l* 351, 362–3; Steingruber, fn. 55, at para. 14.03; O. Spiermann, 'Applicable Law' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 89, 103; I. Alvik, *Contracting with Sovereignty* (Oxford, Hart Publishing, 2011), 144.

<sup>110</sup> Bogdanov, fn. 101, Award, at section 3.2.

<sup>111</sup> On forum selection clauses, See Douglas, fn. 31, *The International Law of Investment Claims*, at 293 (Rule 45). See also Section 4.1.5 (on forum selection agreements).

<sup>112</sup> *Vivendi v Argentina*, fn. 36, Award I, 21 November 2000 (F. Rezek, T. Buergenthal, P.D. Trooboff, arbs); Decision on Annulment, fn. 36; Award II (G. Kaufmann-Kohler, C.B. Verea, J.W. Rowley, arbs), 20 August 2007.

that in order to determine whether the Argentine Government was liable under the treaty, it would have to ‘undertake a detailed interpretation and application of the concession contract’.<sup>113</sup> Since that task had been assigned to the local courts, and ‘because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract’, the tribunal concluded that ‘the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by article 16.4 of their Concession Contract’.<sup>114</sup>

The ad hoc committee annulled the award on the basis that the tribunal, while having had jurisdiction over the claims at hand, had failed to examine them; and as such, it had manifestly exceeded its powers in the sense of article 52 of the ICSID Convention.<sup>115</sup> In so holding, the committee noted that the substantive provisions of the BIT do not relate directly to breach of a municipal contract; ‘[r]ather they set an independent standard. A State may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT.’<sup>116</sup> In its view, the forum selection clause in the contract did not bar the jurisdiction of the tribunal: where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.<sup>117</sup> The committee also commented on the implications characterization has for the applicable law:

[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.<sup>118</sup>

In the resubmitted case, the tribunal applied international law when holding that Argentina was liable for violating the fair and equitable treatment standard and the prohibition on expropriation, as set out in the governing treaty.<sup>119</sup> The same distinction between contract and treaty claims was made by the ICSID Tribunal in *AES Corp. v Argentina* (2005):

[T]he Entities concerned have consented to a forum selection clause electing Administrative Argentine law and exclusive jurisdiction of Argentina administrative tribunals in the concession contracts and related documents. But this exclusivity only plays within the Argentinean legal order, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, within the international legal order from two international treaties, namely the US-Argentina BIT and the ICSID Convention.<sup>120</sup>

<sup>113</sup> *Vivendi v Argentina*, fn. 112, Award I, at para. 79.

<sup>114</sup> *Vivendi v Argentina*, at section A. See also at paras 79–81; Award II, at para. 7.3.6.

<sup>115</sup> *Vivendi v Argentina*, fn. 36, Decision on Annulment, at para. 115. See also Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 52 (hereinafter ICSID/Washington Convention); Chapter 2, Section 4.2.1 (on the tribunals’ insulation from the law of the seat).

<sup>116</sup> *Vivendi v Argentina*, fn. 36, Decision on Annulment, at para. 95.

<sup>117</sup> *Vivendi v Argentina*, at para. 101 (references omitted). See also at para. 102.

<sup>118</sup> *Vivendi v Argentina*, at para. 96.

<sup>119</sup> *Vivendi v Argentina*, Award II.

<sup>120</sup> *AES Corp. v Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (P.-M. Dupuy, K.-H. Böckstiegel, D.B. Janeiro, arbs). See also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case No.

The importance of objective characterization is highlighted by the criticism raised by Douglas against the decision in *Eureko BV v Poland*.<sup>121</sup> That case concerned a Dutch company that, pursuant to a share purchase agreement with the State Treasury of Poland, had acquired 20 per cent of the shares in an insurance group in Poland, upon its privatization in 1999.<sup>122</sup> The agreement was governed by Polish law, and it included a forum selection clause in favour of Polish courts.<sup>123</sup> According to Eureko, Poland had breached the Dutch–Polish BIT by failing to implement its alleged right, pursuant to an addendum to the agreement, to acquire an additional 21 per cent of the shares upon an Initial Public Offering to be implemented by the State Treasury; and more particularly the BIT's provisions on fair and equitable treatment, expropriation, and the ‘umbrella’ clause.<sup>124</sup> According to Poland, however, Eureko’s claims should be declared inadmissible ‘since they are predicated upon contractual claims for which, under express terms of the [contract], exclusive jurisdiction resides in the competence of a “Polish public court competent with respect to the Seller”’.<sup>125</sup>

Rather than conducting its own analysis of the essential basis of the claims at hand, the tribunal merely stated: ‘Claimant in the present arbitration advances claims for breach of the Treaty and, applying the teaching of the decision of the ad hoc committee in the *Vivendi* annulment case, every one of those claims must be heard and judged by this Tribunal.’<sup>126</sup> The investor prevailed on the merits.<sup>127</sup>

In his dissent, Arbitrator Rajska, rebuked his fellow arbitrators for transforming what he viewed as a simple contractual dispute under Polish law into an internationally justiciable matter.<sup>128</sup> In his view, the tribunal’s disregard of the contractual nature of the dispute may lead to the creation of a privileged class of foreign parties to commercial contracts who may transform their contractual disputes with state-owned companies into BIT disputes, so that ‘jurisdiction clauses agreed by the parties submitting all contractual disputes between the parties to an international arbitration tribunal or a state court may be easily frustrated by a foreign contracting party’.<sup>129</sup> Douglas agrees:

Although the tribunal in *Eureko* purported to apply the *Vivendi* test, in actual fact it did no such thing. The essential basis of a claim is not what the claimant says it is. Otherwise it would not be a judicial test at all. This is a threshold question for the tribunal, which is bound to undertake an examination of the juridical basis of the claim to determine whether it is properly classified as contractual or founded upon the treaty.<sup>130</sup>

There are also investment treaties that specifically limit arbitrable claims to those that concern host state obligations as set out in the treaty.<sup>131</sup> Such practice is illustrated by the BIT between Malaysia and Ghana, defining an investment dispute as one ‘between

ARB/03/17 (J.W. Salacuse, G. Kaufmann-Kohler, P. Nikken, arbs), Decision on Jurisdiction, 16 May 2006, paras 41 *et seq.*; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (P. Lalive, G. Leoro Franco, M. Chemloul, E. Gaillard arbs), at paras 493, 496.

<sup>121</sup> Douglas, fn. 20, at 38–44.

<sup>122</sup> *Eureko BV v Republic of Poland*, Partial Award, 19 October 2005 (S.M. Schwabel, J. Rajska, L. Y. Fortier, arbs).

<sup>123</sup> *Eureko v Poland*, at para. 93.

<sup>124</sup> *Eureko v Poland*, at para. 88.

<sup>125</sup> *Eureko v Poland*, at para. 81.

<sup>126</sup> *Eureko v Poland*, at para. 113.

<sup>127</sup> *Eureko v Poland*, fn. 122, Partial Award, at para. 260.

<sup>128</sup> *Eureko v Poland*, Dissenting Opinion Rajska.

<sup>129</sup> *Eureko v Poland*, at para. 11.

<sup>130</sup> Douglas, fn. 20, at 39. See also at 40–1; van Haersolte-van Hof and Hoffmann, fn. 27, at 973.

<sup>131</sup> There are also examples of investment treaties that contain even narrower dispute settlement clauses. See Reinisch, fn. 47.

a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter *under this agreement* in relation to an investment of the former'.<sup>132</sup> By definition, an arbitral tribunal set up pursuant to such a treaty would only be competent to consider BIT claims, i.e., non-contractual claims of an international nature. Likewise, the now shelved<sup>133</sup> Norwegian Draft Model Investment Agreement requires the dispute to 'be based on a claim that the Party has breached an obligation under this Agreement and that the investor of the other Party has incurred loss or damage by that breach'.<sup>134</sup> It is clear that such language does not give rise to claims based in national law. As explicitly set out in the Commentary to the Draft Model Agreement: 'In future Norwegian agreements, the states' prior consent to dispute settlement will be limited to claims based on the provisions in the agreement concerned. A claim by an investor may thus not be based on violation of national law or on the principles of international law/customary public international law.'<sup>135</sup> In other words:

The point of departure for the work on a new model agreement has been that the Arbitration Tribunal shall only be able to consider alleged breaches of the standards in the interstate investment agreement. Therefore, no right is laid down in the model agreement for an investor to use the same arbitration tribunal to settle disputes arising out of a contractual relationship between an investor (or his investment) and the host country. The breach of agreement referred to in the model agreement as the subject for arbitration, and which thereby sets the mandate for the Arbitration Tribunal, must thus be a breach of the investment agreement.<sup>136</sup>

Other noteworthy examples are the North American Free Trade Agreement (NAFTA),<sup>137</sup> and the Energy Charter Treaty.<sup>138</sup> Pursuant to these instruments, the jurisdiction of the tribunal is limited to investor claims of an international nature. As the ICSID Additional Facility Rules Tribunal observed in *Waste Management, Inc. v Mexico* (2004): 'unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts [...]. It is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117 [...].'<sup>139</sup>

<sup>132</sup> Malaysia-Ghana BIT, art. 7(1) (emphasis added).

<sup>133</sup> See D. Vis-Dunbar, 'Norway Shelves its Draft Model Bilateral Investment Treaty' *Investment Treaty News* (8 June 2009).

<sup>134</sup> Norwegian Draft Model Investment Agreement, art. 15(1). See also Netherlands–Venezuela BIT, art. 9(1); Malta-Belgo-Luxembourg Economic Union BIT, art. 8(1) (defining an investment dispute as one 'between an investor of one of the Contracting Parties and the other Contracting Party affecting an investment of the former and relating to a matter with respect to which the latter has undertaken an obligation in favour of the other Contracting Party under this Agreement').

<sup>135</sup> Norwegian Draft Model Investment Agreement, Comments on the Model for Future Investment Agreements, para. 4.3.2. See further at para. 4.3.2 ('The Arbitration Tribunal cannot judge on the basis of violations of national law, which is therefore not applicable law'). Cf. Norwegian Draft Model Investment Agreement (2007), art. 14(1) ('A Tribunal established under this Section shall make its award based on the provisions of this Agreement interpreted and applied in accordance with the rules of interpretation of international law.').

<sup>136</sup> Norwegian Draft Model Investment Agreement, Comments, para. 4.3.2.

<sup>137</sup> North American Free Trade Agreement (1994), art. 1116(1) (hereinafter NAFTA). See also art. 1101 (defining the coverage of its investment provisions as those concerning 'measures adopted or maintained by a [Contracting] Party'). It is noted that an earlier draft of NAFTA contained a broader definition of investment disputes. See Draft version of NAFTA of December 1991, art. XX07(1).

<sup>138</sup> Energy Charter Treaty (1994), art. 26(1).

<sup>139</sup> *Waste Management, Inc. v United Mexican States* (Number 2), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (J. Crawford, B.R. Civiletti, E.M. Gómez, arbs), para. 73. See also Azinian,

Again, we see a logical relationship between the arbitration agreement and the choice-of-law provision: the influence that the narrow dispute settlement clause should have on the tribunal's choice-of-law methodology is explicitly stipulated in the applicable law clause in these treaties, the NAFTA providing for the application of the Treaty itself and 'applicable rules of international law',<sup>140</sup> and the Energy Charter Treaty referring to 'this Treaty and applicable rules and principles of international law'.<sup>141</sup> Thus, held the ICSID Additional Facility Rules Tribunal in *Loewen Group, Inc. and Raymond L. Loewen v United States* (2003): 'whether the conduct [of the host State] amounted to a breach of municipal law [...] is not for us to determine'.<sup>142</sup> And the ICSID Additional Facility Rules Tribunal stated in *Marvin Roy Feldman Karpa v Mexico* (2000): 'The Tribunal does not, in principle, have jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law'.<sup>143</sup>

In this context, we also note the case *Middle East Cement Shipping and Handling Co. S.A. v Egypt* (2002), in which the narrow dispute settlement clause led the ICSID Tribunal to conclude that claims based in national law were precluded from its jurisdiction.<sup>144</sup> The dispute concerned the host state's alleged expropriation of the investor's interest in a business concession located in Egypt and the state's alleged failure to ensure the re-exportation of the investor's assets.<sup>145</sup> The jurisdiction of the tribunal stemmed from the BIT between Greece and Egypt,<sup>146</sup> providing in article 10 that an investor could refer an investment dispute to an international arbitration tribunal in case such a dispute arose 'between an investor of a Contracting Party and the Other Contracting Party concerning an obligation of the latter under this Agreement'.<sup>147</sup> As set out in article 4 of the BIT, one of these obligations was not to subject investors of the other Contracting Party to measures tantamount to expropriation unless accompanied by payment of prompt, adequate, and effective compensation.<sup>148</sup>

With respect to the applicable law, article 11 of the BIT provided that in addition to the rules of the BIT, obligations for a more favourable treatment stemming from the national law of the contracting parties or existing under international law between the contracting parties shall prevail.<sup>149</sup> Seemingly relying on this reference to national law, the investor alleged that Egypt had misinterpreted and failed to apply certain provisions of the Egyptian investment law.<sup>150</sup> The tribunal, referring to the dispute settlement clause in article 10 of the BIT, stated that the test with respect to these claims is whether they 'can be based on the BIT, in particular its Article 4 as measures "the effect of which

*Davitian, & Baca v Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (B. R. Civiletti, C. von Wobeser, J. Paulsson, arbs), para. 87 ('NAFTA does not [...] allow investors to seek international arbitration for mere contractual breaches').

<sup>140</sup> NAFTA (1994), art. 1131(1).

<sup>141</sup> Energy Charter Treaty (1994), art. 26(6). See also Chapter 6, Section 2.1.2 (on express or implied agreement on the application of international law in investment treaties).

<sup>142</sup> *Loewen Group, Inc. and Raymond L. Loewen v United States*, ICSID Case No. ARB(AF)/98/3, 26 June 2003 (A. Mason, A.J. Mikva, Lord Mustill, arbs), para. 134.

<sup>143</sup> *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB[AF]/99/1, Decision on Jurisdiction, 6 December 2000 (J.C. Bravo, D.A. Gantz, K.D. Kerameus, arbs), para. 61.

<sup>144</sup> *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (K.-H. Böckstiegel, P. Bernardini, D. Wallace, arbs).

<sup>145</sup> *Middle East Cement Shipping*, at para. 5.

<sup>146</sup> *Middle East Cement Shipping*, at para. 50.

<sup>147</sup> *Middle East Cement Shipping*, at para. 71.

<sup>148</sup> *Middle East Cement Shipping*, at para. 104.

<sup>149</sup> *Middle East Cement Shipping*, at para. 86.

<sup>150</sup> *Middle East Cement Shipping*, at paras 157–160.

would be tantamount to expropriation”.<sup>151</sup> In light of this, it added, ‘it cannot assume the function as an appeal body regarding the application of local Egyptian laws and, particularly, the [Egyptian] Investment Law.’<sup>152</sup>

It appears reasonable that an arbitration agreement that specifically limits a tribunal’s jurisdiction to claims based on alleged violations of the BIT would bar that tribunal from entertaining separate claims founded in national law. Stated otherwise, a narrow jurisdictional clause, in casu article 10, would appear to take precedence over a broad applicable law clause, in casu article 11.<sup>153</sup> This does not mean, however, that the tribunal would be precluded from considering national law. Hence, when interpreting article 11, the tribunal in *Middle East Cement* specifically added that it would also take into account Egyptian law, when not ‘overridden’ by the application of the provisions of the BIT.<sup>154</sup> In view of the narrow dispute settlement clause, however, such taking into account of national law would necessarily be indirect, rather than creating separate causes of action arising under national law.

Investment treaties may also explicitly envisage arbitration for claims of both a national and international nature. The US Model BIT, for instance, states that the investor may submit to arbitration a claim ‘that the respondent has breached (A) an obligation under Articles 3 through 10 [of this Treaty], (B) an investment authorization, or (C) an investment agreement [...].’<sup>155</sup> A similar dispute settlement clause was at issue in the case *Generation Ukraine, Inc. v Ukraine* (2003).<sup>156</sup> The ICSID Tribunal observed:

The jurisdiction of the Tribunal is limited to investment disputes, which are defined in Article VI (1) of the [U.S.–Ukraine] BIT as: ‘[...] a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.’<sup>157</sup>

The tribunal interpreted this clause to mean that it ‘could conceivably have jurisdiction over domestic law claims under categories (a) and (b) of the definition of investment disputes in Article VI(1)’.<sup>158</sup>

Also here we find a link between the arbitration agreement and the choice-of-law provision contained in the same instrument. This link between the national or international type of claim and the application of national or international law,

<sup>151</sup> *Middle East Cement Shipping*, at para. 159.

<sup>152</sup> *Middle East Cement Shipping*, at para. 159.

<sup>153</sup> Cf. *Case Concerning Fisheries Jurisdiction (Spain v Canada)*, Judgment, 4 December 1998, Separate Opinion of Judge Koroma [1998] ICJ Rep. 432, 487, at para. 4 ([T]he question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter and not on the applicable law, or the rules purported to have been violated. In other words, once it is established that the dispute relates to the subject-matter defined or excluded in the reservation, then the dispute is precluded from the jurisdiction of the Court, whatever the scope of the rules which have purportedly been violated); see also at para. 6.

<sup>154</sup> *Middle East Cement Shipping*, fn. 144, Award, at para. 87. See also at para. 167 (the tribunal referred to both international and national law on the duty to mitigate damages).

<sup>155</sup> U.S. Model BIT (2012), art. 24. See also Burundi Model BIT, art. 8(1); *Alex Genin, Eastern Credit Limited, Inc. v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (L. Y. Fortier, M. Heth, A.J. van den Berg, arbs), para. 325 (referring to U.S.–Estonia BIT, art. VI(1)).

<sup>156</sup> *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (E. Salpius, J. Voss, J. Paulsson, arbs).

<sup>157</sup> *Generation Ukraine*, at para. 8.12.

<sup>158</sup> *Generation Ukraine*, at para. 8.12.

respectively, is explicitly made in the US Model BIT. On the one hand, the determination of whether the host state has breached an obligation as set out in the BIT shall be based on the application of ‘this Treaty and applicable rules of international law’.<sup>159</sup> If, on the other hand, the claim concerns the alleged breach of an investment authorization or investment agreement, national law is also applicable:

[T]he tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.<sup>160</sup>

Finally, mention should be made of the Iran–United States Claims Tribunal, which, to a certain extent, could be seen to provide a form of arbitration without privity, at least in the sense that the host state has unilaterally offered to settle a defined category of disputes through arbitration.<sup>161</sup> According to the Claims Settlement Declaration, the tribunal’s jurisdiction extends to claims and counterclaims that ‘arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights’.<sup>162</sup> Accordingly, the tribunal is competent to hear claims of both a contractual and a non-contractual nature, the great majority of which would otherwise be subject to the domestic jurisdiction of Iran or the United States.<sup>163</sup> Once more, there is a correlation between the tribunal’s jurisdiction and the choice-of-law law provision, the latter expressly allowing for the application of both national and international law.<sup>164</sup> The tribunal noted in *CMI International, Inc. v Ministry of Roads and Transportation* (1983): the flexibility that the arbitrators enjoy as to the applicable law is ‘consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts [...]’.<sup>165</sup>

<sup>159</sup> US Model BIT (2012), arts 30(1), 24(1).

<sup>160</sup> US Model BIT (2012), arts 30(2), 24(1) (references omitted). Cf. G. Sacerdoti, ‘Bilateral Treaties and Multilateral Instruments on Investment Protection’ (1997) 269 *Recueil des Cours* 261, 445.

<sup>161</sup> Cf. D.D. Caron, ‘The Iran–U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT’ in *The Iran–United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor–State Arbitration* (C. Drahoszal and C. Gibson, eds, New York, Oxford University Press, 2007), 375.

<sup>162</sup> Iran–United States Claims Settlement Declaration, art. II(1). See also Chapter 2, Section 4.1 (on the Iran–United States Claims Tribunal).

<sup>163</sup> Cf. Caron, fn. 161, at 379.

<sup>164</sup> Iran–United States Claims Settlement Declaration, art. V (“The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances”). See also F. Rigaux, ‘Les situations juridiques individuelles dans un système de relativité générale’ (1989-I) 213 *Recueil des Cours*, at para. 86 ([L]e Tribunal ne se prononce pas nécessairement sur des questions de droit international. C’est, pour l’essentiel un contentieux de droit international privé qui lui est déferé, en raison de la compétence exercée sur des actions dont auraient dû normalement connaître les tribunaux américains ou les tribunaux iraniens) [The tribunal does not rule necessarily on matters of international law. It is essentially a private international law dispute that is referred to it, because of the jurisdiction it exercises over claims that should normally have been heard in US or Iranian courts.] [references omitted]); Chapter 3, Section 3.2.2.2 (on the Iran–United States Claims Settlement Declaration).

<sup>165</sup> *CMI International, Inc v Ministry of Roads and Transportation, Iran*, 4 Iran–U.S. C.T.R. 263. See also J.R. Crook, ‘Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience’ (1989) 83 *Am. J. Int’l L.* 278, 299–300; Chapter 3, Section 3.2.2.2 (on the Iran–United States Claims Settlement Declaration).

This link between the nature of the claim and the applicable law relates also to the identity of the respondents in each particular case. The Claims Settlement Declaration defines 'Iran' and the 'United States', respectively, as the Government of Iran or of the United States, and any of their political subdivisions; and any agency, instrumentality, or entity controlled by those Governments, or any political subdivision thereof.<sup>166</sup> The fact that the respondent therefore may not be a 'subject of international law' proper, entails that it may not be held responsible for expropriation, a claim that could be based in international law. As stated in *Starrett Housing Corp. v Iran* (1983):

The Tribunal determines that the claims as they are made at this stage of the proceedings are based solely on expropriation of the Claimants' property rights [...]. The only proper Respondent for such an expropriation claim is the Government of the Islamic Republic of Iran, and consequently the Tribunal dismisses Bank Markazi Iran, Bank Omran, and Bank Mellat as Respondents.<sup>167</sup>

The consequences this may have for the decision to apply national or international law to the merits have been pointed out by Caron:

[T]he private municipal claim could be brought against the whole range of respondents possible under Article VII(3), while the public international claim could only be brought against the government of Iran. In the private municipal law claim, the Tribunal's analysis as to choice of law under Article V led to application of the law of the contract, general principles of municipal law, trade usages, and occasionally a specific municipal law. In contrast, in the public international law claim, the Tribunal necessarily applied under Article V the applicable public international law.<sup>168</sup>

### 3.3. Interim conclusions

Arbitration agreements play an important role in the ability of tribunals to apply national and/or international law to the merits of investment disputes. While broadly worded dispute settlement clauses allow for the bringing of claims of both a national and international nature, clauses of a more narrow scope may limit the tribunal's jurisdiction to national or international claims. As was demonstrated, the corollary effect on the applicable law is frequently stipulated in the choice-of-law clause contained in the same instrument. Thus, arbitration agreements that restrict the tribunal's competence to claims of an international nature are often coupled with a choice-of-law clause referring solely to international law sources. Contrariwise, instruments containing arbitration agreements of a broader nature regularly stipulate the application of national and international law.

<sup>166</sup> Iran–United States Claims Settlement Declaration (1981), art. VII(3)–(4). See also C. H. Brower, II, 'Book Review and Note: The International Law Character of the Iran–United States Claims Tribunal. By Moshen Mohebi' (2000) 94 *Am. J. Int'l L.* 813, at 813–14 (according to Brower, these definitions 'include entities far beyond any customary understanding of the "state" or "government"'); Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>167</sup> *Starrett Housing Corp. v Iran*, Interlocutory Award, 19 December 1983, para. 258. See also *Mobil Oil et al. v Iran*, Partial Award, 14 July 1987, para. 75 ('[W]hen a claim is based on an alleged breach of contract, the Tribunal first must determine whether the alleged breach actually took place [...]. [I]t becomes necessary to rely upon the law applicable to the contract. This is also the case when the Tribunal must decide upon the alleged liability of an entity other than Iran or the United States, when the entity is not a subject of international law'); *Fedders Corp. v Iran*, Decision No. DEC 51-250-3, 13 Iran–U.S. C.T.R. 97 (28 October 1986) ('[T]he wording of the Statement of Claim indicated clearly that a part of the claim alleged by the Claimant was based on the nationalization or taking of assets by Iran. Therefore it was clear from the Statement of Claim that Iran was intended to be a Respondent in this case').

<sup>168</sup> Caron, fn. 161, at 380.

#### 4. Counterclaims by Host States

Depending on the arbitration agreement, host states may present counterclaims against foreign investors.<sup>169</sup> One of the issues that arises in that context, and which we will discuss in this section, is whether such counterclaims must be of the same national or international nature as the initial claim presented by the foreign investor. Posed as a question, may a host state bring a counterclaim in national law against a claim requiring the application of international law? This question is particularly pertinent in investment treaty arbitration in light of the fact that most claims brought against host states pursuant to investment treaties are based on alleged violations of those treaties and hence are of an international nature. Before venturing an answer, we will first make some observations concerning the purpose of counterclaims, and secondly examine the situations in which host states may present counterclaims in investment treaty arbitration.

The right of the respondent to file a counterclaim<sup>170</sup> in opposition to the claimant's<sup>171</sup> initial claim in the same legal proceedings is in principle admitted by all national legal systems,<sup>172</sup> as well as in interstate proceedings.<sup>173</sup> The rationale for such consolidation of claims is procedural economy and the better administration of justice; and for that reason, one of the main features of a counterclaim is its connexity or relatedness with the initial claim. When such connexity is present, separate adjudications would require the examination of the same evidence, result in delays and corresponding costs, and possibly lead to inconsistent decisions. As Ben Hamida states:

<sup>169</sup> On this topic, see generally P. Lalive and L. Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' in 2 *Czech Y.B. Int'l L.* (New York, NY, Juris Publishing, 2011), 141.

<sup>170</sup> In presenting a counterclaim, the respondent seeks to achieve more than the dismissal of the applicant's claim, and it should therefore be distinguished from a defence on the merits. See G. Scelle, 'Report on Arbitration Proceedings, Submitted to the International Law Commission in 1949' (1950) II YILC 137, para. 78 (last visited 14 June 2009); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Counter-Claims, Order, 17 December [1997] ICJ Rep. 243, para. 27. A counterclaim should also be differentiated from a claim of set-off. See D. Caron et al., *The UNCITRAL Arbitration Rules: A Commentary* (Oxford, Oxford University Press, 2006), 409–10 ('[A] counter-claim is a separate claim, whereas a set-off "claim" is a defensive pleading that money owed by the main claimant to the defendant be counter-balanced against the claim.' Unlike a set-off, the counterclaim must still be decided upon by the arbitrators when the original claim is withdrawn or settled. Further, a demand based on a counterclaim may exceed the amount of the original claim while a set-off demand may not.)

<sup>171</sup> Cf. *Saluka Investments B.V. v Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004 (P. Behrens, L.Y. Fortier, A. Watts, arbs), para. 49 ('It is a cardinal principle relating to the bringing of counterclaims [...] that the necessary parties to the counterclaim must be the same as the parties to the primary claim'); *Hamester v Ghana*, fn. 36, Award, at para. 356. See also UNCITRAL Arbitration Rules (2010), art. 4(2)(f) (the response to the notice of arbitration may also include '[...] A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant').

<sup>172</sup> See C. Antonopoulos, *Counterclaims before the International Court of Justice* (The Hague etc., T.M.C. Asser Press, 2011), 7 ('The right of a respondent to bring counterclaims or "cross action" is admitted by virtually all municipal civil procedure legislation' [references omitted]).

<sup>173</sup> See Antonopoulos ('The right to present counterclaims is admitted in litigation on the international plane' [references omitted]); *Islamic Republic of Iran v The United States of America*, Case No. B1 (Counterclaim), Interlocutory Award, 9 September 2004, Award No. ITL 83-B1-FT, at para. 87; and at fn. 58 (listing mixed arbitral tribunals that recognized a party's right to file counter-claims even when their constitutive instruments did not expressly refer to counterclaims). See also *Iran and The United States*, Request for Interpretation: Jurisdiction of the Tribunal with respect to claims by the Islamic Republic of Iran against nationals of the United States of America, Case No. A/2, Decision No. Dec 1-A2-FT, 13 January 1982, 1 Iran-U.S. C.T.R. 101, at 103 ('[A] right of counter claim is normal for a respondent').

L'exclusion des demandes reconventionnelles entraîne une multiplication d'instances et suscite des problèmes de litispendance et de connexité très délicats. L'acceptation de ces demandes assure, en revanche, une meilleure administration de la justice, réalise une économie de procès et permet aux arbitres d'avoir une vue d'ensemble des prétentions respectives des parties et de statuer de façon plus cohérente. [The exclusion of counterclaims results in a higher number of proceedings and creates difficult problems of *lis pendens* and connexity. On the other hand, the acceptance of these counterclaims provides both a better administration of justice and judicial economy and it allows arbitrators to have an overview of the respective claims of the parties and to decide disputes in a more consistent fashion.]<sup>174</sup>

For this reason, also arbitration rules and arbitration laws envisage the bringing of counterclaims<sup>175</sup>—a possibility of which host states have taken advantage in arbitration proceedings with foreign investors.<sup>176</sup> Traditionally, arbitral tribunals have accepted such counterclaims where the investor's claim was based on a preexisting contract with the host state, which also included an arbitration clause.<sup>177</sup> Again, the question that will be addressed here is whether the host state may also present counterclaims in arbitration proceedings where the arbitration agreement originates in a unilateral arbitration offer by the host state, as provided in an investment treaty concluded with the investor's home state, i.e., in arbitration without privity.<sup>178</sup>

As will be demonstrated, a significant obstacle in this respect relates to the consensual character of arbitration. A counterclaim constitutes a separate and independent claim by virtue of which the host state may be awarded a remedy vis-à-vis the investor, and it is therefore reasonable that the latter must be deemed to have consented to the bringing of that counterclaim. This is clearly spelled out in the ICSID Convention, according to

<sup>174</sup> W. Ben Hamida, 'L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?' (2005) 7(4) *International Law FORUM du droit international* 261, 270–1 (references omitted). See also Antonopoulos, fn. 172, at 10; Caron et al., fn. 170, at 412. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at para. 30; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Counter-Claims Order, 29 November [2001] ICJ Rep. 660, para. 44; Declaration of Judge ad hoc Verhoeven, at 684; *Case Concerning Jurisdictional Immunities of the State (Germany v Italy) (Counterclaim)*, Order of 6 July 2010, ICJ General List No 143, Judge Cançado Trindade, paras 15, 18–19.

<sup>175</sup> See, e.g., ICSID Convention (1965), art. 46; ICSID Additional Facility Rules, art. 47(1) (as amended effective 10 April 2006); UNCITRAL Arbitration Rules (2010), arts 4(2)(e), 21(3); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (as in force as from 1 January 2010), art. 5; ICC Arbitration Rules (2012), art. 5; LCIA Arbitration Rules (1998), art. 2; Iran–United States Claims Settlement Declaration (1981), art. II(1); UNCITRAL Model Law (2006), Search Term End art. 2(f); English Arbitration Act (1996), art. 47; German Arbitration Act (1998), section 1046(3).

<sup>176</sup> See Dugan et al., fn. 109, at 153–6.

<sup>177</sup> See, e.g., *Lena Goldfields Ltd v Soviet Government*, Award, September 1930, referred to in A. Nussbaum, 'The Arbitration Between the Lena Goldfields, Ltd and the Soviet Government' (1950) 36 *Cornell L.Q.* 31, 43, para. 8; *S.A.R.L. Benvenuti & Bonfanti v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 (J. Trolle, R. Bystricky, E. Razafindralambo, arbs); *Maritime International Nominees Establishment (MINE) v Republic of Guinea (Defendant)*, ICSID Case No. ARB/84/4, Award, 6 January 1988 (D.E. Zubrod, J. Berg, D.K. Sharpe, arbs); *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in resubmitted case, 5 June 1990 (R. Higgins, M. Lalonde, P. Magid, arbs); *Adriano Gardella SpA v Republic of the Ivory Coast*, ICSID Case No. ARB/74/1, Award, 29 August 1977 (P. Cavin, J.M. Grossen, D. Poncet, arbs); *Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983 (E. Jimnez de Arechaga, W.D. Rogers, D. Schmidt, arbs); *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award, 21 April 1986 (P. Sanders, J.-F. Prat, A.J. van den Berg, arbs). For a more recent case, see *RSM v Grenada*, fn. 58, Award.

<sup>178</sup> See J. Paulsson, 'Arbitration Without Privity' (1995) 10(2) *ICSI Rev.-FILJ* 232 (noting that 'arbitration without privity' is also envisaged in investment laws of the host state); Chapter 2, Section 2 (on features of the arbitral process).

which a counterclaim must fall ‘within the scope of consent of the parties’.<sup>179</sup> Consent is also implicit in the 2010 UNCITRAL Arbitration Rules, which provide that ‘the respondent may make a counterclaim [...] provided that the arbitral tribunal has jurisdiction over it’,<sup>180</sup> as well as in the UNCITRAL Model Law on International Commercial Arbitration.<sup>181</sup>

Whereas in the traditional scenario of arbitration with privity the arbitration clause would, as a rule, be broad enough to cover claims by both the investor and the host state based on their mutual rights and obligations under the contract,<sup>182</sup> the same is not necessarily the case in treaty arbitration.<sup>183</sup> This is because investment treaties focus on investor rights and host state obligations, not vice versa. In light of this fact, not only may a host state counterclaim infringe upon the consent requirement, it might also run counter to what has been suggested to be the object and purpose of treaty arbitration: to grant the investors a one-sided right of ‘quasi-judicial review’ of national regulatory action contrary to international law.<sup>184</sup> Yet a further complication is the connexity requirement, which in the context of arbitration without privity proceedings raises interesting questions concerning the need for symmetry in the legal nature of the claim and counterclaim. While this is generally not an issue where the investor’s claim and the host state’s counterclaim are based on the same contract, the situation is different in cases in which, for instance, a contractual counterclaim is presented against a treaty claim or an alleged violation of customary international law.

At the same time, the rejection of counterclaims may lead a host state to seek relief in its own courts or in another, contractually agreed, arbitration forum. As stated previously, this may be inefficient and costly, and it could also lead to contradictory decisions. Hence, the consolidation of claims might not only be in the interest of *both* parties; it may also safeguard the integrity of the legal system as a whole, and

<sup>179</sup> ICSID Convention (1965), art. 46. Cf. ICSID Arbitration Rules, art. 40(1). See also ICSID Additional Facility Rules (2006), art. 47(1) (a counterclaim must be ‘within the scope of the arbitration agreement between the parties’). Cf. *Roussalis v Romania*, fn. 82, Award, at para. 864 ([T]he first issue which the Tribunal has to determine is whether [...] the Parties *consented* to have the State’s counterclaims arbitrated) [emphasis in original]).

<sup>180</sup> UNCITRAL Arbitration Rules (2010), art. 21(3). Note that the 1976 UNCITRAL Rules required the counterclaim to arise out of the same contract as the initial claim. See UNCITRAL Arbitration Rules, art. 19(3) (1976).

<sup>181</sup> See UNCITRAL Model Law (2006), arts 2(f), 7; K.P. Berger, ‘Set-Off in International Economic Arbitration’ (1999) 15(1) *Arb. Int’l* 53, at § V(a)(i) ([I]t was made clear during the deliberations of the Working Group that this restriction to the scope of the arbitration agreement “is self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement”). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at para. 31; Antonopoulos, fn. 172, at 1. But see P.A. Karrer, ‘Jurisdiction on Set-off Defences and Counterclaims’ (2001) 67(2) *Arbitration* 176, 177 ([A]n arbitral tribunal should have jurisdiction over counterclaims between the same parties, even if these counterclaims are not covered by the arbitration agreement which confers jurisdiction on the arbitral tribunal over the main claim’).

<sup>182</sup> This mutuality is illustrated in the award of Government of *Kuwait v American Independent Oil Company*, Award, 24 March 1982, discussed in M. Hunter and A.C. Sinclair, ‘The Arbitration between Aminoil and Kuwait: A Story of Balance and Chance in Foreign Investments’ in *Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005) (neither party was willing to be categorized as the ‘Respondent’, because each had claims against the other).

<sup>183</sup> For the possibility of host states to bring counterclaims when the arbitration agreement is based on an offer to arbitrate provided by the host state in its national investment legislation, see H.E. Veenstra-Kjos, ‘Counterclaims by Host States in Investment Dispute Arbitration “Without Privity”’ in *New Aspects of International Investment Law/Les aspects nouveaux du droit des investissements internationaux 2004* (T. Walde and P. Kahn, Hague Academy of International Law, eds, Leiden, Nijhoff, 2007).

<sup>184</sup> See fn. 267. See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

investment law as a separate discipline in particular.<sup>185</sup> Furthermore, as host state counterclaims would be a means to enforce investor obligations,<sup>186</sup> they could also ensure a degree of procedural and substantive equality between the parties, and as such, help correct a perceived asymmetry in the relationship between foreign investors and host states in treaty arbitration.<sup>187</sup> In this respect, Lalive and Halonen predict that 'States would probably have more faith in the process of investment treaty arbitration if they saw that it could also provide quality adjudication of their own grievances in appropriate circumstances'.<sup>188</sup> We also note that UNCTAD, in its recent World Investment Report, suggests that states include express provisions on counterclaims in international investment agreements.<sup>189</sup>

Indeed, arbitral practice reveals an increasing resort to counterclaims by host states. The first example of this development appears to be *Alex Genin v Estonia* (2001), in which the counterclaim was dismissed on the merits.<sup>190</sup> In *Saluka Investments B.V. v Czech Republic* (2004), the counterclaims were denied on the following bases: first, that the contractual counterclaims were subject to arbitration in a different forum; and secondly, because the other counterclaims involved non-compliance with the general law of the Czech Republic, they were not sufficiently closely connected with the subject-matter of the original claim so as to fall within the tribunal's jurisdiction under the BIT.<sup>191</sup> Then there is the case *Desert Line Projects LLC v Republic of Yemen* (2008), in which the ICSID Tribunal dismissed the counterclaim, but partially upheld the claim for set-off.<sup>192</sup>

<sup>185</sup> See Lalive and Halonen, fn. 169, at para. 7.01 (the authors note, however, that the investor is unlikely to consent to the admissibility of the host state's counterclaim); *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim, at para. 24 (the host state argued that 'the exercise of jurisdiction by the tribunal over the respondent's counterclaim would advance the goals of economy and efficiency in international dispute resolution, since otherwise the respondent would have to pursue its claim elsewhere').

<sup>186</sup> See, e.g., T. Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) 27 *B.C. Int'l & Comp. L. Rev.* 429, 449 (Weiler envisages host state counterclaims against the investor for a breach of international law in relation to the activities of the investment in its territory, and in particular, for human rights violations). For an alternative means of 'enforcement', see O. Schachter, *International Law in Theory and Practice* (Dordrecht, Nijhoff, 1991), 324 (Schachter interprets the standard of 'appropriate,' 'just' and 'equitable' compensation' to mean that '[i]n cases where the company had by practices contrary to good standards of operation, diminished the value of a natural resource, it would not be unjust for the government to reduce its compensation to make up for the damage'). See also fn. 329.

<sup>187</sup> See Ben Hamida, fn. 174, at 263. It could be argued, though, that such 'imbalance' is the price the host state pays for making the offer with the hope of attracting foreign investments and thereby improving the nation's economic development.

<sup>188</sup> Lalive and Halonen, fn. 169, at para. 7.42.

<sup>189</sup> UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies (July 2012), at xxx, 135, 150, 152, 154.

<sup>190</sup> See *Alex Genin v Estonia*, fn. 155, Award, at para. 376. It has been suggested that where a counterclaim is clearly unfounded, arbitrators may avoid taking a stand on jurisdictional issues by dismissing the counterclaim on the merits. See M. Pellonpää and D.D. Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Practice of the Iran–United States Claims Tribunal* (Helsinki, Finnish Lawyers' Publishing, 1994), 354. This might have been the case in *Alex Genin v Estonia*. See *Alex Genin*, fn. 155, Award, at para. 376 (the 'confusion' of the host state's counterclaim, being expressed in varying fashions, amounts and places, need not be resolved, as 'Estonia has failed to demonstrate to the satisfaction of the Tribunal the merits of its request'). See also at fn. 101 (the Republic of Estonia did not appear to be the proper counterclaimant).

<sup>191</sup> See *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim.

<sup>192</sup> *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (P. Tercier, J. Paulsson, A.S. El-Kosheri, arbs), paras 218, 223–35.

We also refer to three cases in which the host state presented a counterclaim for non-material injury. In *Limited Liability Company Amto v Ukraine* (2008), the SCC Tribunal dismissed the counterclaim on the basis that the respondent had not put forth any basis in law to substantiate its counterclaim.<sup>193</sup> Similarly, in *Cementownia 'Nowa Huta' S.A. v Republic of Turkey* (2009), the ICSID Tribunal dismissed the respondent's request because 'it is doubtful that such a general principle [abuse of process] may constitute a sufficient legal basis for granting compensation for moral damages'.<sup>194</sup> In *Europe Cement Investment & Trade S.A. v Republic of Turkey* (2009), the respondent's request for declaratory relief and monetary compensation was denied by the ICSID Tribunal, partly on evidentiary grounds<sup>195</sup> and partly since the respondent was deemed to have received 'a form of "satisfaction"' by way of the award itself and the decision on costs.<sup>196</sup>

There is also the ICSID case of *Gustav FW Hamester GmbH & Co KG v Republic of Ghana* (2010), in which the respondent requested the tribunal to: 'ORDER Hamester to pay to the Government damages, moral or otherwise, for losses it and/or the [Ghana Cocoa Board] have sustained as a result of Hamester's conduct in such sum as the Tribunal during the course of this arbitral proceeding may determine as a result of its inquiry into damages, plus interest per annum'.<sup>197</sup> While noting that '[i]t has in theory been accepted that a respondent State could have a right of action to file a counterclaim against an investor under a bilateral investment treaty',<sup>198</sup> the counterclaim was rejected because it concerned alleged losses suffered not by the state but by the Cocoa Board, which was neither a party to the arbitration nor an organ of the state.<sup>199</sup> Moreover, the host state had neither specified the basis for the jurisdiction over the counterclaim nor the losses it allegedly suffered.<sup>200</sup>

In *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia* (2011), the respondent asserted as many as seven counterclaims of various types.<sup>201</sup> These were rejected as the tribunal found that they raised issues falling within the scope of the exclusive jurisdiction of Mongolian courts; that they were matters governed by Mongolian public law; that there was no reasonable nexus between them and the investors' claim so as to justify their joint consideration; and on evidentiary grounds.<sup>202</sup>

<sup>193</sup> *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (B.M. Cremades, P. Runeland, C. Soderlund, arbs), paras 7, 118.

<sup>194</sup> *Cementownia 'Nowa Huta' S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 (P. Tercier, M. Lalonde, C. Thomas, arbs), paras 170–171. See also at para. 171 ('[T]he Arbitral Tribunal deems it more appropriate to sanction the Claimant with respect to the allocation of costs [...]. In any case, since the Arbitral Tribunal has already accepted the Respondent's request with respect to the fraudulent claim declaration, the Respondent's objective is already achieved' [emphasis added]); see also at paras 162–163.

<sup>195</sup> *Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (D.M. McRae, L. Lévy, J.D.M. Lew, arbs), para. 181 (the tribunal did not 'consider that exceptional circumstances such as physical duress are present in this case to justify moral damages').

<sup>196</sup> *Europe Cement*, at paras 176, 181, 186.

<sup>197</sup> *Hamester v Ghana*, fn. 36, Award, at para. 351.

<sup>198</sup> *Hamester v Ghana*, at para. 353 (referring to *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim).

<sup>199</sup> *Hamester v Ghana*, at para. 356.

<sup>200</sup> *Hamester v Ghana*, at paras 352, 357.

<sup>201</sup> *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia*, Award on Jurisdiction and Liability, 28 April 2011 (M. Lalonde, H.A.G. Naón, B. Stern), para. 678.

<sup>202</sup> *Paushok v Mongolia*, at paras 694–698.

The host state was also unsuccessful in *Spyridon Roussalis v Romania* (2011).<sup>203</sup> The ICSID Tribunal, by majority decision, rejected the counterclaims due to lack of consent on the part of the investor,<sup>204</sup> a decision that was challenged by the third arbitrator, Reisman.<sup>205</sup> Contrariwise, the counterclaim was accepted, yet denied on the merits, in *Antoine Goetz and others v Republic of Burundi* (2012).<sup>206</sup>

Additionally, the tribunals in *SGS v Pakistan* (2002–2003)<sup>207</sup> and *SGS v Philippines* (2004)<sup>208</sup> made a note of, without dismissing, the investors' suggestion that there would be jurisdiction over host state counterclaims. Further, in *Sempra Energy International v Argentine Republic* (2007), the ICSID Tribunal observed:

The Respondent has argued that the Government also had many expectations in respect of the investment that were not met or were otherwise frustrated. Apart from the question of investment risk, it is alleged that there was, *inter alia*, the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework. The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and could have resulted in breaches of the Treaty,<sup>209</sup> the Respondent would be entitled to raise a counterclaim.<sup>210</sup>

Thus, while no host state has yet prevailed on the merits of counterclaims in an investment treaty arbitration, we can conclude that practice supports the possibility that they may be brought, as long as certain conditions are fulfilled. In examining these conditions more comprehensively, we will first consider various offers by the host state that form the basis for the arbitration agreement. We will then discuss the connexity requirement, which involves applicable law issues.

#### 4.1. The arbitration agreement

A tribunal's jurisdiction over counterclaims stands or falls on the parties' arbitration agreement. Since in investment treaty arbitration this agreement is based on the host state's offer, we will in the following analyse the different wording of such offers through a selective survey of various treaties. The two most important factors in this respect are first, the instrument's definition of arbitrable disputes (the tribunal's jurisdiction *ratione materiae*), and more specifically the extent to which it encompasses investor obligations; and secondly, whether it grants locus standi to either party, or solely the investor (jurisdiction *ratione personae*). As will be seen, jurisdiction and admissibility may also depend on the possibility of the investor, through its acceptance, to limit the scope of the arbitration agreement; and whether the parties in concert may expand upon it.

<sup>203</sup> *Roussalis v Romania*, fn. 82, Award, at para. 864.

<sup>204</sup> *Roussalis v Romania*, at para. 872.

<sup>205</sup> *Roussalis v Romania*, Declaration by M. Reisman, 28 November 2011.

<sup>206</sup> *Antoine Goetz and others v Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012 (G. Guillaume, J.-D. Bredin, A.S. El-Kosheri, arbs).

<sup>207</sup> See *SGS v Pakistan*, fn. 30, Procedural Order, 16 October 2002, 18–1 *ICSID Rev.-FILJ* 293, 303 (2003); Decision on Jurisdiction, at para. 108.

<sup>208</sup> See *SGS v Philippines*, fn. 98, Decision on Jurisdiction, at para. 40.

<sup>209</sup> But see Chapter 5, Section 2.3.2 (on non-contractual claims) (footnote not in original).

<sup>210</sup> *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/0/16, Award, 28 September 2007, at para. 289 (emphasis added).

#### *4.1.1. Arbitrable claims (jurisdiction ratione materiae)*

Investment treaties are designed to attract foreign investments, and for that purpose they extend an array of rights to investors, such as ‘national’, ‘most-favoured-nation’, and ‘fair and equitable’ treatment; full protection and security; as well as the prohibition of expropriation of investments except in the public interest and against compensation.<sup>211</sup> The focus on investor rights presents a hurdle for host state counterclaims. This is because the offer to arbitrate, and the investor’s acceptance of that offer, must necessarily be broad enough to encompass investor obligations that could constitute the basis for the state’s grievance.<sup>212</sup> This partly depends on the treaty’s definition of arbitrable investment disputes.

##### **4.1.1.1. Inclusion of investor obligations**

As explained in **Section 3.2**, most investment treaties contain broad dispute settlement clauses and permit ‘any’ or ‘all’ disputes relating to investments to be submitted to arbitration.<sup>213</sup> For instance, the BIT involved in *Saluka* refers to ‘[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter’.<sup>214</sup> A different example is the US-Estonia BIT involved in *Alex Genin*, which lists submittable claims as those ‘arising out of or relating to: (a) an investment agreement [...]; (b) an investment authorization [...]; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment’.<sup>215</sup> Similar language is employed in the Belgium–Luxembourg–Burundi BIT at issue in *Goetz*:

[U]n différend relatif à un investissement est défini comme un différend concernant: (a) l’interprétation ou l’application d’un accord particulier d’investissement entre une Partie contractante et un investisseur de l’autre Partie contractante; (b) l’interprétation ou l’application de toute autorisation d’investissement accordée par les autorités de l’Etat hôte régissant les investissements étrangers; (c) l’allégation de la violation de tout droit conféré ou établi par la présente Convention en matière d’investissement.[A dispute concerning an investment is defined as a dispute concerning: (a) the interpretation or application of a particular investment agreement between a Contracting Party and an investor of the other Contracting Party, (b) the interpretation or application of any investment authorization granted by the authorities of the host state governing foreign investment, (c) the alleged breach of any right conferred or created by this Investment Agreement.]<sup>216</sup>

Whereas these clauses would appear to cover disputes concerning alleged wrongful conduct committed not only by the host state but also by the investor, there appears to be some controversy whether they would cover contractual disputes in particular. This question is of great relevance to the acceptance of counterclaims, as many—if not most—investment disputes have a contractual origin,<sup>217</sup> and because contracts impose

<sup>211</sup> See, e.g., Parra, fn. 84, at 290–1, 293. See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>212</sup> Cf. A.K. Hoffmann, ‘Counterclaims by the Respondent State in Investment Arbitrations—The Decision on Jurisdiction over Respondent’s Counterclaim in *Saluka Investments B.B. v Czech Republic*’ TDM 3(5) (2006) 9, at 10.

<sup>213</sup> Section 3.2 (on arbitration without privity).

<sup>214</sup> Netherlands–Czech/Slovak BIT, art. 8 (1991), referred to in *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic’s Counterclaim, at para. 21.

<sup>215</sup> *Alex Genin v Estonia*, fn. 155, Award, at para. 325 (referring to US-Estonia BIT, art. VI(1)).

<sup>216</sup> Belgium–Luxembourg–Burundi BIT, art. 8(1); *Goetz v Burundi*, fn. 206, at paras 277–278.

<sup>217</sup> See, e.g., S.A. Alexandrov, ‘Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-Based Arbitration to Decide Breach of Contract Claims in *SGS v Pakistan* and *SGS v Philippines*’ (2004) 5(4) *Journal of World Investment and Trade* 555.

on investors obligations that might form the basis of host state counterclaims.<sup>218</sup> Whereas an affirmative answer would clearly be warranted with regard to the aforementioned US-Estonia BIT<sup>219</sup> and the Belgium-Luxembourg-Burundi BIT,<sup>220</sup> we recall that tribunals have differed in their interpretation of more generic and seemingly broader clauses referring to ‘investment disputes’.<sup>221</sup> We also recall our conclusion that the better interpretation favours a broad construction, allowing the bringing of claims of both a national and international nature.<sup>222</sup>

We submit that it follows from this interpretation of broadly worded arbitration agreements that they also allow for the bringing of host state counterclaims. This is affirmed by the tribunal in *Saluka*:

The Tribunal agrees [with the Parties] that, in principle, the jurisdiction conferred upon it by Article 8 [of the Treaty], particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to ‘All disputes,’ is wide enough to include disputes giving rise to counter-claims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal’s jurisdiction, to be ‘between one Contracting Party and an investor of the other Contracting Party’ carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims.<sup>223</sup>

There is normally no reason for the investor’s consent to be broader than is necessary to enable its specific grievance to be submitted to arbitration. Accordingly, the investor might seek to limit its acceptance to the part relating to alleged treaty violations, for instance, expropriation.<sup>224</sup> In that case, the required mutual consent between the parties could arguably be seen to only exist to the extent of the overlap between the host state’s offer to arbitrate and the investor’s acceptance of this offer, i.e., the alleged expropriation. As Alvarez states: ‘[S]ince the investor’s consent will usually be given only after the dispute has arisen, the scope of its consent can be expected to be quite narrow, thus limiting the possibility of counterclaims by the disputing State Party.’<sup>225</sup>

It is suggested, however, that when the investor starts arbitration proceedings based on an offer by the host state in an investment treaty, the investor accepts that offer as set out in that treaty, nothing more and nothing less.<sup>226</sup> Also Ben Hamida supports such a

<sup>218</sup> Cf. Paulsson, fn. 178, at 247.

<sup>219</sup> Cf. reference to ‘disputes arising out of or relating to an investment agreement’.

<sup>220</sup> Cf. reference to ‘un accord particulier d’investissement entre une Partie contractante et un investisseur de l’autre Partie contractante’ [an investment agreement between a Contracting Party and an investor of the other Contracting Party].

<sup>221</sup> See generally Section 3.2 (on arbitration without privity).

<sup>222</sup> See Section 3.2 (on arbitration without privity).

<sup>223</sup> *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic’s Counter-claim, at para. 39.Cf. A.M. Steingruber, fn. 55, at paras 14.14, 14.21; Ben Hamida, fn. 174, at 264–5.

<sup>224</sup> See, e.g., H.C. Alvarez, ‘Arbitration Under the North American Free Trade Agreement’ (2000) 16(4) *Arb. Int’l* 393, 410 (under NAFTA, ‘investors can be expected to focus their requests for arbitration quite narrowly on the State Party’s measure which has caused each of them loss or damage’). Cf. *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic’s Counter-claim, at para. 26 (the claimant argued that the host state’s offer to arbitrate ‘was only accepted by Claimant in respect of claims based on the Treaty, and the Parties’ mutual consent to arbitration was limited accordingly’).

<sup>225</sup> Alvarez, fn. 224, at 411. See also C.H. Schreuer, ‘Consent to Arbitration’ in *UNCTAD: Dispute Settlement: International Centre for Settlement of Investment Disputes* (New York, United Nations, 2003), 30; A.R. Parra and I.F.I. Shihata, ‘The Experience of the International Centre for Settlement of Investment Disputes’ (1999) 14 *ICSID Rev-FILJ* 299, 320; G. Petrochilos et al., ‘ICSID Convention, Chapter IV, Section 3, Article 46 [Ancillary claims] 114’ in *Concise International Arbitration* (L.A. Mistelis, ed., 2010), at para. 6; C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 203, 756.

<sup>226</sup> See Douglas, fn. 31, *The International Law of Investment Claims*, at para. 491.

'take it or leave it' interpretation by stating that a limited acceptance by an investor may be qualified as a counteroffer, i.e. a rejection, rather than an acceptance of the offer:

[N]ous avons proposé d'étendre la solution retenue dans la théorie générale des contrats en considérant que toute réponse par laquelle la personne privée modifie le domaine de l'offre initialement déterminé par la partie publique devrait s'analyser, non en une acceptation, mais en un refus d'acceptation accompagné d'une contre-offre d'arbitrage adressée à l'Etat. [We proposed to extend the solution found in the general theory of contracts so that any response by the private party that changes the initial offer by the public party should be considered not as an acceptance but a rejection of the offer followed by a counter-offer to arbitrate addressed to the state.]<sup>227</sup>

In a similar sense, the United Nations Convention on Contracts for the International Sale of Goods provides in article 19(1) that '[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer'.<sup>228</sup> In any event, and as will be discussed later, the connexity requirement may have related—although not as far-reaching—consequences for the scope of counterclaims allowed.<sup>229</sup>

#### **4.1.1.2. Exclusion of investor obligations**

Other treaties, which are in a minority, specifically limit arbitrable claims to an enumerated list of host state obligations.<sup>230</sup> The fact that the arbitration agreement only encompasses disputes concerning host state obligations does create an obstacle for host state counterclaims. Since the parties have not agreed to settle through arbitration disputes concerning investor obligations, any grievance against the investor would not have a basis in the parties' arbitration agreement, and would consequently seem to fall outside the jurisdiction of the tribunal.<sup>231</sup> This reasoning is supported by the ICSID award in *Roussalis*, in which the majority stated:

It is not disputed that Respondent expressed its consent to arbitration in the BIT and that Claimant accepted Romania's offer to arbitrate. Contrary to Claimant however, Respondent considers that such consent included consent to arbitrate counterclaims. Whether it is so must be determined in the first place by reference to the dispute resolution clause contained in the BIT. The investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT.<sup>232</sup>

In dismissing jurisdiction over the counterclaim, the tribunal, in its majority, placed emphasis on the fact that the wording of the arbitration clause in the BIT, which provided that if '[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former', cannot be settled in an amicable way, 'the investor concerned *may submit* the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international

<sup>227</sup> Ben Hamida, fn. 174, at 269; Ben Hamida, 'L'Arbitrage transnational unilatéral: réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique' (Thèse pour le Doctorat en droit de l'Université Panthéon-Assas (Paris II), 24 June 2003), 178, at para. 280. Cf. Steingruber, fn. 55, at para. 14.21).

<sup>228</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, art. 19(1). Cf. American Law Institute, Restatement 2nd of the Law of Contracts § 95 (1981).

<sup>229</sup> Section 4.2 (on factual and juridical connexity between claims and counterclaims).

<sup>230</sup> See Section 3.2 (on arbitration without privity).

<sup>231</sup> Cf. Steingruber, fn. 55, at para. 14.21.

<sup>232</sup> *Roussalis v Romania*, fn. 82, Award, at para. 866.

arbitration'.<sup>233</sup> According to the tribunal, this language 'undoubtedly limit[s] jurisdiction to claims brought by investors about obligations of the host State. Accordingly the BIT does not provide for counterclaims to be introduced by the host State in relation to obligations of the investor'.<sup>234</sup>

In reasoning that reminds us of the link we made between the applicable law clause and the scope of the dispute settlement clause as concerns investor claims,<sup>235</sup> the tribunal also quoted from article 9(4) of the BIT which provided that '[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement [the BIT] and the applicable rules and principles of international law...'.<sup>236</sup> Making the same link, it then recalled:

870. Article 9(4) of the BIT further provides, in respect of the applicable law, that: 'The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement [the BIT] and the applicable rules and principles of international law...'.

871. As mentioned above, the BIT imposes no obligations on investors, only on contracting States. Therefore, where the BIT does specify that the applicable law is the BIT itself, counter-claims fall outside the tribunal's jurisdiction. Indeed, in order to extend the competence of a tribunal to a State counterclaim, 'the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction'.<sup>237</sup>

Reisman disagreed with the analysis of the majority on the basis, first, that the investor must be deemed to have consented to the bringing of counterclaims when instituting ICSID proceedings:

When the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue. It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 works to the benefit of both respondent state and investor.<sup>238</sup>

Reisman's second reason for allowing counterclaims recalls the beneficial effects of counterclaims: procedural economy and the better administration of justice:

In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal—which was, in fact, selected by the claimant—perforce directs the respondent state to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now

<sup>233</sup> *Roussalis v Romania*, at para. 868 (referring to article 9 of the Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, which entered into force on 23 May 1997 [emphasis in award]).

<sup>234</sup> *Roussalis v Romania*, at para. 869. Cf. B. Hanotiau, *Counterclaims in ICSID Arbitration*, Conference Presentation, Bali, March 2012, at para. 21, available at <<http://www.iareporter.com/downloads/20120703>> (last visited 9 July 2012) (referring to the narrow dispute settlement clause in article 9(1) of the Romania–Greece, Hanotiau—one of the arbitrators in *Roussalis*—explains: 'This is the scope of Romania's offer of consent. When Roussalis filed its ICSID request for arbitration, it accepted that offer of consent to arbitrate. Roussalis could have made a counter-offer expanding the scope of the arbitration or simply consented to arbitrate Romania's counterclaims once they were filed—but chose not to. Since Roussalis never consented to arbitrate disputes concerning its own obligations, it is the opinion of the commentators who approved the decision that the majority of the tribunal properly held that it had no jurisdiction over the counterclaims').

<sup>235</sup> See Section 3.2 (on arbitration without privity).

<sup>236</sup> *Roussalis v Romania*, fn. 82, Award, at para. 870 (referring to Lalive and Halonen, fn. 169, at para. 7.19). But see at para. 306 ('At the first session of the Arbitral Tribunal held on May 4, 2007, the Parties agreed that Romanian law would govern the substantive merits of the dispute and that the BIT would be treated as part of Romanian law').

<sup>237</sup> *Roussalis v Romania*, at para. 871.

<sup>238</sup> *Roussalis v Romania*, fn. 82, Declaration by M. Reisman.

constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.<sup>239</sup>

In light of our previous reasoning, however, it is suggested that such positive effects cannot overcome the jurisdictional hurdle of limited jurisdiction *ratione materiae*<sup>240</sup> combined, as in this case, with limited jurisdiction *ratione personae*.<sup>241</sup>

It should further be noted that while we agree with the reference the *Roussalis* majority tribunal made to the applicable law clause in support of its rejection of the counterclaim, this clause should not be determinative in the way suggested by Lalive and Halonen: ‘Where the BIT does not specify any applicable law, the default rule is that the *lex specialis* is the BIT itself, and counterclaims are likely to fall outside a tribunal’s jurisdiction.’<sup>242</sup> It is true that investment treaties with a narrow dispute settlement clause tend to include an applicable law clause referring solely to sources of an international law nature,<sup>243</sup> and such a clause may support a narrow construction of the dispute settlement clause. Yet, in our opinion, the latter should be determinative in deciding on the jurisdiction over counterclaims, not the other way around.

While it was not expressly stated, the exclusion of investor obligations from the dispute settlement clause in the relevant treaty also appears to have been a reason why the SCC Tribunal dismissed the counterclaim in *Amto v Ukraine* (2008), a case brought under the Energy Charter Treaty (ECT).<sup>244</sup> As to the substance of the counterclaim, the respondent stated that the claimant had ‘irresponsibly and insistently disseminated to the SCC Institute and to the Arbitral Tribunal untrue information about collusion between two state-owned entities, with the implication that Ukraine was involved. The Respondent considers that “such dissemination does not deviate very much from libel”’.<sup>245</sup> The tribunal first noted that ‘[t]he jurisdiction over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration’.<sup>246</sup> After recalling that that the Energy Charter Treaty provides for the application of the treaty itself and ‘the applicable rules and principles of international law’,<sup>247</sup> it dismissed the counterclaim for lack of basis in law: ‘The Respondent has not presented any basis in this applicable

<sup>239</sup> *Roussalis v Romania*. Cf. *Goetz v Burundi*, fn. 206, at para. 280. See also M.N. Bravin and A.B. Kaplan, ‘Arbitrating Closely Related Counterclaims at ICSID in the Wake of *Spyridon Roussalis v. Romania*’ TDM 4 (2012).

<sup>240</sup> *Roussalis v Romania*, Award, at para. 43 (article 9 of the Greece–Romania BIT refers to the settlement of ‘disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former’).

<sup>241</sup> *Roussalis v Romania*, Award, at para. 43 (article 9 of the Greece–Romania BIT states that ‘the investor concerned may submit the dispute [...] to international arbitration’). See also Section 4.1.2 (on potential claimants (jurisdiction *ratione personae*)).

<sup>242</sup> Lalive and Halonen, fn. 169, at para. 7.31.

<sup>243</sup> See Section 3.2 (on arbitration without privity). Indeed, the applicable law clause in the BIT involved in *Goetz v Burundi* refers to national law in addition to international law. *Goetz v Burundi*, fn. 209, at para. 149.

<sup>244</sup> *Amto v Ukraine*, fn. 193, Award.

<sup>245</sup> *Amto v Ukraine*, at para. 117.

<sup>246</sup> *Amto v Ukraine*, at para. 118.

<sup>247</sup> *Amto v Ukraine*. Cf. Energy Charter Treaty (1994), art. 26(6). See also Section 3.2 (on arbitration without privity).

law for a claim of non-material injury to reputation based on the allegations made before an Arbitral Tribunal. Accordingly, the Arbitral Tribunal finds that there is no basis for a counterclaim of this nature and it is accordingly dismissed.<sup>248</sup>

Also the decision in *Europe Cement* supports our conclusion that the narrow dispute settlement clause in the ECT constitutes an obstacle for host state counterclaims.<sup>249</sup> Before rejecting, seemingly on evidentiary grounds, what came ‘close to an ancillary claim under Article 47 of the Arbitration (Additional Facility) Rules’, the tribunal observed that the ‘difficult question’ of awarding moral damages also ‘would entail an analysis of the Tribunal’s jurisdiction to hear the claim’.<sup>250</sup>

#### *4.1.2. Potential claimants (*jurisdiction ratione personae*)*

The relevance of the scope of arbitrable claims to the acceptance or rejection of counterclaims is supported by a reference to the tribunal’s jurisdiction *ratione personae*, as stipulated in the treaty at hand. Whereas treaties with broader subject-matter jurisdiction may expressly provide that both the investor and the host state can present claims, the narrower treaties tend to limit the right to institute proceedings to the investor.

##### **4.1.2.1. The host state as potential claimant**

An example of a treaty of the broader kind is the United States-Estonia BIT at issue in *Alex Genin*, and which provides that if the dispute cannot be settled amicably, ‘the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration’, according to, *inter alia*, the ICSID Convention.<sup>251</sup> Notably, the BIT goes on to specify that ‘[o]nce the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent’.<sup>252</sup> Similar provisions are found in, for instance, the UK-Jamaica BIT,<sup>253</sup> the Iranian and the Peruvian Model BITs,<sup>254</sup> and the ASEAN Agreement for the Promotion and Protection of Investments.<sup>255</sup>

A reasonable interpretation of these offers that envisage the possibility of the host state constituting a potential claimant would be that the host state would also be able to present counterclaims. After all, a counterclaim is ‘to be treated by the arbitral tribunal essentially in the same manner as if it were an original claimant’s

<sup>248</sup> *Amto v Ukraine*, fn. 193, Award, at para. 118.

<sup>249</sup> *Europe Cement*, fn. 195, Award.

<sup>250</sup> *Europe Cement*, at para. 181. Cf. *Cementownia*, fn. 194, Award, at para. 170 (also an ECT case). Cf. P. Dumberry, *How to Remediate Moral Damages Suffered by a State*, Kluwer Arbitration Blog (3 December 2009).

<sup>251</sup> US-Estonia BIT, art. VI(3)(a).

<sup>252</sup> US-Estonia BIT, at art. VI(3)(b) (emphasis added). See also G. Laborde, ‘The Case for Host State Claims in Investment Arbitration’ (2010) 1(1) *J. Int’l Disp. Settlement* 97, 108 (‘[T]he majority of the BITs concluded by the United States include an integrationist clause that incorporates a firm offer to arbitrate conferring express standing to initiate arbitration upon the host State’).

<sup>253</sup> U.K.-Jamaica BIT, art. 9.

<sup>254</sup> Iranian Model BIT, art. 12(2) (‘In the event that the host Contracting Party and the investor(s) can not agree within six months from the date of notification of the claim by one party to the other, either of them may refer the dispute to the competent courts of the host Contracting Party or with due regard to their own laws and regulations to an arbitral tribunal of three members [...]’); Peru Model Agreement, art. 8.

<sup>255</sup> ASEAN Agreement: An Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, art. X(2), 15 December 1987.

demand'.<sup>256</sup> As argued by the investor in *SGS v Pakistan*, the host state and its home state, Switzerland, must have expressly contemplated that an ICSID tribunal could consider the host state's counterclaim because Article 9(3) of the BIT provides that 'each party may start the procedure'.<sup>257</sup>

#### **4.1.2.2. The investor as sole potential claimant**

Contrariwise, treaties that restrict the tribunal's subject-matter jurisdiction to host state obligations are likely to limit the right to institute proceedings to the investor solely. One example is the Energy Charter Treaty. Defining an arbitrable dispute as one 'concern[ing] an alleged breach of an obligation of the [host state] under Part III [of the Treaty]', it provides that 'the *Investor party to the dispute* may choose to submit it for resolution [by an arbitral tribunal]'.<sup>258</sup> Also the NAFTA does not envisage claims being initiated by host states: an investor of a party (on behalf of an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly) may submit to arbitration a claim that another party has breached (a) specified provision(s) of the NAFTA.<sup>259</sup>

If the inclusion of the host state as a potential claimant raises a presumption in favour of counterclaims, the question naturally arises whether a similar exclusion would give rise to a contrary presumption. On the one hand, one of the characteristics of a counterclaim is that the respondent might have brought it in a separate action and recovered judgment.<sup>260</sup> As these instruments do not envisage claims being brought by the host state, more express language in favour of counterclaims may therefore appear necessary.<sup>261</sup> In this respect, the Claims Settlement Declaration, establishing the Iran–United States Claims Tribunal is illustrative, as the drafters expressly included the possibility of the United States or Iran presenting counterclaims regardless of the otherwise 'one-way street' nature of the proceedings.<sup>262</sup>

On the other hand, it could be questioned whether this reference to the investor's locus standi was intended by the drafters to have this exclusionary effect with respect to

<sup>256</sup> UNCITRAL Secretariat, *Possible Future Work in the Area of International Commercial Arbitration*, 6 April 1999, A/CN.9/460, at para. 72. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, Declaration of Judge ad hoc Kreca, at 262 (Kreca objected to the court's characterization of the applicant's claim as the 'principal', rather than the 'initial' or 'original' claim).

<sup>257</sup> *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 109. Cf. Ben Hamida, fn. 174, at 270. See also Case No. B1 (Counterclaim), fn. 173, at para. 89 (a lack of an express clause in the Claims Settlement Declaration conferring the right to present counterclaims in interstate cases does not warrant the conclusion that such counterclaims are prohibited, 'since each Party could file claims against the other').

<sup>258</sup> See Energy Charter Treaty (1994), art. 26 (emphasis added). Contrariwise, it is open to both investors and host states to request amicable settlement. See also art. 26.

<sup>259</sup> See NAFTA (1994), arts 1116–1117. Cf. Malaysia-Ghana BIT, art. 7(3); Canada-South Africa BIT, art. XIII(2); cf. Laborde, fn. 252, at 107.

<sup>260</sup> See, e.g., Counterclaim, Recoupment and Setoff, 20 Am. Jur. 2d. § 120 (1965); H. Thirlway, 'Counterclaims before the International Court of Justice: The *Genocide Convention* and *Oil Platforms Decisions*' (1999) 12 *Leiden J. Int'l L.* 197, 202.

<sup>261</sup> Cf. J. Paulsson, 'Arbitration Without Privity' in *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (T.W. Wälde, ed., London, Kluwer Law International, 1996), 422, 422–3 ('This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant, and where the tables could not be turned; the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim').

<sup>262</sup> See Iran–United States Claims Settlement Declaration (1981), art. II(1). See also Case No. A/2, fn. 173, at II.B; *Gould Marketing, Inc. v Ministry of National Defense*, Award No. ITL 24–49–2, 27 July 1983, 3 Iran–U.S. C.T.R. 147, 151–2; Case No. B1 (Counterclaim), fn. 173, at para. 89; A. Asgarkhani, 'Compromise and Cooperation at the Iran–United States Claims Tribunal' (2003) 19(2) *Arb. Int'l* 149.

counterclaims. The emphasis on the investor's procedural right could rather be seen to underline the host state's willingness and unequivocal consent to arbitrate. Moreover, in practice, such treaties do not differ very much from those in which the host state may also institute proceedings, as the separate consent of the investor is always required.<sup>263</sup> In fact, whereas a narrow definition of investment disputes tends to dovetail with a limited locus standi, a broad definition of arbitrable claims does not always go hand in hand with a reference to the right of the host state to present claims against the investor in the sense of the US–Estonia BIT quoted earlier.<sup>264</sup> As Kantor notes:

The protections of the investor–state arbitration provisions in the [Draft Model U.S. BIT (2004)] are afforded only to ‘claimants,’ and the term ‘claimants’ is defined in Article 1 to cover only ‘investors of a Party.’ Accordingly, while an investor may initiate an arbitration claim against a host state under the BIT, that host state may not initiate claims against the investor under the investor–state arbitration provisions. The host state may, however, raise certain counterclaims if permitted under the arbitration rules applicable to the proceeding.<sup>265</sup>

This leads to the conclusion that whereas the sole reference to the investor's locus standi would not necessarily be conclusive with regard to the inadmissibility of counterclaims, the combined features of a limited jurisdiction *ratione personae* and a limited jurisdiction *ratione materiae* will have such effect.

In this context, one should note the observation by various scholars that the narrow type of instrument gives rise to a paradigm different from that of international commercial arbitration in general, in that it creates ‘une sorte d'instrument de contrôle du respect par les Etats de la légalité dans le domaine économique’ [a kind of instrument for ensuring compliance with law by states in the economic field].<sup>266</sup> A similar characterization is offered by Weiler and Wälde, who refer to this type of arbitration as ‘international quasi-judicial review of national regulatory action’ analogous to judicial review of administrative acts in national law.<sup>267</sup> Although it is open to discussion whether the bringing of counterclaims would be contrary to such object and purpose,<sup>268</sup> or stated differently, that the intention of the drafters was partly to exclude the possibility of consolidating closely related claims,<sup>269</sup> it cannot be denied that these characteristics do present an obstacle for host state counterclaims.<sup>270</sup>

<sup>263</sup> Cf. G. Burdeau, ‘Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États’ (1995) 1 *Revue de l'arbitrage* 3, at para. 28bis.

<sup>264</sup> See fn. 251–252.

<sup>265</sup> M. Kantor, ‘The New Draft Model U.S. BIT: Noteworthy Developments’ (2004) 21(4) *J. Int'l Arb.* 383, 387 (references omitted). See also Norway–Lithuania BIT, art. IX(2); Norway–Romania BIT, art. VIII(2); Burundi Model BIT, art. 8(1).

<sup>266</sup> Burdeau, fn. 263, at para. 29 (emphasis in original). See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>267</sup> T. Weiler and T.W. Wälde, ‘Investment Arbitration under the Energy Charter Treaty in the light of new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation’ TDM 1(1) (2004).

<sup>268</sup> For the possibility of the state to present counterclaims in administrative proceedings, see, e.g., German *Verwaltungsgerichtsordnung*, §89; *Robert B. Lara v US Secretary of the Interior*, 642 F. Supp. 458 (April 30, 1986).

<sup>269</sup> In fact, Weiler, Wälde, and Burdeau seem to envisage the possibility of counterclaims in ‘arbitration without privity’ situations, regardless of its focus on investor rights. See Weiler and Wälde, fn. 267; Burdeau, fn. 263, at para. 21. See also Paulsson, fn. 178, at 250, at fn. 32; Alvarez, fn. 224, at 412; F.O. Vicuña, ‘Foreign Investment Law: How Customary Is Custom?’ (2005) 99 *Am. Soc'y Int'l L. Proc.* 97.

<sup>270</sup> One may wish to note that a restriction of the tribunal's jurisdiction in this regard cannot be overcome by a reference to explicit provisions for counterclaims in the relevant arbitration rules. Cf. Case No. B1 (Counterclaim), fn. 173, at fn. 116 ([I]t seems doubtful that Article 19(3) of the

A different situation arises where the investment treaty provides for a limited jurisdiction *ratione materiae* and a broad jurisdiction *ratione personae*. This was the case in *Hamester*, in which the BIT provided as follows:

- (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Treaty in relation to an investment of the former shall as far as possible be settled amicably between the parties to the dispute.
- (2) If the dispute cannot be settled within six months of the date of written notification by one of the parties to the dispute, it shall be submitted for arbitration if either party to the dispute so requests.
- (3) Unless the parties agree otherwise, the aggrieved party shall have the right to refer the dispute to: (a) [ICSID] arbitration under the provisions of the [ICSID Convention].
- (4) When a national or company, as well as a Contracting Party believe that their rights have been violated, then the national or company's choice of procedures shall prevail.<sup>271</sup>

As noted by the ICSID Tribunal, ‘the scope of consent in Article 12(1) of the BIT is limited to disputes “concerning an obligation of [one Contracting Party] under this Treaty in relation to an investment of [a national or company of the other Contracting Party]”.’<sup>272</sup> Yet, noted the tribunal, this BIT with a restricted scope of covered disputes ‘recognises that the State party may be “aggrieved” and “shall have the right to refer the dispute to” arbitration (Article 12(3) and (4) of the BIT).’<sup>273</sup> Unfortunately, ‘in the absence of any submission on the nature of the Respondent’s counterclaim’, the tribunal did not have occasion to analyse whether the counterclaim was capable of falling within the parties’ scope of consent, in accordance with article 46 of the ICSID Convention.<sup>274</sup> On the one hand, one could argue that the limited jurisdiction *ratione materiae* trumps broad jurisdiction *ratione personae*. On the other hand, and this is the better argument, the *express* reference in the dispute settlement clause to the possibility that an aggrieved host state shall have the right to refer the dispute to arbitration is part and parcel of the offer of arbitration. When the investor accepts that offer, it also consents to the bringing of counterclaims by the host state and the tribunal will have jurisdiction over them.

#### *4.1.3. Express, tacit, and implied consent to counterclaims*

Investment treaties could explicitly provide for the bringing of host state counterclaims, and the consent requirement would be satisfied by virtue of the investor’s acceptance of the offer in the treaty that so stipulates. This is the case for the COMESA Investment

UNCITRAL Rules [on counterclaims] could constitute a basis for the Tribunal’s jurisdiction over official counterclaims’. But see Alvarez, fn. 224, at 410 (Alvarez suggests that counterclaims could be permitted ‘if provided for in the arbitration rules selected by the investor’).

<sup>271</sup> *Hamester v Ghana*, fn. 36, Award, at para. 88 (referring to the Germany–Ghana BIT, art. 12, which in article 12(4) states in the original language: ‘Fühlen sich sowohl ein Staatsangehöriger oder eine Gesellschaft als auch eine Vertragspartei in ihrem Recht verletzt, so hat die Wahl des Staatsangehörigen oder der Gesellschaft hinsichtlich des Verfahrens zur Streitbeilegung Vorrang’).

<sup>272</sup> *Hamester v Ghana*, at para. 353.

<sup>273</sup> *Hamester v Ghana*, at para. 354.

<sup>274</sup> *Hamester v Ghana*, at para. 355.

Area Agreement, which in article 28(9) provides: ‘A Member State against whom a claim is brought by a COMESA investor [...] may assert as a [...] counterclaim [...] that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures [...].’<sup>275</sup>

There may also be jurisdiction by virtue of the investor’s express consent to the counterclaim at hand.<sup>276</sup> In *SGS v Pakistan*, for instance, the investor contended that the host state was ‘fully entitled to file a counterclaim’.<sup>277</sup> Similarly, in *SGS v Philippines*, the host state had alleged fraud and overcharging on the part of the investor. Whilst denying these allegations, the investor nevertheless ‘appeared to accept that they could be considered, if necessary, as a counterclaim if the Respondent so wished’.<sup>278</sup> In these cases, the host states did not so wish, preferring to have such counterclaims decided in other fora.<sup>279</sup> If both parties would consent, however, there would be jurisdiction based on a corresponding expansion of the arbitration agreement;<sup>280</sup> although, in the *SGS* cases, the agreement—originating from the BIT—was arguably broad enough in and of itself to encompass the counterclaim at hand.

Similarly, it is also possible for the investor to *tacitly* consent to a counterclaim by not presenting any jurisdictional objections.<sup>281</sup> As provided in the Arbitration Rules of the Netherlands Arbitration Institute, ‘[a] counterclaim is admissible [...] if the [...] arbitration agreement is expressly or tacitly made to apply to it by the parties.’<sup>282</sup> In view of the lack of reference to any objections by the investor, such tacit consent may have been present in *Alex Genin*.<sup>283</sup>

<sup>275</sup> COMESA [Common Market for Eastern and Southern Africa] Investment Area Agreement (2007), art. 28(9). Cf. art. 13 (‘COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made’). See also IISD [International Institute for Sustainable Development] Model Agreement on International Investment for Sustainable Development (as revised in April 2006), art. 18[E] (‘A host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement’). Cf. IISD Model Agreement, at Part 3 (‘Obligations and Duties of Investors and Investments’). See also UNCTAD, fn. 189.

<sup>276</sup> Cf. Ben Hamida, fn. 174, at 266.

<sup>277</sup> *SGS v Pakistan*, fn. 207, Procedural Order, 16 October 2002, 18(1) *ICSID Rev.-FILJ* 293, 303 (2003). See also *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 108.

<sup>278</sup> *SGS v Philippines*, fn. 98, Decision on Jurisdiction, at para. 40.

<sup>279</sup> See *SGS v Philippines*, at para. 17; *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 48.

<sup>280</sup> Cf. *Klöckner v Cameroon*, fn. 177, Award, at p. 4 (the subject-matter of the dispute may be extended ‘at any time, even in written submissions to the Tribunal (“forum prorogatum”) provided that this is met by the consent of the parties’); Berger, fn. 177, at § V(a)(i); J.L. Simpson and H. Fox, *International Arbitration: Law and Practice* (London, Stevens, 1959), 49; A.D. Renteln, ‘Encountering Counterclaims’ (1987) 15(2–3) *Denver J. Int’l L. & Pol’y* 379, 391.

<sup>281</sup> See, e.g., Berger, fn. 181, at § V(a)(i). In this respect, an analogy can be made with the doctrine of *forum prorogatum*, where the consent of one party is consolidated after the institution of proceedings. See, e.g., Cheng, fn. 1, at 262–6; S. Rosenne, ‘Counter-Claims in the International Court of Justice Revisited’ in *Liber Amicorum ‘In memoriam’ of Judge José María Ruda* (C.A. Armas Barea et al., eds, The Hague, Kluwer Law International, 2000), 457, 460, 465–6.

<sup>282</sup> Arbitration Rules of the Netherlands Arbitration Institute (2001), art. 25(2). See also UNCITRAL Arbitration Rules (2010), art. 21(3) (‘A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in [...] the reply to the counter-claim’); ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 41(1); ICSID Additional Facility Rules (2006), art. 45(2).

<sup>283</sup> See *Alex Genin v Estonia*, fn. 155, Award, at para. 376. See also *Europe Cement*, fn. 195, Award, at para. 181 (the tribunal did not ‘consider that exceptional circumstances such as physical duress are present in this case to justify moral damages’). By way of comparison, the investor in *Saluka v Czech Republic* expressly objected to the counterclaim. *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic’s Counterclaim, at para. 13. Cf. *Klöckner v Cameroon*, fn. 177,

One of the arguments by the host state in *Roussalis* was that the investor had consented to the arbitration of Romania's counterclaims.<sup>284</sup> More specifically, Romania contended that such consent was manifested in a 'cooling off' letter sent to the host state as a predicate to commencing the arbitration at issue.<sup>285</sup> The respondent also referred to a statement the investor submitted to a Romanian court contesting its jurisdiction on the ground that the dispute must be resolved in ICSID arbitration, next to the fact that it urged Romania to terminate national courts proceedings on that same basis.<sup>286</sup> While in *Roussalis* these arguments did not satisfy the tribunal that the investor had consented to the bringing of Romania's counterclaims, other fact-patterns may lead to a different outcome. As Hanotiu, one of the arbitrators in *Roussalis*, stated on the topic of counterclaims at a subsequent conference:

Commentators [...] seem to agree that even if, according to Article 25 of the Washington Convention, consent has to be given in writing, it need not be express, it might be implied, for example from a contract between the parties or from the request for arbitration or from a submission in the context of the proceedings.<sup>287</sup>

At any rate, and as exemplified by these cases and as previously mentioned, it may in fact be in the investor's interest that the arbitral tribunal resolves the counterclaim. Since a refusal may lead the host state to seek relief in its own domestic courts or another, contractually agreed arbitration forum, not only is there a possibility of inconsistent decisions—the investor will also have the advantage of a neutral forum.<sup>288</sup> Additionally, the acceptance of counterclaims may arguably render a host state more willing to arbitrate, so that less time is spent on costly jurisdictional battles.

Apart from express and tacit consent, one may ask whether the investor's consent to counterclaims could be *implied* from the very act of bringing a claim. In this respect, an analogy might possibly be drawn with the field of sovereign and diplomatic immunity. In *Banco Nacional de Cuba v Sabbatino* (1964), the US Supreme Court held that even though a state would normally be immune from suit by private parties in foreign courts, 'fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it'.<sup>289</sup> In other words, the fact that a state or diplomat presents a claim estops it from benefiting from its immunity with respect to counterclaims.

While it has been shown that investors might similarly be 'immune' to claims by a claimant host state, and that in many instances, allowing the host state to present counterclaims could be seen as adding a degree of 'fairness' to the proceedings, there are important differences between the decision of a domestic court to allow a counter-claim to 'cut into the doctrine of immunity'<sup>290</sup> and an arbitral tribunal's decision to

Decision on Annulment, 3 May 1985 (P. Lalive, A.S. El-Kosheri, I. Seidl-Hohenveldern, committee members), para. 5.

<sup>284</sup> *Roussalis v Romania*, fn. 82, at para. 775.

<sup>285</sup> *Roussalis v Romania*, at para. 776.

<sup>286</sup> *Roussalis v Romania*, at paras 778–779.

<sup>287</sup> Hanotiu, fn. 234, at fn. 1.

<sup>288</sup> See, e.g., Ben Hamida, fn. 227, 'L'Arbitrage transnational unilateral' at 177, at para. 280; Karrer, fn. 181, at 177.

<sup>289</sup> *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 438 (1964). See also US Foreign Immunities Act, 28 U.S.C.A. 1607 (b); European Convention on State Immunity, art. 1(2)(a); R. B. Looper, 'Counterclaims Against a Foreign Sovereign Plaintiff' (1956) 50 Am. J. Int'l L. 647 (1956); Vienna Convention on Diplomatic Relations (1961), art. 32(3).

<sup>290</sup> *Nat'l City Bank of New York v Republic of China*, 348 U.S. 356, 364 (1955) ('It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity').

exercise jurisdiction over a counterclaim that is not covered by the arbitration agreement. The doctrine of sovereign and diplomatic immunity is namely a reason for a court not to exercise the jurisdiction that it *already has* over a defendant state or diplomat;<sup>291</sup> whereas for an arbitral tribunal, the investor's consent is the very basis for its jurisdiction in the first place. This distinction is buttressed by a reference to article 46 of the ICSID Convention, which lists as a condition precedent for the acceptance of counterclaims that 'they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre'.<sup>292</sup> If the bringing of a claim could in and of itself be construed as consent to counterclaims, this clause would lose its meaning.<sup>293</sup> Accordingly, and in line with the maxim *interpretatio fienda est ut res magis valeat quam pereat*,<sup>294</sup> the fact that the investor presents a claim ought not to be construed to create, in and of itself, the consent necessary for the host state to present counterclaims against the investor. In the words of Hanotiau:

Article 46 of the ICSID Convention does not create an unfettered right to submit closely-related counterclaims. Nor does it appear to contain a '*consent component*'. Rather, Article 46 presupposes consent. A tribunal '*shall*' entertain counterclaims '*provided that they are within the scope of consent to the parties*'. The consent of the parties is the condition precedent for the operation of this provision. If this condition precedent is not met, Article 46 has no mandatory character.<sup>295</sup>

#### 4.1.4. Express exclusions of counterclaims

While counterclaims should be accepted in case the investor expressly or tacitly consents thereto, it is clear that an express exclusion of counterclaims in the host state's offer would be an obstacle to jurisdiction in this respect. This caveat is mentioned in the ICSID Convention,<sup>296</sup> but should also be deemed implicit under other arbitration rules, as the acceptance of counterclaims in that case would be contrary to the parties' arbitration agreement. Various investment treaties do refer to such exclusions. As provided in the NAFTA, for example, 'a Party shall not assert, as a defense, counter-claim, right of set off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.'<sup>297</sup> Accordingly, a counterclaim

<sup>291</sup> See, e.g., I. Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980) 167 *Recueil des Cours* 113 (Sinclair defines immunity 'as the correlative of a duty imposed upon the territorial State to refrain from exercising its jurisdiction over a foreign State' and notes that immunity 'operates by way of exception to the dominating principle of territorial jurisdiction'. Stated differently, 'one does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified.' Rather, '[o]ne starts from an assumption of non-immunity, qualified by reference to the functional need [...] to protect the sovereign rights of foreign States operating or present in the territory').

<sup>292</sup> ICSID Convention (1965), art. 46.

<sup>293</sup> For a similar interpretation with regard to the ICJ Rules of Court, see Thirlway, fn. 260, at 204 (Thirlway concludes that 'advance acceptance of the possibility of counter-claims' is 'difficult to square with the provision as it stands').

<sup>294</sup> See, e.g., H.C. Black et al, *Black's Law Dictionary* (St Paul, MN, West Group, 1999), 1697 (that the matter may have effect rather than fail).

<sup>295</sup> Hanotiau, fn. 234, at para. 22 (emphasis in original).

<sup>296</sup> See ICSID Convention (1965), art. 46 ('[e]xcept as the parties otherwise agree [...]']).

<sup>297</sup> NAFTA (1994), art. 1136(2). See also US Model BIT (2012) art. 28(7); Energy Charter Treaty (1994), art. 15(3). It may be noted that earlier NAFTA drafts contained a broader reference to counterclaims: 'The Tribunal may determine any incidental or additional claims or counterclaims arising directly out of the acts or measures constituting the alleged breach of this Chapter, except as the parties to the investment dispute otherwise agree [...]' See, e.g., Draft version of NAFTA of 13 May 1992, art. XX07(10). See also Antonopoulos, fn. 172, at 13 ('Whether counterclaims may be brought

of this nature would not fall within the arbitration agreement, and would therefore be excluded from the tribunal's jurisdiction.

It has been suggested that where the relevant instrument excludes a specified category of counterclaims, it may be presumed that other counterclaims are allowed, at least to the extent to which the connexity requirement is satisfied.<sup>298</sup> Although such *e contrario* argumentation<sup>299</sup> has some appeal and might constitute a factor for the tribunal to consider, it is doubtful whether it—in and of itself—could counterbalance a lack of any inclusion of investor obligations in the arbitration agreement.

#### *4.1.5. Forum selection agreements*

The situation may arise in which the parties have agreed to settle a particular aspect of their dispute in a different forum.<sup>300</sup> There is little question nowadays that such forum selection agreements should generally be enforced, *inter alia*, by virtue of the *pacta sunt servanda* principle.<sup>301</sup> Consequently, although a broad arbitration offer may grant a tribunal jurisdiction over a contractual claim and counterclaim, it would appear that they are both inadmissible where the contract at hand stipulates that contractual disputes shall be settled in another forum.<sup>302</sup>

The same tribunal, however, may retain jurisdiction over the investor's treaty claim, for instance an alleged expropriation.<sup>303</sup> In case the line between the contractual and the treaty characteristics of the investor's claim is sufficiently blurred, it could be argued that the tribunal, in the interest of judicial economy, should nevertheless retain jurisdiction over a host state counterclaim based in contract.<sup>304</sup> This would especially seem to be the case where the investor has requested a stay of the proceedings

or not by either of the parties is a matter, first, of the terms of the *compromis*. If it expressly excludes the making of counterclaims, then the issue is settled there').

<sup>298</sup> See, e.g., Ben Hamida, fn. 227, L'Arbitrage transnational unilateral at 177–8, at para. 280. Cf. Alvarez, fn. 224, at 410.

<sup>299</sup> Also referred to as the maxim *expressio unius est exclusion alterius*, 'negative implication', or 'implied exclusion'. For a critical analysis of the maxim, see R.N. Graham, 'In Defence of Maxims' (2001) 22(1) *Statute Law Review* 45. See also Case No. B1 (Counterclaim), fn. 173, at para. 82 (the maxim 'does not constitute a mandatory directive applicable in all cases where a treaty is silent on a subject: it merely reflects a common sense principle applicable in many, but not all, situations').

<sup>300</sup> See Section 3.2 (on arbitration without privity).

<sup>301</sup> See, e.g., Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, Oxford University Press, 2003), 153 (arguing that the presumptive validity of choice of forum agreements constitutes a general principle of law); Douglas, fn. 31, 'Hybrid Foundations', at 248; see also at 259–60.

<sup>302</sup> See *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim, at paras 52–57 (the tribunal dismissed the contractual counterclaims on the basis that the contract at issue contained a clause providing for arbitration pursuant to the UNCITRAL Arbitration Rules in Zurich). With regard to set-off defences, see Swiss Rules of International Arbitration (2012), art. 21(5) ('The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which this defence is said to arise [...] falls within the scope of another arbitration agreement or forum-selection clause').

<sup>303</sup> See, e.g., *Vivendi v Argentina*, fn. 36, Decision on Annulment, at para. 98.

<sup>304</sup> See Karrer, fn. 181, at 177 (arguing that although 'simple contract interpretation would first suggest that if parties provide for different [...] choice-of-forum agreements for different obligations [...] if the parties subsequently are in arbitration or litigation, the jurisdiction of that arbitral tribunal or state court should extend to the counterclaim all the same'). See also Paulsson, fn. 178, at 250, at fn. 32 (arguing that an investor's 'disregard' of a pre-existing arbitration clause pursuant to which the host state could have brought a claim 'would intuitively weigh in favor of counterclaims' under the Energy Charter Treaty); Alvarez, fn. 224, at 412 (Alvarez construes NAFTA's waiver requirement (article 1121) in favour of allowing host state counterclaims, regardless of whether they are subject to a forum selection clause).

simultaneously taking place in this other agreed-upon forum. As pointed out in *SGS v Pakistan*,

It would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of the international proceedings, if such international proceedings could not encompass the Respondent's claim.<sup>305</sup>

Still, a consolidation might appear to conflict with the right of the investor to have its separate contract claim heard by the designated forum. Consequently, the better solution would be for the parties to agree in concert to rescind the forum selection clause so that the tribunal would be competent to hear both the contract and treaty claims.<sup>306</sup> This would ensure that both the investor and the host state get their 'day in court', and it would also restrict the possibility of double recovery.<sup>307</sup>

#### 4.2. Factual and juridical connexity between claims and counterclaims

Apart from the fact that the counterclaim must fall within the scope of the arbitration agreement, and that it should not be subject to a different forum selection clause, it must also be connected to the investor's claim. As stated by the tribunal in *Saluka*: it is necessary that counterclaims 'satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a legitimate counterclaim must have a close connexion with the primary claim to which it is a response'.<sup>308</sup> As with forum selection agreements, connexity is a question of admissibility rather than jurisdiction.<sup>309</sup>

We noted that the connexity requirement is intrinsically linked to the two main objectives for allowing counterclaims: procedural economy and the better administration of justice.<sup>310</sup> As such, it serves an equitable and practical filtering function. In

<sup>305</sup> *SGS v Pakistan*, fn. 207, Procedural Order, 18–1 *ICSID Rev.-FILJ* 293, 303 (2003). Cf. *Anaconda-Iran, Inc. v the Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, Interlocutory Award, 10 December 1986, at para. 106.

<sup>306</sup> Cf. Karrer, fn. 181, at 178 ('All it takes is that [the parties] both agree in this sense, which they can do, in my view, by conclusive action, which may be recorded in writing for those who still cling to the notion that an arbitration agreement must be in writing'). See also *France Telecom v Republic of Lebanon*, unpublished award rendered in Switzerland, pursuant to the UNCITRAL Arbitration Rules on 22 February 2005 (B. Audit, A. Akl, M. Lalonde, arbs), referred to in Swiss Federal Tribunal Decision I, 10 November 2005, at Part A (the parties agreed to rescind the forum selection clause and to grant the tribunal general jurisdiction to decide both the contractual and the BIT claims); *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 161.

<sup>307</sup> On the rule against double recovery, see, e.g., K. Yannaca-Small, 'Parallel Proceedings' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 1008, 1011–12.

<sup>308</sup> *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counter-claim, at para. 61. See also at paras 65–75 (for a survey of other cases discussing the connexity requirement); *Amto v Ukraine*, fn. 193, Award; *Paushok v Mongolia*, fn. 201, Award on Jurisdiction and Liability, at para. 693; *Goetz v Burundi*, fn. 206, at paras 273, 275, 282–285. See also Antonopoulos, fn. 172, at 2 ('Unlike municipal law, connection is compulsory in international litigation because of the consensual nature of the jurisdiction of the Court and arbitral tribunals and, secondly, of the fact of specific class of dispute resolved by a number of courts and tribunals').

<sup>309</sup> See Schreuer et al., fn. 225, at 751, para. 73; S. Rosenne, 'The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court' (2001) 14 *Leiden J. Int'l L.* 77, 85; Rosenne, fn. 281, at 458.

<sup>310</sup> See fn. 174. Cf. Simpson and; Fox, fn. 280, at 175–6 (the PCIJ 'recognises direct connection between application and counterclaim, where both are based on the same facts or incidents, or where

the words of the International Court of Justice, the respondent cannot use a counter-claim to

[...] impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice; and [...] it is for that reason that [...] the Rules of Court requires [inter alia] 'that it is directly connected with the subject-matter of the claim of the other party.'<sup>311</sup>

In this light, it seems reasonable to conclude that connexity would not only be required when explicitly provided for in the relevant arbitration rules and laws,<sup>312</sup> but also, for instance, under the UNCITRAL Model Law and the UNCITRAL Arbitration Rules (2010).<sup>313</sup>

In view of the non-jurisdictional nature of connexity, the twin goals of allowing counterclaims also suggest that arbitral tribunals enjoy a certain degree of flexibility in assessing whether the facts of each particular case would warrant consolidation of the claims at hand.<sup>314</sup> In carrying out such assessment, tribunals are guided by the following two considerations.

#### *4.2.1. Factual connexity*

First, and related to the aspect of judicial economy, there is general agreement that the claim and counterclaim must be *factually* linked. This characteristic has the advantage of allowing the tribunal to gain a more complete overview of the various facets of the dispute at hand;<sup>315</sup> and, at the same time it avoids duplication of effort by a second tribunal examining the same evidence. As explained by the ICSID Secretariat, the admissibility of a counterclaim under the ICSID Convention depends on the extent to which 'the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the

the legal issues raised by the counterclaim are so close to those involved in the application that their determination, while not strictly necessary, is convenient both logically and in the interests of the justice of the case').

<sup>311</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at para. 31. See also *Case Concerning Oil Platforms*, fn. 6, Counter-Claim, Order of 10 March [1998] ICJ Rep. 190, para. 33; *Case Concerning Armed Activities on the Territory of the Congo*, fn. 174, Counter-Claims Order, at para. 35. Cf. Thirlway, fn. 260, at 215–16.

<sup>312</sup> See, e.g., ICSID Convention (1965), art. 46.

<sup>313</sup> Cf. B. Larschan and G. Mirfendereski, 'The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State' (1986–7)15(1) *Denver J. Int'l L. & Pol'y* 11, 35 (the authors interpret the general rules of international law to provide that 'a counterclaim is admissible only when it arises out of the same subject matter as that involved in the principal claim'). In fact, as early as the nineteenth century, international law was held to require counterclaims to relate to the initial claim. See also at 19. See also Case No. B1 (Counter-claim), fn. 173, at fn. 118 (interstate counterclaims must arise 'out of the contractual arrangements forming the subject matter of the main claim'). But see UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9–13 February 2009), A/CN.9/669, para. 30 (the group discarded the suggestion requiring a 'sufficient link' between the counterclaim and the main claim: 'it was viewed as being too restrictive'); Alvarez, fn. 224, at 412 (Alvarez states that the lack of reference in the ICSID Additional Facility Rules that the counterclaim arise directly out of the subject matter of the dispute 'could be argued to provide a broader scope of counterclaims').

<sup>314</sup> If there is connexity, however, the consolidation of claims by ICSID tribunals appears to be compulsory. See Summary Proceedings of the Legal Committee meeting, 7 December 1964, SID/LC/SR/15, reported in Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-2, at p. 811.

<sup>315</sup> Cf. Renteln, fn. 280, at 380.

dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter'.<sup>316</sup>

Since arbitrators have often left the connexity issue unaddressed,<sup>317</sup> one may in this context seek additional guidance from the jurisprudence of the International Court of Justice, whose Rules of Court contain a definition of counterclaims almost identical to that of the ICSID Convention, namely that they must be 'directly connected with the subject-matter' of the initial claim.<sup>318</sup> In applying this criterion, the Court has found it significant that the facts on which the parties rely form part of the 'same factual complex', and, more specifically, that they are alleged to have occurred on the same territory during the same period; that they are of the 'same nature'; and that the respondent relies on certain identical facts in order both to refute the allegations of the claimant and to obtain judgment against it.<sup>319</sup>

#### 4.2.2. Juridical connexity

The second consideration for tribunals is *juridical* connexity. As held by the ICJ in the *Armed Activities* case: 'as a general rule, the existence of a direct connection between the counter-claim and the principal claim must be assessed both in fact *and in law*'.<sup>320</sup> Such connexity would seem to be satisfied when the claim and counterclaim arise out of the same contract. This is because the parties' rights and obligations would generally be interpreted by reference to the same—national—legal order, which would govern the contract as a whole.

Juridical connexity is more problematic when the investor's claim concerns an alleged treaty violation. This relates to the fact that, as a rule, international law does not impose obligations on private parties.<sup>321</sup> The host state must therefore base its counterclaim in national law, such as a breach of contract. In that case, not only will the nature of the claims be different since the treaty claim, e.g., an alleged failure to accord the investment 'full protection and security', would be non-contractual in nature; the tribunal would also be applying norms from different legal orders. The reason why this might constitute an obstacle to the admissibility of counterclaims is linked to the second reason for permitting counterclaims: the better administration of justice, and more specifically, the avoidance of conflicting decisions. Whereas this would clearly be a concern for contractual claims and counterclaims, it is not necessarily so for treaty claims versus contractual counterclaims. As pointed out by the ad hoc committee in *Vivendi*, '[a] state may breach a treaty without breaching a contract, and *vice versa*, and

<sup>316</sup> ICSID Secretariat, Explanatory Report, Note B(a) to Arbitration Rule 40 of 1968, 1 ICSID Rep.

<sup>317</sup> In the context of ICSID, see Schreuer et al., fn. 225, at 752, para. 79.

<sup>318</sup> Rules of Court of the International Court of Justice, art. 80(1).

<sup>319</sup> *Case Concerning Armed Activities on the Territory of the Congo*, fn. 174, Counter-Claims Order, at para. 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at para. 34; *Case Concerning Oil Platforms*, fn. 311, Counter-Claim Order, at para. 138; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Order of 30 June 1999; *Asylum Case (Columbia/Peru)*, Judgment, 20 November, ICJ Rep. 1950, pp. 280–1.

<sup>320</sup> *Case Concerning Armed Activities on the Territory of the Congo*, fn. 174, Counter-Claims Order, at para. 36 (emphasis added). See also at paras 38, 40; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at paras 33, 35; *Case Concerning Oil Platforms*, fn. 311, Counter-Claim Order, at para. 138.

<sup>321</sup> See generally Chapter 5, Section 2.3.2 (on non-contractual claims).

this is certainly true of these provisions of the BIT.<sup>322</sup> Thus, not only would the reasons for allowing the counterclaim be less cogent; as cautioned by Judge Oda in the ICJ *Oil Platforms* case (1998), too broad a definition of counterclaims may lead to a situation in which ‘we put what may have originally been somewhat distinct matters into one melting-pot without making a careful examination of the essential character of [the] claim[s].<sup>323</sup>

The question arises whether there is juridical asymmetry in the case of so-called ‘umbrella’ or ‘sanctity of contract’ clauses inserted in a large number of investment treaties; and which—in various terms—oblige the host state to observe commitments entered into with respect to investments.<sup>324</sup> On the one hand, it could be argued that the international nature of the investor’s umbrella claim creates an obstacle to the admissibility of the host state contractual claim based in national law. As noted by Hoffman, ‘[t]he umbrella clause [...] only creates an obligation of the host state, not the investor.’<sup>325</sup> On the other hand, the fact that the parties’ rights and obligations on the level of the contractual relationship would be governed by the same—national—legal order, supports admissibility, particularly when considering that national and international practice suggests that juridical connexity ought to be construed more as a factor for the tribunal to take into account, rather than a prerequisite as such. As noted by Judge Higgins in the *Oil Platforms* case,

In both civil and common law domestic systems, as in the Rules of the Court, a defendant seeking to bring a counter-claim must show that the Court has jurisdiction to pronounce upon them. But it is not essential that the basis of jurisdiction in the claim and in the counter-claim be identical. It is sufficient that there is jurisdiction. (Indeed, were it otherwise, counter-claims in, for example, tort could never be brought, as they routinely are, to actions initiated in contract.)<sup>326</sup>

A similar observation was made in the *Armed Activities Case* (2001): ‘[A]s the jurisprudence of the Court reflects, counter-claims do not have to rely on identical instruments to meet the “connection” test of Article 80 [of the ICJ Rules].’<sup>327</sup> Thus, although connexity should generally be assessed by reference both to facts *and* law, it appears that tribunals enjoy sufficient flexibility to enable them to conclude in favour of admissibility where juridical connexity is lacking but where consolidation of the claim and counterclaim would better administer justice, due to, e.g., strong factual connexity.

<sup>322</sup> *Vivendi v Argentina*, fn. 36, Decision on Annulment, at para. 95. See also *SGS v Pakistan*, fn. 30, Decision on Jurisdiction, at para. 147. Cf. Douglas, fn. 31, ‘Hybrid Foundations’, at 267–74 (Douglas refers to ‘asymmetrical jurisdictional conflicts’).

<sup>323</sup> *Case Concerning Oil Platforms*, fn. 311, Counter-Claim Order, Separate Opinion of Judge Oda, at para. 8.

<sup>324</sup> See generally Chapter 6, Section 3.1.2 (on ‘umbrella’ clauses); Chapter 1, Section 1 (on motivations for the study). Cf. J. Gill et al., ‘Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases’ (2004) 21(5) *J. Int'l Arb.* 397, 412.

<sup>325</sup> Hoffmann, fn. 212, at 10.

<sup>326</sup> *Case Concerning Oil Platforms*, fn. 311, Counter-Claim Order, Separate Opinion of Judge Higgins. See also H.J. Snijders et al., *Nederlands burgerlijk procesrecht* (2007) (nr. 171) at 185.

<sup>327</sup> *Case Concerning Armed Activities on the Territory of the Congo*, fn. 174, Counter-Claims Order, at para. 326. See also Declaration of Judge ad hoc Verhoeven ([T]he principal claim and the counter-claim are independent of one other, which necessarily implies that they need [not] have [...] the same legal basis); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, Declaration of Judge ad hoc Kreca, at 268 (‘One thing cannot have a connection with itself for in that case it would not be a separate thing, but just a relationship between things’).

From the foregoing, it seems that contractual counterclaims could be admissible against both contractual claims and treaty claims.<sup>328</sup> Another category that remains to be addressed are counterclaims in tort against either a contractual claim or a treaty claim, on the basis, for instance, that workers have been treated in contravention of certain labour or human rights standards or that the investor has caused environmental damage, as was alleged in *Paushok*.<sup>329</sup> Generally, and in light of the suggestion that juridical connexity is not required *per se*, this is not impossible, assuming that there is strong factual connexity.<sup>330</sup>

Still, an important caveat must be added that relates to the definition in the applicable treaty of arbitrable disputes. Relying on article 8 of the Czech–Netherlands Treaty in issue, the tribunal in *Saluka* held that for a counterclaim to fall within its jurisdiction, it must be one ‘concerning an investment’.<sup>331</sup> Jurisdiction over counter-claims has also been denied by the Iran–United States Claims Tribunal, interpreting the Claims Settlement Declaration to exclude counterclaims that arise by operation of law rather than from breach of the contract or transaction that constitutes the basis for the applicant’s claim.<sup>332</sup> As the tribunal ruled in *Harris International Telecommunications, Inc. v Iran* (1987):

Previous decisions of the Tribunal interpreting Article II(1) of the Claims Settlement Declaration have clarified that the Tribunal has no jurisdiction over counterclaims for social security premiums that are based on municipal laws rather than on the contract which forms the basis of the claims. Article 2.26 of the Contract in this Case stipulates that the Claimant is responsible for ‘Payment of all taxes, charges, fees and Government charges relating to this Contract and contractor’s personnel and his Contractors *outside* of Iran’ (emphasis added). The Contract does not provide for any obligation of the Claimant to pay social security premiums in Iran. Any such obligation can therefore only stem from an application of Iranian law, which is also the legal basis

<sup>328</sup> A host state could, for instance, base its contractual counterclaim on grievances similar to those of Mexico in *Azinian v Mexico*, fn. 139, Award, at paras 21, 35, 104–105 (alleging misrepresentations and failure of performance on the part of the investor). The counterclaim could also arise out of a different contract where the contracts form part of the same transaction. See, e.g., *Klöckner v Cameroon*, fn. 177, Award; Decision on Annulment, fn. 283, Decision on Annulment, 2 ICSID Rep. 95, 98 (1994).

<sup>329</sup> Cf. *Paushok v Mongolia*, fn. 201, Award on Jurisdiction and Liability, at para. 678. See also Lalive and Halonen, fn. 169, at para. 7.42; Ben Hamida, fn. 174, at 262.

<sup>330</sup> The counterclaim brought by Estonia in *Alex Genin*, and discussed by the tribunal on the merits, was based on an alleged violation of Estonian banking law. See *Alex Genin v Estonia*, fn. 155, Award, at para. 199. But see at fn. 101 (the tribunal questioned whether the respondent was the proper party to raise the particular counterclaim).

<sup>331</sup> *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic’s Counter-claim, at para. 60. Cf. Douglas, fn. 31, *The International Law of Investment Claims*, at 260 *et seq.* (on ‘[t]he requisite nexus between the counterclaim and the investment’). See also Chapter 6, Section 3.2.2 (on the supervening role of national law).

<sup>332</sup> See, e.g., C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998), 100–101 (and the cases cited therein); A. Avanessian, *Iran–United States Claims Tribunal in Action* (London, Graham & Trotman/Martinus Nijhoff, 1993), 58–61; *American Bell International, Inc. v The Government of the Islamic Republic of Iran, et al.*, Interlocutory Award No. ITL 41–48–3, 11 June 1984, 6 Iran–U.S. C.T.R. 74, Sec. (ii), at 83–4 (tribunal dismissed for lack of jurisdiction the respondent’s counterclaims alleging violations of Iranian penal laws or tortious conduct against the claimant’s claim based in contract). But see G. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford, Clarendon Press, 1996), 117–18 (noting that when claims are based on the taking or deprivation of property, the tribunal has, when valuing the property on a dissolution or asset value basis, taken into account relevant tax liabilities accrued at the date of taking or deprivation).

on which the Respondent itself bases this Counterclaim. Thus, the Counterclaim for social security premiums and related penalties must be dismissed.<sup>333</sup>

Indonesia's tax fraud claim met a similar fate in *Amco Asia*. As noted by the second ICSID Tribunal, the counterclaim on tax fraud arose out of the application of 'general law' to 'persons who are within the reach of the host State's jurisdiction', and not 'directly out of [the] investment' as required by article 25(1) of the ICSID Convention. Accordingly, the counterclaim was held to be beyond its competence *ratione materiae*.<sup>334</sup>

In light of this precedent, it was arguably open to the tribunal in *Saluka*, i.e., without referring to the requirement of connexity, to dismiss the non-contractual counterclaim for lack of jurisdiction on the basis that it did not concern an investment as required by article 8 of the Treaty but rather the alleged non-compliance of the investor with 'Czech law, and involve[d] rights and obligations which [were] applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction'.<sup>335</sup> Still, the tribunal decided to lend support to its dismissal of the non-contractual counterclaim by interpreting article 8 in light of the general legal principle of connexity,<sup>336</sup> concluding that 'the disputes which have given rise to the Respondent's counterclaim are not sufficiently closely connected with the subject-matter of the original claim put forward by *Saluka* to fall within the Tribunal's jurisdiction under Article 8 of the Treaty'.<sup>337</sup>

It is submitted that the former approach would have been desirable, also because the tribunal, in discussing the connexity requirement, interpreted it quite, if not too, narrowly.<sup>338</sup> Yet, its position is supported by the ICSID Tribunal in *Paushok*, as it also linked connexity with the 'general law' of the host state: 'In considering whether the Tribunal has jurisdiction to consider the counterclaims, it must therefore decide whether there is a close connection between them and the primary claim from which they arose or whether the counterclaims are matters that are otherwise covered by the general law of Respondent'.<sup>339</sup> As for counterclaims (1), (2), and (3),<sup>340</sup> the tribunal found:

<sup>333</sup> *Harris International Telecommunications, Inc. v Iran*, Partial Award, 2 November 1987, 17 Iran-U.S. C.T.R. 31, at para. 176, cited in *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim, at para. 73.

<sup>334</sup> *Amco Asia Corporation et al. v Indonesia*, fn. 177, Decision on Jurisdiction (resubmitted case), 10 May 1988 at paras 122–127. The tribunal also held that Indonesia could not present a counterclaim for tax fraud that it had not asserted before the first tribunal, pointing to article 52 of the ICSID Convention. See at 60–4, paras 128–136.

<sup>335</sup> *Saluka v Czech Republic*, fn. 171, Decision on Jurisdiction over the Czech Republic's Counterclaim, at para. 79. Cf. at para. 78 (the respondent's 'heads of counterclaim involve non-compliance with the general law of the Czech Republic').

<sup>336</sup> *Saluka v Czech Republic*, at para. 77.

<sup>337</sup> *Saluka v Czech Republic*, at para. 81.

<sup>338</sup> See, in particular, the reliance by the *Saluka* tribunal in para. 79 on the ICSID award *Klöckner v Cameroon*. In that award, the ICSID Tribunal found the counterclaim admissible on the basis that it formed 'an indivisible whole' with the primary claim asserted by the claimant, or as invoking obligations which share with the primary claim 'a common origin, identical sources, and an operational unity' or which were assumed for 'the accomplishment of a single goal, [so as to be] interdependent'. See Award, para. 79. Arguably, this language may rather be construed as factual support for admitting the counterclaim rather than a legal requirement pursuant to article 46 of the ICSID Convention. See also Lalive and Halonen, fn. 169, at para. 7.04 ('In our view the test established in [*Saluka*] was probably too strict, and leads to it being near-impossible for states to succeed in having their counter-claims heard by investment treaty tribunals'); see also at paras 7–39–7.41.

<sup>339</sup> *Paushok v Mongolia*, fn. 201, Award on Jurisdiction and Liability, at para. 693.

<sup>340</sup> *Paushok v Mongolia*, at para. 678 ('Respondent asserts seven counterclaims: (1) Claimants owe Windfall Profits Taxes they caused GEM to evade in violation of law; (2) Claimants owe back Foreign

[They] arise out of Mongolian public law and exclusively raise issues of non-compliance with Mongolian public law, including the tax laws of Mongolia. All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT.<sup>341</sup>

According to the tribunal, a decision on the merits in favour of Mongolia's counter-claims, enforceable through the New York Convention, would have the 'likely effect of advancing the enforcement of Mongolian tax laws by non-Mongolian courts in respect of non-Mongolian nationals beyond limitations on the extraterritorial application of Mongolian tax laws rooted in public international law'.<sup>342</sup>

Also counterclaims (4), (5), and (6)<sup>343</sup> were found to 'relate to subjects being the object of Mongolian legislation and regulations'; and moreover, the tribunal held, they 'cannot be seen as having a "close connection with the primary claim to which (they are) a response"'.<sup>344</sup> The fate of the counterclaims was also sealed by the lack of supporting evidence, which was the case for counterclaim (7) as well.<sup>345</sup>

It is hoped that other tribunals faced with host state counterclaims will be more flexible in assessing connexity, drawing rather from the emphasis laid by judges at the International Court of Justice on practical convenience and procedural economy. Such flexibility is supported by the lack of reference to juridical connexity in the aforementioned Explanatory Report by the ICSID Secretariat,<sup>346</sup> as well by recent ICJ jurisprudence challenging the need for the counterclaim to be defensive so as to rebut the initial claim.<sup>347</sup> The decision by the UNCITRAL Working Group to discard the suggestion requiring a 'sufficient link' between the counterclaim and the main claim

Worker Fees they caused GEM to refuse; (3) Claimants owe taxes, fees and levies they caused GEM to evade by illicit intergroup transfers, including non-arm's length transfers [...]).

<sup>341</sup> *Paushok v Mongolia*, at para. 694.

<sup>342</sup> *Paushok v Mongolia*, at para. 695.

<sup>343</sup> *Paushok v Mongolia*, at para. 678 ('Respondent asserts seven counterclaims: [...] (4) Claimants have violated their obligations under their license agreements to extract gold in an efficient and effective manner, causing Mongolia a loss in tax revenue, loss of employment of Mongolian nationals and other benefits; (5) Claimants violated their environmental obligations towards Mongolia; (6) Claimants owe damages for gold smuggling [...]').

<sup>344</sup> *Paushok v Mongolia*, at para. 696.

<sup>345</sup> *Paushok v Mongolia*, at paras 696–698. See also at para. 678 ('Respondent asserts seven counterclaims: [...] (7) Golden East failure to comply with Order from House of Lords').

<sup>346</sup> ICSID Secretariat, fn. 316.

<sup>347</sup> See *Case Concerning Armed Activities on the Territory of the Congo*, fn. 174, Counter-Claims Order, at para. 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, at paras 27–28. See also Thirlway, fn. 260, at 219. But see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, fn. 170, Counter-Claims Order, Dissenting Opinion of Vice-President Weeramantry, at 291 ('A claim that is autonomous and has no bearing on the determination of the initial claim does not thus qualify as a counter-claim'); R. Genet, 'Les demandes reconventionnelles et la procédure de la C.P.J.I.' (1938) 19 *Revue de droit international et de législation comparé* 175; A. Blomeyer, 'Types of Relief Available (Judicial Remedies)' in *VXI International Encyclopedia of Comparative Law* (M. Cappelletti, ed., 1982), para. 128 (in Central European, Scandinavian and Romanic Legal Systems, 'the admissibility of a cross action is doubtful if the defendant may not assert his counter-right defensively'); O.L. Pegna, 'Counter-Claims and Obligations Erga Omnes before the International Court of Justice' (1998) 9 *Eur. J. Int'l L.* 274. See also G. Petrochilos et al., fn. 225, at 114, para. 6 ('Ancillary claims must be so close to the primary claim as to require the adjudication of the ancillary claim before the primary claim can be finally settled').

can also be seen in this light.<sup>348</sup> The recent formulation by Douglas in his Rule 26 reinforces our conclusion:

In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction *ratione materiae* may extend to counterclaims by the host contracting state party founded upon a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of matters directly related to the investment.<sup>349</sup>

#### **4.3. Interim conclusions**

In sum, a tribunal's jurisdiction over counterclaims depends on the extent to which they fall within the parties' arbitration agreement. This suggests that host state counter-claims may be accepted in investment treaty arbitration where that state's arbitration offer, as set out in the treaty, contains a definition of arbitrable investment disputes broad enough to encompass investor obligations relied upon by the host state in their counterclaim. Dispute settlement clauses that implicitly cover investor obligations by virtue of express language in favour of the right of the host state to bring claims may also allow for the bringing of counterclaims. Contrariwise, in case the offer only covers host state obligations, counterclaims would appear to fall outside the tribunal's jurisdiction. This observation may be strengthened by reference to the lack of locus standi of the host state.

In addition to falling within the tribunal's jurisdiction, the counterclaim must also be admissible. This presupposes that it is not subject to a different forum selection agreement, and that there is connexity between the host state's counterclaim and the investor's claim. In cases in which juridical connexity is lacking, a strong factual connexity could weigh in favour of admissibility, the most important criteria being procedural economy and the better administration of justice.

### **5. General Conclusions**

In this chapter, we discussed the important role that the nature of the claim may have for a tribunal's decision on the applicable law. We also introduced the choice-of-law technique of characterization, observing that the application of national and international law may depend on whether a claim is contractual or non-contractual in nature. The importance of characterization in investment arbitration also stems from the fact that the tribunal's jurisdiction may be limited to claims of a national or international nature, a fact that has a corollary effect on the ability of the tribunal to apply national or international law.

We concluded that while some dispute settlement clauses may be limited to claims of a national or international nature, other clauses allow for the bringing of both national and international claims. Choice-of-law clauses may help in interpreting arbitration agreements. Thus, where an investment contract refers to the application of national and international law, this may support a finding of a broad arbitration agreement allowing for the bringing of both national and international claims. Likewise, in investment treaties, the scope of the arbitration clause frequently corresponds

<sup>348</sup> UNCITRAL, fn. 313, at para. 30 (the group discarded the suggestion requiring a 'sufficient link' between the counterclaim and the main claim: 'it was viewed as being too restrictive').

<sup>349</sup> Douglas, fn. 31, *The International Law of Investment Claims*, at 255.

to the applicable law clause, providing in the case of broad arbitration clauses for the application of both national and international law; or, in case of narrow arbitration clauses, solely international law.

Finally, we considered the jurisdiction of investment treaty tribunals over host state counterclaims, concluding that when they fall within the arbitration agreement, juridical connexity does not necessarily constitute an obstacle against admissibility as long as there is strong factual connexity. Accordingly, it may be possible for host states to bring counterclaims based in national law against claims based in international law.

In our analysis of arbitral practice in **Chapters 5 to 7**, further reference is made to the role played by the nature of the claim in the decision by arbitrators to apply national or international law to the merits.

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# 5

## The Primary Applicability of National Law and the Role of International Law

[W]hen international law has *not* been adopted as governing law by the parties to an international commercial transaction nor directly incorporated and self-executing in the system of national law which was selected, would it not be inappropriate to allow a norm of international law to override the applicable norm of the national law selected by the parties on the ground that the international norm is ‘different’ and ‘higher’? The issue does not turn on grand theories of monism or dualism but on common sense. [...] [W]hen parties have the power to select the law which will govern their transaction, whether the law which they select is ‘higher’ or ‘lower’ is irrelevant.<sup>1</sup>

### 1. Introduction

With a view to creating a sense of structure as concerns the applicable law in investment arbitration, we will in the following two chapters examine arbitral practice according to whether the tribunals primarily apply national or international law to the merits of the dispute at hand. In this chapter, we will discuss the following three factors that may lead to the primary application of *national* law: an agreement by the disputing parties to apply national law (**Chapter 5, Section 2.1**); considerations of host state sovereignty (**Chapter 5, Section 2.2**); and the national nature of the claim (**Chapter 5, Section 2.3**). **Chapter 6** is organized in a similar fashion: *international* law may primarily apply on the basis of party agreement (**Chapter 6, Section 2.1**); by virtue of the international nature of the claim (**Chapter 6, Section 2.2**); and because of arguments pertaining to the superior nature of international law vis-à-vis national law (**Chapter 6, Section 2.3**).

As will become apparent, the reason for qualifying the *lex causae* as ‘primarily’ applicable lies in the fact that a decision that national law or international law governs the dispute does not rule out a role for international and national law, respectively. As such, primacy denotes sequential rather than hierarchical superiority. Specifically, when the dispute is primarily governed by national law, international law may apply *indirectly* as part of the ‘law of the land’ or by virtue of international-law-friendly interpretation (**Chapter 5, Section 3.1**); or in a *corrective* fashion, when the applicable national legal system has lacunae or a relevant national norm conflicts with a fundamental rule of international law (**Chapter 5, Section 3.2**). Conversely, when the dispute is primarily governed by international law, national law could apply *indirectly* when the particular international claim requires a determination on the parties’ rights and obligations in

<sup>1</sup> W.M. Reisman, ‘Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration’ in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series No. 13, van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 849, 852–3 (emphasis in original).

accordance with national law, such as for expropriation and ‘umbrella’ clause claims pursuant to investment treaties (**Chapter 6, Section 3.1**); or *correctively*, where international law has lacunae or conflicts with a fundamental national norm (**Chapter 6, Section 3.2**).

## 2. Reasons for the Primary Applicability of National Law

We may generally distinguish between four different situations: those in which the parties have agreed to the application of either (i) national or (ii) international law; (iii) where the agreement provides for the application of both national and international law; and (iv) where there is no choice-of-law agreement.<sup>2</sup> While in the first situation it is undisputed that arbitrators should primarily apply national law to the dispute (**Section 2.1**), the answer is not as straightforward with respect to the latter two cases, where both national and international law are seemingly of equal relevance. As we will see, in those cases, national law has been argued and held to apply in light of host state sovereignty (**Section 2.2**) and because of the national nature of the claim at hand (**Section 2.3**).

### 2.1. Party agreement on the application of national law

An obvious factor in favour of the application of national law is an agreement by the parties to that effect. This is in conformity with the doctrine of party autonomy, which for territorialized tribunals is respected by the national arbitration law of the tribunal’s juridical seat, as well as in arbitration rules to which the parties may refer; and for internationalized tribunals because of Article 42(1), first sentence, of the ICSID Convention and Article V of the Iran–United States Claims Settlement Declaration.<sup>3</sup>

The application of national law by virtue of party agreement will most commonly arise where the arbitration tribunal is constituted pursuant to an investment contract. There are numerous examples of investment contracts between foreign investors and host states that expressly provide for the application of national law.<sup>4</sup> In addition to reflecting the host state’s desire to have the investment relationship governed by its own national law,<sup>5</sup> a choice for the application of national law has the advantage of predictability for both parties:

[A national system of law] is not merely a set of general principles or of isolated legal rules. It is an interconnecting, interdependent collection of laws, regulations and ordinances, enacted by or on behalf of the State and interpreted and applied by the courts. It is a complete legal system,

<sup>2</sup> See Chapter 3, Section 4 (general conclusions).

<sup>3</sup> See Chapter 3, at Section 3.1.1 (the parties may stipulate the application of national and/or international law).

<sup>4</sup> See P. Muchlinski, *Multinational Enterprises and the Law* (Oxford, Blackwell, 1999), 503 ([N]ewer international investment agreements tend to be governed by the law of the host state rather than by international law) [references omitted]; G. Sacerdoti, ‘State Contracts and International Law: A Reappraisal’ (1986–87) VII *Italian Y.B. Int'l L.* 26, 35. But see T. Begic, *Applicable Law in International Investment Disputes* (Utrecht, Eleven International, 2005), 16 (‘Clauses with [...] a straightforward and exclusive stipulation in favour of the host State’s law are rare, in particular, nowadays’).

<sup>5</sup> See Chapter 1, Section 1 (on motivations for the study). But see *Colt Industries v The Republic of Korea*, ICSID Case No. ARB/84/2, Settlement, 3 August 1990 (K.O. Rattray, E. Jimenez de Arechaga, I.E. McPherson, arbs), unreported (the parties had agreed to the application of the law of the investor’s home country); C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 560.

designed to provide an answer to any legal question that might be posed. Furthermore, a national system of law will in principle be a known and existing system, capable of reasonably accurate interpretation by experienced practitioners.<sup>6</sup>

Arbitral practice of both territorialized and internationalized tribunals confirms the appropriateness of applying national law to contractual disputes when the parties have so agreed. The following cases may serve as examples here. As for territorialized tribunals, *Alsing Trading Co. v Greece* (1954) concerned an alleged breach of contract for the exclusive supply of matches to the Greek Government.<sup>7</sup> Sole Arbitrator Python held that since ‘the plaintiffs accepted before the arbitration tribunal that the case be judged according to Greek law, as requested by the defendant’, the law of the host state was applicable to the dispute.<sup>8</sup>

The case *National Oil Corporation (NOC) v Libyan Sun Oil Company* (1985/1987) is also illustrative.<sup>9</sup> The dispute involved a claim for breach of contract by the NOC, a state-owned Libyan Corporation, against a US corporation that had stopped performance of an oil exploration project in Libya.<sup>10</sup> The investor claimed *force majeure* as a defence, arguing that it was prevented from carrying out the project due to the fact that a US passport order and export regulations prohibited US citizens from going to Libya, and because its application for a licence to export oil technology had been denied by the US Government.<sup>11</sup> The parties had stipulated that the contract was to be governed by and interpreted in accordance with Libyan law.<sup>12</sup> Accordingly, the ICC Tribunal construed the *force majeure* clause contained in the contract in light of the Libyan Civil Code and the jurisprudence of the Libyan Supreme Court, concluding that the events in question did not constitute *force majeure*.<sup>13</sup> The tribunal also applied Libyan law to the remaining issues,<sup>14</sup> including the question of damages.<sup>15</sup> In so doing, it relied extensively on legal interpretations provided by experts in Libyan law.<sup>16</sup>

A more recent example from the practice of territorialized tribunals is *Zeevi Holdings Ltd v Republic of Bulgaria and The Privatization Agency of Bulgaria* (2006).<sup>17</sup> The

<sup>6</sup> N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 198. Contrariwise, international law is said to be a more undeveloped system of law. See Chapter 6, Section 2.1.1 (on the express or implied ‘internationalization’ of investment contracts); and Section 3.2.1 (on the complementary role of national law).

<sup>7</sup> *Alsing Trading Co. & Svenska Tändsticks Aktiebolaget v Greece*, Award, 22 December 1954 (Python, sole arb.), 23 I.L.R. 633 (1956).

<sup>8</sup> *Alsing Trading v Greece*, at 637–8 (more specifically, it was held that the ‘dispute comes under Roman-Byzantine law which was reintroduced into Greece by Decree of 23rd February and 7th March, 1835, after liberation from Turkish domination’). See also at 635, 638, 640–7 (the parties had also agreed that, ‘given the interdependence and the common source of the system of law in force in continental Europe, the question of the law to be applied is rather a question of principle without much practical significance.’ Accordingly, alongside Greek jurisprudence and doctrine, the arbitrator referred to French, Swiss, and German law when dismissing the investor’s claims on the merits).

<sup>9</sup> *National Oil Corporation v Libyan Sun Oil Company*, ICC Case No. 4462, First Award (on *force majeure*), 31 May 1985 (R. Schmelck, H. Koetz, E. Muskie, arbs), 29 I.L.M. 565 (1990).

<sup>10</sup> *National Oil Corporation*, at 568.

<sup>11</sup> *National Oil Corporation*, at 579.

<sup>12</sup> *National Oil Corporation*, at 568 (‘This agreement was a risk contract to be governed by and interpreted in accordance with the laws and regulations of Libya including the Petroleum law (EPSA Art. 21)’).

<sup>13</sup> *National Oil Corporation*, at 600.

<sup>14</sup> *National Oil Corporation*, Final Award, 23 February 1987, 29 I.L.M. 601 (1990).

<sup>15</sup> *National Oil Corporation*, at 618, 620.

<sup>16</sup> *National Oil Corporation*, at 615. See also at 608.

<sup>17</sup> *Zeevi Holdings Ltd v Republic of Bulgaria and The Privatization Agency of Bulgaria*, Final Award, 25 October 2006 (K.-H. Böckstiegel, A.A. Yarkoni, S. Cherney, arbs), UNCITRAL Case No. UNC 39/DK.

dispute arose under a Privatization Agreement (PA), by which Zeevi purchased Balkan Airlines EAD, Bulgaria's national carrier.<sup>18</sup> According to the foreign investor, it was fraudulently misled as to the financial condition of Balkan Airlines at the time of the acquisition, and contrary to undertakings given by the Bulgarian Government, Balkan Airlines' designation as national carrier was withdrawn following the privatization.<sup>19</sup> The respondents denied any breach of the PA, and instead counterclaimed for Zeevi's failure to service Balkan Airlines' debts up to USD 30 million; its failure additionally to invest USD 100 million in the airline; its failure to secure these obligations by way of letters of credit and corporate guarantees; and its illegitimate appropriation of Balkan Airlines' principal assets in violation of express terms of the Agreement.<sup>20</sup> In settling the dispute on the merits, the UNCITRAL Tribunal applied Bulgarian law on the basis of an express stipulation to that effect in the Privatization Agreement:

Pursuant to para. 15.1 of the PA the Parties have agreed to settle any claim or dispute arising out of or in relation to this contract by arbitration to be conducted under the Rules of Arbitration of the United Nations Commission on International Trade (UNCITRAL Rules). Regarding the substantive law to be applied by the tribunal, Article 33 UNCITRAL Rules provides: 'Article 33 [...] 1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.' [...] In Section 14.1 of the PA the Parties have agreed that the PA 'shall be governed by and construed in accordance with the laws of Bulgaria.' Therefore, concerning the merits of the case the law of the Republic of Bulgaria will be applied.<sup>21</sup>

Also ICSID tribunals have applied national law by virtue of the parties' agreement. The arbitration in *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (1988) arose out of a dispute as to which party had prevented the performance of their contract relating to the creation of facilities to ship bauxite.<sup>22</sup> The parties had agreed that any dispute would be settled with reference to the investment contract itself, with recourse to be had to the law of the host state only in respect of questions on which the agreement was silent or incomplete.<sup>23</sup> The scope of Guinean law was further confined by a stabilization clause.<sup>24</sup> Without referring to the choice-of-law agreement, the ICSID Tribunal concluded that Guinea had breached the contract, relying—apart from on the contract itself—on the principle of good faith set forth in the French Civil Code, given that Guinean law derived from French law: 'Guinea's conduct in secretly negotiating the afrobulk arrangement, and in denying its existence to MINE thereafter, exhibits bad faith on its part, violating the principle of good faith set forth in the French Civil Code.'<sup>25</sup>

<sup>18</sup> *Zeevi v Bulgaria*, at para. 3.

<sup>19</sup> *Zeevi v Bulgaria*, at para. 3.

<sup>20</sup> *Zeevi v Bulgaria*, at para. 3.

<sup>21</sup> *Zeevi v Bulgaria*, at paras 104–105. Cf. *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd and Bridas Corporation v Government of Turkmenistan, Concern Balkannebitgazsenagat and State Concern Turkmenneft*, ICC Arbitration Case No. 9058/FMS/KGA, First Partial Award, 25 June 1999 (H. Smit, E.C. Chiasson, G.B. Bell, arbs), 4, 31, 43, 70–1 (applying English law); *Joint Venture Yashlar and Bridas S.A.I.P.I.C. v Turkmenistan*, ICC Arbitration Case No. 9151/FMS/KGA, Interim Award, 8 June 1999 (S. Kentridge, J. Paulsson, J. Kolrud, arbs), Part II, at paras 2–3; Final Award, 19 May 2000, Part I, at para. 44 (applying English law).

<sup>22</sup> *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988 (D.E. Zubrod, J. Berg, D.K. Sharpe, arbs), section A.

<sup>23</sup> *MINE v Guinea*, Decision on Annulment, 22 December 1989 (S. Sucharitkul, A. Broches, K. Mbaye committee members), paras 1.03, 6.31–6.34.

<sup>24</sup> *MINE v Guinea*, paras 1.03, 6.31–6.34. On stabilization clauses, see generally Chapter 6, Section 2.1.1 (on express or implied 'internationalization' of investment contracts).

<sup>25</sup> *MINE v Guinea*, Award, at section 8. See also at fn. 11; see also fn. 23, Decision on Annulment, at para. 6.31; see also at paras 5.02, 6.35–6.41 (the committee dismissed Guinea's request for annulment on the basis that the tribunal had manifestly exceeded its powers by failing to apply the law agreed to by the parties).

In *CDC Group plc v Republic of the Seychelles* (2003), the investment contract provided that it should be ‘governed by and construed in all respects in accordance with the laws of England [...].’<sup>26</sup> The ICSID Tribunal noted that the host state had also made reference to ‘the emerging jurisprudence in relation to international trade and investments between developed and developing countries’, but that no argument based in such jurisprudence had later been put forward: ‘The submissions presented by the parties proceeded on the footing that CDC’s claim was to be resolved in accordance with English law.’<sup>27</sup>

*Amoco International Finance Corporation v Iran et al.* (1987), decided by the Iran–United States Claims Tribunal, involved two separate claims: breach of contract and expropriation.<sup>28</sup> The investor’s position was that its contractual claim arose under international law, in that the agreement at hand belonged to ‘a special category of international contract as economic development agreements’; and because such contracts, ‘by their nature require that they be insulated from the disruptive effects of changing municipal law’.<sup>29</sup> As a result, the investor argued, ‘the law from which they derive their binding force (*loi d’enracinement*) is international law.’<sup>30</sup> According to the investor, the practical consequences were that the contract ‘would not only be governed by the principle of good faith mentioned in Article 21 of the [contract], but also by the rule *pacta sunt servanda*. Therefore any breach of the [contract] would also be a breach of international law, for which the State is internationally responsible.’<sup>31</sup>

The tribunal discarded the investor’s argument. First, it noted that the issue of the applicable law in case of contractual breaches ‘is quite different from the law applicable to expropriation [as it] relates to the problem known in conflicts of laws, or private international law, as “the law of the contract,” namely the law governing the validity, interpretation and implementation of the [...] Agreement’.<sup>32</sup> Secondly, it referred to the choice-of-law clause inserted in the contract: ‘This Agreement shall be construed and interpreted in accordance with the plain meaning of its terms, but subject thereto, shall be governed and construed in accordance with the laws of Iran.’<sup>33</sup> On this basis, it concluded that ‘[i]t is clear that the parties chose Iranian law as the law of the contract and no reason appears for reading the provision otherwise’.<sup>34</sup>

<sup>26</sup> *CDC Group plc v Republic of the Seychelles*, ICSID Case No. ARB/02/14, Award 17 December 2003 (A. Mason, sole arb.), para. 43.

<sup>27</sup> *CDC Group v Seychelles*, at para. 43. See also Decision on Annulment, 29 June 2005 (C.N. Brower, M. Hwang, D.A.R. Williams, committee members), para. 45 ([O]ur inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law. That it did so is made plain by its explicit statement in the Award that it did as well as by its repeated citation to relevant English legal authorities); and at para. 47; *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Award, 12 July 2001 (K.S. Rokison, C. N. Brower, A. Rogers, arbs), para. 51 (applying Tanzanian law); *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 (G. Guillaume, V.V. Veeder, A. Rogers, arbs), paras 158 *et seq.* (applying English and Kenyan law); *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Award, 13 March 2009 (V.V. Veeder, B. Audit, D.S. Berry, arbs) paras 12–13 (applying the laws of Grenada and English common law).

<sup>28</sup> *Amoco International Finance Corporation v Iran et al.*, Partial Award No. 310-56-3 (14 July 1987). For the claim for expropriation, see Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>29</sup> *Amoco v Iran*, at para. 149.

<sup>30</sup> *Amoco v Iran*, at para. 149.

<sup>31</sup> *Amoco v Iran*, at para. 150. On the application of international law to economic development agreements, see generally Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>32</sup> *Amoco v Iran*, at para. 154.

<sup>33</sup> *Amoco v Iran*, at para. 155.

<sup>34</sup> *Amoco v Iran*, at para. 156.

We also note the case of *Qwestech, Inc. v Ministry of National Defence of the Islamic Republic of Iran* (1985), in which the Iran–United States Claims Tribunal stated:

Since Iranian law is the law expressly chosen as applicable by the Parties and since the Contract does not contain any provision designed to protect against unilateral changes by the State party, the Tribunal does not need to enter into additional considerations that may have to be taken into account in other cases including terminations of contracts to which public international law is found to be the applicable law.<sup>35</sup>

In sum, both territorialized and internationalized tribunals have applied national law to contractual claims when the parties have so stipulated in their contract.

It is briefly noted that the application of national law by virtue of party agreement may also occur in arbitration proceedings without privity.<sup>36</sup> This would be the case where the host state gives its consent in its national investment law and where that law provides for the application of national law. This possibility was unsuccessfully argued by Egypt in *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (1992):

‘[E]n désignant expressément, notamment dans le Heads of Agreement, avec différentes lois égyptiennes, la loi 43/74, les parties ont choisi le droit égyptien comme loi applicable à leurs litiges, y compris le droit administratif, et ce conformément à l’article 42.1, 1ere phrase de la Convention de Washington.’ [Pointing expressly, especially in the Heads of Agreement, to various Egyptian laws, Law 43/74, the parties have chosen Egyptian law as the law applicable to their disputes, including administrative law, and this in accordance with Article 42.1, first sentence of the Washington Convention.]<sup>37</sup>

Depending on the scope of the dispute settlement clause, the application of national law by virtue of party autonomy is also possible in investment treaty arbitration. Because of the broad dispute settlement clause in the BIT at hand,<sup>38</sup> this could have been possible had the contract at issue in *Compañía de Aguas del Aconquija, SA and Vivendi Universal v Argentina* (2000/2002/2007) not contained a forum selection clause providing for the ‘exclusive jurisdiction of the Contentious Administrative

<sup>35</sup> *Qwestech, Inc. v Ministry of National Defence of the Islamic Republic of Iran*, Award, 20 September 1985. See also *FMC Corporation and The Ministry of National Defence, et al.*, Award, 12 February 1987, Dissenting Opinion of Bahrami Ahmadi, at section B.1 ([S]ince Article V of the Declaration prescribes how the applicable law is to be determined, in this claim where the laws of Iran have been expressly specified [as applicable], the Contract should be construed solely on the basis of Iranian law, especially since Iranian law makes specific provision with respect to termination of contract and damages arising from termination. Regrettably, however, the majority has not taken this highly important matter into consideration, and the Award was not rendered on the basis of Iranian law.). But see J.R. Crook, ‘Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience’ (1989) 83 *Am. J. Int'l L.* 278, 280 (‘The Tribunal has rarely decided on the basis of national rules, even in cases where the parties might arguably have agreed on them as the rule of decision’); see also at 310. Cf. *Mobil Oil et al. v Iran*, Partial Award, 14 July 1987, paras 80–81, referred to in Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>36</sup> See Chapter 2, Section 2 (on features of the arbitral process); Chapter 4, Section 3.2 (on arbitration without privity).

<sup>37</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (E. Jimenez de Arechaga, M.A.E. El Mahdi, R.F. Pietrowski, arbs), at para. 34. See also Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>38</sup> *Compañía de Aguas del Aconquija, SA and Vivendi Universal v Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (L.Y. Fortier, J.R. Crawford, J.C.F. Rozas, committee members), para. 55 (‘Read literally, the requirements for arbitral jurisdiction [...] do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT’). See also Chapter 4, Section 3.2 (on arbitration without privity).

Tribunals of Tucumán'.<sup>39</sup> According to the ICSID ad hoc Committee, 'whether there has been a breach of contract [...] will be determined by [...] the proper law of the contract, in other words, the law of Tucumán.'<sup>40</sup> In cases where the parties to the contract agree to the application of national law, that would be the 'proper law of the contract' also in treaty arbitration.

## 2.2. Host state sovereignty and territorial control over foreign investors and investments

In situations where there is no party agreement or where the parties have agreed to the application of both national and international law, arguments in favour of the application of national law may relate to the principle of state sovereignty; and more specifically, the right of the host state to regulate activities, including those of foreign investors, on its territory.<sup>41</sup> Brierly explains the principle of sovereignty as follows:

At the basis of international law lies the notion that a state occupies a definite part of this surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory.<sup>42</sup>

The Argentinean publicist and historian Carlos Calvo (1824–1906) was a strong proponent of the principle of sovereignty, which he used to reject the applicability of international law in favour of national law. In his '*Derecho internacional teórico y práctico de Europa y América*' (1863), he states:

The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside. This principle is intrinsically contrary to the law of equality of nations [...]. To admit that in the present case governmental responsibility, that is the principle of an indemnity, is to create an exorbitant and fatal privilege, essentially favorable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners.<sup>43</sup>

On this basis, Calvo concludes that 'the responsibility of governments towards foreigners cannot be greater than that which these governments have towards their own

<sup>39</sup> *Compañía de Aguas v Argentina*, Award I, 21 November 2000 (F. Rezek, T. Buergenthal, P.D. Trooboff, arbs); Decision on Annulment, fn. 38; Award II, 20 August 2007 (G. Kaufmann-Kohler, C.B. Verea, J.W. Rowley, arbs).

<sup>40</sup> *Compañía de Aguas v Argentina*, fn. 38, Decision on Annulment, at para. 96.

<sup>41</sup> See, e.g., H.A.G. Naón, 'ICC Arbitration and Developing Countries' (1993) 8(1) *ICSID Rev.-FIJ* 116, 121; S.J. Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge, Grotius, 1990), 240. Cf. W.W. Park, *Arbitration of International Business Disputes* (Oxford, Oxford University Press, 2006), 319 ('Derived from the Latin *super*, meaning "above," sovereignty in the context of international relations normally implicates a state's right to exercise supreme power within its territory' [references omitted]).

<sup>42</sup> J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford, Clarendon Press, 1963), 162.

<sup>43</sup> D. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis, University of Minnesota Press, 1955), 18. See also W. Shan, 'Is Calvo Dead?' (2007) 55 (1) *Am. J. Comp. Law* 123, 126 ('In the substantive sense, the Calvo Doctrine emphasizes that host states shall not grant foreigners any rights or benefits greater than those they accord to their own nationals [...]. [I]t rejects the so-called "international minimum standard" as a standard of law applicable to the treatment of foreigners including foreign investors').

citizens'.<sup>44</sup> The Calvo Doctrine was 'enthusiastically received' in Latin American states, which inserted 'Calvo Clauses' in constitutions, domestic legislation, international treaties, and contracts signed between foreign investors and Latin American governments.<sup>45</sup> For instance, a 1938 Ecuadorian law stated:

Foreigners, by the act of coming to the country, subject themselves to the Ecuadorian laws without any exception. They are consequently subject to the Constitution, laws, jurisdiction and police of the Republic, and may in no case, nor for any reason, avail themselves of their status as foreigners against the said conditions, jurisdiction, and police.<sup>46</sup>

A current example is found in the Constitution of Peru (1993), which provides in Article 63 that '[n]ational and foreign investments are subject to the same conditions. [...] In all contracts of the State and public corporations with resident aliens, these shall subject to the national laws [...].'<sup>47</sup> As noted by Shan, 'Calvo Clauses' have been included in the national laws of developing states beyond Latin America, especially in Asian and African states.<sup>48</sup> He gives the example of a 1996 Chinese law that stipulates that all Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts, and Sino-foreign contracts for the joint exploration and development of natural resources, shall be governed by Chinese law.<sup>49</sup>

The principle of sovereignty was also stressed by the promoters of the New International Economic Order, including—notably—capital-importing states; and their focus on permanent sovereignty over natural resources<sup>50</sup> is mirrored in United Nations General Assembly resolutions from the 1950s to the 1970s.<sup>51</sup> The corollary subjection of foreign investors to the national laws of the host state was recently articulated by Ruggie, Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates.'<sup>52</sup> It is also reflected in investment laws, and in bilateral investment treaties such as that between Sri Lanka and Belgium/Luxembourg: 'For the avoidance of any doubt, it is declared that all investments shall, subject to the priority to be attached to this agreement, be governed by the laws in force in the territory of the

<sup>44</sup> Shea, fn. 43, at 19.

<sup>45</sup> Shea, fn. 43, at 21–32.

<sup>46</sup> Shea, fn. 43, at 26 and fn. 56 (with sources for further examples of such constitutional provisions).

<sup>47</sup> Political Constitution of Peru (1993), art. 63. See also art. 71 ('Regarding to property, aliens, whether they be natural or juridical persons, are in the same conditions as Peruvians. Therefore, in any case, they may in no instance invoke exception or diplomatic protection').

<sup>48</sup> Shan, at 129.

<sup>49</sup> Shan, at 129 (referring to art. 126 of the Contract Law of the People's Republic of China).

<sup>50</sup> See generally N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, Cambridge University Press, 1997). See also T.W. Wälde, 'A Requiem for the New International Economic Order: The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance' in *Liber Amicorum: Professor Ignaz Seidl-Hohenfeldern in Honour of His 80th Birthday* (G. Hafner et al., eds, The Hague, Kluwer Law International, 1998), 771.

<sup>51</sup> See, e.g., General Assembly (GA) Resolution 3281 (XXIX) (Charter of Economic Rights and Duties of States), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50, arts 2(2)(a), 4(g); GA Resolution No. 626 (VII) of December 21, 1952 (on the Right to exploit freely Natural Wealth and Resources); GA Resolution No. 1803 (XVII), 14 December 1962 (Permanent Sovereignty over Natural Resources); GA Declaration on the Establishment of a New International Economic Order, Resolution 3201 (S-VI) (1 May 1974).

<sup>52</sup> Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Report of J. Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), A/HRC/8/5, 7 April 2008, at para. 14.

Contracting Party in which such investments are made.<sup>53</sup> We further note the Law on Private Investment in Afghanistan (2005), providing that '[u]nless otherwise specifically provided by this Law or other Afghan laws, all Registered Enterprises, and all investors, whether domestic or foreign, must abide by all applicable laws of Afghanistan'.<sup>54</sup>

The primary application of national law in cases where the parties have agreed to the application of national and international law, or where there is no agreement on the applicable law, has frequently been advanced by the host state party to arbitral proceedings.<sup>55</sup> With respect to territorialized tribunals, *Texaco Overseas Petroleum Co. (TOPCO) & California Asiatic Oil Co. (Calasiatic) v Libya* (1977) concerned the nationalization by Libya of several petroleum concessions held by two US companies.<sup>56</sup> The Concessions stipulated the following applicable law:

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>57</sup>

Libya argued in favour of the application on its own national law, stating that the recent United Nations General Assembly Resolutions 3171 and 3201 'provide that any dispute related to Nationalization or its consequences should be settled in accordance with provisions of domestic law of the State'.<sup>58</sup> In *CME v Czech Republic* (2001/2003), the investor alleged that the Czech Republic had breached various substantive provisions of the Netherlands–Czech/Slovak Bilateral Investment Treaty.<sup>59</sup> The treaty stipulated the applicability of both national and international law:

The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

<sup>53</sup> Sri Lanka-Belgium/Luxembourg BIT, art. 9. See also P. Peters, 'Investment Risk and Trust: The Role of International Law' in *International Law and Development* 131, 159–60 (P. de Waart et al., eds, 1988), fn. 30.

<sup>54</sup> Law on Private Investment in Afghanistan (2005), art. 15; Angolan Basic Private Investment Law, Law 11/03, 13 May 2003, art. 23; see also art. 24; Law on Foreign Investment in Vietnam, 29 December 1987 (including amendments adopted in 2000), arts 25–27, 51; Law of the Republic of Belarus on Foreign Investment on the Territory of the Republic of Belarus, 14 November 1991, art. 5; Federal Republic of Yugoslavia Law on Foreign Investment, 16 January 2002, art. 18. Cf. *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002 (K.D. Kerameus, A. Bucher, F.O. Vicuña, committee members), para. 57 (the ICSID ad hoc Committee fully agreed with the point brought forward by Egypt, namely the 'legitimate principle that a country that attracts foreign investment is entitled to insist that investors comply with the laws of that country'); C. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, at 10, available at [http://www.univie.ac.at/intlaw/pdf/csnpublpaper\\_1.pdf](http://www.univie.ac.at/intlaw/pdf/csnpublpaper_1.pdf) (last visited 1 May 2012); Chapter 6, Section 3.2.2 (on the supervening role of national law).

<sup>55</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>56</sup> *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CALASIATIC) v Government of the Libyan Arab Republic*, Preliminary Award, 27 November 1975 (R.-J. Dupuy, sole arb.); Award on the Merits, 19 January 1977.

<sup>57</sup> *Texaco v Libya*, Award on the Merits, 53 I.L.R. 389, at 442 (referring to Clause 28). See also at 395 (the concessions also contained a stabilization clause (Clause 16)).

<sup>58</sup> *Texaco v Libya*, at 484.

<sup>59</sup> *CME Czech Republic B.V. v Czech Republic*, Partial Award, 13 September 2001 (W. Kühn, S. M. Schwebel, J. Händl, arbs); Final Award, 14 March 2003 (W. Kühn, S.M. Schwebel, I. Brownlie, arbs). See also Section 3.2.2.2 (on the supervening role of international law when the parties have agreed to the combined application of national and international law or there is no agreement); Chapter 6, Section 2.2 (on the international nature of the claim); and Section 3.1.1 (on the prohibition against expropriation without compensation).

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.<sup>60</sup>

According to the host state, Czech law should be given primacy in determining whether or not it had breached its obligations under the treaty.<sup>61</sup> This view was shared by Arbitrator Händl in his dissenting opinion to the Partial Award.<sup>62</sup> Regarding the law applicable to the alleged expropriation of the investor's assets, he reprimanded his fellow arbitrators for not having taken into consideration that it 'occurred on the Territory of the Czech Republic and should be judged according to Czech law/there is no reason for the application of the international law [...].'<sup>63</sup> Händl reiterated his view on the primary applicability of Czech law in his discussion of the elements required for a successful claim for damages: 'the same principles are contained in the Czech law, which has to be applied under the principle that the alleged violation of law occurred on the Czech territory.'<sup>64</sup>

As for the practice of internationalized tribunals, the host state in *Duke Energy International Peru Investments No 1, Ltd v Peru* (2006/2008) contended that the ICSID Tribunal 'must apply Peruvian Law to resolve this dispute'.<sup>65</sup> In its view, 'Article 42(1) of the ICSID Convention gives the law of the host State primacy in the absence of an agreement on governing law. [...] Inasmuch as the DEI Bermuda LSA does not have a choice of law clause, Respondent submits that, in accordance with Article 42(1) of the ICSID Convention, the law of the host State, i.e., Peru, applies in the first instance'.<sup>66</sup> And in the ICSID case *Siemens A.G. v Argentine Republic* (2007) the respondent argued that since there was no express agreement between the parties as to the law applicable and the treaty at hand did not indicate the law to be applied, 'the Tribunal should apply the municipal law of Argentina'.<sup>67</sup>

<sup>60</sup> *CME v Czech Republic*, Partial Award, at para. 286. Cf. Netherlands–Czech/Slovak Republic BIT, art. 8(6).

<sup>61</sup> *CME v Czech Republic*, Partial Award, at para. 287. See also fn. 59, Final Award, at paras 219, 398–399.

<sup>62</sup> *CME v Czech Republic*, fn. 59, Partial Award, Dissenting Opinion by J. Händl.

<sup>63</sup> *CME v Czech Republic*, at p. 15. See also at p. 15 (Händl pointed out that in the Czech Republic an expropriation can only be committed on the basis of an administrative decision by a state body; and because no such decision had been taken, he would dismiss the claim).

<sup>64</sup> *CME v Czech Republic*, p. 20. See also at 22 (Händl strongly criticized his colleagues for not applying and for wrongly interpreting Czech law). See also C. Schreuer and A. Reinisch, 'Legal Opinion submitted to the Svea Court of Appeal' TDM 2(3) (2005), at para. 145; C. Schreuer and A. Reinisch, 'Legal Opinion submitted to the Stockholm Tribunal in the Quantum Proceedings' TDM 2(3) (2005), at para. 224; C. Schreuer, 'Comments Relating to the Applicable Law on the Stockholm Tribunal' Final Award of 14 March 2003', p. 7.

<sup>65</sup> *Duke Energy International Peru Investments No. 1, Ltd v Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006 (L.Y. Fortier, G.S. Tawil, P. Nikken, arbs), para. 162.

<sup>66</sup> *Duke Energy v Peru*, Award, 18 August 2008, at paras 150–151.

<sup>67</sup> *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (A.R. Sureda, C.N. Brower, D.B. Janeiro, arbs), para. 74. For other cases in which the host state has argued in favor of the (primary) applicability of its national law see, e.g., *ADC Affiliate Limited, ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (N. Kaplan, C.N. Brower, A.J. van den Berg, arbs), para. 288; *LG &E Energy Corp. et al. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (T. Bogdanowsky de Maekelt, F. Rezek, A.J. van den Berg, arbs), para. 81; *Wena v Egypt*, fn. 54, Decision on Annulment, at paras 21, 23; *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (R.E. Vinuesa, B.J. Greenberg, J.C. Irarrázabal, arbs), para. 215; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005

The primary applicability of national law has also been advanced by Iran before the Iran–United States Claims Tribunal. In *Mobil Oil Iran v Iran* (1987) it argued that ‘a breach of contract can be established only by reference to the proper law of the [contract], which undoubtedly is Iranian law, as clearly stated in Article 29 of the Agreement’.<sup>68</sup> Moreover, argued Iran, assuming arguendo that there were no express choice-of-law, the governing law would have to be determined by reference either to the tacit intent of the parties, or to factors demonstrating to which law the agreement is most closely connected.<sup>69</sup> According to Iran, both criteria pointed to Iranian law: ‘The Agreement was concluded in Iran, it was to be performed in Iran and directly affected the natural resources of Iran.’<sup>70</sup> Iran also drew attention to the presumption in international law that the law applicable to a contract to which a state is a party is the domestic law of that state.<sup>71</sup>

Whereas in these particular cases, the arguments by Libya, the Czech Republic, Arbitrator Händl, Argentina, and Iran did not find resonance in the awards,<sup>72</sup> the primary, albeit not always the exclusive, application of national law has received support in scholarship and practice. In this respect, we note in particular the ICSID Convention, during the drafting of which several state representatives stressed the need to apply the law of the host state in the absence of party agreement.<sup>73</sup> The importance, and indeed the primacy, of the law of the host state was supported by Chairman Broches: ‘an international tribunal would in the first place have to look to national law, since the relationship between the investor and the host state is governed in the first

(F.O. Vicuña, M. Lalonde, F. Rezek, arbs), para. 112; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (A. Rigo Sureda, M. Lalonde, R. Oreamuno, arbs), para. 86; *SPP (Middle East) Ltd v Arab Rep. of Egypt*, ICC Award No. 3493, Award, 16 February 1983 (G. Bernini, M. Littman, A. Elghatit, arbs), para. 49; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009 (G. Guillaume, R.A. Cass, M. Wasi Zafar, arbs), para. 60.

<sup>68</sup> *Mobil Oil v Iran*, fn. 35, Partial Award, at para. 67 (referring to article 29 of the agreement). Cf. para. 59 (‘This Agreement shall be interpreted in accordance with the laws of Iran. The rights and obligations of the Parties shall be governed by and according to the provisions of this Agreement. The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties’).

<sup>69</sup> *Mobil Oil v Iran*, at para. 69.

<sup>70</sup> *Mobil Oil v Iran*, at para. 69.

<sup>71</sup> *Mobil Oil v Iran*, at para. 67. See also *Watkins-Johnson Company v Iran*, Award, 28 July 1989, Dissenting Opinion of Judge A. Noori, Award No. 429-370-1, para. 49 (‘[T]he majority has failed to take into account that the Party to the Contract with Watkins-Johnson was the Iranian Government; and it has long been a strong presumption and a general rule of law that the law of the contracting State party governs the relations between the parties, even where the contract is silent in that connection [...]’); *Schlegel Corporation v National Iranian Copper Industries Company*, Award, 27 March 1987, Dissenting Opinion by Judge H. Bahrami-Ahmadi, at section II; *Anaconda-Iran, Inc. v Government of the Islamic Republic of Iran and National Iranian Copper Industries Company (NICIC)*, Case No. 167, Interlocutory Award, 10 December 1986, at para. 125.

<sup>72</sup> See *TOPCO v Libya*, fn. 56, Award on the Merits, 53 I.L.R. 389, 484–95 (sole arbitrator Dupuy dismissed the relevance placed by Libya on the General Assembly Resolutions). See also Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts); *CME v Czech Republic*, Chapter 6, Section 2.2 (on the international nature of the claim); *Siemens v Argentina*, fn. 67, Award, at para. 76; *Mobil Oil v Iran*, Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>73</sup> See Chapter 3, Section 3.2.2.1 (on the ICSID Convention). See also Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-2, p. 802 (hereinafter History of the ICSID Convention) (the delegate from Dahomey noted that ‘national law should prevail’ and that ‘[i]nternational law should of course not be the point of departure when settling a dispute’); see also at 803 (the US representative pointed out that national law would usually be applied).

instance by national law.<sup>74</sup> At a later point, he added that '[i]t was quite clear that the laws of the host country would be of primary importance and that *international law itself* would in the first place refer to them'.<sup>75</sup> The emphasis on state sovereignty led to the specific reference to the law of the host state in Article 42(1), second sentence, of the ICSID Convention, which applies in case the parties have not reached an agreement on the applicable law: '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>76</sup>

While several ICSID tribunals have applied national law to the dispute without finding it necessary to enter into discussions on the relationship between national and international law under the second sentence of Article 42(1) ICSID Convention, ad hoc committees presented with requests for annulment for a failure to apply the proper law have offered guidance in this respect. Several of these committees have called attention to the sequential primacy of national law vis-à-vis international law, an approach that has also found considerable support in scholarship.<sup>77</sup> One example is *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1983/1985).<sup>78</sup> In that case, the ICSID Tribunal concluded that 'the legal system or the contractual law' governing the contracts at hand 'is naturally the civil and commercial law applicable in Cameroon'.<sup>79</sup> It further specified that 'only that part of Cameroon law that is based on French law should be applied in the dispute'.<sup>80</sup> On the merits, the tribunal dismissed the investor's claim for breach of

<sup>74</sup> History of the ICSID Convention, Vol. II-1, at 571. See also Vol. II-2, at 984.

<sup>75</sup> History of the ICSID Convention, Vol. II-2, at 800 (emphasis added). See also at 986 (Broches stated that 'in general, one would have to start with the domestic law of the host State').

<sup>76</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 42(1), second sentence, (hereinafter ICSID/Washington Convention). See also Chapter 3, Section 3.2.2.1 (on the ICSID Convention). But see Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>77</sup> See, e.g., A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Dordrecht, Nijhoff, 1995), 227–9; I.F.I. Shihata and A. Parra, 'Applicable Substantive Law' (1994) 9 *ICSID Rev.* 183, 191–5, 205; W.M. Reisman, 'The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold' in *Liber Amicorum Ibrahim F.I. Shihata* (S. Schlemmer-Schulte and K.-Y. Tung, eds, The Hague, Kluwer Law International, 2001), 585, 586; P.T. Muchlinski, 'Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes' in *Control over Compliance with International Law* (W.E. Butler, ed., Dordrecht, Martinus Nijhoff, 1991), 175, 185–6; K.I. Juster, 'The Santa Elena Case: Two Steps Forward, Three Steps Back' (1999) 10 *Am. Rev. Int'l Arb.* 371, 375; M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague, Kluwer Law International, 2000), 271–3; O. Chukwumerije, 'International Law and Article 42 of the ICSID Convention' (1997) 14 *J. Int'l Arb.* 79; M. Hirsch, *Arbitration Mechanism of the International Center for the Settlement of Investment Disputes* (Dordrecht, Nijhoff, 1993), 138, 140–1; A.F.M. Maniruzzaman, 'Conflict of Laws Issues in International Arbitration: Practice and Trends' (1993) 9 *Arb. Int'l* 371, 399 et seq.; B. Goldman, '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 États et ressortissants d'autres États' in *Investissements Étrangers et arbitrage entre États et personnes privées, La Convention B.I.R.D. du 18 mars 1965* (1969), 151.

<sup>78</sup> *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983 (E. Jimenez de Aréchaga, W.D. Rogers, D. Schmidt, arbs); Decision on Annulment, 3 May 1985 (P. Lalive, A.S. El-Kosheri, I. Seidl-Hohenveldern, committee members).

<sup>79</sup> *Klöckner v Cameroon*, Award, at section VI.

<sup>80</sup> *Klöckner v Cameroon*, at section VI(A). For criticism, see G. Elombi, 'ICSID Awards and the Denial of Host State Laws' (1994) 11 *J. Int'l Arb.* 61, 63 ('Nowhere in the award is reference made to Cameroonian jurisprudence, academic writing or statutes on the principle of good faith [...]. It is clear both from the award and the ensuing annulment proceedings that all parties to the award were concerned not with Cameroonian law based on French law but with *French civil law*' [emphasis in original]).

contract.<sup>81</sup> In reaching this decision, it held that Klöckner had failed to respect its duty of confidence and loyalty vis-à-vis its partner. As to the source of this duty, the tribunal noted:

We take for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under the other national codes which we know of.<sup>82</sup>

Klöckner requested an annulment of the award, partly on the basis that by failing to apply the law of the host state, the tribunal had manifestly exceeded its powers: ‘The Claimant maintains that the Tribunal must [...] “render its award by applying Cameroonian law based on French law, since this, as the Tribunal itself has held, is the law applicable to the present dispute.”’<sup>83</sup> Based on its finding that the tribunal had failed to apply ‘the law of the Contracting State’, the ad hoc Committee annulled the award.<sup>84</sup> In so doing, it construed the tribunal’s reasoning so as to indicate that it ‘may have wanted to base, or thought it was basing, its decision on the general principles of law recognized by civilized nations, as that term is used in Article 38(3) [sic] of the Statute of the International Court of Justice’.<sup>85</sup> It went on to state:

Such an interpretation is conjectural and cannot be accepted. [...] [T]he 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 [...] and *after* having applied the relevant rules of the State’s law. Article 42(1) therefore clearly does not allow the arbitrator to base its decision *solely* on the ‘rules’ or ‘principles’ of international law.<sup>86</sup>

In *Amco Asia Corporation v Republic of Indonesia* (1984/1986/1990),<sup>87</sup> the ICSID Tribunal applied both Indonesian and international law to the merits.<sup>88</sup> Indonesia sought an annulment of the award on several grounds, including manifest excess of powers.<sup>89</sup> Analysing the relationship between national and international law pursuant to Article 42(1), second sentence, of the ICSID Convention, the ad hoc Committee held that ‘the law of the host State is, in principle, the law to be applied in resolving the dispute’.<sup>90</sup> The need to first apply national law was reiterated by the ICSID Tribunal when the case was resubmitted subsequent to the decision on annulment by the ad hoc Committee: ‘[T]he Tribunal believes that its task is to test every claim of law in this case *first* against Indonesian law [...].’<sup>91</sup>

<sup>81</sup> *Klöckner v Cameroon*, at section VII.

<sup>82</sup> *Klöckner v Cameroon*, at section VI(B).

<sup>83</sup> *Klöckner v Cameroon*, Decision on Annulment, at para. 57.

<sup>84</sup> *Klöckner v Cameroon*, Decision on Annulment, at para. 79.

<sup>85</sup> *Klöckner v Cameroon*, Decision on Annulment, at para. 69.

<sup>86</sup> *Klöckner v Cameroon*, Decision on Annulment (emphasis in original). See also at para. 76.

<sup>87</sup> *Amco Asia Corp. v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (B. Goldman, I. Foighel, E.W. Rubin, arbs); Decision on Annulment, 16 May 1986 (I. Seidl-Hohenveldern, F.P. Feliciano, A. Giardina, arbs); Resubmitted Case, Award, 5 June 1990 (R. Higgins, M. LaLonde, P. Magid, arbs).

<sup>88</sup> See Chapter 7, Section 2.1 (on the concurrent application of national and international law and reference to consistency).

<sup>89</sup> *Amco Asia v Indonesia*, fn. 87, Decision on Annulment.

<sup>90</sup> *Amco Asia v Indonesia*, para. 21 (the committee added that in case of conflict between national and international law, the latter prevails.). See also at para. 98 (annulling a finding in the award on the basis that the tribunal had failed to consider a provision of the Indonesian Foreign Investment Law).

<sup>91</sup> *Amco Asia v Indonesia*, fn. 87, Resubmitted Case, Award, at para. 40 (emphasis added). For other ICSID awards supporting the primary application of national law in the absence of an agreement by the parties see, e.g., *Cable TV v The Federation of St. Christopher (St. Kitts) and Nevis*, ICSID Case No.

Whereas these decisions give evidence of a practice according to which investment tribunals of both a territorialized and an internationalized nature first apply national law in assessing the merits of disputes, it is emphasized that according to this approach, the primary applicability of national law is one of sequential and not absolute hierarchy, in that international law may still be applied correctively in supervening fashion.<sup>92</sup> Indeed, it is for that reason that we refer to the applicability of national law as *primary* in nature. As such, this choice-of-law methodology could be said to find a parallel—albeit of a different nature—in the principles of subsidiarity and complementarity. The former principle, which is incorporated in European Union (EU) law,<sup>93</sup> is based on the idea that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level.<sup>94</sup> The latter principle of complementarity, as it appears in the Rome Statute of the International Criminal Court, puts primary power and responsibility in the criminal law area with national jurisdictions, and residual but ultimate power and responsibility with international jurisdiction vested in the International Criminal Court.<sup>95</sup>

In addition, in the subsequent chapter, it will be demonstrated that arbitrators have recently taken a more pragmatic view of the relationship between national and international law, so that ‘international law can be applied by itself if the appropriate rule is found in this other ambit’.<sup>96</sup> According to this view, where the claim in question is international in nature, national law will not be of primary applicability.

### **2.3. The national nature of the claim**

As noted in Chapter 4, a tribunal’s choice-of-law methodology is influenced by the scope of the parties’ arbitration agreement.<sup>97</sup> In the absence of a party agreement, and to the extent to which the tribunal’s jurisdiction is broad enough to cover both national

ARB/95/2, Award, 13 January 1997 (W.A. Davis, A.A. Maynard, R. McKay, arbs), para. 6.25; *Alex Genin, Eastern Credit Limited, Inc. v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (L.Y. Fortier, M. Heth, A.J. van den Berg, arbs), para. 350; *SPP v Egypt*, fn. 37, ICSID Award, Dissenting Opinion El Mahdi, section III(3)(v)(b).

<sup>92</sup> See Section 3.2.2 (on the supervening role of international law).

<sup>93</sup> See Treaty on the Functioning of the European Union (TFEU), at Preamble; see also art. 5(3); Charter of Fundamental Rights of the European Union, at Preamble; see also art. 51(1).

<sup>94</sup> See *Oxford English Dictionary*, available at <<http://www.oed.com/>> (last visited 1 May 2012). See also M. Kumm, ‘The Legitimacy of International Law: A Constitutional Framework of Analysis’, (2004) 15(5) *Eur. J. Int'l L.* 907, 920–1 (‘Subsidiarity is in the process of replacing the unhelpful concept of “sovereignty” as the core idea that serves to demarcate the respective spheres of the national and international’); J.H. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97 *Am. J. Int'l L.* 782, 792.

<sup>95</sup> See T. van Boven, ‘The International Criminal Court and National Laws’ in *De genocidewet in internationaal perspectief* (J. Wouters and H. Panken, eds, Gent, Larclier, 2002), 65, 66. See generally J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, Oxford University Press, 2008).

<sup>96</sup> *Wena v Egypt*, fn. 54, Decision on Annulment, at para. 40. See also E. Gaillard and Y. Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18 *ICSID Rev.-FILJ* 375. Cf. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008), 270 (the authors question whether the doctrine of the supplemental and corrective function of international law vis-à-vis domestic law ‘accurately reflects reality. Tribunals have given international law more than a mere ancillary or subsidiary role’).

<sup>97</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

and international claims, one basis for concluding that national law should govern the claim in question is the national nature of the claim at issue.<sup>98</sup>

Such classification illustrates the qualitatively different nature of the national and the international legal orders. While national law primarily governs relations between private parties *inter se*, traditionally, international law concerned itself exclusively with the mutual relationship between states.<sup>99</sup> Although international law has developed from possessing solely such ‘horizontal’ characteristics to also govern the ‘vertical’ relationship between states and private parties,<sup>100</sup> the horizontal nature of international law is still prevalent.<sup>101</sup>

### 2.3.1. Contractual claims

In the context of investment arbitration, one substantive area that, as a rule, is governed by national law concerns contracts. In other words, the development of general international law so as also to encompass the ‘vertical’ relationship between states and private parties does not extend to contracts entered into between them. The term ‘state contract’ has been attached to contracts made between a state (entity) and a foreign investor.<sup>102</sup> While according to some, state contracts are governed by international law on the basis of the theory of ‘internationalized’ contracts and/or an implicit choice of international law,<sup>103</sup> others, including the present author, would submit that unless the parties’ intention to the contrary is manifest, contractual claims are governed by national law.<sup>104</sup>

In the case of *Payment of Various Serbian Loans Issued in France* (1929), the Permanent Court of International Justice (PCIJ) held that insofar as an agreement is

<sup>98</sup> Cf. *CMI International, Inc. v Ministry of Roads and Transportation, Iran*, Award No. 99-245-2, 27 December 1983, 4 Iran-US C.T.R.-267-8 (1983) (the tribunal’s freedom with regard to applicable law issues, ‘is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts [...]’).

<sup>99</sup> See, e.g., L. Oppenheim, *International Law: A Treatise* (London, Longmans, Green, 1905), § 20; A.P. Sereni, ‘International Economic Institutions and the Municipal Law of States’ (1959-I) 96 *Recueil des Cours* 133, 210. But see J. Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harv. L. Rev.* 129, 132 (referring to the older concept *ius gentium*).

<sup>100</sup> For a discussion of the difference between horizontal and vertical conceptions of international law, see L. Brilmayer, *Justifying International Acts* (Ithaca, London, Cornell University Press, 1989). See also Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>101</sup> See R. Jennings and A. Watts, *Oppenheim’s International Law* (Jennings & Watts, eds, London, Longman, 1992), 16; M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 2008), 5.

<sup>102</sup> Cf. UNCTAD, State Contracts, UNCTAD Series on Issues in International Investment Agreements (2004). Such contracts have also been referred to as ‘internationalized’ contracts or ‘economic development agreements.’ See Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>103</sup> See generally Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts). Cf. *SPP v Egypt*, fn. 67, ICC Award, at para. 49.

<sup>104</sup> See, e.g., F.V. García Amador, ‘State Responsibility: Fourth Report by the Special Rapporteur in International Responsibility’ (1959) 2 *Y.B. Int’l L. Comm’n*, U.N. Doc. A/CN.4/119, para. 126; A.R. Parra, ‘Applicable Law in Investor–State Arbitration’ TDM 15 (November 2007); F. Rigaux, ‘Les situations juridiques individuelles dans un système de relativité générale’ (1989-I) 213 *Recueil des Cours*, para. 154; F.A. Mann, ‘State Contracts and State Responsibility’ in *Studies in International Law* (Oxford, Clarendon Press, 1973), 302, 315. It is noted that an internationalization of the contractual relationship between the investor and the host state may be partly achieved through so-called ‘umbrella’ or ‘sanctity-of-contract’ clauses inserted in investment treaties. See Chapter 6, Section 3.1.2 (on ‘umbrella’ clauses).

not concluded between subjects of international law, it is governed by national law.<sup>105</sup> Jurisprudence such as this, coupled with diplomatic practice, led the Committee established by the League of Nations for the study of international loan contracts to conclude that '[e]very contract which is not an international agreement—i.e., a treaty between States—is subject (as matters now stand) to municipal law'.<sup>106</sup> The conceptual difference between contractual and international claims receives support in the commentary to the International Law Commission's Articles on State Responsibility: 'Of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party'.<sup>107</sup> Accordingly, and absent an agreement by the disputing parties to the contrary, a contract between an investor and a host state is governed by national law. Normally, this national law will be that of the host state. This follows from the centre of gravity test,<sup>108</sup> as well as notions of state sovereignty.<sup>109</sup> The PCIJ stated: 'a sovereign state [...] cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own'.<sup>110</sup> In a similar vein, García-Amador explains:

[G]iven the nature and scope of the State's powers with respect to patrimonial rights, whatever their character or the nationality of their owners, the substance of the contractual relation can be governed by a body of law other than the municipal law of the State only if there is an express stipulation to that effect or the State has, as least, given its tacit consent thereto.<sup>111</sup>

In terms of practice, territorialized and internationalized tribunals have applied national law to investment contracts in the absence of a choice-of-law agreement. As for the first category of tribunals, this practice is illustrated by the award in *Wintershall A.G. et al v Government of Qatar* (1987–89).<sup>112</sup> In that case, the host state had entered into an

<sup>105</sup> *Case Concerning the Payment of Various Serbian Loans Issued in France*, Judgment, 12 July 1929, PCIJ Series A No. 14, at 41. See also S.M. Schwebel, 'The Alsing Case' (1959) 8 *Intl & Comp. L.Q.* 320, 324–5 ('Greece maintained that the law applicable to the case was Greek law. [...] [S]ince the Treasury was a party to the contract, it was to be presumed that the parties intended Greek law to apply (the defendant cited, *inter alia*, the *Serbian and Brazilian Loans Cases* in support of this view' [references omitted]). But see T. Wälde, 'The Serbian Loans Case: A Precedent for Investment Treaty Protection of Foreign Debt?' in *International Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 383, 395 (criticizing the interpretation that the *Serbian Loans* judgment justifies a view that municipal law prevails and that international law has no, or at least only a marginal, role when it comes to states' noncompliance with their loan and investment agreements).

<sup>106</sup> Report of the Committee for the Study of International Loan Contracts, at p. 21, League of Nations Publication, II. Economic and Financial, 1939.II.A.10 (document C.145.M.93.1939.II.A). Cf. *Messageries maritimes*, French Court of Cassation, 21 June 1950 *Case Concerning Anglo-Iranian Oil Co. (United Kingdom v Iran)*, Judgment, 22 July [1952] ICJ Rep. 93, 112.

<sup>107</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 87 (Article 4, Comment 6) <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> (last visited 1 May 2012).

<sup>108</sup> See Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law). Cf. Institut de droit international, *La loi du contrat dans les accords entre un Etat et une personne privée étrangère*, Athens, 1979, art. 5; D. Di Pietro, 'Applicable Law Under Article 42 of the ICSID Convention: The Case of Amco v Indonesia' in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 223, 224; Rigaux, fn. 104, at para. 156.

<sup>109</sup> See generally Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>110</sup> *Payment of Various Serbian Loans Issued in France*, fn. 105, at 42.

<sup>111</sup> García Amador, fn. 104, at para. 128. See also at paras 106, 126.

<sup>112</sup> *Wintershall A.G. v Government of Qatar*, Partial Award of 5 February 1988 and Final Award of 31 May 1988 (J.R. Stevenson, I. Brownlie, B. Cremades, arbs).

Exploration and Production Sharing Agreement with various foreign investors.<sup>113</sup> The latter contended that the host state had breached this agreement and expropriated their contractual rights and interest in violation of Qatari and public international law; and alternatively, that they were entitled to recovery of unjust enrichment.<sup>114</sup> Applying the centre of gravity test, the tribunal decided to apply the law of the host state, and, ‘in case the Tribunal should determine that it is relevant to an issue, public international law’.<sup>115</sup> After having reviewed the deposited authorities on public international law, the tribunal found that public international law was not independently relevant to the issues before it, and it concluded that the governing substantive law was Qatari law.<sup>116</sup>

The conclusion that contractual claims are governed by national law is indirectly confirmed by the NAFTA award *Waste Management, Inc. v United Mexican States* (2004).<sup>117</sup> Article 1105 of NAFTA provides that ‘[e]ach Party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security’.<sup>118</sup> The tribunal, set up pursuant to the ICSID Additional Facility Rules, concluded that the investor had failed to show that the conduct of the Mexican City of Acapulco amounted to a breach of the treaty: ‘Showing that it was a breach of contract is not enough’.<sup>119</sup>

ICSID tribunals have frequently applied national law to contractual claims. This practice receives support in the *travaux préparatoires* of the ICSID Convention. For instance, the Austrian delegate stated that there was ‘no difficulty in cases where an investor complained of action which affected the performance of the contract’.<sup>120</sup> In that event, she opined, the tribunals were ‘merely a substitute for the domestic courts and would apply municipal law’.<sup>121</sup> In a similar vein, the representative from Ceylon pointed out that contracts between private persons and states are not governed by customary international law; and that if such a development was necessary, he thought the proper body to achieve it was the International Law Commission.<sup>122</sup>

In *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal* (1988), the investor sought reparation for losses suffered following an alleged breach by the host state of a contract for the construction of low-income housing.<sup>123</sup> The parties had not reached an agreement on the applicable law, and the ICSID Tribunal concluded that ‘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’.<sup>124</sup> More specifically, the tribunal

<sup>113</sup> *Wintershall A.G. v Government of Qatar*, Partial and Final Awards.

<sup>114</sup> *Wintershall A.G. v Government of Qatar*, Partial Award, at 800.

<sup>115</sup> *Wintershall A.G. v Government of Qatar*, Partial Award, at 802 (referring to Order of 18 March 1987, para. 2).

<sup>116</sup> *Wintershall A.G. v Government of Qatar*, Partial Award. See also at 821–3 (the tribunal dismissed the investors’ claims on the merits. In its reasoning, the tribunal referred to several provisions of Qatari law). See also Separate Opinion of I. Brownlie, at 831–2; ICC Case No. 1434 (1975), reprinted in Yves Derains, *Chronique de Sentences Arbitrales*, Clunet (1976) (applying concepts of French law).

<sup>117</sup> *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (J.R. Crawford, E. Magallón Gómez, B.R. Civiletti, arbs).

<sup>118</sup> North American Free Trade Agreement (NAFTA), art. 1105 (emphasis added).

<sup>119</sup> *Waste Management*, fn. 117, Award, at para. 73. Cf. *Council of Canadians, CUPW and the Charter Committee on Poverty Issues v the Attorney General of Canada*, Affidavit of J. Crawford, 15 July 2004 (reply to M. Sornarajah), para. 7.

<sup>120</sup> History of the ICSID Convention, fn. 73, Vol. II-1, p. 400.

<sup>121</sup> History of the ICSID Convention, fn. 73, Vol. II-1, p. 400.

<sup>122</sup> See History of the ICSID Convention, Vol. II-2, p. 801.

<sup>123</sup> *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988 (A. Broches, K. Mbaye, J.C. Schultsz, arbs).

<sup>124</sup> *SOABI v Senegal*, at para. 5.02. See also at para. 5.02 (the parties did not dispute this conclusion. The tribunal noted: ‘[B]oth parties agree that the applicable law is Senegalese administrative law’).

found 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 [...].’<sup>125</sup>

National law was also applied to contractual claims in *Autopista Concesionada de Venezuela, C.A. (Aucoven) v Bolivarian Republic of Venezuela* (2003).<sup>126</sup> On the basis of a reference to certain Venezuelan laws and decrees in the choice-of-law provision,<sup>127</sup> the ICSID Tribunal held that, except for matters covered by these Venezuelan legal provisions, it had to consider the second sentence of Article 42(1) of the ICSID Convention, providing for the application of the law of the host state and international law.<sup>128</sup> As for the relationship between these sources, the tribunal stated: ‘Whatever the extent of the role that international law plays under Article 42(1) (second sentence), this tribunal believes that there is no reason in this case, *considering especially that it is a contract and not a treaty arbitration*, to go beyond the corrective and supplemental functions of international law.’<sup>129</sup> Accordingly, national law was held to be of primary applicability with respect to the merits of the contractual claims.<sup>130</sup> And, as the ICSID Tribunal held in *Noble Ventures, Inc. v Romania* (2005):

[It is a] well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. [...]. This derives from the clear distinction between municipal law on the one hand and international law on the other [...].<sup>131</sup>

In some cases, the Iran–United States Claims Tribunal has applied national law to questions relating to investment contracts lacking a choice-of-law provision, at least as concerns the existence of a contractual relationship. One example is *Sea-Land Service, Inc. v Government of the Islamic Republic of Iran, Ports and Shipping Organizations (PSO)* (1984).<sup>132</sup> In that case, Sea-Land requested relief on various alternative bases: breach of contract, expropriation, and unjust enrichment.<sup>133</sup> As for the contractual claims, the tribunal held: ‘The Facility Agreement of 26 November 1976 between PSO and [the Iranian transportation company] ILB must be taken to have been governed by the laws of Iran. Both parties to it were Iranian, and its subject-matter was a parcel of

<sup>125</sup> *SOABI v Senegal*, at para. 5.02.

<sup>126</sup> *Autopista Concesionada de Venezuela, C.A. (Aucoven) v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003 (G. Kaufmann-Kohler, K.-H. Böckstiegel, B.M. Cremades, arbs).

<sup>127</sup> *Aucoven v Venezuela*, at para. 94.

<sup>128</sup> *Aucoven v Venezuela*, at para. 100.

<sup>129</sup> *Aucoven v Venezuela*, at para. 102. Cf. *Wena v Egypt*, fn. 54, Decision on Annulment, at para. 42 (the determinant factor for applying international law was that the dispute concerned Egypt’s obligations under the BIT and not contractual obligations).

<sup>130</sup> *Aucoven v Venezuela*, fn. 126, Award, at paras 222–227 (the tribunal construed Venezuelan law, including the jurisprudence of the Venezuelan Supreme Court, to allow for unilateral termination of the contract).

<sup>131</sup> *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (K.-H. Böckstiegel, J. Lever, P.-M. Dupuy, arbs), para. 53. See also *Vivendi v Argentina*, fn. 38, Decision on Annulment, at para. 96 (while the committee did not have an opportunity to consider contractual claims due to a forum selection clause, it stated that they would be governed ‘by the proper law of the contract, in other words, the law of Tucumán’); *SGS Société Générale de Surveillance, S.A. v Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003 (F.P. Feliciano, A.J.E. Fauréz, J.C. Thomas, arbs), para. 167 ([A] violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law’).

<sup>132</sup> *Sea-Land Service, Inc. v Government of the Islamic Republic of Iran, Ports and Shipping Organizations (PSO)*, Case No. 33, Award, 22 June 1984.

<sup>133</sup> *Sea-Land v Iran*, at section I(i).

land in the port of Bandar Abbas.<sup>134</sup> Finding that Sea-Land had contractual rights vis-à-vis PSO on the basis neither of the agency theory nor of the third-party beneficiary theory, the tribunal relied on and quoted from the Iranian Civil Code.<sup>135</sup>

Another case on point is *Dic of Delaware, et al. v Tehran Redevelopment Corp. (TRC), et al.* (1985), in which an issue arose about the enforceability of a certain Phase III Contract.<sup>136</sup> The tribunal concluded that if there were an agreement, there was not sufficient evidence of its definiteness of terms to be enforceable.<sup>137</sup> In so holding, it applied Iranian law:

If there were an oral agreement, it would be enforceable under Iranian law, which would seem to be the law of the contract because of the connection between the project and Iran and because of the fact that Iranian law was chosen to be the applicable law in the contracts for the other phases [...]. Under Iranian law, a contract not in writing and involving an amount exceeding over 500 rials in value cannot be proved by oral or written testimony alone. See The Civil Code of Iran, Arts. 1306 and 1310. In the present case the Claimants rely on contemporaneous documents recording the understandings reached with TRC, and demonstrating part performance of the contract [...]. It appears that acceptance of part performance can be proof of a binding contract under Iranian law. See, e.g., The Civil Code of Iran, Art. 193. [...].<sup>138</sup>

The application of national law to contracts was, however, expressly rejected by the tribunal in *Anaconda-Iran, Inc. v Government of the Islamic Republic of Iran and National Iranian Copper Industries Company (NICIC)* (1986).<sup>139</sup> The dispute arose out of a Technical Assistance Agreement (TAA), according to which the investor was to provide NICIC with technical assistance in connection with the development, construction, and operation of a copper mine and related plant and smelter in Iran.<sup>140</sup> The TAA terminated prior to its term, and each party alleged breach of the TAA by the other party.<sup>141</sup> As to the applicable law, the investor argued that the fact that the TAA did not contain any provision subjecting it to any governing national law implied a ‘negative choice’ of law: ‘each Party refused to accept the other’s national law.’<sup>142</sup> While the investor argued in favour of the application of the terms of the TAA, trade usages, and general principles of international commercial law,<sup>143</sup> NICIC argued in favour of the application of national law:

[I]n the absence of any specific contractual choice of law provisions the Tribunal is required, by virtue of the terms of Article V of the CSD, to apply relevant choice of law rules of international commercial law. The relevant choice of law rules of international commercial law are, *inter alia*, the principles of *lex loci contractus*, *lex loci solutionis* and *lex rei sitae*. On the basis of these principles NICIC argues that Iranian law is applicable to the TAA.<sup>144</sup>

<sup>134</sup> *Sea-Land v Iran*, at section II(A)(i).

<sup>135</sup> *Sea-Land v Iran*. See also Dissenting Opinion of Judge H.M. Holtzmann, at section III (referring to the Civil Code of Iran).

<sup>136</sup> *Dic of Delaware, et al. v Tehran Redevelopment Corp., et al.*, Award, 26 April 1985, at section B (1).

<sup>137</sup> *Dic of Delaware*, at section B(1).

<sup>138</sup> *Dic of Delaware*, at section B(1). Cf. Economy Forms Corporation and Iran, Award, 14 June 1993, 3 Iran-US C.T.R. 42, 47–8 (the tribunal stated that it would decide contract claims pursuant to the ‘proper law of the contract’. It used the centre of gravity test to find that law).

<sup>139</sup> *Anaconda-Iran v Iran*, fn. 71, Interlocutory Award.

<sup>140</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 1.

<sup>141</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 1.

<sup>142</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 122.

<sup>143</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 124.

<sup>144</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 125.

The tribunal disagreed with NICIC and held that it would apply to the agreement ‘relevant usages of trade and take into account principles of commercial and international law’.<sup>145</sup> It justified its decision not to apply Iranian law by stating that ‘the Tribunal is not required to apply any particular national system of law such as Iranian law’; and it further reasoned as follows:

[The Tribunal cannot conclude] that Iranian law is applicable because the place of conclusion and execution of the TAA was Iran. In most contract cases before the Tribunal the contracts actually were concluded and executed in Iran. If the States Parties to the Algiers Accords had intended that Iranian law would apply to all such cases which do not contain a contractual clause to the contrary, the Algiers Accords undoubtedly would have contained specific provisions to that effect. As we have seen, however, Article V created quite a different system.<sup>146</sup>

### 2.3.2. Non-contractual claims

In the absence of an agreement to the contrary, non-contractual claims may—in contrast to contractual claims—be based both in national and in international law. Still, the applicability of international law depends on the identity of the claimant. Where—as in most cases—the claimant is a foreign investor, the latter may rely on obligations the host state has under international law. However, where the (counter-) claimant<sup>147</sup> is the host state, the latter is—as the law stands today—limited to invoking obligations of the foreign investors under national law.

Depending on the scope of the arbitration agreement, foreign investors may present non-contractual claims against the host state.<sup>148</sup> Frequently, such claims are based in international law;<sup>149</sup> but investment tribunals have also considered non-contractual claims in the light of national law, either alone or in addition to international law. One example is *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova* (2005), in which the foreign investor, invoking Moldovan law, alleged that the host state had violated the principle of non-retroactivity of legislation.<sup>150</sup> In dismissing the claim on the merits, sole Arbitrator Moss applied the Moldovan Foreign Investment Act, Governmental Regulation No 482 of 1988.<sup>151</sup>

In certain cases, host states may present non-contractual claims or counterclaims<sup>152</sup> against foreign investors. As a rule, such claims will be governed by national law. Despite the fact that individuals may enjoy rights under international law—and apart

<sup>145</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at para. 156(h).

<sup>146</sup> *Anaconda-Iran v Iran*, Interlocutory Award, at paras 132–134. See also at para. 156(h). Cf. *Mobil Oil v Iran*, fn. 35, Partial Award, at para. 67, referred to in Chapter 6, Section 2.1.1 (on express or implied ‘internationalization’ of investment contracts).

<sup>147</sup> On host states as claimants, see G. Laborde, ‘The Case for Host State Claims in Investment Arbitration’ (2010) 1(1) *J. Int'l Disp. Settlement* 97.

<sup>148</sup> See Chapter 4, Section 2 (on the scope of the arbitration agreement: national and/or international claims).

<sup>149</sup> See Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>150</sup> *Iurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova, SCC Institute*, Award, 22 September 2005 (G. Cordero Moss, sole arb.), section 1.3.

<sup>151</sup> *Bogdanov v Moldova*, at section 4.1. See also *SPP v Egypt*, fn. 37, ICSID Decision on Jurisdiction I, 7 November 1985; see also fn. 37, Award; Chapter 4, Section 3.2 (on arbitration without privity); Chapter 7, Section 2.2 (on reference to consistent national and international law); *Tradex Hellas S.A. v Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 (K.-H. Böckstiegel, F.F. Fielding, A. Giardina, arbs); Final Award, 29 April 1999; Chapter 4, Section 3.2 (on arbitration without privity); Section 3.1.2 (on international law as a source of interpretation).

<sup>152</sup> See Chapter 4, Section 4 (on counterclaims by host states).

from notable exceptions of EU law,<sup>153</sup> international criminal/humanitarian law,<sup>154</sup> and international sanctions law<sup>155</sup>—international law generally does not impose obligations on private parties. As stated by Cassese, '[t]he first salient feature of international law is that most of its rules aim at regulating the behaviour of States, not that of individuals.'<sup>156</sup> With this in mind, we may better understand the disinclination by a host state against a sole role for international law in the proceedings, and that it rather—or also—may favour the application of its own national law, which may impose obligations on the foreign investor.<sup>157</sup>

We do, however, observe certain developments set in motion by scholars, states, and (non-) governmental organizations attempting to fill this lacuna in international law.<sup>158</sup> According to Peterson and Gray, 'it is clear, that if the investor's conduct rose to the level where it violated (or was complicit in the host state violation of) certain core human rights, then tribunals would need to consider such violations of so-called peremptory norms of international law.'<sup>159</sup> Further, the International Institute for Sustainable Development (IISD) Model Agreement on International Investment for Sustainable Development stipulates that '[i]nvestors and investments should uphold human rights in the workplace and in the state and community in which they are located, [and] shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of [sic] Work, 1998'.<sup>160</sup> Moreover, we note the following provision in the now shelved<sup>161</sup> Norwegian Draft Model

<sup>153</sup> See, e.g., Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297, para. 36 and operative part 1; Case 43/75, *Gabrielle Défrenne v Sabena* [1976] ECR 455, para. 39.

<sup>154</sup> See, e.g., *Regina v Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet* (24 March 1999) (Lord Millet); E. van Sliedrecht, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, T.M.C. Asser Press, 2003).

<sup>155</sup> Cf. H.H.G. Post, 'Introduction' in *International Economic Law and Armed Conflict* (H.H.G. Post, ed., Dordrecht, Nijhoff, 1994), 1. See also J.J. van Haersolte-van Hof and A.K. Hoffmann, 'The Relationship Between International Tribunals and Domestic Courts' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 962, 987–8.

<sup>156</sup> A. Cassese, *International Law* (Oxford, Oxford University Press, 2001), 3. See also M. Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 *Int. Environ. Agreements* 329, 341; Jennings and Watts, fn. 101, at 16. See also Chapter 4, Section 4.2.2 (on juridical connexity). But see *Okpeticha v Okpeticha*, Constitutional Court of Benin, Decision, 17 August 2001 (the African Charter on Human and People's Rights expressly provides for individual duties in articles 27–29).

<sup>157</sup> See Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments); Chapter 1, Section 1 (on motivations for the study).

<sup>158</sup> See Ruggie Report, fn. 52, at paras 23, 55 *et seq.*; S.K.B. Asante, 'Code of Conduct on Transnational Corporations' in *Legal Aspects of the New International Economic Order* (K. Hossain, ed., London, Pinter, 1980), 9; International Institute for Sustainable Development and World Wildlife Fund, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (Winnipeg, Manitoba, IISD, 2001), 19; S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale L.J.* 443. But see C.M. Vázquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 *Colum. J. Transnat'l L.* 927 (urging caution). See generally P. Muchlinski, 'Corporate Social Responsibility' in *The Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 367.

<sup>159</sup> L.E. Peterson and K.R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, April 2003, at 2, available at <[http://www.iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf)> (last visited 1 May 2012).

<sup>160</sup> IISD [International Institute for Sustainable Development] Model Agreement on International Investment for Sustainable Development (as revised in April 2006) (hereinafter IISD Model Agreement), art. 14(c). See also arts 14(D) and 16(B).

<sup>161</sup> D. Vis-Dunbar, 'Norway Shelves its Draft Model Bilateral Investment Treaty' *Investment Treaty News* (8 June 2009).

Investment Agreement: ‘The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.’<sup>162</sup>

In this context, brief mention should also be made of the Alien Tort Claims Act of 1789 (ATCA).<sup>163</sup> The latter grants jurisdiction to US federal courts over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.<sup>164</sup> As such, it allows for the application of international law in disputes between private parties.<sup>165</sup> We note in particular the case of *Wiwa v Royal Dutch Petroleum Co.* (2002), in which the Court held that Mr Anderson, the former Managing Director of the Royal Dutch/Shell subsidiary Shell Nigeria, could be sued under the ATCA, as actions of the company and Anderson constituted participation in crimes against humanity; torture; summary execution; arbitrary detention; cruel, inhuman and degrading treatment; and other violations of international law.<sup>166</sup>

Still, the aforementioned developments with respect to the liability of corporations under international law cannot be said to have crystallized into *lex lata* (‘the law as it exists’). As stated in the Interim Report of the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises:

There are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended. Moreover, there are no inherent conceptual barriers to States deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firms or by establishing some form of international jurisdiction. But these are not propositions about established law; they are normative commitments and policy preferences about what the law should become and that require State action for them to take effect.<sup>167</sup>

Therefore, the following remark made by the ICSID Tribunal in the investment treaty award *Sempra Energy International v Argentine Republic* (2007), cannot be said to accurately depict the present state of the law. In discussing the issue of legitimate expectations under international law, the tribunal observed:

<sup>162</sup> Norwegian Draft Model Investment Agreement, art. 32. See also the Comments on the Model for Future Investment Agreements, at paras 2.5, 4.6.3.

<sup>163</sup> See Alien Tort Claims Act, 28 U.S.C. § 1330.

<sup>164</sup> Alien Tort Claims Act, 28 U.S.C. § 1330.

<sup>165</sup> Courts have also applied national law. See, e.g., *Doe I v Unocal*, 395 F.3d 932 (9th Cir. 2002), rehearing en banc granted, 395 F.3d 978 (9th Cir. 2003).

<sup>166</sup> *Wiwa v Royal Dutch Petroleum Co.* 2002 WL 319887 (S.D.N.Y.).

<sup>167</sup> UN Economic and Social Council (ECOSOC), Commission on Human Rights, *Promotion and Protection of Human Rights, Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, at para. 65, UN Doc. E/CN.4/2006/97 (22 February 2006). See also at para. 62; Ruggie Report, fn. 52, at para. 34; J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 21 March 2011, A/HRC/17/31, Annex, Principle 12, Commentary; A. Nollkaemper, ‘Translating Public International Law into Corporate Liability’ in *From Government to Governance: The Growing Impact of Non-State Actors on the International and the European Legal System* (W.P. Heere, ed., The Hague, T.M.C. Asser Press, 2004), 224; A. Reinisch, “Investment and . . .”—the Broader Picture of Investment Law’ in *International Investment Law in Context* (A. Reinisch and C. Knahr, eds, Utrecht, Eleven International, 2007), 201, 203–4; *Presbyterian Church of Sudan, et. al., v Talisman Energy, Inc., et. al.*, 244 F.Supp.2d 289, 308 (S.D.N.Y. 2003) (19 March 2003).

The Respondent has argued that the Government also had many expectations in respect of the investment that were not met or were otherwise frustrated. Apart from the question of investment risk, it is alleged that there was, *inter alia*, the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework. The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and *could have resulted in breaches of the Treaty*, the Respondent would be entitled to raise a counterclaim.<sup>168</sup>

In light of the fact that the Argentina–United States BIT does not appear to include any relevant substantive obligations on the part of the investor,<sup>169</sup> it appears that such counterclaim would need to be based on national law, and not the treaty—as the tribunal suggested.<sup>170</sup>

Although a decision on jurisdiction and not on the merits, we also note that the ICSID Tribunal in *Inceysa Vallisoletana S.L. v Republic of El Salvador* (2007) applied public international law to assess the conduct of the foreign investor.<sup>171</sup> The tribunal denied jurisdiction on the basis that the investment was made in a manner that violated the national law of the host country; and that therefore, the dispute was not within the scope of consent expressed by the Republic of El Salvador in the BIT at hand.<sup>172</sup> The arbitrators were convinced that Inceysa had engaged in several instances of fraudulent conduct.<sup>173</sup> Rather than judging this conduct on the basis of Salvadorian law, the tribunal decided to assess it according to general principles of law, ‘an autonomous or direct source of International Law, along with international conventions and custom’.<sup>174</sup> More specifically, Inceysa’s conduct was held to have violated the general principle of good faith,<sup>175</sup> as well as the legal principle that prohibits unlawful enrichment.<sup>176</sup> In deciding to apply general principles of law, rather than national law, the tribunal first noted that treaties, and therefore the BIT at hand, are considered part and parcel of Salvadorian law.<sup>177</sup> Accordingly, held the tribunal, ‘the BIT, as valid law in El Salvador, is the primary and special legislation this Tribunal must analyze to determine whether Inceysa’s investment was made in accordance with the legal system of that Nation.’<sup>178</sup> Secondly, it referred to the applicable law clause in the BIT, which stated that the arbitration was to be based on ‘the provisions of this [BIT] and those of other agreements executed between the Contracting Parties; [...] general recognized rules and principles of International Law; [and] the national law of the Contracting Parties in whose territory the investment was made, including the rules regarding conflict of laws’.<sup>179</sup>

<sup>168</sup> *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/0/16, Award, 28 September 2007, at para. 289 (emphasis added).

<sup>169</sup> Argentina–United States BIT.

<sup>170</sup> See Chapter 4, Section 4.2.2 (on juridical connexity).

<sup>171</sup> *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (R. Oreamuno, B. Landy, C. von Wobeser, arbs).

<sup>172</sup> *Inceysa Vallisoletana*, at para. 257. See also Chapter 6, Section 3.2.2 (on the supervening role of national law).

<sup>173</sup> *Inceysa Vallisoletana*, at paras 101–127.

<sup>174</sup> *Inceysa Vallisoletana*, at para. 226. See also at para. 225 (quoting from Article 38(1) of the Statute of the International Court of Justice).

<sup>175</sup> *Inceysa Vallisoletana*, at paras 230–239.

<sup>176</sup> *Inceysa Vallisoletana*, at para. 253.

<sup>177</sup> *Inceysa Vallisoletana*, at para. 219.

<sup>178</sup> *Inceysa Vallisoletana*, at para. 220.

<sup>179</sup> *Inceysa Vallisoletana*, at para. 222 (referring to article XI(3) of the BIT). See also *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (C.F. Salans, A.J. van den Berg, V.V. Veeder, arbs), paras 143–146 (referring also to Bulgarian law).

It is submitted that the tribunal's application of general principles of law in assessing the conduct of the investor was—at the very least—unnecessary.<sup>180</sup> From the language of the BIT, as well as its *travaux préparatoires*,<sup>181</sup> it is clear that the relevant test is whether the investment was made in accordance with the laws of the host state, and not international law.<sup>182</sup> Thus, a more logical step would have been to apply Salvadorian law and not international law as part of national law, since it is unlikely that in El Salvador—as in most national legal systems—international law is generally directly applied to the conduct of private parties.

Such an approach would be consistent with that of other arbitral tribunals considering non-contractual counterclaims brought by host states against investors. While practice is admittedly scarce,<sup>183</sup> one example is *Atlantic Triton Company Limited v Guinea* (1986), in which the ICSID Tribunal, under the heading of 'Quasi-Tortious Fault', and applying national law, dismissed the host state's counterclaim that the investor had wrongfully seized its ships.<sup>184</sup> Another example is *Alex Genin v Estonia* (2001), in which the host state brought a counterclaim against the investor based on an alleged violation of Estonian banking law.<sup>185</sup> The ICSID Tribunal dismissed the counterclaim on the merits: 'Estonia has failed to demonstrate to the satisfaction of the Tribunal the merits of its request.'<sup>186</sup>

## 2.4. Interim conclusions

We have seen that arbitrators apply national law to the merits of the dispute when the parties have so agreed. When the tribunal may have recourse to both national and international law, considerations of host state sovereignty and territorial control over foreign investors and investments have led tribunals and scholars to hold and argue that national law should be of primary applicability. The importance of the principle of sovereignty notwithstanding, it is submitted that a decision to apply national law to the merits ought to depend more on the national nature of the claim at hand than any automatic sequential primacy of national law. On the basis of such a 'cause-of-action' analysis,<sup>187</sup> contractual claims are generally to be governed by national law. Also non-contractual claims may be based on and consequently governed by national law. Moreover, in light of the fact that investors generally do not have any obligations under international law, non-contractual (counter-) claims presented by a host state against an investor would be based in and governed by national law.

<sup>180</sup> Cf. C. Knahr, 'Investments "in Accordance with Host State Law"', in *International Investment Law in Context* (A. Reinisch and C. Knahr, eds, Utrecht, Eleven International, 2007), 27, 34.

<sup>181</sup> See *Inceysa Vallisoletana*, fn. 171, Award, at paras 192–194.

<sup>182</sup> See *Inceysa Vallisoletana*, fn. 171, Award, at paras 192–194.

<sup>183</sup> There are examples of host states seeking to enforce its national tax law by means of counter-claims, but such counterclaims have been held to fall outside the tribunal's jurisdiction or to be inadmissible. See Chapter 4, Section 4 (on counterclaims by host states).

<sup>184</sup> *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award of 21 April 1986 (P. Sanders, J.-F. Prat, A.J. van den Berg, arbs), 3 ICSID Rep. 13, 17, 33, 35 (1995) (the investment agreement stipulated that Guinean law would be applicable. However, the arbitral tribunal was also empowered to decide disputes *ex aequo et bono*.)

<sup>185</sup> *Alex Genin v Estonia*, fn. 91, Award, at para. 199.

<sup>186</sup> *Alex Genin v Estonia*, at para. 376. See also at fn. 101 (noting that the Republic of Estonia did not appear to be the proper counterclaimant).

<sup>187</sup> Cf. Z. Douglas, 'Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22(1) *Arb. Int'l.* 27, 40.

Finally, whereas tribunals do at times differ as to their approach to the primary applicability of national law, it does not appear from our examination of practice that any difference is caused by the territorialized and internationalized nature of the tribunals. Indeed, in several cases ICSID tribunals in particular, but also the Iran–United States Claims Tribunal, have concluded that national law should primarily be applied to the merits of the dispute in the absence of an agreement by the parties to the contrary.

### 3. The Role of International Law when National Law Primarily Applies

When a tribunal holds that national law should primarily apply to the dispute—for any of the reasons set out earlier: party autonomy, host state sovereignty, nature of the claim—international law may still apply to the merits of the dispute. Indeed, it is for that very reason that it is appropriate to use the terminology of *primary* applicability. In this section, we will see that international law may apply indirectly, through the applicable national law (Section 3.1); or directly, in a complementary or supervening fashion (Section 3.2).

#### 3.1. The indirect application of international law

International law may be applied when the national legal order at hand perceives of international law as being part of the ‘law of the land’, or when it includes ‘international-law-friendly’ interpretation techniques. Since international law applies as a function of the national law itself—i.e., the approach of the tribunals is similar to that which would have been employed by the national courts of the host state—this indirect form of interplay does not undermine party autonomy or host state sovereignty.

##### 3.1.1. International law as part of the ‘law of the land’

Several states consider international law part and parcel of their law.<sup>188</sup> Accordingly, their national courts may directly apply international norms; that is, to the extent to which such norms are considered to be self-executing or have direct effect.<sup>189</sup> It is submitted that in investment arbitration, investors should have the same opportunity to make use of international norms as a function of the applicable national law if it so provides.<sup>190</sup> In case the parties have opted for the application of a particular national

<sup>188</sup> See A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford, Oxford University Press, 2008), 73–4 ([A] significant number of states have adopted or recognized a rule (often constitutional, whether written or unwritten) of domestic law that can authorize all or particular rules of international law to be part of domestic law, without there being a need for implementing legislation. This is for instance the situation in Benin, Cape Verde, (in principle) China, Côte d'Ivoire, the Czech Republic, the Dominican Republic, Egypt, Ethiopia, France, Japan, the Netherlands, Portugal, the Russian Federation, Senegal, Switzerland, Turkey, and the United States [references omitted]); *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (D. Shelton, ed., Oxford, Oxford University Press, 2011)).

<sup>189</sup> See Nollkaemper, fn. 188, at chapter 6 on direct effect. Cf. *Medellín v Texas*, 552 U.S. 491 (2008).

<sup>190</sup> See Reisman, fn. 77, at 597; A. Broches, ‘The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’ (1992) 136 *Recueil des Cours* 331, 341; Schreuer et al., fn. 5, at 582–3. See also Chapter 1, Section 2 (on the scope of and terminology used in the study).

legal order, any contrary conclusion<sup>191</sup> would be inconsistent with the doctrine of party autonomy.<sup>192</sup> Moreover, arbitrators would then need to disregard national provisions—often of a constitutional character—providing for the incorporation of international law in the national legal order. Such disregard would have the undesirable consequence that the parties would be faced with one application of national law in the national courts of the host state, and another by the arbitral tribunal, as the former would be bound to respect international law as part of its law and the latter not.

States differ with regard to the extent to which they incorporate international law;<sup>193</sup> and investors should therefore be warned against relying on the automatic application of international law via national law.<sup>194</sup> First, states do not generally provide for incorporation into national law of all sources of international law. England, for instance, does not consider treaties part of its domestic law.<sup>195</sup> Customary international law is, however, part of English law.<sup>196</sup> The situation is the same in Italy.<sup>197</sup> It appears that in Pakistan, neither treaty law nor customary international law may be invoked before national courts.<sup>198</sup>

A second variation is that several states will not apply an international norm in case of a conflicting national norm. The South African Constitution provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.<sup>199</sup> Several other states, such as the Netherlands,<sup>200</sup> Argentina,<sup>201</sup>

<sup>191</sup> See Toope, fn. 41, at 239 ('[I]f the parties expressly choose the law of a single state, why should they not be presumed to have chosen the law of that *simpliciter*, and not the law of the state plus international law (as incorporated in the municipal law of the state)?'). See also at 239 (based on Toope's finding that there is no coherent body of international contract law, he reasons that an implicit reference to international law would lead to great uncertainty in the rules to be applied to a contract involving a private party. This uncertainty, he argues, is scarcely consistent with an express choice of law.)

<sup>192</sup> See Schreuer et al., fn. 5, at 582. Cf. US Model BIT (2012), fn. 22 ('The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case').

<sup>193</sup> See Nollkaemper, fn. 188, at 75. For national jurisprudence on the relationship between international and domestic law, see generally *International Law in Domestic Courts*, available at <<http://www.oxfordlawreports.com>> (last visited 1 May 2012).

<sup>194</sup> See P. Muchlinski, 'Policy Issues' in *The Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 3, 39–40.

<sup>195</sup> See, e.g., *MacLaine Watson v Department of Trade and Industry* [1989] 3 All ER 523.

<sup>196</sup> See, e.g., *Chung Chi Cheung v The King* [1939] AC 160, 167–8. See also *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, ICSID Case No. ARB/10/1, Decision on treaty authenticity and interpretation, 7 May 2012, at para. 6.3 ('[C]ustomary international law is part of the applicable law in Turkey' [references omitted]).

<sup>197</sup> See Constitution of the Italian Republic (1947), art. 10; *Ente Nazionale per la Cellulosa v Cartiera Italiana*, 24 I.L.R. 12 (1957).

<sup>198</sup> See *Société Générale de Surveillance S.A. v Pakistan* (Civil Appeal Nrs 459 and 460 of 2002), 2002 SCMR 1694 (3 July 2002), ILDC 82 (PK 2002), at C2; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (G. Kaufmann-Kohler, F. Berman, K.-H. Böckstiegel, arbs), para. 94.

<sup>199</sup> Constitution of South Africa (1996), Chapter 14, Title 1, section 232. Cf. G. Guillaume, 'The Work of the Committee on International Law in National Courts of the International Law Association' (2001) 3 *International Law FORUM du droit international* 35 ('As a general rule, however, treaties do not rank above the constitution, although in some cases they may have equal rank, as, for example, the European Convention on Human Rights in Austria').

<sup>200</sup> The Netherlands also considers treaties superior to the Constitution. See Constitution of the Kingdom of the Netherlands, arts 91(3), 94 (2002).

<sup>201</sup> Cf. *Sempra Energy v Argentina*, fn. 168, Award, at para. 237.

Belgium,<sup>202</sup> Egypt,<sup>203</sup> Luxembourg,<sup>204</sup> Japan,<sup>205</sup> France,<sup>206</sup> Poland,<sup>207</sup> Spain,<sup>208</sup> and Turkey<sup>209</sup> consider treaties supreme to conflicting national law. However, in case of a conflict between a national norm and customary international law, it appears that a Dutch court will grant priority to the former.<sup>210</sup> In the United States, treaties constitute the 'supreme law of the land',<sup>211</sup> but treaties have been interpreted to have supremacy neither over conflicting provisions in the US Constitution,<sup>212</sup> nor over conflicting federal statutes enacted subsequent to the ratification of the relevant treaty (the last-in-time rule).<sup>213</sup>

Finally, we note the special role of international *jus cogens* norms in the domestic legal order, a topic that is treated differently by various states.<sup>214</sup> Further, many states have ensured in their constitutional laws the supremacy of human rights standards, a position they do not grant to other international standards.<sup>215</sup> Moreover, the Treaty on the Functioning of the European Union (TFEU) and European Union (EU)

<sup>202</sup> See, e.g., *Minister for Economic Affairs v Fromagerie Franco-Suisse Le Ski* [1972] CMLR 330, translated in L.J. Brinkhorst and H.G. Schermers, *Judicial Remedies in the European Communities: A Case Book* (Universiteit van Amsterdam, Europa Instituut, 1977), 174, 175.

<sup>203</sup> See, e.g., *Wena v Egypt*, fn. 54, Decision on Annulment, at para. 42.

<sup>204</sup> See E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4(2) *Eur. J. Int'l L.* 159, 163–4.

<sup>205</sup> See Japanese Constitution (1946), art. 98. Cf. K. Holloway, *Modern Trends in Treaty Law* (London, Stevens; Dobbs Ferry, Oceana Publications, 1967), 198.

<sup>206</sup> See French National Constitution (1958), art. 55.

<sup>207</sup> See Constitution of Poland (1997), art. 91(2).

<sup>208</sup> See Spanish Constitution (1978), art. 96(1).

<sup>209</sup> See *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (F.O. Vicuña, L.Y. Fortier, G. Kaufmann-Kohler, arbs), para. 168.

<sup>210</sup> See *SA Maritime et Commerciale v Netherlands (Nyugat II)*, Dutch Supreme Court, 6 March 1959, NJ 1962. See also *Bouterse*, Dutch Supreme Court, 18 September 2001, NJ 2002, 559. Cf. P.H. Kooijmans et al., *Internationaal publiekrecht in vogelvlucht* (Deventer, Kluwer, 2002), 87. But see H. Meijers, 'On International Customary Law in the Netherlands' in *On the Foundations and Sources of International Law* (I.F. Dekker and H.H.G. Post, eds, Asser Press, The Hague, 2003), 111 (in answering the question whether unwritten law shall prevail over Dutch codified law, the Dutch Government stated in 1980: 'Based on the view that in principle a state abides by current international law, including unwritten law, we answer this question affirmatively'). For France, see R. Errera, *Domestic Courts and International Law, the Law and Practice in France: General Aspects and Recent Developments*, at 19–20 (paper delivered at the First International Law in Domestic Courts (ILDC) Colloquium (The Hague, 28 March 2008), on file with author).

<sup>211</sup> See US Constitution (1789), art. VI, section 2; *Edve v Robertson*, 112 U.S. 580 (1884). But see J.C. Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding' (1999) 99 *Colum. L. Rev.* 1955, 1962–7 (the US Constitution can be read to establish that treaties do not 'take effect as internal U.S. law' until implemented by federal statute).

<sup>212</sup> See *Reid v Covert*, 354 U.S. 1, 17 (1957).

<sup>213</sup> See, e.g., *Chae Chan Ping v US*, 130 U.S. 581, 600 (1889); *Diggs v Shultz*, 411 U.S. 931 (1973); Restatement (Third) of Foreign Relations Law § 115 (1987). Cf. R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press; New York, Oxford University Press, 1994), 213–14; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London, Routledge, 1997), 65. See also *CMS v Argentina*, fn. 67, Award at para. 114 ('In respect of the legal regime of treaties in Argentine, the Respondent argues that while treaties override the law they are not above the Constitution and must accord with constitutional public law. Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing and, therefore, in the Respondent's view, stand above ordinary treaties such as investment treaties' [references omitted]).

<sup>214</sup> See, e.g., *Comm. of United States Citizens Living in Nicaragua v Reagan*, 859 F.2d 929, 935 (D.C.Cir. 1988); E. de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' (2004) 15 *Eur. J. Int'l L.* 97, 102.

<sup>215</sup> See, e.g., National Constitution of Argentina (1994), section 75(22). Cf. D. Shelton, 'Introduction' in *International Law and Domestic Legal Systems* (Oxford, Oxford University Press, 2011), 2.

regulations are directly applicable sources in the national legal order of EU Member States, regardless of how these states otherwise regard international instruments.<sup>216</sup>

The practice of territorialized tribunals supports the application of international law on the basis that it constitutes ‘part and parcel’ of the applicable national law. The resulting ‘indirect’ interplay between the legal orders is illustrated by *Libyan American Oil Co. (LIAMCO) v Libyan Arab Republic* (1977).<sup>217</sup> The concession contract at hand provided for the applicability of both national law and international law:

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>218</sup>

Sole Arbitrator Mahmassani, having noted that the Libyan Civil Code referred to Islamic law as a source of law, found it ‘very relevant in this connection to point out that Islamic law treats international law (the Law of Siyar) as an imperative compendium forming part of the general positive law, and that the principles of that part are very similar to those adopted by modern international legal theory’.<sup>219</sup> Mahmassani further noted that general principles of law ‘are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law’.<sup>220</sup> This led the arbitrator to refer to the principle of sanctity of contract, ‘admitted in Islamic law, as is evidenced by many historical precedents’.<sup>221</sup>

Another example is *Government of the State of Kuwait v American Independent Oil Company (Aminoil)* (1982), which concerned a sixty-year concession granted to Aminoil, a US Corporation, by the Ruler of Kuwait in 1948 when Kuwait was still under British control.<sup>222</sup> The contracting parties had agreed that ‘[t]he law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world’.<sup>223</sup> While holding that ‘[i]t can hardly be contested but that the law of Kuwait applies to many matters over which it is the law most directly involved’, the tribunal also emphasized the applicability of general principles of law, partly on the basis of a statement by the host state that ‘established public international law is necessarily a part of the law of Kuwait’.<sup>224</sup>

Further, we note the case *Occidental Exploration and Production Company v Ecuador* (2004), in which the investor alleged that the failure of the host state to refund Value-Added Tax (VAT) constituted violations of the BIT between Ecuador and its home

<sup>216</sup> See *Flaminio Costa v E.N.E.L.*, Case 6/64, ECJ, Judgment, 15 July 1964.

<sup>217</sup> *Libyan American Oil Co. (LIAMCO) v Libyan Arab Republic*, Award, 12 April 1977 (Mahmassani, sole arb.).

<sup>218</sup> *LIAMCO v Libya*, 20 I.L.M. 1, 33 (referring to Clause 28(7)). See also at 13 (Clause 16(2) contained a stabilization clause); and at 19.

<sup>219</sup> *LIAMCO v Libya*, 20 I.L.M. 1, 37.

<sup>220</sup> *LIAMCO v Libya*, 20 I.L.M. 1, 37.

<sup>221</sup> *LIAMCO v Libya*, 20 I.L.M. 1, 56.

<sup>222</sup> *Government of the State of Kuwait v American Independent Oil Company (Aminoil)*, Award, 24 May 1982 (P. Reuter, H. Sultan, G. Fitzmaurice, arbs.).

<sup>223</sup> *Kuwait v Aminoil*, 21 I.L.M. 976, 1000.

<sup>224</sup> *Kuwait v Aminoil*, 21 I.L.M. 976, 1000. See also *SPP v Egypt*, fn. 67, ICC Award, 22 I.L.M. 752, 771 (1983) (after having accepted that Egyptian law constituted the ‘relevant domestic law’, the ICC Tribunal held that international law could be deemed as part of Egyptian law); *SPP v Egypt*, fn. 37, ICSID Award, Dissenting Opinion El Mahdi, at section III(3)(iv) (‘Noteworthy, in this respect, that provisions of treaties entered into by Egypt are considered part of the Egyptian law in appliance of the mechanism provided for in article (151) of the constitution [...]’); see also at section III(3)(v)(b).

state.<sup>225</sup> In deciding the claim on the merits, the UNCITRAL Tribunal referred to international law, including Andean Community law, which is 'binding under the Ecuadorian legal system'.<sup>226</sup> A last example of the practice of territorialized tribunals is *BG Group Plc v Argentina* (2007), in which the UNCITRAL Tribunal stated the following with respect to the incorporation of international law in the Argentine national legal order:

[I]mportantly, the interplay between international law and municipal law under Article 8(4) of the BIT should not overlook that the former may be deemed incorporated into the latter, depending on the status conferred to international treaties and international law in general by a particular constitutional system. This is particularly relevant to the case of Argentina, whose constitutional framework and doctrine have traditionally admitted the direct application of international law whenever feasible and, at least since the constitutional reform undertaken in 1994, expressly providing for the principle that international treaties preempt provincial and federal law. Accordingly, the challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as 'the supreme law of the land', are incorporated into Argentine domestic law, superseding conflicting domestic statutes.<sup>227</sup>

As for ICSID tribunals, representatives present during the drafting of the ICSID Convention commented on the possibility that international law could be applied when the applicable national law incorporates international law as part of its law. The Austrian delegate pointed out that some states, such as her own, would not have difficulties with respect to the application of international law since international law is embodied in the national law.<sup>228</sup> Further, the representative from Tanganyika referred to the practice by municipal courts of applying international law.<sup>229</sup> Also the representative from Peru, otherwise sceptical about the application of international law, agreed that it could apply when the national law of the host state so provided.<sup>230</sup>

The indirect application of international law in ICSID arbitration is supported by arbitral practice. The ICSID Tribunal in *Antoine Goetz and others v Republic of Burundi* (1999) observed that the BIT in question could be considered applicable partly for the reason that Burundian law incorporates international law.<sup>231</sup> The incorporation of international law in the national legal order was also referred to in *Wena Hotels Ltd v*

<sup>225</sup> *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004 (F.O. Vicuña, C.N. Brower, P.B. Sweeney, arbs), para. 9.

<sup>226</sup> *Occidental Exploration*, at paras 145–52. See also Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, 9 September 2005 [2005] EWCA Civ 1116, para. 56 (Lord Phillips of Worth Matravers MR, Clarke, Mance LJ).

<sup>227</sup> *BG Group Plc v Argentina*, Award, 24 December 2007 (A.M. Carro, A.J. van den Berg, G. A. Alvarez, arbs), para. 97 [references omitted]). See also *National Grid plc v Argentine Republic*, Award, 3 November 2008 (A.M. Garro, J.L. Kessler, A.R. Sureda, arbs), para. 89 ('[A]s a matter of Argentine law, the standards of protection granted by an international investment treaty and applicable principles of international law prevail over any lower standard provided by domestic law [...]'] [references omitted]); *Himpurna California Energy Ltd v Republic of Indonesia*, Interim Award of 26 September 1999 (J. Paulson, A.A. de Fina, H.P. Abdurasyid, arbs), para. 21 ('International law forms part of Indonesian law'); and at para. 177; *CME v Czech Republic*, fn. 59, Partial Award, at para. 419 (the BIT is 'part of the laws of the Czech Republic'); and see fn. 59, Final Award, at paras 503, 506, 507 ('Czech law stipulates the primacy of the Treaty' for the determination of compensation); and also Separate Opinion by I. Brownlie, para. 2.

<sup>228</sup> See History of the ICSID Convention, fn. 73, Vol. II-2, p. 803.

<sup>229</sup> See History of the ICSID Convention, Vol. II-1, p. 259.

<sup>230</sup> See History of the ICSID Convention, Vol. II-2, p. 802. See also at 801 (intervention by the German delegate); and at 803 (interventions of representatives of Costa Rica and Côte d'Ivoire). Cf. Broches, fn. 77, at 227.

<sup>231</sup> *Antoine Goetz, and others v Republic of Burundi*, ICSID Case No. ARB/95/3, Award (embodiment of the Parties' Settlement Agreement), 10 February 1999 (P. Weil, M. Bedjaoui, J.-D. Bredin, arbs),

*Arab Republic of Egypt* (2002).<sup>232</sup> The ad hoc Committee was faced with the claim by Egypt that the tribunal had erred in holding that the BIT in question should be applied as the primary source of law.<sup>233</sup> In dismissing this ground for annulment, the Committee pointed out that under the Egyptian Constitution, treaties that have been ratified and published have the force of law; and that most commentators have interpreted this provision as equating treaties with domestic legislation.<sup>234</sup> It also referred to the practice of Egyptian courts holding that treaty rules prevail also over subsequent legislation; and that *lex specialis*, such as treaty law, prevails over *lex generalis*, embodied in domestic law.<sup>235</sup> Moreover, the committee stated, in certain matters, Egyptian laws, including the Civil Code and Code of Civil Procedure, provide for a ‘without prejudice clause’ in favour of the relevant treaty provision.<sup>236</sup> In the tribunal’s view, this amounts to ‘a kind of *renvoi* to international law by the very law of the host State’.<sup>237</sup> As such, it concluded that when a tribunal applies the law embodied in a treaty to which Egypt is a party, it is not applying rules alien to the domestic legal system of this state.<sup>238</sup>

A similar reference to the incorporation of international law in the national legal order was made by the ICSID Tribunal in *LG &E Energy Corp. et al. v Argentina* (2006):

[A]s part of the Argentine legal system, the Bilateral Treaty prevails over domestic law, ‘especially, inasmuch as in most of the Bilateral Treaty’s assumptions there is an express mention of international law, be it when referring to the treatment to be given to investments, or to the compensation in the event of expropriation or any other like measure, etc.’<sup>239</sup>

Also the Iran–United States Claims Tribunal may apply international law indirectly, on the basis that it constitutes part of US or Iranian law. With respect to the United States, US courts may directly apply both treaty provisions and customary international law.<sup>240</sup> As for Iranian law, Article 9 of the Iranian Civil Code states that ‘[t]reaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other governments, shall have the force of law’.<sup>241</sup> As such, treaties that have been approved by the Islamic Consultative

paras 94–96 (the tribunal added: ‘by reason of the non-appearance of the defendant, the Tribunal is not however in a position to reach a definite conclusion on this point’).

<sup>232</sup> *Wena v Egypt*, fn. 54, Decision on Annulment.

<sup>233</sup> *Wena v Egypt*, at paras 21–23.

<sup>234</sup> *Wena v Egypt*, at para. 42.

<sup>235</sup> *Wena v Egypt*, at para. 42.

<sup>236</sup> *Wena v Egypt*, at para. 42.

<sup>237</sup> *Wena v Egypt*, at para. 42.

<sup>238</sup> *Wena v Egypt*, at para. 44. See also Award, 8 December 2000 (M. Leigh, I. Fadlallah, D. Wallace, arbs), at para. 79.

<sup>239</sup> *LG &E Energy v Argentina*, fn. 67, Decision on Liability, at para. 91 (referring to G.S. Tawil, Los conflictos en materia de inversión, la jurisdicción del CIADI y el Derecho aplicable: a propósito de las recientes decisiones en los casos ‘Vivendi’, ‘Wena’ y ‘Maffezini’ (October 2002) XXV-239 RAP 241, 256). Cf. *CMS v Argentina*, fn. 67, Award at para. 111 (‘The Claimant further explains that [...] treaties have a significant place in the Argentine constitutional order and must be observed [...]’); *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (A.R. Sureda, E. Lauterpacht, D.H. Martins, arbs), para. 47; *Siemens v Argentina*, fn. 67, Award, at para. 79. See also *SPP v Egypt*, fn. 37, ICSID Award, at paras 34, 76; *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (A.S. El-Kosheri, B. Goldman, S.K.B. Asante, arbs), Dissenting Opinion Asante, 30 I.L.M. 577, 631 (1991).

<sup>240</sup> US Constitution (1789), art. VI(2); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>241</sup> Iranian Civil Code, art. 9.

Assembly,<sup>242</sup> reviewed by the Council of Guardians,<sup>243</sup> and signed by the President<sup>244</sup> have the same weight as the national laws of Iran, and are thus a source of law for Iranian courts.<sup>245</sup> With regard to customary international law and general principles of law, however, Article 167 of the Iranian Constitution provides that '[t]he judge is bound to endeavor to judge each case on the basis of the *codified law*'.<sup>246</sup> Thus, by implication, these 'uncodified' sources of international law may not be directly applied.<sup>247</sup>

In practice, the application of the Treaty of Amity has been justified on the basis that it was not only international law, but also part of the law of Iran and the United States. In his concurring opinion to the award in *American International Group, Inc. v Iran* (1983), Judge Mosk stated:

[I]n the instant case, the Treaty of Amity is the source of international law. It also appears that the Treaty of Amity is part of the municipal law of both the United States and Iran. United States Constitution, Art. VI, cl.2; Civil Code of Iran, Art. 9. Accordingly, in cases such as this case, which involve matters that are the subject of the Treaty of Amity, that Treaty is the most, if not the only, appropriate law to apply.<sup>248</sup>

While customary international law is not part and parcel of Iranian law, it may be applied directly by US courts. In no award, however, has the tribunal ever applied this source of international law on the basis that it is part of US law.

### 3.1.2. International law as a source of interpretation

Another way in which national courts give effect to international law in the national legal order is through applying the principle of consistent interpretation, whereby a rule of national law is construed in light of international law.<sup>249</sup> As we will see in this subsection, the same methodology can be applied by investment tribunals.

It has been observed that, '[i]n practice, courts will always attempt first to reconcile a conflict between international and national law through the principle of consistent interpretation'.<sup>250</sup> Such 'international-law-friendly' interpretation is expressly required by the South-African Constitution, which provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is

<sup>242</sup> See Constitution of the Islamic Republic of Iran (1979), art. 77.

<sup>243</sup> See Constitution of the Islamic Republic of Iran, art. 94.

<sup>244</sup> See Constitution of the Islamic Republic of Iran, arts 123, 125.

<sup>245</sup> Cf. Office of the United Nations High Commissioner for Human Rights, *Core Document Forming Part of the Reports of States Parties: Islamic Republic of Iran*, 15 July 1999, HRI/CORE/1/Add.106, para. 80.

<sup>246</sup> Constitution of the Islamic Republic of Iran (1979), art. 167 (emphasis added).

<sup>247</sup> Noushin Keyhanlou, email, 14 April 2003.

<sup>248</sup> *American International Group, Inc v Iran*, Award, 19 December 1983, Concurring Opinion by Mosk, 84 I.L.R. 645, 665. See also G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford, Clarendon Press, 1996), 157 (the treaty 'was simultaneously international law, American law, and Iranian law').

<sup>249</sup> See generally Nollkaemper, fn. 188, at Chapter 6; G. Betlem and A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 Eur. J. Int'l L. 569, 572. See also B. Simma et al., 'The Role of German Courts in the Enforcement of International Human Rights' in *Enforcing International Human Rights in Domestic Courts* (B. Conforti and F. Francioni, eds, The Hague, Nijhoff, 1997), 71, 94–6 (discussing the concept *völkerrechtshfreundlich*).

<sup>250</sup> Betlem and Nollkaemper, fn. 249, at 572.

inconsistent with international law'.<sup>251</sup> US law also provides for the interpretation of federal law enacted subsequent to a treaty in an international-law-conform manner,<sup>252</sup> as does, for instance, Dutch,<sup>253</sup> Israeli,<sup>254</sup> Belgian,<sup>255</sup> and Norwegian law.<sup>256</sup> Such practice is important, as it provides an indirect means of enforcement of international law by national courts when the norm at hand is either non-self-executing or the forum state does not directly incorporate international law in its national legal order.<sup>257</sup>

The argument can be made that investment tribunals should always seek to construe national law in an international-law-friendly manner, and not only where the applicable national law so provides. As stated by the United Nations Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant, '[i]t is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations'.<sup>258</sup> Not only does the flexibility granted by choice-of-law rules support this conclusion; as will be elaborated upon in Chapter 7, a choice-of-law methodology that focuses on the similarities rather than the differences between national and international law can be seen not only to enhance the legitimacy of the award for the disputing parties; it also contributes to a more harmonious outlook on the relationship between the legal orders.<sup>259</sup>

While it is unclear whether these considerations influenced the arbitrators, this approach appears to have been adopted in *Tradex Hellas S.A. v Albania* (1996/1999).<sup>260</sup> In that case, the ICSID Tribunal's jurisdiction was limited to claims of expropriation based on the 1993 Albanian Foreign Investment Law, and the tribunal

<sup>251</sup> Constitution of South Africa (1996), Chapter 14, Title 1, section 233. See also section 39(1).

<sup>252</sup> See *Murray v The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *US v Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D. N.Y. 1988); Restatement (Third) of Foreign Relations Law § 115 (1987).

<sup>253</sup> See *Hoge Raad*, 3 March 1919, NJ 371 (1919); *Hoge Raad*, 5 January 1951, NJ 69(1951); A. Nollkaemper, *Kern van het internationale publiekrecht* (2004), 417–20.

<sup>254</sup> *Tibi v Government of Israel*, HCJ 6230/95 (1995); *Kurtz and Letushinsky v Kirschen*, Israeli Supreme Court, 27 June 1967, 47 I.L.M. 212, 214–15.

<sup>255</sup> J. Wouters and D. Van Eeckhoutte, 'Doorwerking van internationaal recht voor de Belgische hoven en rechtfabanken' in *De nationale rechter en het internationale recht*, 131 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (2005), 145, 209–13 <<http://lirias.kuleuven.be/handle/123456789/94376>> (last visited 1 May 2012).

<sup>256</sup> See *Case Concerning Certain Norwegian Loans (France v Norway)*, Judgment, 6 July 1957, Separate Opinion by Judge Lauterpach [1957] ICJ Rep. 9, at 40–1; N. Hostmaelingen, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Norway' (2005) 19 *Emory Int'l L. Rev.* 989, 992. For EU/EEA law, see Case C-165/91, *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661 para. 34; EFTA Court, Case E-1/07, at para. 39. But see A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *Am. J. Int'l L.* 760, 784, fn. 130 ('On the other hand, there is ample practice where domestic courts apply principles of domestic (statutory) interpretation without referring to international principles of interpretation. See, e.g., *Société Générale de Surveillance S.A. v Pakistan*, 2002 S.C.M.R. 1694, para. C5, ILDC 82 (PK 2002)').

<sup>257</sup> See J.J. Paust, 'Self-Executing Treaties (1988), 82 *Am. J. Int'l L.* 760, at 781; Nollkaemper, fn. 256, at 784–5. But see M.A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Colum. L. Rev.* 628, 634 ('There is no question that the current trend has the potential to transform the world's common law courts into increasingly powerful mediators between the domestic and international legal regimes. *But the phenomenon also raises questions regarding the democratic legitimacy of this transformation in the judicial role*' [emphasis added]).

<sup>258</sup> General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc. A/CONF.39/27), para. 15. See also Bettelém and Nollkaemper, fn. 249, at 574 ('State practice allows one to infer an international duty of courts to interpret, within their constitutional mandates, national law in the light of international law').

<sup>259</sup> See Chapter 7 (on concurrent application of and reference to national and international law in case of consistency).

<sup>260</sup> *Tradex v Albania*, fn. 151, Decision on Jurisdiction; and see fn. 151, Final Award.

held that consequently, it would examine the investor's claim on the basis of that national law.<sup>261</sup> Still, in line with the fact that the parties had not agreed on the applicable law, it stated that it would, in accordance with Article 42(1), second sentence of the ICSID Convention, 'make use of sources of international law insofar as that seems appropriate for the interpretation of terms used in the 1993 Law, such as "expropriation".'<sup>262</sup> On the merits, the tribunal applied Article 4 of the 1993 Law, which provided that foreign investments shall not be expropriated directly, indirectly, or by any measure of tantamount effect.<sup>263</sup> Referring to decisions of the Iran–United States Claims Tribunal and the International Court of Justice,<sup>264</sup> it concluded that the investor had been unable to establish that the host state had expropriated its investment.<sup>265</sup>

### *3.1.3. Interim conclusions*

First, arbitral tribunals may and do apply international law to the dispute when the national legal order in question incorporates international law. Yet, the fact that no state is fully 'monist' in their outlook on the relationship between the national and the international legal orders should caution investors in relying on the application of international law via national law. Secondly, in all cases, arbitrators are advised to construe national law in light of relevant international law.

## **3.2. The corrective application of international law**

When national law primarily governs the claim, international law could still apply in a corrective fashion either because national law contains lacunae or due to a conflict between a particular national norm and an international norm. However, this corrective role of national law is subject to several restrictions.

### *3.2.1. The complementary role of international law*

First, the situation may occur that the parties have agreed to the application of a particular national law that contains lacunae, or gaps. In that case, it has been argued and held that international law may function as a 'gap-filler' so as to 'complement' and thereby 'correct' the national law.<sup>266</sup>

In several early awards, tribunals have found the national law of the host state inadequate to deal with the various issues at hand; and as a consequence, they have proceeded to apply international law, principles of justice, and principles common to various states other than the law of the host state. While such practice does not

<sup>261</sup> See Chapter 4, Section 3.2 (on arbitration without privity).

<sup>262</sup> *Tradex v Albania*, fn. 151, Final Award, at para. 69.

<sup>263</sup> *Tradex v Albania*, fn. 151, Final Award, at para. 133.

<sup>264</sup> *Tradex v Albania*, fn. 151, Final Award, at para. 135; at para. 200.

<sup>265</sup> *Tradex v Albania*, fn. 151, Final Award, at paras 203–204.

<sup>266</sup> See, e.g., D.W. Bowett, 'Claims between States and Private Entities: The Twilight Zone of International Law' (1986) 35 *Cath. U.L. Rev.* 929, 932 ('Certainly there have been some few cases in which the state's law has been inadequate to deal with the specific problem posed, and so arbitral tribunals have understandably had to supplement the state's law by reference to "general principles of law"'); *TOPCO v Libya*, fn. 56, Award on the Merits, at para. 42 ('It should be noted that the invocation of the general principles of law does not occur only when the municipal law of the contracting State is not suited to petroleum problems [...]']).

necessarily amount to an application of general principles of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice,<sup>267</sup> the following awards illustrate the perceived need at that time to complement the host state's national law in the case of lacunae.

One example is *Petroleum Development (Trucial Coast) Limited v Sheik of Abu Dhabi* (1951).<sup>268</sup> It involved an oil concession granted in 1939 by the Sheik of Abu Dhabi (then a British protectorate) to Petroleum Development (Trucial Coast) Ltd, transferring to the latter the exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi for seventy-five years.<sup>269</sup> A dispute arose between the parties regarding certain seabed and subsoil areas, resulting in arbitration proceedings.<sup>270</sup> The concession agreement did not set out the governing law, although Article 17 provided that '[t]he Ruler and the Company both declare that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this agreement in a fashion consistent with reason'.<sup>271</sup>

It appears that sole Arbitrator Lord Asquith of Bishopstone first considered national law to be primarily applicable: 'This is a contract made in Abu-Dhabi and wholly to be performed in that country. If any municipal system were applicable, it would *prima facie* be that of Abu-Dhabi,' which, he added, was grounded in Koranic law.<sup>272</sup> Nevertheless, the Arbitrator held that the aforementioned Article 17 repelled the notion that any national legal system should be applicable to the contract;<sup>273</sup> and he further dismissed Koranic law as primitive at best, finding that '[n]o such law can reasonably be said to exist'.<sup>274</sup> Rather, he understood the Sheik to administer 'a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments'.<sup>275</sup> As such, Lord Asquith held that the terms of Article 17 'invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of "modern law of nature"'.<sup>276</sup> This rather deplorable characterization of the Abu-Dhabi legal system is to some extent mitigated by the arbitrator's expressed belief 'that on this point there is [not] any conflict between the parties'.<sup>277</sup> In a footnote, he further supported his consideration of general principles as being 'at the express invitation of the parties'.<sup>278</sup>

Although Lord Asquith conceded that English municipal law was inapplicable as such, he found that 'some of its rules are [...] so firmly grounded in reason, as to form part of this broad body of jurisprudence—this "modern law of nature"'.<sup>279</sup> He concluded that the company was entitled to extract oil from the seabed and subsoil subjacent to, but not beyond, Abu Dhabi's territorial waters.<sup>280</sup> In so holding, he construed and relied on the 'doctrine of the Continental Shelf', based on customary international law, legal scholarship, and arbitral awards.<sup>281</sup>

<sup>267</sup> Statute of the International Court of Justice, art. 38(1)(c).

<sup>268</sup> *Petroleum Development Ltd v Sheikh of Abu Dhabi*, Award, September 1951 (Lord Asquith, sole arb.).

<sup>269</sup> *Petroleum Development*, 18 I.L.R. 144 (1951), at 144–5, 147.

<sup>270</sup> *Petroleum Development*, at 144–5.

<sup>271</sup> *Petroleum Development*, at 148.

<sup>272</sup> *Petroleum Development*, at 149.

<sup>273</sup> *Petroleum Development*, at 149.

<sup>274</sup> *Petroleum Development*, at 149.

<sup>275</sup> *Petroleum Development*, at 149.

<sup>276</sup> *Petroleum Development*, at 149.

<sup>277</sup> *Petroleum Development*, at 149.

<sup>278</sup> *Petroleum Development*, at 161.

<sup>279</sup> *Petroleum Development*, at 149–50.

<sup>280</sup> *Petroleum Development*, at 160.

<sup>281</sup> *Petroleum Development*, at 150–60.

The dismissal of national law as insufficient is also illustrated by *Qatar v International Marine Oil Co., Ltd* (1953), in which sole Arbitrator Buknill held:

I need not set out the evidence before me about the origin, history and development of Islamic Law as applied in Qatar or as to the legal procedure in that country. I have no reason to suppose that Islamic Law is not administered there strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.<sup>282</sup>

He therefore decided to apply ‘principles of justice, equity and good conscience’.<sup>283</sup>

While the awards just discussed have rightly been subject to criticism for their ‘imperialist underpinnings’,<sup>284</sup> we do observe that the gap-filling role of international law has received particular support in the context of ICSID arbitration, partly in light of the express prohibition in the ICSID Convention of a finding of *non liquet*<sup>285</sup> on the ground of ‘silence or obscurity in the law’.<sup>286</sup> Thus, the ad hoc Committee in *Klöckner* (1985) held that principles of international law may have ‘a complementary role (in the case of a “lacuna” in the law of the State)’,<sup>287</sup> and the ad hoc Committee in *Amco Asia* (1986) noted that the second sentence of Article 42(1) authorizes an ICSID tribunal to apply rules of international law to ‘fill up lacunae in the applicable domestic law’.<sup>288</sup> This was also pointed out in the resubmitted case of *Amco Asia* (1990): ‘If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws.’<sup>289</sup> The complementary role of international law was reaffirmed in *Aucoven v Venezuela*: ‘It is certainly well settled that international law may fill lacunae

<sup>282</sup> *Ruler of Qatar v Int'l Marine Oil Co.*, Award, June 1953 (A. Buknill, sole arb.), 20 I.L.R. 534, 545 (1957).

<sup>283</sup> *Ruler of Qatar*, at 545 (Buknill added: ‘in my opinion neither party intended Islamic law to apply, and intended that the agreement was to be governed by “the principles of justice, equity and good conscience” as indeed each party pleads in Claim and Answer, alternatively to Islamic law, in the case of the Claimant’). See also *TOPCO v Libya*, fn. 56, Award on the Merits, at para. 42 ([R]ecourse to general principles is to be explained not only by the lack of adequate legislation in the State considered (which might have been the case, at one time, in certain oil Emirates [...]']); *CME v Czech Republic*, fn. 59, Final Award, at para. 399 ([T]he Respondent’s position is that international law only becomes applicable if there is a “genuine gap” in Czech law [...]'); *Société Rialet v Ethiopia*, 8 *Recueil des décisions des Tribunaux Arbitraux Mixtes* (1929) 742 (the host state’s law was supplemented by reference to ‘general principles of law’).

<sup>284</sup> O. Spiermann, ‘Applicable Law’ in *Oxford Handbook of International Investment Law* 89, 95–6 (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008). See also Reisman, fn. 1, at 10; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005), 226.

<sup>285</sup> On the concept *non liquet* in general, see D. Bodansky, ‘Non Liquet’ *Max Planck Encyclopedia of Public International Law*, available at <<http://www.mpepl.com/home>> (last visited 1 May 2012). See also M.J. Aznar-Gomez, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law’ (1999) 48 *Int'l & Comp. L. Quart.* 3, 8, fn. 25 (‘By *non liquet* it has been generally understood that “an international tribunal should decline to decide a case where rules are not available for its determination because of gaps or lacunae in international law” [references omitted].

<sup>286</sup> ICSID Convention (1965), art. 42(2). Cf. History of the ICSID Convention, fn. 73, Vol. II-2, p. 802 (the delegate from Dahomey stated that international law ‘should be used to complement or supplement national law’); at 803 (Indian delegate stating that ‘he might accept the application of international law in those cases where the national law of the host country would be absolutely silent on the issue in dispute’); and (the delegate from Costa Rica noting that ‘international law should only be applied in the case of a lacuna in domestic law’); and again at 803 (the delegate from the Ivory Coast sought to ‘restrict the application of international law to cases of obscurity or lacunae in the domestic legislation of the State in which the investment was made’); at 804 (A. Broches explained that Article 42(1)[2] as it now stands would bring international law into play in case of a lacuna in domestic law); Broches, fn. 77, at 226; Shihata and Parra, fn. 77, at 192; A. Masood, ‘Law Applicable in Arbitration of Investment Disputes under the World Bank Convention (1973) 15(2) *J. Indian L. Inst.* 311, 323–4.

<sup>287</sup> *Klöckner v Cameroon*, fn. 78, Decision on Annulment, at para. 60 (emphasis in original).

<sup>288</sup> *Amco Asia v Indonesia*, fn. 87, Decision on Annulment, at para. 20.

<sup>289</sup> *Amco Asia v Indonesia*, Resubmitted Case, Award, 5 June 1990, at para. 40.

when national law lacks rules on certain issues (so called complementary function).<sup>290</sup> And the ICSID Tribunal held in the more recent case of *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (2008): '[P]ursuant to Article 42(2) of the [ICSID] Convention the Tribunal will certainly apply residually international law if the other applicable rules are silent or obscure or are eventually determined not to apply *ratione temporis*.'<sup>291</sup>

Reference to lacunae in the national law of the host state were also made in *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (1992).<sup>292</sup> The respondent had argued that the parties had implicitly agreed to the application of Egyptian law.<sup>293</sup> The ICSID Tribunal, however, held that even if this was so, 'such an agreement cannot entirely exclude the direct applicability of international law in certain situations'.<sup>294</sup> This was because in its view, the law of Egypt, like all national legal orders, 'is not complete or exhaustive, and where a lacunae [sic] occurs it cannot be said that there is agreement as to the application of a rule of law which, *ex hypothesi*, does not exist'.<sup>295</sup> In such situations, held the tribunal, there is absence of agreement on the applicable law, and consequently, the second sentence of Article 42(1) would come into play.<sup>296</sup> It also found that '[i]f the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer'.<sup>297</sup> On this basis, the tribunal found irrelevant the argument by Egypt that its officials had acted ultra vires:

Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities [...]. These acts, which are now alleged to have been in violation of the Egyptian municipal legal systems, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer.<sup>298</sup>

It is possible that a national law may have gaps. In such a situation, a differentiation should be made between situations in which the parties have agreed to the sole application of national law and those in which the tribunal may have recourse to both national and international law, either because of a party agreement to that effect or because the parties have not reached an agreement on the applicable law. In the latter case, the need for international law to play a 'gap-filling' function is redundant in that in such cases, the parties are generally entitled to invoke both national and international law on the merits.<sup>299</sup> It could also be that the parties themselves have specified a

<sup>290</sup> *Aucoven v Venezuela*, fn. 126, Award, at para. 102.

<sup>291</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (L. Lévy, S. Alexandrov, C.-D. Ehlermann, arbs), para. 151. See also *Oil Field of Texas, Inc. v Iran, National Iranian Oil Company, Oil Service Company of Iran* (1982) 1 Iran-US C.T. R. 347, 361–2 (with respect to the principle that a de facto successor to a defunct debtor corporation could be liable for the debts of the latter, Judge Mosk pointed out that 'there is no clear showing that Iranian law specifically deals with the situation in issue').

<sup>292</sup> *SPP v Egypt*, fn. 37, ICSID Award.

<sup>293</sup> See Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>294</sup> *SPP v Egypt*, fn. 37, ICSID Award, at para. 80.

<sup>295</sup> *SPP v Egypt*.

<sup>296</sup> *SPP v Egypt*. See also Shihata and Parra, fn. 77, at 203–4.

<sup>297</sup> *SPP v Egypt*, fn. 37, ICSID Award, at para. 83.

<sup>298</sup> *SPP v Egypt*, ICSID Award, at para. 83. See also at para. 168.

<sup>299</sup> See Chapter 6, at Section 2.2 (on the international nature of the claim). Cf. V.C. Igobokwee, 'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (2006) 23(4) *J. Int'l Arb.* 267, 278.

complementary role for international law. Hence, the ICSID Tribunal in *AGIP S.p.A. v People's Republic of the Congo* (1979) correctly interpreted the choice-of-law clause providing for the application of 'the law of the Congo, supplemented if need be by any principles of international law' to signify that 'recourse to principles of international law can be made either to fill a *lacuna* in Congolese law, or to make any necessary additions to it'.<sup>300</sup>

Where the parties have agreed to the sole application of national law, and that law contains lacunae, we have seen that the ICSID Convention prohibits the finding of a *non liquet*.<sup>301</sup> The universality of this prohibition, however, is debated;<sup>302</sup> and consequently, it is open to question whether under other arbitration rules tribunals would be bound to resort to international law in a complementary fashion. In any event, it is clear that arbitrators should not reach the conclusion that there are gaps in applicable national law too swiftly. It is only for those particular parts of the dispute where a true lacuna exists that a tribunal would be authorized to apply international law.<sup>303</sup> In this context, three considerations should be kept in mind.

First, the national law in question must be understood broadly to include both its statutory and judicially illuminated law, as well as its own mechanisms for filling lacunae.<sup>304</sup> A tribunal would be required to apply these mechanisms as provided by the applicable national law, before reaching any conclusion on possible lacunae.<sup>305</sup> Thus, the ICSID Tribunal in *Liberian Eastern Timber Corporation v Government of the Republic of Liberia* (1986) noted:

The primary source of Liberian law and the basic document from which all other sources of law emanate is the Liberian Constitution; other sources include treaties, statutes and what may be called 'residual law'. [...] In the absence of any relevant constitutional or statutory provisions,

<sup>300</sup> *AGIP S.p.A. v People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979 (J. Trolle, R.-J. Dupuy, F. Rouhani, arbs), para. 82. See also *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafia*, Court of Appeals, Judgment, 13 November 2006 [2006] EWCA Civ 1529, para. 18; *Himpurna California Energy Ltd v PT. (Persero) Perusahaan Listriku Negara*, Final Award, 4 May 1999 (A.A. de Fina, Setiawan SH, J. Paulsson, arbs), paras 37–43 (the tribunal noted that both parties had invoked international arbitral awards in their legal briefs; the host state explicitly stating that it is would be 'convenient' to refer to international practice with respect to matters 'where Indonesian law is less detailed'. Since their submissions thus evidenced 'a tacit common position as to the permissibility of such references', the tribunal decided to 'follow the Parties' example in connection with discrete points where international precedents appear useful').

<sup>301</sup> ICSID Convention (1965), art. 42(2). See also fn. 286.

<sup>302</sup> See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, Declaration by Judge Vereshchtein [1996] ICJ Rep. 226, 279–80.

<sup>303</sup> See G.R. Delaume, 'The Pyramids Stand—The Pharaohs Can Rest in Peace' (1993) 8 ICSID Rev.–FILJ 231, 248; O. Chuckwumerije, 'International Law and Article 42 of the ICSID Convention' (1997) 14 *J. Int'l Arb.* 79, 86; A.F.M. Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12(2) *Eur. J. Int'l L.* 309, 327–8.

<sup>304</sup> See Reisman, fn. 77, at 594; Shihata and Parra, fn. 77, at 196. See also Blackaby et al., fn. 6, at 198 (a national system of law 'is a complete legal system, designed to provide an answer to any legal question that might be posed'); M.G. Cohen, 'L'avis consultatif de la CIJ sur la Licéité de la menace ou de l'emploi d'armes nucléaires et la fonction judiciaire' (1997) 8(2) *Eur. J. Int'l L.* 336, 348.

<sup>305</sup> A different conclusion may arguably be reached when national law requires the judge to fill the gap 'as he had himself to act as legislator', or in some other subjective manner. See Aznar-Gomez, fn. 285, at 5; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), 16, 404–5. Cf. Shihata and Parra, fn. 77, at 196. But see Reisman, fn. 1, at 4 ('[S]ome civil codes explicitly authorize and require a judge confronted by a *lacuna* to act as if he or she were the legislator rather than return a judgment of *non liquet*. An arbitrator applying that choice of law of the parties would similarly have a derivative competence to "legislate" *pro hac vice* but without effects beyond that case').

residual law will be applied. (See Culp, *Sources of Liberian Law* and Berlowitz, Affidavit of 6 September 1985 lodged by the claimant.)<sup>306</sup>

The tribunal in *SPP v Egypt* was therefore overstating the problem when it held that ‘all municipal legal systems [are] not complete or exhaustive’, and that therefore Article 42 (1), second sentence, would *always* come into effect.<sup>307</sup> This is even more true considering the fact that the Egyptian Civil Code at the time provided that in the absence of applicable legislative provisions, the judge ‘shall pronounce his sentence in accordance with usage. In the absence of usage his sentence shall be issued according to principles of Islamic Legislation. And in the absence of Islamic Legislative provisions applicable thereto the judge shall rule in accordance with natural law provisions and rules of justice.’<sup>308</sup> Accordingly, the tribunal should have considered these principles before finding lacunae in the applicable Egyptian law. In any event, the finding of a lacuna would not justify the application of second sentence of Article 42(1), ICSID Convention. If the parties are found to have agreed on the application of national law, such a choice should be upheld. Otherwise, the party autonomy would lose its meaning.<sup>309</sup>

Secondly, to the extent that the tribunal in *SPP* sought to distil a principle of general validity, the statement that international law should apply in case the national legal order does not contain a remedy, may be criticized on the basis that the absence of a remedy is not necessarily a lacuna; rather, it may represent a decision not to regulate a certain matter or to regulate it in a different way.<sup>310</sup> Thus, the question is, according to Reisman, ‘whether or not the law of the host State addresses the issue at hand. If it does and, as part of its law, has decided not to grant remedies in such matters then there is no remedy, as none is provided in the law that must be applied.’<sup>311</sup> Indeed, it seems clear that a tribunal would first make sure that the national law has failed to address the particular issue so that there is a true lacuna. Only in such cases would an application of international law be warranted. The fact that there is no remedy should not, in and of itself, trigger any recourse to international law. In fact, it would seem incompatible with the doctrine of party autonomy and/or host state sovereignty that a tribunal required to apply national law would be authorized to create a legal remedy for a party when no such remedy was intended to exist in the national legal order.

Accordingly, absent true lacunae in the national legal order, the gap-filling role of international law should preferably be limited to ancillary questions of law; it should not create causes of action as such. Otherwise, the claimant would get more than it ‘bargained for’ when agreeing to the application of national law. In this respect, a parallel may be drawn to a comment by Cassese concerning contentious proceedings before the International Court of Justice: ‘a *non liquet* cannot be envisaged, for, if the court cannot find any rule or principle material to the claim made by the party, it must

<sup>306</sup> *Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, rectified 10 June 1986 (B.M. Cremades, J. Goncalves Pereira, D.A. Redfern, arbs), 26 I.L.M. 647, 665 (1987).

<sup>307</sup> *SPP v Egypt*, fn. 37, ICSID Award, at para. 80.

<sup>308</sup> *SPP v Egypt*, Dissenting Opinion El Mahdi, at section III(3)(iv) (quoting from article 1(2) of the Egyptian Civil Code enacted by Law 131 of 1948). See also at section III(3)(i); and at para. 75; *LIAMCO v Libya*, fn. 217, Award, 20 I.L.M. 1, 35 (1977).

<sup>309</sup> See G.R. Delaune, ‘L'affaire du Plateau des Pyramides et le CIRDI. Considérations sur le droit applicable’ (1994) 1 *Revue de l'Arbitrage* 39, 48; Maniruzzaman, fn. 303, at 327.

<sup>310</sup> See Reisman, fn. 77, at 595.

<sup>311</sup> Reisman, at 594. Cf. *SPP v Egypt*, fn. 37, ICSID Award, Dissenting Opinion El Mahdi, at section III(3)(v)(b); Aznar-Gomez, fn. 285, at 18.

simply dismiss the claim, on the strength of the principle that whatever is not prohibited is allowed by law.<sup>312</sup>

One example of such an ancillary question of law is the issue of interest; and also in this context, we may refer to the ICSID Award in *SPP v Egypt*.<sup>313</sup> More specifically, the host state had invoked Article 226 of the Civil Code of Egypt which provided that ‘the interest shall run from the date of the claim in Court’.<sup>314</sup> The tribunal, however, held that provision to be inapplicable to the case at hand; and ‘[g]iven this lacunae [sic]’, it found it ‘legitimate to apply the logical and normal principle usually applied in cases of expropriation, namely, that the *dies a quo* is the date on which the dispossession effectively took place’.<sup>315</sup> It appears that the tribunal found this principle to constitute a general principle of law: ‘This principle is supported by the doctrine and the jurisprudence of international tribunals. Moreover, many constitutions and national laws concerning expropriation require that payment be made prior to or simultaneous with the dispossession, thus supporting the *dies a quo* from the date of the taking [...].’<sup>316</sup>

Thirdly, and finally, the important point should be made that nowadays, most national legal systems are so advanced that the question of lacunae will rarely occur. In the words of Raimondo: ‘Since a huge range of human and State activities have been regulated, it is likely that nowadays national courts and tribunals resort to general principles of law to fill gaps less frequently than in the past.’<sup>317</sup>

### 3.2.2. The supervening role of international law

When appropriate, arbitral tribunals may in a supervening, or trumping, fashion apply international rules that conflict with the otherwise applicable national norms. This function is more controversial, as international law does more than complementing the relevant national law; rather, primarily applicable national norms are deliberately disapplied or set aside in favour of international norms. As such, it has the potential more directly to clash with the doctrine of party autonomy or host state sovereignty.

The supervening function of international law is partly linked to the debate referred to in the introductory chapter concerning the monist and dualist controversy. In brief, whereas dualist scholars consider the national and the international legal orders as separate and distinct, the monist school views the national legal order as part of, or subordinate to, the international legal order.<sup>318</sup> Since international law is viewed as hierarchically superior to national law, scholars with a monist view may therefore argue that international law should always be applied to the detriment of conflicting national legal provisions.<sup>319</sup>

<sup>312</sup> Cassese, fn. 156, at 152. See also *Legality of the Threat or Use of Nuclear Weapons*, fn. 302, Separate Opinion by Judge Guillaume, at para. 9; Aznar-Gomez, fn. 285, at 12–13.

<sup>313</sup> *SPP v Egypt*, fn. 37, ICSID Award.

<sup>314</sup> *SPP v Egypt*, at para. 232.

<sup>315</sup> *SPP v Egypt*, at paras 233–234.

<sup>316</sup> *SPP v Egypt*, at para. 234.

<sup>317</sup> F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Nijhoff, 2008), 7.

<sup>318</sup> See Chapter 1, Section 1 (on the motivations for the study).

<sup>319</sup> Cf. L.-C. Chen, *An Introduction to Contemporary International Law* (New Haven, CT, Yale University Press, 1989), 3–4; P. Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois’ (2000) 15(2) *ICSID Rev.–FILJ* 409; B. Conforti, ‘The Role of the Judge in International Law’ (2007) 1(2) *EJLS* 7. Cf. Maniruzzaman, fn. 303, at 310–11. See also Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law).

The application of international law in a supervening fashion has been particularly advanced for internationalized tribunals on the basis that they operate in the international legal order. In this vein, Lauterpacht—in the infancy of the ICSID regime—explored the possibility that:

[...] notwithstanding the silence of the first sentence of Art. 42(1) [ICSID Convention] on the question of the applicability of international law, the competence of the tribunal to pass upon such questions without express reference thereto in the relevant proper law clause is inherent in its very status as a tribunal set up to dispose of issues under international investment contracts and in deliberate substitution for alternative modes of international protection.<sup>320</sup>

He added that ‘there is at present no authority to support this view’; yet to him, this view ‘appears to possess an intrinsic reasonableness which may serve to commend it to a Tribunal taking a broad view of its competence’.<sup>321</sup>

As we will see later,<sup>322</sup> other arguments that pertain to internationalized tribunals relate first to the fact that the home state of the investor is precluded from bringing a claim of diplomatic protection against the host State with regard to a dispute that is settled by ICSID arbitration or the Iran–United States Claims Tribunal.<sup>323</sup> Secondly, importance is placed on the international obligation of all states parties to the ICSID Convention to recognize and enforce ICSID awards as if they were judgments of their own courts.<sup>324</sup> Automatic recognition and enforcement of awards rendered by the Iran–United States Claims Tribunal is also expected of states parties to the Algiers Accords.<sup>325</sup>

One has also reasoned that disregard of international law would be inconsistent with the ICSID Convention’s object and purpose, namely, ‘promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it’.<sup>326</sup>

According to the present author, any supervening function of international law should depend less on the national or international legal order in which the tribunal operates, and more on whether there is a preexisting agreement for the sole application of national law or not. This is first because the doctrine of party autonomy is a principle of fundamental importance for both territorialized and internationalized tribunals.<sup>327</sup> Consequently, an agreement on the application of national law should generally be respected for both types of tribunals, the applicable national norm only being set aside in case it conflicts with a fundamental norm of international law.

Secondly, when the parties have not reached an agreement on the applicable law or they have agreed to the application of both national and international law, the latter

<sup>320</sup> E. Lauterpacht, ‘The World Bank Convention on the Settlement of International Investment Disputes’ in *Recueil d’Etudes de Droit International en Hommage à Paul Guggenheim* (Genève, Tribune, 1968), 642, 658.

<sup>321</sup> Lauterpacht, 642, 658. See also J. Cherian, *Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes* (Leyden, Sijthoff, 1975), 89; Schreuer et al., fn. 5, at 566.

<sup>322</sup> See fn. 434 (on the decision on annulment in the case *Amco Asia v Indonesia*).

<sup>323</sup> See ICSID Convention (1965), art. 27; Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 18 January 1981, General Principle B.

<sup>324</sup> ICSID Convention (1965), art. 54(1). See also Chapter 2, Section 4.2.2 (on the states parties’ international obligation to comply with and enforce awards rendered by ICSID tribunals).

<sup>325</sup> See Chapter 2, Section 4.1.2 (on the states parties’ international obligation to enforce awards rendered by the Iran–United States Claims Tribunal).

<sup>326</sup> Schreuer et al., fn. 5, at 586 (referring to the Report of the Executive Directors, 1 ICSID Rep. 25, para. 9).

<sup>327</sup> See Chapter 3, Section 3.1 (on party agreement on the applicable law).

source can often be invoked as a separate cause of action before both territorialized and internationalized tribunals;<sup>328</sup> that is, where the arbitration agreement is broad enough to encompass claims of both a national and international nature.<sup>329</sup> In these cases, it is therefore not entirely correct to refer to the ‘supervening’ role of international law; rather, international law would apply as the proper norm to the claim at hand, due to its international nature.

### 3.2.2.1. The parties have agreed to the sole application of national law

Arbitral tribunals have on occasion applied, or in dicta supported the application of, international law in a supervening manner despite an agreement by the parties to the sole application of national law. One example is *Aucoven v Venezuela*,<sup>330</sup> The concession agreement at hand provided that it ‘shall be governed by [...] [Decree] Law Nr. 138 [...] Executive Decree Nr. 502 [...] and the provisions of any other laws, regulations, or other documents as may be applicable’.<sup>331</sup> Further, it ‘shall be governed by [Decree Law 138]; [Executive Decree Nr. 502]; by the Clauses and Annexes [of the Concession Agreement]; by the terms set forth in the Bid submitted by [Aucoven]; and by the conditions set forth in the Bid Documents’.<sup>332</sup> The tribunal held that except for matters covered by these Venezuelan decrees, it had to look to the second sentence of Article 42(1) of the ICSID Convention.<sup>333</sup>

One of the investor’s arguments was that Venezuela had breached the concession agreement by initiating proceedings before the Venezuelan Supreme Court of Justice. On this point, Venezuela invoked Decree Law Nr. 138, which reserved any issues related to termination of the concession agreement to the Venezuelan courts.<sup>334</sup> While acknowledging that this Decree ‘governs the Concession Agreement by virtue of the parties’ choice of law’,<sup>335</sup> the tribunal refuted Venezuela’s position, referring to Clause 64 of the concession agreement according to which the parties had agreed to submit all disputes arising out the agreement to ICSID arbitration. Holding Venezuela in breach of agreement on this point,<sup>336</sup> it relied on the

[...] well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law *in the same manner* as the application of the host state law failing an agreement (under the second sentence of the same treaty provision).<sup>337</sup>

<sup>328</sup> See Chapter 6, Section 2.2 (on the international nature of the claim). Cf. Igbokwee, fn. 299, at 278.

<sup>329</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

<sup>330</sup> *Aucoven v Venezuela*, fn. 126, Award.

<sup>331</sup> *Aucoven v Venezuela*, at para. 94.

<sup>332</sup> *Aucoven v Venezuela*, at para. 94.

<sup>333</sup> *Aucoven v Venezuela*, at para. 100. Cf. ICSID Convention (1965), art. 42(1), second sentence (in the absence of party agreement on the applicable law, ICSID tribunals 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>334</sup> *Aucoven v Venezuela*, at para. 200.

<sup>335</sup> *Aucoven v Venezuela*, at para. 206.

<sup>336</sup> *Aucoven v Venezuela*, at paras 204–205.

<sup>337</sup> *Aucoven v Venezuela*, at para. 207 (emphasis added). But see Schreuer et al., fn. 5, at 572 (‘Despite the relevance of international law even where it is not part of the law chosen by the parties [...], its position is somewhat different and clearly stronger under the residual rule where there is no agreed choice of law [...]’).

As such, it concluded that 'Venezuela's defense based on national law is no bar to Aucoven's claim of a breach of Clause 64'.<sup>338</sup>

While this decision may be justified on the basis that it related to the jurisdiction of the tribunal, and more particularly, the 'well settled principle of international law that a state cannot rely on a provision of its domestic law to defeat its consent to arbitration',<sup>339</sup> it is submitted that the ICSID Tribunal may have adopted a too unnuanced view with respect to the role of international law vis-à-vis national law. Rather, the supervening function of international law should be interpreted restrictively where the parties have agreed to the sole application of national law. In the words of Higgins, if, in the bargaining process, the private party has been unable to reach an agreement on the application of international law, 'it seems doubtful that international arbitrators should remedy that which one of the negotiating parties was unable to achieve'.<sup>340</sup> Reisman phrases it this way:

[W]hen international law has not been adopted as governing law by the parties to an international commercial transaction nor directly incorporated and self-executing in the system of national law which was selected, would it not be inappropriate to allow a norm of international law to override the applicable norm of the national law selected by the parties on the ground that the international norm is 'different' and 'higher'? The issue does not turn on grand theories of monism or dualism but on common sense. That the norms are different is obvious. The predicate of the selection of governing law—the whole idea of bothering to make a selection—is that different legal systems address particular legal and factual issues differently. And, as for the relative 'spatial' positions of different systems of law, when parties have the power to select the law which will govern their transaction, whether the law which they select is 'higher' or 'lower' is irrelevant.<sup>341</sup>

The *pacta sunt servanda*<sup>342</sup> based argument that national law should govern when the parties have so agreed is supported by comments made during and after the drafting of the ICSID Convention. In reply to concerns indicated by some state representatives regarding the application of international law under Article 42(1), Chairman Broches pointed out that 'it was for the parties to [...] exclude the application of international law'.<sup>343</sup> Further, he stated, a state 'could well provide that the agreement would be

<sup>338</sup> *Aucoven v Venezuela*, at para. 207.

<sup>339</sup> *Aucoven v Venezuela* (that is, the issue was also related to the question of the ICSID Tribunal's jurisdiction, a matter of international law). Cf. J. Paulsson, *Unlawful Laws and the Authority of International Tribunals* (Lalive Lecture, Geneva, 27 May 2009), (2008) 23(2) *ICSID Rev.-FILJ* 215, 223.

<sup>340</sup> Higgins, fn. 213, at 141. But see also at 141 ('At the same time, the purpose of the reference to international arbitration certainly merits examination. Was it because the local courts are not trusted or because a different system of law was to be applied?')

<sup>341</sup> Reisman, fn. 1, at 11. See also I. Brownlie, 'Some Questions Concerning the Applicable Law in International Tribunals' in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof* (J. Makarczyk, ed., The Hague, Kluwer Law International, 1996), 763, 767; Masood, fn. 286, at 319. But see P. Bernardini, 'The Law Applied by International Arbitrators to State Contracts' in *Law of International Business and Dispute Settlement in the 21st Century* (R. Briner et al., eds, Köln, Heymann, 2001), 51, 65–6 ('[T]he arbitral system created by the Washington Convention [...] is so integrated into public international law as to make it unthinkable that a State law would be applied by an ICSID tribunal if contrary to a rule of public international law. It must therefore be presumed that when the parties have made reference to a particular State law without further qualifications they have assumed the conformity of such law with the rules of public international law').

<sup>342</sup> Cf. S. Wittich, 'The Limits of Party Autonomy in Investment Arbitration' in *Investment and Commercial Arbitration: Similarities and Divergences* (C. Knahr, ed., Utrecht, Eleven International 2010), 47, 51 ('In international law, the concept of party autonomy is also said to be rooted in the generally accepted principle of *pacta sunt servanda*' [references omitted]).

<sup>343</sup> History of the ICSID Convention, fn. 73, Vol. II-1, p. 267.

governed by its own laws as they prevailed from time to time', and in such case, 'no other law could be applied and no complaint could be made of changes in that law'.<sup>344</sup>

Moreover, not even international courts and tribunals will automatically apply international law to a dispute where the states parties have specifically agreed to the application of other sources, including national law. International courts will do so, however, where the national norm in question conflicts with a fundamental norm of international law. As stated by the tribunal in the '*OSPAR*' Arbitration (2003) between Ireland and the United Kingdom, '[a]s long as it is not inconsistent with *jus cogens*,<sup>345</sup> Parties may also instruct a tribunal to apply a *lex specialis* that is not part of general international law at the time'.<sup>346</sup>

As concerns territorialized tribunals, hierarchically superior international norms gain relevance in light of the possibility that the seat of the tribunal and the state called upon to enforce the award may—by virtue of its national arbitration law and conventions such as the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards—annul or refuse to enforce awards that conflict with 'international public policy'.<sup>347</sup> This concept includes *jus cogens* norms and the state's duty to respect its international obligations such as a United Nations resolution imposing sanctions.<sup>348</sup> Thus, in order to ensure the enforceability of awards, territorialized tribunals are advised to apply—even *ex officio*<sup>349</sup>—such norms of a fundamental nature even if they contradict the otherwise applicable national norms.

There are other reasons that have been or could be advanced in favour of tribunals heeding international norms of a fundamental nature. First, it has been said that arbitrators have certain responsibilities vis-à-vis a community extending beyond the parties to the dispute. Referring, *inter alia*, to decisions of the UN Security Council, Blessing notes:

[T]he international arbitrator is not simply the '*obedient servant*' of the parties, and he is not only called upon to pass a decision in respect of the inter-parties contractual interests. His responsibility is not solely vis-à-vis the parties (as had too frequently been maintained), but goes beyond: The arbitrator of our times, and certainly of the times to come, *has to apply a broader perspective*, a perspective which is not solely confined by the interests of the parties and will have to *take into account the general notions and requirements of the transnational public policy*.<sup>350</sup>

<sup>344</sup> History of the ICSID Convention, at 502. See also at 571; Masood, fn. 286, at 319; D. Bettens, *Les contrats entre Etats et entreprises étrangères* (Le Mont-sur-Lausanne, Méta-Editions, 1989), 76, 79; Maniruzzaman, fn. 303, at 324–5.

<sup>345</sup> See Chapter 3, Section 3.3.2 (on peremptory norms of international law) (footnote not in original).

<sup>346</sup> *Ireland v United Kingdom ('OSPAR' Arbitration)*, Final Award, 2 July 2003, at para. 100. Cf. D.W. Bowett, 'Contemporary Development in Legal Techniques in the Settlement of Disputes' (1983) 180 *Recueil des Cours* 169, 181–2.

<sup>347</sup> See Chapter 2, Sections 3.2.1.2 (on annulment as an exercise of control); and at Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards); Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>348</sup> See ILA Public Policy Resolution, art. 1(d)–(e); ILA Final Report, at para. 31. See also Chapter 3, Section 3.3.2 (on peremptory norms of international law).

<sup>349</sup> See M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel, Helbing und Lichtenhahn, 1999), 270–1; G. Nerdrum, 'A Lack of Party Agreement' in *The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses* (L. Heuman and S. Jarvin, eds, New York, Jurisnet, 2006). Cf. Joined Cases C-430/93 and C-431/93, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR 4705, Opinion of AG Jacobs, 15 June 1995, at para. 35. But see Blessing, fn. 349, at 271 ('On the other hand, it would certainly not be justified to expect from an arbitral tribunal to carry out *sua sponte* detailed investigations where particular "indicators" are absent').

<sup>350</sup> Blessing, fn. 349, at 270 (emphasis in original). On transnational public policy, see Chapter 3, Section 3.3.1 (on public policy and mandatory rules).

A second ground that should be mentioned in favour of a corrective role of international law vis-à-vis national law is articulated by Cairns:

[T]ransnational public policy is an expression of international arbitral practice, implicitly accepted by any party to an international arbitration agreement. The juridical basis for the application of transnational public policy is therefore the agreement of the parties, and the jurisdictional framework of international arbitration to which the arbitration agreement provides access. Transnational public policy therefore joins the terms of the contract between the parties, trade usages, and perhaps *lex mercatoria*, as part of the applicable law in the arbitration that in certain circumstances will prevail over the applicable national law(s) expressly chosen by the parties.<sup>351</sup>

Admittedly, the strength of these grounds is weakened by the controversy concerning the existence of ‘transnational public policy’;<sup>352</sup> and further, it is difficult to identify the ultimate source of the ‘responsibility’ territorialized tribunals have toward the greater community.<sup>353</sup>

Be that as it may, we suggest a third basis for the application of fundamental international norms in arbitration set up pursuant to investment treaties, specifically. This argument is based on the theory that arbitration agreements that stem from an offer to arbitrate included in a treaty, in the sense of ‘arbitration without privity’,<sup>354</sup> are governed by international law. Support for this proposition is found in the judgment by the English Court of Appeal in *Occidental Exploration and Production Company v. Republic of Ecuador* (2005).<sup>355</sup> On the question of which law was applicable to the arbitration agreement reached between the foreign investor and the host state on the basis of the offer of the latter in a bilateral investment treaty with the investor’s home state, the Court rightly concluded that ‘the agreement to arbitrate which results by following the Treaty route is not itself a treaty’.<sup>356</sup> Applying English choice-of-law rules, it nevertheless recognized—albeit in dicta—that ‘on our preferred view, the present agreement to arbitrate was subject to international law’.<sup>357</sup> Where an arbitration agreement is governed by international law,<sup>358</sup> it follows that the choice-of-law clause as set out in the investment treaty is also governed by international law.<sup>359</sup> On

<sup>351</sup> D.J.A. Cairns, ‘Transnational Public Policy and the Internal Law of State Parties’ (September 2007) 10 *Arab J. Arb.* 27–8 (references omitted).

<sup>352</sup> See Chapter 3, Section 3.3.1 (on public policy and mandatory rules).

<sup>353</sup> See generally S. Wilske and M. Raible, ‘The Arbitrator as Guardian of International Policy? Should Arbitrators Go Beyond Solving Legal Issues?’, in *The Future of Investment Arbitration* (C.A. Rogers and R.P. Alford, eds, Oxford, Oxford University Press, 2009), 249. See also Chapter 2, Section 3.4 (interim conclusions).

<sup>354</sup> See Chapter 2, Section 2 (features of the arbitral process); Chapter 4, Section 3.2 (on arbitration without privity).

<sup>355</sup> *Occidental Exploration and Production Company v Republic of Ecuador*, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, fn. 226.

<sup>356</sup> *Occidental Exploration*, at para. 33. Cf. C. Schreuer, ‘Consent to Arbitration’ in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 830, 864.

<sup>357</sup> *Occidental Exploration*, at paras 33–36, 41. Cf. J. Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24(3) *Arb. Int'l* 351, 361. See also *RosInvest v Russian Federation*, SCC Case No. Arbitration V 079/2005, Award on Jurisdiction, October 2007 (K.-H. Böckstiegel, Lord Steyn, F. Berman, arbs), para. 33. But see V. Heiskanen, ‘Forbidding Dépeçage: Law Governing Investment Treaty Arbitration’ (2009) 32 *Suffolk Transnat'l L. Rev.* 367, 391–3.

<sup>358</sup> For the law governing arbitration agreements, see Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims); Chapter 1, Section 2 (on the scope of and terminology used in the study).

<sup>359</sup> See Chapter 3, Section 3.1.2 (on express and implied choice of law) (the provision on applicable law forms part of the host state’s offer to arbitrate, as set out in the relevant treaty).

this basis, it could be argued that the parties would be prevented from agreeing on a choice of law that could result in the violation of fundamental international norms.<sup>360</sup> While it is unclear whether it was motivated on these grounds, this interpretation is supported by the UNCITRAL Tribunal in *Methanex v United States* (2005), set up pursuant to the North American Free Trade Agreement (NAFTA).<sup>361</sup> In its view, it had a ‘duty to apply imperative principles of law or *jus cogens* and not to give effect to parties’ choices of law that are inconsistent with such principles’.<sup>362</sup>

The conclusion that fundamental international norms may apply in a supervening fashion vis-à-vis conflicting national norms is especially warranted for internationalized tribunals, also in cases not involving investment treaties. As explained in Chapter 3, this is because these tribunals ought to respect the *ordre public* of the international legal order in which they operate.<sup>363</sup> This concept would necessarily include *jus cogens*, the disregard of which could lead to an annulment or non-enforcement of awards, as such norms are peremptory vis-à-vis any other international obligation states may have under the ICSID Convention and the Algiers Accords.<sup>364</sup> However, the scope of potentially supervening norms has also been held and argued to be of a broader nature. As an ICSID tribunal stated in a case in which the parties had agreed to the application of English and Kenyan law: ‘If it had been necessary [...], the Tribunal would [...] have been minded to decline in the present case to recognize any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.’<sup>365</sup> Considering that ‘international public policy’ is a national law concept,<sup>366</sup> the tribunal might have had in mind what others have referred to as ‘truly international public policy’ or ‘transnational public policy’.<sup>367</sup> In any event, we agree with the conclusion of the tribunal, and of that of several scholars, that ICSID tribunals should heed international norms of a fundamental nature, and that these extend beyond the relatively restricted group of *jus cogens* norms. Schreuer, for instance, refers to the concept of ‘the public policy of the international community’, which, to him, ‘would include but not be restricted to peremptory rules of international law. Examples are the prohibition of slavery, piracy, drug trade and genocide, the protection of basic principles of human rights and the prohibition to wage an aggressive war’.<sup>368</sup>

Clearly, there exists a tension between the rule of party autonomy and the legitimate desire to hold the host state to its international commitments. While the balance is delicate to make,<sup>369</sup> any emphasis on the latter consideration in the face of an agreement for the application of national law has the potential to illustrate the inherent

<sup>360</sup> Cf. Bowett, fn. 346, at 181–2.

<sup>361</sup> *Methanex v United States*, Final Award, 3 August 2005 (J.W.F. Rowley, W.M. Reisman, V.V. Veeder, arbs.).

<sup>362</sup> *Methanex v US*, at para. 24. See also Chapter 2, Section 3.1 (on the delocalization theory).

<sup>363</sup> See Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>364</sup> See Chapter 3, Section 3.3.

<sup>365</sup> *World Duty Free v Kenya*, fn. 27, at para. 172. See also at para. 158.

<sup>366</sup> See Chapter 3, Section 3.3.1 (on public policy and mandatory rules).

<sup>367</sup> See *World Duty Free v Kenya*, at para. 172.

<sup>368</sup> Schreuer et al., fn. 5, at 566. See also at 583; Reisman, fn. 77, at 601; A. Broches, ‘Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application’ (1993) 18 *Y.B. Com. Arb.* 627, 669; Broches, fn. 190, at 392; I. Alvik, *Contracting with Sovereignty* (Oxford, Hart Publishing, 2011), 90; Maniruzzaman, fn. 303, at 324.

<sup>369</sup> Cf. Broches, fn. 77, at 227 (‘[T]he question is whether the Tribunal can apply international law where international law is not included in the rules of law agreed by the parties pursuant to the first sentence of Article 42(1). This is a difficult question on which I hesitate to express a firm opinion.’)

value-laden and ‘slippery slope’ concept of *ordre public*,<sup>370</sup> at least where it goes beyond *jus cogens*. To our mind, for arbitration to continue to thrive as a method of dispute resolution in the area of foreign investment, it needs the support of host states; and this is not ensured by arbitrators overzealously applying international law to protect investors in situations in which the latter have in fact agreed to the application of national law.

At any rate, it is clear that the supervening role of international law vis-à-vis national law should be limited to cases of true conflicts.<sup>371</sup> Thus, where there is a party agreement in favour of national law, one should first establish whether that national legal system contains the same standard as the one protected by international public policy. According to Reisman, this is often the case:

[D]oes international commercial arbitration really need such a slippery and malleable concept in order to protect its virtue? After all, what practice before an international commercial arbitration tribunal that has been alleged to violate an international or transnational public policy was permitted by the national governing law? Is there a national legal system that does not prohibit bribery of public officials? A national legal system that does not prohibit slavery...<sup>372</sup>

In a thought-provoking lecture, Paulsson similarly suggests limiting the corrective role of international law by insisting on a broad interpretation of the concept of national law: ‘we are, it seems, too quick to consider the corrective effect of international law on national law before giving full scope for national law to correct itself.’<sup>373</sup> To him,

[a] purported mandatory law—like any law—is not necessarily effective even on the national level. In all legal systems worthy of the name, courts may annul or disregard laws which violate the rule of law—often by their constitutional irregularity. *International courts and tribunals must have at least equally great authority if their duty to apply the national law is to have its full meaning.*<sup>374</sup>

Thus, he reasons with persuasion, if a decree has been enacted in violation of fundamental laws of a country, ‘an international tribunal empowered to apply that national law should not give effect to [that decree]—and is under no obligation to wait for the national courts (if ever) to make such a determination; the international tribunal’s authority to determine and apply that national law is plenary.’<sup>375</sup> In other words, ‘[t]he international tribunal is empowered to determine national law whenever it has the mandate to apply it. When the tribunal does so, it is proper for it to refuse to recognise

<sup>370</sup> Cf. *Richardson v Melish* (1824) Bing. 228 [1824–1834] All ER 258 (public policy is ‘a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but where other points fail.’)

<sup>371</sup> On the definition of ‘conflict’, see Chapter 1, Section 2 (on the scope of and terminology used in the study). See also *Gami Investments, Inc. v Mexico*, Final Award, 15 November 2004 (W.M. Reisman, J.L. Muró, J. Paulsson, arbs), para. 41 (‘International tribunals are properly reluctant to conclude that national law contradicts international law’).

<sup>372</sup> Reisman, fn. 1, at 17. See also M. Pyles, ‘Reflections on Transnational Public Policy’ (2007) 24(1) *J. Int'l Arb.* 1, 6; International Law Association, Committee on International Law on Foreign Investment, Report (Rio de Janeiro Conference, 2008), at 4 (‘Public international law accords preference to fundamental human rights and rules related to international peace and security (via the concept of *jus cogens* and article 103 of the UN Charter) but investment tribunals have hardly dealt with such superior norms of international law’). But see Schreuer et al., fn. 5, at 566 (‘The application of international public policy to investment contracts is less far-fetched than might appear at first sight’); M. Hirsch, ‘Interactions Between Investment and Non-Investment Obligations’ in *The Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 155, 159.

<sup>373</sup> Paulsson, fn. 339, at 218.

<sup>374</sup> Paulsson, at 224 (emphasis in original).

<sup>375</sup> Paulsson, at 224.

unlawful laws.<sup>376</sup> We cannot help drawing a parallel here with Scelle's theory of 'role splitting', according to which 'les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité "fonctionnelle" telle qu'elle est organisée dans l'ordre juridique qui les a instituées mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à sa réalisation.' [the agents having an institutional competence or a competence invested by a legal order use their 'functional' capacity as regulated by the legal order that constituted them but in order to assure the effectiveness of norms belonging to a different legal order lacking the necessary organs to realize them.]<sup>377</sup> While the observation has frequently been made that national courts can be seen as agents of the international legal order when they apply and give effect to international law,<sup>378</sup> Paulsson's approach hints at a converse form of 'role splitting' for investment tribunals: as they apply and interpret national law, they take on the role of organs of the relevant national legal order.

A separate query in respect of the possible supervening role of international law concerns the special role of European Union law. In this context, reference should be had to the judgment by the European Court of Justice (ECJ) in *Eco Swiss China Time Ltd v Benetton International NV* (1999).<sup>379</sup> In that case, the Court gave a preliminary ruling on the question whether a Dutch court was required, by virtue of the membership of the Netherlands to the European Community (EC), to annul an award rendered on its territory when the arbitrators failed to consider, on their own motion, EC competition law.<sup>380</sup> The ECJ answered in the affirmative; and held that when national rules of procedure require a national court to grant an application for annulment of an award for failure to observe national rules of public policy, it must grant such an application where it is founded on a failure to comply with Article 85 of the EC Treaty (now Article 101 TFEU).<sup>381</sup> In fact, stated the Court, this provision 'may be regarded as a matter of public policy within the meaning of the New York Convention'.<sup>382</sup>

It can therefore be concluded that territorialized tribunals seated in EU Member States may therefore need to consider particular EU norms even in situations in which the parties have agreed to the application of a law different from that of a non-EU Member State, and regardless of whether such norms have been invoked by the parties. Burgstaller states:

There is no reason why [the *Eco Swiss*] principle, which would appear to extend to enforcement and execution of awards, should not be applied if another violation of directly applicable EC law is at issue. There is also no reason why this principle should not be applied in the context of

<sup>376</sup> Paulsson, ay 224. But see P. Mayer, 'L'arbitre international et la hiérarchie des normes' (2011) 2 *Revue de l'Arbitrage* 361, 384 ('[L]orsque la contrariété de la norme inférieure à la norme supérieure ne peut être sanctionnée par aucune autorité, notamment judiciaire, du pays en cause, ou ne pourrait l'être que par une autorité spéciale (autre que le juge) qui n'a pas encore été saisie et que l'arbitre ne pourrait pas saisir lui-même, l'arbitre ne devrait pas refuser d'appliquer la norme inférieure') [When the incompatibility of the lower norm with the higher norm cannot be sanctioned by any authority, of the country in question, in particular the judiciary, or could be sanctioned only by a special authority (other than the judge) who has not yet been seized and whom the arbitrator could not seize him- or herself, the arbitrator should not refuse to apply the lower standard.]

<sup>377</sup> G. Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in *Rechtsfragen der Internationalen Organisation, Festschrift für Hans Weberg zu seinem 70. Geburtstag* (W. Schätzl and H. J. Schlochauer, eds, 1956), 324, 331. See also Scelle, *II Précis de droit des gens: principes et systématique* (Paris, Recueil Sirey, 1934), 10–12. Cf. A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1(1) *Eur. J. Int'l L.* 210.

<sup>378</sup> See generally Y. Shany, 'National Courts as International Actors: Jurisdictional Implications' (29 July 2009) *Rivista di diritto pubblico italiano, comunitario e comparato*.

<sup>379</sup> Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

<sup>380</sup> *Eco Swiss v Benetton*. <sup>381</sup> *Eco Swiss v Benetton*, at para. 37.

<sup>382</sup> *Eco Swiss v Benetton*, at para. 39.

investor–state arbitration outside the framework of the International Centre for Settlement of Investment Disputes (ICSID) Convention.<sup>383</sup>

As stated, the same conclusion is at first sight not warranted for ICSID tribunals. This is because they are insulated from the application of the law of the tribunal's seat.<sup>384</sup> It is posited, however, that in certain situations also ICSID tribunals may need to consider the potentially supervening quality of EU norms, as a failure to do so might jeopardize the enforcement of the award. EU Member States have an international duty, by virtue of Article 4(3) TFEU (ex Article 10 TEC), to cooperate fully with the EU.<sup>385</sup> Another provision of possible relevance is Article 351 TFEU (ex Article 307 TEC), which obliges Member States to take 'all appropriate steps to eliminate the incompatibilities' between the EU Treaty and other treaties that the Member States have entered into prior to their accession to the European Union.<sup>386</sup> Accordingly, when a national court in an EU Member State is faced with an award disregarding (fundamental rules of) EU law, it could be seen to be facing a conflict between its obligation to respect the international validity of the awards on the one hand, and obligations vis-à-vis the European Union on the other.

While EU law does not qualify as *jus cogens*, the interpretation by what is now the Court of Justice of the European Union (CJEU) of Articles 4(3)<sup>387</sup> and 351<sup>388</sup> TFEU suggests that this conflict might possibly need to be solved in favour of EU law; in any case from the point of view of the CJEU.<sup>389</sup> While noting that '[w]ithin the framework

<sup>383</sup> M. Burgstaller, 'European Law and Investment Treaties' (2009) 26(2) *J. Int'l Arb.* 181, 196 [references omitted]. Cf. H. Van Houtte, 'The Application by Arbitrators of Articles 81 & 82 and their Relationship with the European Commission', in *European Business Law Review Special Edition: Arbitrating Competition Law Issues* (G. Blanke, ed., Alphen aan den Rijn, Kluwer Law International, 2008), 63, <<http://centers.law.nyu.edu/jmtoc/article.cfm?id=2147444263>> (last visited 1 May 2012); International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, para. 30, New Delhi Conference (2002); N. Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Nijmegen, Wolf Legal Publishers (WLP), 2003). Cf. *Marketing Displays International Inc. v VR*, Court of The Hague, March 24, 2005. But see *Thales Air Defence B.V. v GIE Euromissiles, EADS France and EADS Deutschland GmbH*, CA Paris, 18 November 2004 (an arbitrator is not considered to have breached his/her *prima facie* duty to raise competition law issues *ex officio* if the competition law issues concerned were so intricate that they could not be readily detected by the arbitrator at the time of rendering the award in question); *The Swedish Arbitration Act of 1999, Five Years on: A Critical Review of Strengths and Weaknesses*, at Chapter 8 (Roundtable Discussion: Applicable Law) (L. Heuman and S. Jarvin, eds, New York, JurisNet, 2006) (Comment by C. Zettermark).

<sup>384</sup> See Chapter 2, Section 4.2.1 (on the tribunals' insulation from the law of the seat). See also C. Tietje, 'The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States' *TDM* 1 (2009); E. Levine, 'Amicus Curiae in International Investment Arbitration' (2011) 29 *Berkeley J. Int'l L.* 101.

<sup>385</sup> TFEU, art. 4(3) ('Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties').

<sup>386</sup> TFEU, art. 351 ('The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude [...]']).

<sup>387</sup> See, e.g., Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, at para. 174.

<sup>388</sup> See, e.g., Joined Cases C-402/05 P and C-415/05, *P Kadi and Al Barakaat* [2008] ECR II-3649; Case C-205/06, *Commission v Austria* and Case C-249/06, *Commission v Sweden* [2009] ECR I-0000. See also *Eastern Sugar B.V. v Czech Republic*, SCC No. 088/2004, Partial Award, 27 March 2007 (R. Volterra, P.A. Karrer, E. Gaillard, arbs), para. 119. Cf. Burgstaller, fn. 383, at 186.

<sup>389</sup> Cf. P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2003), 419–20. See also C.W.A. Timmermans, 'The Basic Principles' in *The Law of the European*

of the ICSID Convention, the issues are not as clear-cut', Burgstaller therefore predicts that Member States' courts might rule against any given enforcement request following an ICSID proceeding in order to give full effect to EU law, regardless of the terms of the ICSID Convention.<sup>390</sup> Indeed, he states, 'it would be surprising if Member States' courts would not examine such awards with regard to their conformity with EU law', and consequently, a decision by such a court 'may affect the practical opportunities for a prevailing party to enforce an award'.<sup>391</sup>

One possibility for national courts of EU Member States when faced with such a potential conflict is to request a preliminary ruling from CJEU in accordance with Article 267 TFEU (ex Article 234 TEC).<sup>392</sup> This was indeed a strategy applied by the Slovak Republic following a decision in favour of jurisdiction by the UNCITRAL Tribunal seated in Germany in *Eureko B.V. v Slovak Republic* (2010).<sup>393</sup> Yet, its request for annulment and a preliminary ruling was denied by the Frankfurt Higher Regional Court.<sup>394</sup> Contrary to the arguments presented by the Slovak Republic, and in many respects supported by the Commission,<sup>395</sup> the Court found that there was no conflict between the BIT at hand and EU law.<sup>396</sup> It noted that arbitration is an EU-wide recognized remedy of dispute resolution giving legal protection in principle equal to that of state courts, and the CJEU does not enjoy a monopoly of interpretation in relation to issues involving EU law.<sup>397</sup> Further the Frankfurt court held that it was not obligated to ask the CJEU for a preliminary ruling because such rulings are only given abstract legal issues relating to the interpretation of EU law and its validity, and also because the Court had no doubts regarding the scope of Article 344 TFEU.<sup>398</sup>

An additional reason why national courts may have less occasion to face a possible conflict between national and European Union law is reflected in the ruling by the ICSID Tribunal in *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v Hungary* (2010).<sup>399</sup> Hungary argued that EU competition law played an important part of the case and should be considered as part of the applicable law, or at least be taken into account in relation to the Energy Charter Treaty providing jurisdiction for the arbitration.<sup>400</sup> The tribunal solved any potential clash between EU and ECT rules by stating that the respondent's acts or measures would be assessed under the ECT as the applicable law, and that EU law would be considered and taken into account as a relevant fact.<sup>401</sup> The arbitrators reasoned:

*Union and the European Communities* (P.J.G. Kapteyn and P. VerLoren van Themaat, eds, Alphen aan den Rijn, Kluwer Law International Law, 2008), 115, 153–6.

<sup>390</sup> M. Burgstaller, 'European Law Challenges to Investment Arbitration' in *The Backlash Against Investment Arbitration* (A.Waibel et al., eds, Austin, Texas, Wolters Kluwer Law and Business, 2010), 455, 473 (references omitted). See also Burgstaller, fn. 383, at 196, at fn. 80.

<sup>391</sup> Burgstaller, fn. 390, at 473 (references omitted).

<sup>392</sup> TFEU, art. 267. See also Court of Justice of the European Union, *Information Note on References from National courts for a Preliminary Ruling*, 2011/C 160/01. Cf. Burgstaller, fn. 390, at 473.

<sup>393</sup> *Eureko B.V. v Slovak Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (V. Lowe, A.J. van den Berg, V.V. Veeder, arbs).

<sup>394</sup> *Eureko*, Decision of the Frankfurt Higher Regional Court (*Oberlandesgericht*), 10 May 2012. See also A. Ross, 'Slovakia Takes Intra-EU BIT Controversy to Germany's Highest Court' *Global Arbitration Rev.* (30 May 2012).

<sup>395</sup> *Eureko*, Award on Jurisdiction, fn. 393.

<sup>396</sup> *Eureko*, Decision of the Frankfurt Higher Regional Court, fn. 394.

<sup>397</sup> *Eureko*, Decision of the Frankfurt Higher Regional Court.

<sup>398</sup> *Eureko*, Decision of the Frankfurt Higher Regional Court.

<sup>399</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (C. von Wobeser, J.W. Rowley, B. Stern, arbs).

<sup>400</sup> *AES v Hungary*, at paras 7.2.1–7.2.5.

<sup>401</sup> *AES v Hungary*, at para. 7.6.12.

It is common ground that in an international arbitration, national laws are to be considered as facts. Both parties having pleading [*sic*] that the Community competition law regime should be considered as a fact, it will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.<sup>402</sup>

While these rulings are welcomed as being in line with both public international law and European Union law, a final note of caution from Burgstaller is still appropriate: ‘Because even ICSID awards may end up before the ECJ, arbitral tribunals concerned about the enforceability of their awards are well advised to take EU law into account to the extent that it is applicable.’<sup>403</sup> As noted by the *Eureko* Tribunal: ‘EU law may have a bearing upon the scope of rights and obligations under the BIT in the present case, by virtue of its role as part of the applicable law under BIT Article 8(6) and German law as the *lex loci arbitri*.’<sup>404</sup>

### **3.2.2.2. The parties have agreed to the combined application of national and international law or there is no agreement**

Awards and scholarship support the possibility that international law may play a supervening role against the primarily applicable national law in case the parties have agreed to the application of both national and international law, or where the parties have not reached an agreement on the applicable law.<sup>405</sup> This form of interplay between national and international law is illustrated by all of the three Libyan Nationalization/Oil cases,<sup>406</sup> primarily due to an explicit agreement by the parties to such effect in the identical choice-of-law clause: ‘This Concession shall be governed by and interpreted in accordance with the principles of law of Libya *common to the principles of international law* [...].’<sup>407</sup>

In the first award, *British Petroleum Exploration Co. (BP) v Government of the Libyan Arab Republic* (1973),<sup>408</sup> sole Arbitrator Lagergren found the choice-of-law clause to offer ‘guidance in a negative sense by excluding the relevance of any single municipal legal system as such’.<sup>409</sup> In this respect, he noted that the clause ‘was the final product of successive changes made in the Libyan petroleum legislation in the decade between 1955 and 1965 by which the relevance of Libyan law was progressively reduced’.<sup>410</sup> Still, he rejected the investor’s contention that the clause’s effect was to

<sup>402</sup> *AES v Hungary*, at para. 7.6.6.

<sup>403</sup> Burgstaller, fn. 390, at 474.

<sup>404</sup> Cf. *Eureko v Slovak Republic*, fn. 393, Award on Jurisdiction, Arbitrability and Suspension, at para. 279. See also at paras 287–290 (the tribunal noted that EU law may be considered as part of the applicable law; yet, its ‘jurisdiction is confined to ruling upon alleged breaches of the BIT. The Tribunal does not have jurisdiction to rule on alleged breaches of EU law as such’).

<sup>405</sup> Spiermann refers to this choice-of-law methodology as the ‘vertical approach’. Spiermann, fn. 284, at 105.

<sup>406</sup> These cases are (i) *British Petroleum Exploration Co. (BP) v Libyan Arab Republic*, Award, 10 October 1973 and 1 August 1974 (Lagergren, sole arb.); (ii) *TOPCO v Libya*, fn. 56, Award on the Merits; and (iii) *LIAMCO v Libya*, fn. 217, Award. See generally, R.B. von Mehren and P.N. Kourides, ‘International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases’ (1981) 75 *Am. J. Int’l L.* 476; C. Greenwood, ‘State Contracts in International Law—The Libyan Oil Arbitrations’ (1982) 53 *Brit. Y.B. Int’l L.* 27, 27–8; B. Stern, ‘Trois arbitrages, un même problème, trois solutions: Les nationalisations pétrolières libyennes devant l’arbitrage international’ (1980) *Rev. Arb.* 3.

<sup>407</sup> *LIAMCO v Libya*, fn. 217, Award, 20 I.L.M. 1, 33 (referring to Clause 28(7); emphasis added). See also *BP*, fn. 406, 53 I.L.R. 297, 303 (referring to Clause 28(7)). See also at 322 (the concessions also contained the same stabilization clause (Clause 16)).

<sup>408</sup> *BP*, fn. 406, 53 I.L.R. 297.

<sup>409</sup> *BP*, at 327.

<sup>410</sup> *BP*, at 327.

render applicable only international law,<sup>411</sup> finding that the law of Libya was the proper law of the agreement.<sup>412</sup> Even so, he continued, '[i]n the event that international law and Libyan law conflict on [an] issue, the question is to be resolved by the application of the general principles of law'.<sup>413</sup>

A similar conclusion with regard to the supervening role of international law was reached by the tribunal in the second Libyan Nationalization case: *TOPCO v Libya*.<sup>414</sup> In his choice-of-law analysis, sole Arbitrator Dupuy concluded that '[t]he application of the principles of Libyan law does not have the effect of ruling out the application of the principles of international law, but quite the contrary: it simply requires us to combine the two in verifying the conformity of the first with the second'.<sup>415</sup>

Also the third and last of the Libyan Nationalization awards, *LIAMCO*, supports a supervening role for international law.<sup>416</sup> Whereas sole Arbitrator Mahmassani interpreted the applicable law clause to provide for the primacy of national law,<sup>417</sup> he noted that 'this covers only "the principles of law of Libya common to the principles of international law". Thus, it excludes any part of Libyan law which is in conflict with the principles of international law'.<sup>418</sup>

A more recent example is the *CME v Czech Republic* award (2001/03), in which the tribunal emphasized the common understanding by the states parties to the Netherlands–Czech/Slovak BIT that its choice-of-law provision<sup>419</sup> implied a hierarchical relationship between the two legal orders: 'To the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law'.<sup>420</sup> In so holding, it also referred to Article 3(5) of the BIT, which specifies a variable hierarchy between the legal orders depending on which is the most favourable to the investor:

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.<sup>421</sup>

As for the question of damages, therefore, the tribunal refrained from applying Czech law in order to diminish the quantum of compensation, as 'the international law standard prevail[s] in case of contradiction between international and national

<sup>411</sup> *BP*, at 327. <sup>412</sup> *BP*, at 329.

<sup>413</sup> *BP*, at 328. On the merits, Lagergren primarily referred to international law. See Chapter 6, Section 2.1.1 (on express or implied 'internationalization' of investment contracts).

<sup>414</sup> *TOPCO v Libya*, fn. 56, Award on the Merits, at para. 49.

<sup>415</sup> *TOPCO v Libya*, Award on the Merits, at para. 41.

<sup>416</sup> *LIAMCO v Libya*, fn. 217, Award.

<sup>417</sup> See Section 3.1.1 (on international law as part of the 'law of the land').

<sup>418</sup> *LIAMCO v Libya*, fn. 217, Award, 62 I.L.R. 140, 142.

<sup>419</sup> *CME v Czech Republic*, fn. 59, Partial Award, 13 September 2001, at para. 286 ('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'). Cf. Netherlands–Czech/Slovak Republic BIT, art. 8(6).

<sup>420</sup> *CME v Czech Republic*, fn. 59, Final Award, at para. 91. See also at paras 219, 398; Separate Opinion by I. Brownlie, at para. 3.

<sup>421</sup> *CME v Czech Republic*, fn. 59, Final Award, at para. 397 (emphasis in original). See also at para. 504. Cf. Netherlands–Czech BIT, art. 3(5).

law'.<sup>422</sup> This special form of hierarchy, therefore, must be established on a case-by-case basis depending on the content of the norm rather than its origin.

With respect to internationalized tribunals, the supervening role of international law was subject to discussions during the drafting of Article 42(1), second sentence, of the ICSID Convention.<sup>423</sup> Chairman Broches noted that '[i]n some cases the tribunal may be faced with a claim that international law should prevail over national law, e.g., where one of the parties claims that a particular action taken under national law, or a particular provision of national law, violates international law'.<sup>424</sup> However, he explained that '[o]n balance it had been considered preferable not to state the position too specifically'.<sup>425</sup> At a later point, though, he made it clear that in cases in which national law was in violation of international law, the tribunal would, in the application of international law, set aside national law.<sup>426</sup> He further explained that 'Article 42 intentionally referred to domestic law *and* international law since a tribunal might be called upon to determine whether standards set by both systems of law had been respected by the host State'.<sup>427</sup> In fact, an effort made to limit the relevance of international law to situations where the national law of the host state was silent,<sup>428</sup> was rejected by 19 votes to 7;<sup>429</sup> and the vote in favour of the final version, without any limitation as to the applicability of international law, was adopted by 24 votes to 6.<sup>430</sup>

This understanding concerning the supervening role of international law vis-à-vis national law under Article 42(1), second sentence, of the ICSID Convention has been followed and supported by tribunals and scholars.<sup>431</sup> Thus, the ad hoc Committee in *Klöckner v Republic of Cameroon* (1985) held that not only does international law have a complementary function in case of lacunae; it also has a corrective function, 'should the State's law not conform on all points to the principles of international law'.<sup>432</sup>

<sup>422</sup> *CME v Czech Republic*, at para. 504.

<sup>423</sup> See History of the ICSID Convention, fn. 73, Vol. II-1, p. 418 (the French delegate noted that '[i]t might be claimed that the national law applied in the matter conflicted with some rule of international law'); see also at p. 420 (the UK representative suggested that 'some guidelines should be established regarding where international law should be prevail over clearly applicable national law').

<sup>424</sup> History of the ICSID Convention, Vol. II-1, p. 570.

<sup>425</sup> History of the ICSID Convention, Vol. II-1, p. 420.

<sup>426</sup> History of the ICSID Convention, Vol. II-1, p. 571. See also Vol. II-2, at 804 (Broches explained that Article 42(1)[2] as it now stands would bring international law into play in case of inconsistency between the two legal orders).

<sup>427</sup> History of the ICSID Convention, Vol. II-2, p. 986. See also at 801 (the Spanish representative stated that 'the national legislation would not be applied when it would clearly violate admitted principles of international law'). See also at 804 (Tsai from China wanted to limit the application of international law to cases where it was inconsistent with national law introduced after the investment was made).

<sup>428</sup> History of the ICSID Convention, Vol. II, p. 802.

<sup>429</sup> History of the ICSID Convention, Vol. II, p. 804 (motion by the delegate from India). See also at 985 (Broches noted that the Legal Committee's vote had been very clearly in favour of permitting the tribunal to apply international law particularly in order to take account of cases where a state changed its own law to the detriment of an investor [sic] and in violation of an agreement not to do so); see also at 986 (Broches explained that a valid domestic law, if inconsistent with international law, would give rise to international responsibility, its validity on the national level notwithstanding). See also at 570, 985.

<sup>430</sup> History of the ICSID Convention, Vol. II, p. 804.

<sup>431</sup> See Broches, fn. 77, at 229; M. Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Dordrecht, Nijhoff, 1993), 140; G. Sacerdoti, 'Arbitration of Investment Disputes under UNCITRAL Rules and the Choice of Applicable Law' in *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (S. Charnovitz et al., eds, Cambridge, Cambridge University Press, 2005), 276, 294; Sacerdoti, 'Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19(1) *ICSID Rev.-FIL* 1; Parra, fn. 104, at 5–6.

<sup>432</sup> *Klöckner v Cameroon*, fn. 78, Decision on Annulment, at para. 60.

The same conclusion regarding the relationship between national and international under Article 42(1), second sentence, of the ICSID Convention was reached by the ad hoc Committee in *Amco Asia* (1986): an ICSID tribunal is authorized to apply rules of international law ‘to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms’.<sup>433</sup> The committee based this view of the role or relationship of international law norms vis-à-vis the law of the host State on an ‘overall evaluation of the system established by the Convention’, and specifically on Article 54(1) which relates to the duty of ICSID member states to recognize and enforce ICSID awards, as well as Article 27, providing that the home state would normally be precluded from exercising diplomatic protection on behalf of its national, the foreign investor: ‘The thrust of Article 54(1) and of Article 27 of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.’<sup>434</sup>

The tribunal in the resubmitted case of *Amco Asia* (1990) went further than the ad hoc Committee in the same case, criticizing the latter’s characterization of the role of international law as ‘only’ ‘supplemental and corrective’.<sup>435</sup> Rather, it concluded that ‘international law is fully applicable and to classify its role as “only” “supplemental and corrective” seems a distinction without a difference’.<sup>436</sup> As such, it found that although the law of the host state would primarily apply, every claim would also be tested against international law.<sup>437</sup>

In *Aucoven v Venezuela*, the ICSID Tribunal concluded that, except for matters covered by certain Venezuelan decrees, it had to look to the default choice-of-law provision of Article 42(1) of the ICSID Convention.<sup>438</sup> While finding that Venezuelan law should primarily apply to the merits of the dispute, the tribunal referred to the

<sup>433</sup> *Amco Asia v Indonesia*, fn. 87, Decision on Annulment, at para. 20.

<sup>434</sup> *Amco Asia v Indonesia*, at 515. See also *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (L.Y. Fortier, E. Lauterpacht, P. Weil, arbs.), rectified 8 June 2000, at para. 64 (in case of inconsistency between Costa Rican and international law, ‘the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the Convention would, in this respect, be frustrated.’) It should be noted that the tribunal reinforced its conclusion of the applicability of international law by pointing to the submissions of the parties, whereby they had relied on international law. See also P. Feuerle, ‘International Law and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes’ (1977–78) 4 *Yale J. World Public Order* 89, 111; History of the ICSID Convention, fn. 73, Vol. II-1, p. 804.

<sup>435</sup> *Amco Asia v Indonesia*, fn. 87, Resubmitted Case, Award.

<sup>436</sup> *Amco Asia v Indonesia*, Resubmitted Case, Award, at para. 40.

<sup>437</sup> *Amco Asia v Indonesia*, Resubmitted Case, Award, at para. 40. See also *SPP v Egypt*, fn. 37, ICSID Award, at para. 84 (not only when the national legal order contains lacunae, but also when ‘international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the [ICSID] Convention to apply directly the relevant principles and rules of international law’); and also at para. 84 (referring to A. Broches, fn. 190, at 342) (‘[This] 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 under that law, violates international law’). For criticism, see N. Nassar, ‘Internationalization of State Contracts: ICSID, the Last Citadel’ (1997) 14(3) *J. Int’l Arb.* 185, 201.

<sup>438</sup> *Aucoven v Venezuela*, fn. 126, Award, at para. 100. See also Section 2.3.1 (on contractual claims); *LETCO v Liberia*, fn. 306, Award, 2 ICSID Rep. 346, 359 (Article 42(1), second sentence, 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’); *SPP v Egypt*, fn. 37, ICSID Award, Dissenting Opinion El Mahdi, at section III(3)(v)(b) (pursuant to Article 42(1), second sentence, ICSID Convention, recourse may be had to international rules (or principles) ‘in cases of a presumed lacuna in the national law and/or of non-conformity with imperative international rules’).

established principle that international law ‘may correct the result of the application of national law when the latter violates international law (corrective function).’<sup>439</sup> Indeed, the parties themselves had accepted that international law would prevail over Venezuelan law if the latter were in conflict with the former.<sup>440</sup> On this basis, the tribunal held that ‘international law prevails over conflicting national rules’.<sup>441</sup>

While the following decisions may be explained on the basis that the claims at issue were subject to international law,<sup>442</sup> the supervening role of international law vis-à-vis national law is also supported by recent decisions such as *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador* (2007);<sup>443</sup> *Sempra Energy International v Argentine Republic* (2007),<sup>444</sup> and *Duke Energy International Peru Investments No. 1, Ltd v Peru* (2008).<sup>445</sup> And the ICSID Tribunal held in *LG &E Energy Corp. v Argentina* (2006):

International law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law [...]. If this contradiction does not exist, it is not an easy task to establish the relationship between international law and domestic law.<sup>446</sup>

### *3.2.3. Interim conclusions*

International law may play a corrective role vis-à-vis the primarily applicable national law where the latter contains lacunae or where it conflicts with fundamental norms of international law. Where the parties have agreed to the sole application of national law, the complementary role of international law should be restrictively interpreted and be limited to ancillary questions of law rather than creating separate causes of action as such. Where the tribunal’s mandate authorizes it to apply both national and international law to the merits, tribunals may directly apply international law; and consequently, there is no need to qualify the application of international law as complementary.

A similar conclusion can be made with respect to the supervening role of international law in situations where the parties have agreed to the application of both national and international law, or where an agreement on the applicable law is lacking. The purported need to resort to international law in a supervening fashion as illustrated by these awards and scholarship may be seen as the product of the influence of the principle of host state sovereignty on the choice-of-law methodology of arbitral tribunals. As was demonstrated, this principle has led tribunals to find in favour of the primary application of national law in the face of an agreement by the parties to the application of both national and international law, and where the parties have not reached a choice-of-law agreement.<sup>447</sup> It is submitted, however, that in such cases,

<sup>439</sup> *Aucoven v Venezuela*, at para. 102.

<sup>440</sup> *Aucoven v Venezuela*, para. 103.

<sup>441</sup> *Aucoven v Venezuela*, para. 105.

<sup>442</sup> See Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>443</sup> *M.C.I. Power Group v Ecuador*, fn. 67, Award, at para. 218.

<sup>444</sup> *Sempra Energy v Argentina*, fn. 168, Award, at para. 238.

<sup>445</sup> *Duke v Ecuador*, fn. 65, Decision on Jurisdiction, at para. 162.

<sup>446</sup> *LG&E Energy v Argentina*, fn. 67, Decision on Liability, at paras 94–95 (applying ICSID Convention, art. 42(1), second sentence). See also *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (F.S. Nariman, P. Bernardini, B. Vukmir, arbs), para. 10.1.4; *Cable TV v The Federation of St. Christopher (St. Kitts) and Nevis*, fn. 91, Award, 13 *ICSID Rev.-FILJ* 328, 371, 385 (1998); *Tradex v Albania*, fn. 151, Award, 14 *ICSID Rev.-FILJ* 197, 216, 217 (1999); *Santa Elena*, fn. 434, Award, at para. 64.

<sup>447</sup> See Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

where the relevant international norm gives a higher degree of protection to an investor, the latter should be able to invoke and the tribunal should have the mandate to apply international law to the merits of the case, without necessarily first applying national law.<sup>448</sup> When this is the case, it is not entirely appropriate to refer to the application of international law as ‘supervening’. Rather, international law can apply directly, for instance so as to give rise to a claim for wrongful expropriation, and not only when the conflicting national law is violative of fundamental international norms, such as is the case where the parties have agreed to the sole application of national law.

#### 4. General Conclusions

In sum, we have seen that national law will primarily apply when the parties have so agreed, or because of considerations of the host state’s sovereign right to regulate activities on its territory. A more neutral choice-of-law determinant than state sovereignty is the nature of the claim. Thus, if the ‘essential basis’ of the claim is national in nature, such as is the case regarding claims for breach of contract, national law primarily applies. When investment tribunals—as ‘one-stop shops’<sup>449</sup>—apply national law to the merits of the dispute for any of the foregoing reasons, they could be seen to take on the role of agents of the national legal order in question in a way converse to how national courts are agents of the international legal order when they apply international law.

International law may still play a role when the applicable national legal order contains gaps. However, in order not to run counter to the principle of party autonomy, such a complementary role of international law should be limited to ancillary questions of law when the parties have reached an agreement on the application of solely national law. International law may also be applied in a supervening fashion when the otherwise applicable national norm conflicts with an international norm of a fundamental nature. For territorialized tribunals, the taking into account of these norms may be necessary to ensure the enforceability of the award. This is because such norms may be part of the international public policy of the juridical seat or the state of enforcement. Fundamental international norms should also be heeded by internationalized tribunals as they form part of the *ordre public* of the international legal order in which the tribunals operate. Further, to the extent to which the norms are also of a peremptory nature, their disregard may endanger the enforceability of the award.

<sup>448</sup> See Chapter 6, Section 2.2 (on the international nature of the claim).

<sup>449</sup> See Chapter 1, Section 1 (on motivations for the study).

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# 6

## The Primary Applicability of International Law and the Role of National Law

What is clear is that [t]he law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.<sup>1</sup>

### 1. Introduction

Frequently, arbitral tribunals apply international law to the merits of investment disputes. In **Section 2** of this chapter, we will see that the main factors that arbitral tribunals take into account in deciding to apply international law are an agreement by the parties to that effect, and the international nature of the claim invoked. An additional reason that has been used is the superior nature of international law vis-à-vis national law.

In **Section 3**, it will be demonstrated that the primary applicability of international law does not necessarily rule out a role for national law, as (i) the latter source may be applied indirectly when the nature of the international claim requires a determination of the parties' rights and obligations pursuant to national law, such as with respect to expropriation and 'umbrella' clause claims; and (ii) national law could apply correctly, in a complementary or supervening fashion.

### 2. Reasons for the Primary Applicability of International Law

#### 2.1. Party agreement on the application of international law

In accordance with the principle of party autonomy, arbitral tribunals will honour a choice by the parties for the application of international law, either alone or in combination with national law.<sup>2</sup> Such choice does not need to be express; as long as the parties' intention is manifest, it may be implied by the circumstances of each particular case.<sup>3</sup> In the following analysis of practice, the application of international law due to party agreement will be considered first with respect to investment contracts, and second in investment treaty arbitration.

<sup>1</sup> *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002 (K.D. Kerameus, A. Bucher, F.O. Vicuña, committee members), para. 40.

<sup>2</sup> See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law).

<sup>3</sup> See Chapter 3, Section 3.1.2 (on express and implied choice of law).

### *2.1.1. Express or implied ‘internationalization’ of investment contracts*

While we have seen that foreign investors often agree to subject the investment contract to the application of national law,<sup>4</sup> practice reveals that they sometimes also agree to the sole application of international law,<sup>5</sup> or, as is more frequently the case, to the combined application of national and international law.<sup>6</sup>

Express choices for the application of international law should, in agreement with the principle of party autonomy, be upheld by arbitral tribunals.<sup>7</sup> But we also observe that subsequent to the seminal *Serbian Loans* case (1929), in which the Permanent Court of International Justice held that contracts between a private party and a state are generally governed by national law,<sup>8</sup> a stream of practice developed whereby arbitrators construed the nature of the contractual relationship between foreign investors and host states to require the application of (general principles) of (international) law, often in the absence of obvious factors in favour of such ‘internationalization’. This approach, according to which the parties must have *intended* to insulate their contract from the application of national law, serves to protect the investor against legislative abuse by the host state. Leben explains:

[A]lors que les règles habituelles de droit international privé conduisaient à l’application du droit de l’Etat contractant, les arbitres repousseraient ce droit et lui préféreraient les principes généraux de droit. La raison d’un tel choix peut se comprendre dans une perspective de protection des investissements: en effet, accepter l’application de la loi de l’Etat aurait mis l’investisseur étranger à la merci de celui-ci qui aurait pu modifier le contrat de concession ou y mettre fin sans assumer aucune obligation financière à l’égard de l’investisseur, si telle était sa volonté. [[W]hile the traditional rules of private international law led to the application of the law of the contracting state, the arbitrators rejected this law and preferred the general principles of law. The reason for such a choice can be understood from the perspective of investment protection: in effect, accepting the application of state law would have placed the foreign investor at the mercy of this state which could have changed the concession contract or terminate it without incurring any financial obligation with respect to the investor, if that was the desired objective.]<sup>9</sup>

<sup>4</sup> See Chapter 5, Section 2.1 (on party agreement on the application of national law).

<sup>5</sup> See W.M. Reisman, ‘Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration’ in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series No. 13, van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 849, 852; Ch. Leben, ‘La Théorie du contrat d’Etat et l’évolution du droit international des investissements’ (2004) 302 *Recueil des Cours* 209, 270, at para. 136.

<sup>6</sup> See A.F. Maniruzzaman, ‘International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View’ (2001) 20 *Wis. Int’l L.J.* 1, 32; Leben, fn. 5, at 270, at para. 137.

<sup>7</sup> See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law). Note, however, the debate concerning the desirability of agreeing to the application of general principles of law. See, e.g., M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel, Helbing und Lichtenhahn, 1999), 210–11.

<sup>8</sup> See Chapter 5, Section 2.3.1 (on contractual claims).

<sup>9</sup> Leben, fn. 5, at 221–2, at para. 23. See also T.W. Wälde, ‘Renegotiating Acquired Rights in the Oil and Gas Industries’ (2008) 1(1) *J. World Energy Bus.* 55, 56–7; I.F.I. Shihata and Á.R. Parra, ‘Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the Convention’ in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (ICCA Congress Series No. 7, XIIth International Arbitration Congress, Vienna, 13–16 November (1994) (A.J. van den Berg, ed., 1996), 294, 302; Y. Dezalay and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, IL, The University of Chicago Press, 1996), 86; C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 560; O. Spiermann, ‘Applicable Law’ in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 89, 92. Indeed, it is due to the inequality in the

This development in arbitral practice was coupled with and supported by scholarship, offering the theory of internationalized contracts as an academic underpinning for applying international law to contractual disputes between investors and host states. In varying degrees, this theory—which remains controversial<sup>10</sup>—considers such contracts to be, by their very nature, subject to international law.<sup>11</sup> Weil, for instance, supports the application of international law to investor–state contracts on the basis that while these contracts are commercial in nature, they form an integral part of the foreign policy of the host state.<sup>12</sup> As such, they find their centre of gravity—or *Grundlegung*—in the international sphere and should be classified as *instruments des relations inter-gouvernementales*.<sup>13</sup> In a similar vein, Lillich suggests treating investment agreements as ‘quasi’ public international or internationalized.<sup>14</sup>

Other scholars, while not necessarily considering the contracts to receive their binding force from international law, have sought to characterize state contracts as allowing or requiring the application of international law by reference to more objective elements: the combined characteristics of (i) an arbitration clause providing for the settlement of disputes by a neutral forum, and (ii) a choice-of-law clause withdrawing the exclusive application of the national law of the host state.<sup>15</sup> The latter could be in the form of a ‘stabilization’ clause, where the parties agree to the application of a national system of law frozen at a particular point in time, such as the signing of the investment contract. According to Jaenicke:

legal relationship of the individual and the state that most legal systems contain specific rules of public contracts. Thus, the French legal system has developed the concept of an ‘administrative contract’. See I. Marboe and A. Reinisch, ‘Contracts between States and Foreign Private Persons’ in *Max Planck Encyclopedia of Public International Law*, at para. 3, available at <<http://www.mpepl.com/home>> (last visited 1 May 2012).

<sup>10</sup> See Leben, fn. 5, at 212, at para. 5; D.W. Bowett, ‘Claims between States and Private Entities: The Twilight Zone of International Law’ (1986) 35 *Cath. U.L. Rev.* 929, 931; M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague, Kluwer Law International, 2000), 253–4.

<sup>11</sup> For an overview of the wealth of scholarship on this issue, see Leben, fn. 5, at 209–10, fn.s 1–2. In addition to Leben’s seminal work, Alvik’s recent book discusses the theory of state contracts in great detail. I. Alvik, *Contracting with Sovereignty* (Oxford, Hart Publishing, 2011) (especially Chapter 3, at pp. 45–96).

<sup>12</sup> P. Weil, ‘Le Droit International en Quête de son Identité’ (1992–VI) 237 *Recueil des Cours* 96.

<sup>13</sup> Weil, *Le Droit International*. See also Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage à Trois*’ in *Liber Amicorum Ibrahim F.I. Shihata* (S. Schlemmer-Schulte and K.-Y. Tung, eds, The Hague, Kluwer Law International 2001), 839, 844–5. But see P. Mayer, ‘Le mythe de “l’ordre juridique de base” (ou *Grundlegung*)’ in *Le droit des Relations Economiques Internationales: Etudes offertes à Berthold Goldman* (Paris, Litec, 1982), 199.

<sup>14</sup> R.B. Lillich, ‘The Law Governing Disputes under Economic Development Agreements: Re-Examining the Concept of Internationalisation’ in *International Arbitration in the Twenty-First Century, Towards Judicialization and uniformity* (R.B. Lillich and C.N. Brower, eds, Irvington, NY, Transnational, 1993), 92. See also J. Verhoeven, ‘Arbitrage entre Etats et entreprises étrangères: des règles spécifiques?’ in *Hommage à Jean Robert, Les Etats et l’arbitrage international* (1985) *Rev. Arb.* 609, 627–8; A. Verdross, ‘The Status of Foreign Private Interests Stemming from Economic-Development Agreements with Arbitration Clauses’ in *Selected Readings on Protection by Law of Private Foreign Investment* (The Southwestern Legal Foundation, International and Comparative Law Center, Albany, M. Bender, 1964), 117, 120–1. State contracts have also been referred to as economic development agreements, deriving protection of international law on the basis that they are geared toward the economic development of the host state. See J. Hyde, ‘Economic Development Agreements’ (1962) 105 *Recueil des Cours* 271. But see M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, Cambridge University Press, 2004), 420 (“[T]he idea that foreign investment is motivated by altruistic motives of developing the economy of the host state is such an absurdity that it can hardly be the basis of any rule that deserves even a casual consideration”).

<sup>15</sup> See Leben, fn. 5, at 248, at para. 89; P. Mayer, ‘La neutralisation du pouvoir normatif de l’Etat en matière de contrats d’Etat’ (1986) 113 *Journal du Droit International* 5, 31–4; W. Peter, *Arbitration and Renegotiation of International Investment Agreements* (Dordrecht, Boston M. Nijhoff, 1986), 95.

The incorporation of a ‘stabilization clause’ in an investment contract between the host State or any of its agencies and the investor, if coupled with an arbitration clause, is a strong additional indicator of the intention of the parties to insulate their contractual relations from the reach of the law of the host State.<sup>16</sup>

Below, we will examine arbitral decisions in which international law was applied to disputes arising out of investment contracts. Consistent with our observations in Chapter 3 on implied choices of law, the readiness of these arbitral tribunals to find an implicit agreement in favour of internationalization may at times be questioned.<sup>17</sup>

Also to be considered is the relationship between such internationalization and the scope of the arbitration agreement, as well as the implications that flow therefrom. As will be demonstrated, internationalization has often gone hand in hand with a decision to allow investors to bring additional causes of action and to claim corresponding remedies when the contract has been frustrated. Thus, in addition to ‘mere’ contractual breaches based on the general principle of law *pacta sunt servanda*, tribunals have found in favour of the investor on the bases *inter alia* of expropriation and unjust enrichment.<sup>18</sup> In Chapter 4, we noted that the arbitration agreement may be broad enough to encompass both contractual and non-contractual claims, the latter being amenable to the application of international as well as national law.<sup>19</sup> A legitimate question that emerges therefore is why tribunals have supported their decision to apply international law by reference to the parties’ presumed intent as to the applicable law rather than to the arbitration clause. A plausible answer relates to the relative novelty of allowing private parties directly to invoke international law vis-à-vis the respondent state<sup>20</sup> compared to the longstanding acceptance of the doctrine of party autonomy.<sup>21</sup> Lauterpacht’s observation is elucidating here, as he construes an (implied) agreement for the application of international law to signify ‘an endeavour to overcome the dichotomy between the two traditional planes of relationship that can result from a foreign investment’; that is, on the one hand, the ‘basic’ relationship between the investor and the state party to the agreement, which is normally governed by the proper law of the contract; and on the other hand, the ‘higher’ relationship between the state and the national state of the investor, governed by public international law.<sup>22</sup> While Lauterpacht notes that a bridging of the gap between these two planes has the advantage of judicial economy,<sup>23</sup> he adds the following words of caution: ‘It can immediately be seen, though, that in the existing state of international relations the implementation of

<sup>16</sup> G. Jaenische, ‘The Prospects for International Arbitration: Disputes between States and Private Enterprises: Comments on a Paper by Professor L.J. Bouchez’ in *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1988–1987)* (A.H.A. Soons, ed., Dordrecht, Martinus Nijhoff, 1990), 155, 159 (references omitted). See also R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008), 75; Sornarajah, fn. 10, at 50–1; T. Begic, *Applicable Law in International Investment Disputes* (Utrecht, Eleven International, 2005), 16, 84–98.

<sup>17</sup> See Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>18</sup> Cf. Jaenische, fn. 16, at 161.

<sup>19</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

<sup>20</sup> See Chapter 3, Section 3.2.2.1 (on the ICSID Convention); Chapter 5, Section 2.3 (on the national nature of the claim).

<sup>21</sup> See Chapter 3, Section 3.1 (on party agreement on the applicable law); Chapter 5, Section 2.3 (on the national nature of the claim).

<sup>22</sup> E. Lauterpacht, ‘The World Bank Convention on the Settlement of International Investment Disputes’ in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Genève, Tribune, 1968), 642, 654.

<sup>23</sup> Lauterpacht, at 642, 654.

this type of technique must be somewhat experimental. Much will depend upon the tribunal which considers the matter.<sup>24</sup>

First among the cases that illustrate an implicit choice for the application of international law is the *Lena Goldfields* arbitration (1930), which involved a concession contract entered into between a British corporation and the Soviet Government.<sup>25</sup> The contract subjected Lena Goldfields to 'the existing code and to future enactments and ordinances of the Government of the U.S.S.R.',<sup>26</sup> but with the following reservation: 'in so far as special provisions are not contained in the present agreement'.<sup>27</sup> Moreover, the contract stipulated that '[t]he basis of the present agreement on the part of both parties is one of goodwill, good faith, as well as a desire to interpret its provisions reasonably'.<sup>28</sup> There was also a stabilization clause pursuant to which the Soviet Government promised not to make any alteration in the contract, either by order, decree, or any unilateral act, or at all, except with the investor's consent.<sup>29</sup>

In an attempt to avoid the sole application of national law,<sup>30</sup> Lena's counsel advanced an argument in favour of international law,<sup>31</sup> which was later to be heralded a 'gigantic first step for international commercial arbitration, almost equivalent to the caveman's discovery of fire'.<sup>32</sup> More specifically, for the claim for unjust enrichment he invoked general principles of law as the 'proper law' of the parties' contract.<sup>33</sup> In support of this argument, he referred first, to the fact that the contract and one amendment thereof had been signed not only on behalf of the Executive Government of Russia but by the Acting Commissary of Foreign Affairs; and secondly, he claimed that 'many of the terms of the contract contemplated the application of international rather than merely national principles of law'.<sup>34</sup> This latter argument has been construed as a reference to the dispute settlement clause in favour of arbitration abroad.<sup>35</sup> Without much explicit reasoning, the tribunal accepted this proposition.<sup>36</sup> On the merits, therefore, it relied on the principle of 'unjust enrichment', being a general principle of law recognized by civilized nations.<sup>37</sup>

<sup>24</sup> Lauterpacht, at 642, 654.

<sup>25</sup> See A. Nussbaum, 'The Arbitration between Lena Goldfields Ltd and the Soviet Government' (1950) 36 *Cornell Law Quarterly* 51; H. Lauterpacht, 'Lena Goldfields Arbitration' (1930) 5 *Ann. Dig. Pub. Int'l L. Cas.* 3; V.V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 *Int'l & Comp. L.Q.* 747.

<sup>26</sup> See Veeder, fn. 25, at 767, at fn. 58 (referring to article 75 of the parties' contract).

<sup>27</sup> See Veeder, at 767, at fn. 58.

<sup>28</sup> See Veeder, at 766, at fn. 57.

<sup>29</sup> See Veeder, at 767, at fn. 58 ('Art.76 of the concession agreement precluded the USSR from making by itself any change to the concession agreement "by disposition, decree or other unilateral acts of the state authorities" [...]']).

<sup>30</sup> See Veeder, at 766–7.

<sup>31</sup> See Veeder, at 766.

<sup>32</sup> See Veeder, at 773; and at 750. Cf. Spiermann, fn. 9, at 93.

<sup>33</sup> See Veeder, fn. 25, at 766.

<sup>34</sup> See Veeder, at 766. See also at 766: (Lena's counsel also stated that on all domestic matters not excluded by the contract, including its performance by both parties inside the Soviet Union, Soviet law was 'the proper law of the contract').

<sup>35</sup> See Veeder, at 766.

<sup>36</sup> Veeder, at 767, at fn. 58 (Veeder refers to para. 22 of the award, where 'the tribunal recorded and accepted the submission of Lena Goldfield's counsel'); see also at fn. 59 (the tribunal held: 'In so far as any difference of interpretation [of the concession agreement] might result, the court holds that this contention is correct'). See also Nussbaum, fn. 25, at 36 ('[S]uch a splitting of applicable legal systems was not warranted; the "proper law" of the entire contract was Soviet').

<sup>37</sup> See Veeder, fn. 25, at 752, at fn. 12.

The concession contract in *Sapphire International Petroleum Ltd v National Iranian Oil Co. (NIOC)* (1963) provided that the parties should carry out its provisions ‘in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement’.<sup>38</sup> It also contained a stabilization clause, which stipulated that the Government or any governmental authority in Iran was prevented from cancelling or changing the agreement through any general or special statutory enactment, or any administrative measure or decree of any kind.<sup>39</sup> Sole Arbitrator Cavin did not construe these clauses to constitute an express choice of law; and he set out to ‘determine which system of law should best be applied according to the evidence of the parties’ intention and in particular the evidence to be found in the contract’.<sup>40</sup>

Cavin first considered the applicability of national law: ‘Since the contract was concluded in Teheran and was due to be performed for the most part in Iran, the *lex loci contractus* and the *lex loci executionis* both point to the application of Iranian law.’<sup>41</sup> Due to the special nature of the contract, however, Cavin found it unlikely that the parties had implicitly agreed to the application of Iranian Civil Law.<sup>42</sup> He went on to state:

[A] reference to rules of good faith, together with the absence of any reference to a national system of law, leads the judge to determine, according to the spirit of the agreement, what meaning he can reasonably give to a provision of the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them.<sup>43</sup>

According to Cavin, the application of international law was particularly justified in light of the parties to the dispute: a state organ and a foreign company.<sup>44</sup> He concluded: ‘This contract has therefore a quasi-international character which releases it from the sovereignty of a particular legal system, and it differs fundamentally from an ordinary commercial contract.’<sup>45</sup>

Other factors that reinforced Cavin’s finding of an implicit agreement to the application of international law were the transnational aspect of the concession contract; its long-term nature; the special tax arrangements; the need for the Iranian Government to ratify the concession; as well as the fact that the contract gave the investor possession and, to a certain extent, control over a territory—all of which gave the contract more of a public character.<sup>46</sup> Considering the investments, responsibilities, and considerable risks taken by the investor, he also found it natural that it ‘should be assured of some legal security. This could not be guaranteed to it by the outright application of Iranian law, which it is within the power of the Iranian State to change.’<sup>47</sup> Cavin also relied on the *force majeure* clause referring to principles of international law; and the fact that other, similar agreements made by the respondent explicitly referred to the application of international law.<sup>48</sup>

<sup>38</sup> *Sapphire Int'l Petroleum Ltd v National Iranian Oil Co.*, Award, 15 March 1963, 35 I.L.R. 136, 140 (1963). For criticism, see G.R. Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 *Am. J. Int'l L.* 784, 800–1. See also Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>39</sup> *Sapphire*, fn. 38, Award, at 140. <sup>40</sup> *Sapphire*, Award, at 171.

<sup>41</sup> *Sapphire*, Award, at 171. <sup>42</sup> *Sapphire*, Award, at 171.

<sup>43</sup> *Sapphire*, Award, at 173. <sup>44</sup> *Sapphire*, Award, at 173.

<sup>45</sup> *Sapphire*, Award, at 173. See also at 175. <sup>46</sup> *Sapphire*, Award, at 171.

<sup>47</sup> *Sapphire*, Award, at 171. <sup>48</sup> *Sapphire*, Award, at 173–5.

On the merits, and in applying the fundamental principle of law *pacta sunt servanda*, ‘which is constantly being proclaimed by international courts’, Cavin found that the host state had deliberately refused to carry out certain of its obligations and that this failure constituted a breach of contract.<sup>49</sup>

Three awards, referred to as the Libyan Nationalization cases,<sup>50</sup> contained identical choice-of-law clauses, referring to both national and international law:

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>51</sup>

In *British Petroleum Exploration Co. (BP) v Government of the Libyan Arab Republic* (1973), sole Arbitrator Lagergren rendered his award primarily on the basis of international law. He found that by virtue of the stabilization clause, Libya had limited its ‘freedom to change or terminate the concession by unilateral act unless it could be shown that the change was truly in the public interest’.<sup>52</sup> Lagergren went on to hold that the nationalization amounted to a fundamental breach of the concession and its total repudiation.<sup>53</sup> He concluded that the taking by Libya of BP’s property, rights, and interests ‘violate[d] public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character [...] [T]he fact that no offer of compensation has been made indicates that the taking was also confiscatory.’<sup>54</sup>

In *Texaco Overseas Petroleum Co. (Topco) & California Asiatic Oil Co. (Calasiatic) v Libya* (1977), sole Arbitrator Dupuy pointed to the new concept according to which contracts between foreign private parties and states could be ‘internationalized’ in the sense of being subject to public international law: ‘treaties are not the only type of agreements governed by [international] law [...]. [C]ontracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: The international law of contracts.’<sup>55</sup> According

<sup>49</sup> *Sapphire*, Award, at 181. Cf. *Deutsche Schachtbau- und Tiefbohr GmbH v R'As al-Khaimah National Oil Co (Rakoil)*, ICC Case No. 3572, Final Award, 1982, XIV Y.B. Commercial Arb. 111, 117 (1989) (in the absence of an express choice of law, the tribunal found it inappropriate to apply national law. Instead, it referred to ‘what has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland’, which it reasoned, ‘must have been known to the parties [...] and should be regarded as representing their implicit will’. Accordingly, it went on to decide the dispute by reference to ‘internationally accepted principles of law governing contractual relations’); *Revere Copper & Brass, Inc. v Overseas Private Investment Corporation (OPIC)* (Amer. Arb. Assn. 1978), 17 I.L.M. 1321 (1978).

<sup>50</sup> See Chapter 5, Section 3.2.2.2 (the parties have agreed to the combined application of national and international law or there is no agreement).

<sup>51</sup> *British Petroleum Exploration Co. (BP) v Libyan Arab Republic*, Award, 10 October 1973, 53 I.L.R. 297, 303 (1979) (Lagergren, sole arb.) (referring to Clause 28(7)). See also at 322 (the concessions also contained the same stabilization clause (Clause 16).); *Libyan American Oil Co. (LIAMCO) v Libyan Arab Republic*, Award, 12 April 1977 (Mahmassani, sole arb.), 20 I.L.M. 1, 33 (1977) (referring to Clause 28(7)). See also at 13, 19.

<sup>52</sup> R.C.A. White, ‘Expropriation of the Libyan Oil Concessions—Two Conflicting International Arbitrations’ (1981) 30 *Int'l & Comp. L.Q.* 1, 5–6 (1981).

<sup>53</sup> *BP v Libya*, fn. 51, Award, 53 I.L.R. 297, 329.

<sup>54</sup> *BP v Libya*, Award.

<sup>55</sup> *Texaco Overseas Petroleum Company (Topco) and California Asiatic Oil Company (Calasiatic) v Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, para. 32 (referring to F.A. Mann, ‘Contrats entre Etats et Personnes Privées Etrangères: The Theoretical Approach towards the Law Governing Contracts between States and Private Persons’ (1975) *Revue Belge de Droit*

to Dupuy, such internationalization had been achieved first on the basis of the reference in the contract to international law as a standard for the application of Libyan law;<sup>56</sup> and secondly, the fact that the parties had agreed to arbitration.<sup>57</sup> Thirdly, he pointed to the special nature of contracts entered into with a sovereign state.<sup>58</sup> Such ‘economic development agreements’, stated Dupuy, were characterized by several elements: investment and technical assistance in developing states; a long-term close cooperation; and the importance of an equilibrium between the interest of the private party and the state.<sup>59</sup> Especially, he emphasized, the investor must be protected against the risk of modifications in the national law.<sup>60</sup>

Noting that the Permanent Court of Justice in the *Serbian Loans* case had admitted that the principle that ‘[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country’ could be set aside depending on the ‘specific case under consideration’, Dupuy found that ‘the legal order from which the binding nature of the contract derives is international law itself’.<sup>61</sup> As to the law governing the contract, he concluded that it was ‘international law’ rather than the general principles of law, and that Libyan law would apply solely to the extent that it was consistent with international law.<sup>62</sup> He did emphasize, however, that such internationalization did not imply that the private party or the contract was to be assimilated to a state or a treaty respectively; it only meant that ‘for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities’.<sup>63</sup> The investor succeeded on the merits. Dupuy held: ‘in respect of the international law of contracts, a nationalization cannot prevail over an internationalized contract, containing stabilization clauses, entered into between a State and a foreign private company.’<sup>64</sup>

As for the practice of the Iran–United States Claims Tribunal, there does not appear to be any case in which the parties had explicitly agreed to the application of international law. Indeed, it was the practice in Iran before the Revolution to subject contracts concluded with Iranian governmental entities to the laws of Iran.<sup>65</sup> On occasion, the tribunal has nevertheless implied a choice of international law by virtue of the nature of the contract. One example is *Mobil Oil Iran v Iran* (1987), where the

*International* 562 *et seq.*). For criticism, see Maniruzzaman, fn. 6, at 32; Spiermann, fn. 9, at 99, at fn. 38.

<sup>56</sup> *Texaco v Libya*, at para. 41.

<sup>57</sup> *Texaco v Libya*, at para. 44. But see G.R. Delaume, ‘The Myth of the Lex Mercatoria and State Contracts, Ch. 8’ in *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (T.E. Carboneau, ed., Yonkers, NY, Juris Publishing; The Hague, Kluwer Law International, 1998). See also Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>58</sup> *Texaco v Libya*, at para. 45.

<sup>59</sup> *Texaco v Libya*, at para. 45.

<sup>60</sup> *Texaco v Libya*, at para. 45.

<sup>61</sup> *Texaco v Libya*, at paras 26–27.

<sup>62</sup> *Texaco v Libya*, at para. 41 ([T]he expression “principles of international law” is of much wider scope than “general principles of law”, because the latter contribute with other elements (international custom and practice which is accepted by the law of nations) to constitute what is called the “principles of international law”).

<sup>63</sup> *Texaco v Libya*, at para. 47.

<sup>64</sup> *Texaco v Libya*, at para. 73.

<sup>65</sup> See A. Avanessian, *The Iran–United States Claims Tribunal in Action* (London, Graham & Trotman/Martinus Nijhoff, 1993), 239, at fn. 19.

host state argued in favour of the application of its own national law.<sup>66</sup> In support thereof, Iran referred to article 29 of the contract at hand:

This Agreement shall be interpreted in accordance with the laws of Iran. The rights and obligations of the Parties shall be governed by and according to the provisions of this Agreement. The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties.<sup>67</sup>

In the view of the tribunal, however, article 29 ‘is only partially and secondarily concerned with a choice of law. The fact that this choice only applied to the issue of interpretation, in contrast with the usual practice, does not justify an extension of this choice to other issues. *Expressio unius exclusio alterius est.*’<sup>68</sup> These other issues, held the tribunal, could not be governed by Iranian law:

In view of the international character of the [Agreement], concluded between a State, a State agency and a number of major foreign companies, of the magnitude of the interests involved, of the complex set of rights and obligations which it established, and of the link created between this Agreement and the sharing of oil industry benefits throughout the Persian Gulf Countries, the Tribunal does not consider it appropriate that such an Agreement be governed by the law of one Party. This conclusion is in accord with the spirit of Article 29 and with the usages of trade, as expressed in agreements between States and foreign companies, notably in the oil industry, and confirmed in several recent arbitral awards.<sup>69</sup>

Thus, the tribunal concluded that the law applicable to the contract was Iranian law for interpretative issues, and the general principles of commercial and international law for all other issues.<sup>70</sup> The law applicable to the liability of Iran, as well as of NIOC, which acted as an instrumentality of the Iranian Government, was held to be international law.<sup>71</sup>

In sum, there is arbitral practice supporting the possibility for arbitrators to construe the nature of the parties’ contractual relationship so as to require, on the basis of their presumed intention, the application of international law. As noted in Chapter 4 and as we will see later, non-contractual claims may properly be based in international law.<sup>72</sup> As for contractual claims, and while an agreement for the sole application of international law is clearly valid, it should be emphasized that it may be impractical in that international law is not as fully equipped as national law to answer numerous questions of private law that arise in disputes between a state and a private person.<sup>73</sup> Coupled with the controversy concerning the theory and scope of internationalized contracts relating partly to considerations of host state sovereignty,<sup>74</sup> a finding for the application

<sup>66</sup> *Mobil Oil et al. v Iran*, Partial Award, 14 July 1987, at para. 67.

<sup>67</sup> *Mobil v Iran*, Partial Award, fn. 66, at para. 67. See also at para. 59; Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>68</sup> *Mobil Oil Iran v Iran*, Partial Award, at para. 80.

<sup>69</sup> *Mobil Oil Iran v Iran*, Partial Award, at para. 80.

<sup>70</sup> *Mobil Oil Iran v Iran*, Partial Award, at para. 81.

<sup>71</sup> *Mobil Oil Iran v Iran*, Partial Award, at para. 81.

<sup>72</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims); Section 2.2 (on the international nature of the claim).

<sup>73</sup> See, e.g., Maniruzzaman, fn. 6, at 29; N. Nassar, ‘Internationalization of State Contracts: ICSID, the Last Citadel’ (1997) 14(3) *J. Int’l Arb.* 185, 195; A.A. Fatouros, ‘International Law and the Internationalized Contract’ (1980) 74 *Am. J. Int’l L.* 134, 136. But see Blessing, fn. 7, at 217; C.T. Curtis, ‘The Legal Security of Economic Development Agreements’ (1988) 29 *Harv. Int’l L.J.* 317, 344; Weil, *The State, the Foreign Investor, and International Law*, fn. 13, at 845–6.

<sup>74</sup> See, e.g., V.C. Igboekwe, ‘Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?’ (1997) 14(1) *J. Int’l Arb.* 99. See also Chapter 5, Section 2.3.1 (on contractual claims).

of international law should be limited to situations in which the parties' intention is manifest.<sup>75</sup> The sole insertion of an arbitration clause would appear insufficient in this respect, as would general arguments relating to the transnational, governmental, and long-term character of the contract, or a phrase that the contract is to be carried out in 'good faith'. In the words of Delaume:

Failing an explicit reference to international law or to the general principles of law in an agreement between a developed country and a foreign investor, it would occur to no one to construct a reference to 'good faith' otherwise than as a reminder of an elementary rule of contract law. Why should a different solution prevail when the contracting state is a developing nation whose law is capable of supplying the basic legal framework of the transaction?<sup>76</sup>

In light of these considerations, it is fair to conclude that the protection by international law of the investor-state relationship can be better achieved through means of investment treaties. These treaties, which will be discussed in the following, include a variety of investor rights that can be directly invoked by the investor against the host state in arbitration proceedings. Generally, such rights concern expropriation; 'fair and equitable treatment' and 'full protection and security'; and frequently, the treaties also include 'umbrella' (sanctity-of-contract) clauses that protect contractual rights.<sup>77</sup>

### *2.1.2. Express or implied agreement on the application of international law in investment treaty arbitration*

The significant number of investment treaties that allow foreign investors to bring claims against the host state and that provide for the application of international law either alone, or in combination with national law, have resulted in an increase of cases being decided on the basis of international law. As the ICSID Tribunal noted in *Antoine Goetz et al. v Republic of Burundi* (1999):

[C]hoice of law clauses in investment protection treaties frequently refer to the provisions of the treaty itself, and more broadly, to international law principles and rules. This leads to a remarkable comeback of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors [...].<sup>78</sup>

*Tecnicas Medioambientales Tecmed S.A. v Mexico* (2003) was arbitrated on the basis of the ICSID Additional Facility Rules.<sup>79</sup> The dispute concerned the alleged violation by the host state of several provisions in the Spanish-Mexican BIT: promotion and admission of investments; protection of investments; fair and equitable treatment; most favourable treatment; national treatment; and expropriation.<sup>80</sup> In finding in

<sup>75</sup> Cf. F.V. García Amador, *State Responsibility: Fourth Report by the Special Rapporteur in International Responsibility*, U.N. Doc. A/CN.4/119 [1959] 2 *Y.B. Int'l L. Comm'n*, at para. 126.

<sup>76</sup> Delaume, fn. 38, at 800. See also O. Schachter, *International Law in Theory and Practice* (Dordrecht, Nijhoff, 1991), 310.

<sup>77</sup> See Chapter 1, Section 1 (on motivations for the study); and Section 2 (on the scope of and terminology used in the study). See also Leben, fn. 5, at 374, at para. 345. See also Section 3.1.2 (on 'umbrella' clauses).

<sup>78</sup> *Antoine Goetz et al. v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (P. Weil, M.M. Bedjaoui, J.-D. Bredin, arbs), 15 *ICSID Rev.-FILJ* 457, 488–9 (2000). See also P. Peters, 'The Semantics of Applicable Law Clauses and the Arbitrator' in *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil* (C.C.A. Voskuil et al., eds, The Hague, T.M.C. Asser, 1992), 231, 242–3.

<sup>79</sup> *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003 (H.A. Grigera Nanon, J.C. Fernandez Rozas, C. Bernal Verea, arbs).

<sup>80</sup> *Tecnica Medioambientales*, at para. 93.

favour of the investor with respect to its expropriation claim, the tribunal first noted that in accordance with the BIT's applicable law clause, it should resolve the dispute by applying the provisions of the BIT as well as international law provisions.<sup>81</sup> The term 'international law' was interpreted to refer to the 'sources described in Article 38 of the Statute of the International Court of Justice considered, also in the case of customary international law, not as frozen in time, but in their evolution'.<sup>82</sup> In discussing the meaning of expropriation under international law, the tribunal referred to the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights, and the Iran–United States Claims Tribunal.<sup>83</sup>

Tribunals set up under the North American Free Trade Agreement (NAFTA) are, by virtue of the applicable law clause in the NAFTA, bound to settle the dispute 'in accordance with this Agreement and applicable rules of international law'.<sup>84</sup> According to the UNCITRAL Tribunal in *International Thunderbird Gaming Corporation v Mexico* (2006):

In particular, the Tribunal has regard to the sources of law listed in Article 38(1) of the Statute of the International Court of Justice [...] and shall construe the terms of Chapter Eleven of the Nafta 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>85</sup>

This interpretation was supported by the host State, which observed that 'the jurisdiction of a Nafta Tribunal is more limited in contrast with other tribunals [...] since Nafta tribunals may not decide a dispute by reference to the internal law of a Nafta Party'.<sup>86</sup>

The right of investors directly to invoke international law against host states based on the applicable law clause in the treaty at hand was pointed out by the Stockholm Chamber of Commerce (SCC) Tribunal applying the Energy Charter Treaty (ECT) in *Petrobart Limited v Kyrgyz Republic* (2005).<sup>87</sup> Article 26(6) ECT provides for the application of the ECT's provisions and applicable rules and principles of public international law.<sup>88</sup> The tribunal found that since the investor alleged breaches by the host state of various obligations under the ECT, 'the present case is in its entirety a claim under international law and more specifically a Treaty claim'.<sup>89</sup>

The treaty nature of the arbitration may also lead a tribunal to *infer* a choice for the primary applicability of the treaty and international law in general.<sup>90</sup> The dispute in *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (1990) arose out of the

<sup>81</sup> *Tecnica Medioambientales*, at para. 116 (referring to Title VI.1 of the Appendix to the BIT).

<sup>82</sup> *Tecnica Medioambientales*, at para. 116 (references omitted).

<sup>83</sup> *Tecnica Medioambientales*, at para. 116.

<sup>84</sup> North American Free Trade Agreement (NAFTA), art. 1131(1). Cf. Chapter 4, Section 3.2 (on arbitration without privity).

<sup>85</sup> *International Thunderbird Gaming Corporation v United Mexican States*, Award, 26 January 2006 (A.P. Ariosa, T.W. Wälde, A.J. van den Berg, arbs), paras 90–91 (referring to the Vienna Convention on the Law of Treaties, art. 31).

<sup>86</sup> *International Thunderbird*, at para. 88.

<sup>87</sup> *Petrobart Limited v Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 29 March 2005 (H. Danelius, O. Bring, J. Smets, arbs), 22.

<sup>88</sup> See *Petrobart*, at 23. Cf. Energy Charter Treaty (1994), art. 26(6). See also Chapter 4, Section 3.2 (on arbitration without privity).

<sup>89</sup> *Petrobart*, at 22. See also *ADC Affiliate Limited, ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (C. Brower, A.J. van den Berg, N. Kaplan, arbs), paras 290–292.

<sup>90</sup> See Chapter 3, Section 3.1.2 (on express and implied choice of law).

destruction of a Sri Lankan shrimp farm company, in which AAPL was a shareholder.<sup>91</sup> The investors claimed that the destruction was the result of a counter-insurgency operation undertaken by Sri Lankan security forces.<sup>92</sup> The ICSID Tribunal found that parties had implicitly agreed on the primary application of the BIT between Sri Lanka and the United Kingdom, on which rested the tribunal's jurisdiction.<sup>93</sup>

The investor based its claims on alleged violations of the host state's obligations as set out in the treaty: full protection and security of its investment, and adequate compensation for the destruction of its property.<sup>94</sup> It also alleged that the host state's liability covered 'damage caused under customary rules of international law on State responsibility'.<sup>95</sup> The tribunal applied provisions of the BIT to the merits of the case. Article 2 (2) of that treaty provided that the host state should extend to the foreign investor 'full protection and security'.<sup>96</sup> The tribunal interpreted that term to embody a standard of 'due diligence'.<sup>97</sup> Following an analysis of the jurisprudence of international tribunals and academic writings, the arbitrators concluded that by failing to undertake all possible measures to prevent the eventual occurrences of killings and property destruction, the host state had indeed violated the due diligence standard provided in article 2 (2); and that it was therefore responsible vis-à-vis the foreign investor.<sup>98</sup>

## 2.2. The international nature of the claim

International law may also primarily govern the dispute when the parties have not reached an express or implied agreement with respect to the applicable law, or where the parties have agreed to the application of both national and international law. In such cases, an important factor for tribunals when deciding to apply international law relates to the international nature of the claim at hand.

The possibility for investment tribunals to apply international law directly without first having to assess the conduct of the host state in accordance with national law resonates with important developments in the last century, whereby international law bestows rights not only on states but also private parties.<sup>99</sup> This development most notably concerns human rights, but it also extends to other rights under international law of customary and treaty nature. For instance, in the *LaGrand* case (2001), the

<sup>91</sup> *Asian Agricultural Products Limited (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (A.S. El-Kosheri, B. Goldman, S.K.B. Asante, arbs), 30 I.L.M. 577 (1991).

<sup>92</sup> *AAPL v Sri Lanka*, at para. 3.

<sup>93</sup> *AAPL v Sri Lanka*, at 246, 250, 256. See also at para. 38; Chapter 3, Section 3.1.2 (on express and implied choice of law). For criticism, see G. Elombi, 'ICSID Awards and the Denial of Host State Laws' (1994) 11 *J. Int'l Arb.* 61, 66.

<sup>94</sup> *AAPL v Sri Lanka*, at para. 7.

<sup>95</sup> *AAPL v Sri Lanka*, at para. 7.

<sup>96</sup> *AAPL v Sri Lanka*, at para. 43.

<sup>97</sup> *AAPL v Sri Lanka*, at para. 53. Cf. I.F.I. Shihata and A.R. Parra, 'Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' (1994) 9 *ICSID Rev.-FILJ* 183, 201.

<sup>98</sup> *AAPL v Sri Lanka*, at para. 86.

<sup>99</sup> See C. Walter, 'Subjects of International Law' in *Max Planck Encyclopedia of Public International Law*, in para.18, available at <<http://www.mpepil.com/home>> (last visited 1 May 2012); J.J. van Haersolte-van Hof and A.K. Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in *Oxford Handbook of International Investment Law* (P. Muchlinski et al., eds, Oxford, Oxford University Press, 2008), 962, 990. See also Chapter 1, Section 1 (on motivations for the study).

International Court of Justice ruled that article 36(1)(b) of the Vienna Convention on Consular Relations creates individual rights.<sup>100</sup>

It is also generally accepted that companies, including foreign investors, have rights pursuant to international law.<sup>101</sup> Apart from the area of human rights, investment law is, in fact, one of the areas that best illustrates the ‘vertical’<sup>102</sup> characteristics of international law. In line with the general objectives of stimulating foreign investment, investment treaties contain terminology consistent with the granting of international rights to foreign investors.<sup>103</sup> These substantive rights are coupled with and thereby strengthened by the procedural right of investors to claim those rights directly vis-à-vis the host state in investment arbitration.<sup>104</sup> Compared to the interstate system of diplomatic protection, the advantages for the investors are obvious, especially the fact that the sanctioning of host state behaviour no longer depends on the discretionary intervention by the investor’s home state.<sup>105</sup> The possibility for investors directly to invoke international law was noted by Justice Aikens of the English High Court of Justice in *Ecuador v Occidental* (2001):

[T]he BIT creates rights and obligations between states on the level of public international law. Given the wording of the BIT, [...] two points seem to me to be logical. First, that the State Parties to the BIT intended to give investors the right to pursue, in their name and for themselves, claims against the other State party. Secondly, that those rights are granted under public international law and must be determined on principles of public international law.<sup>106</sup>

The Court of Appeal in the same case confirmed this interpretation: ‘That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without

<sup>100</sup> *Case Concerning LaGrand (Germany v United States of America)*, Judgment, 27 June [2001] ICJ Rep. 466, paras 75–78, 89. See also *McKesson Corp. v Islamic Republic of Iran*, Civ. Action No. 82–220 (RJL) (D.D.C. 17 July 2007) (a private right of action for expropriation exists under the Iran-US Treaty of Amity); A. Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’ (2007) 101 *Am. J. Int’l L.* 760, 769 (on humanitarian law).

<sup>101</sup> Cf. M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford, Oxford University Press, 2006), 1–2.

<sup>102</sup> For a discussion of the difference between horizontal and vertical conceptions of international law, see L. Brilmayer, *Justifying International Acts* (Ithaca, London, Cornell University Press, 1989).

<sup>103</sup> See *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008 (A.F. Lowenfeld, L.J.A.S. de la Vega, C.J. Greenwood, arbs), para. 169; O. Spiermann, ‘Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties’ (2004) 20(2) *Arb. Int’l* 179, 183 (2004). But see *Loewen Group, Inc. and Raymond L. Loewen v United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (S. Mason, A.J. Mikva, Lord Mustill, arbs), para. 233. See also Z. Douglas, ‘Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex’ (2006) 22(1) *Arb. Int’l* 27, 36–7; J. Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *Am. J. Int’l L.* 874, 888. Cf. A. Roberts, ‘Power and Persuasion in International Treaty Interpretation: The Dual Role of States’ (2010) 104 *Am. J. Int’l L.* 179, 184–5 (Robert sets out three possibilities that have been mooted about whether investment treaties grant investors substantive and/or procedural rights).

<sup>104</sup> See Chapter 2, Section 2 (on features of the arbitral process).

<sup>105</sup> See J. Paulsson, ‘Arbitration Without Privity’ (1995) 10(2) *ICSID Rev.-FILJ* 232, 255–6; *Council of Canadians, CUPW and the Charter Committee on Poverty Issues v the Attorney General of Canada*, Affidavit of J. Crawford, 15 July 2004 (reply to M. Sornarajah), para. 44. Cf. J. Dugard, *Fourth Report on Diplomatic Protection*, (2003) UN Doc A/CN.4/530, para. 17.

<sup>106</sup> *Republic of Ecuador v Occidental Exploration and Production Company*, High Court of Justice, Queen’s Bench Division, Commercial Court, 29 April 2005, [2005] EWHC 774 (Comm), (per Mr Justice Aikens), para. 61.

their national state's involvement or even consent.<sup>107</sup> To the extent that such claims would fall under the scope of the arbitration agreement,<sup>108</sup> the same can be said about certain norms of customary international law providing for a minimum standard of treatment for aliens; and possibly, general principles of international law, such as good faith.<sup>109</sup>

In view of such remarks, the practice discussed in Chapter 5 whereby investment tribunals, and especially those set up pursuant to the ICSID Convention, primarily apply national law in situations where both national and international sources of law are applicable,<sup>110</sup> may be subject to deeper scrutiny. More specifically, it may be asked whether tribunals should *always* primarily apply national law to the merits; leaving a complementary and supervening role for international law also in investment treaty arbitration, or more generally, where the dispute settlement clause is broad enough to encompass claims of an international nature.<sup>111</sup> Indeed, where the parties have only invoked international law, the primary application of national law by the tribunal could seem to go against the principle *non ultra petita*.<sup>112</sup>

While the claimant in *Wena Hotels Ltd v Arab Republic of Egypt* (2000/02) had invoked both national and international law in its pleadings,<sup>113</sup> the tribunal and ad hoc committee answered the question just posed in the negative by interpreting the second sentence of article 42(1) ICSID Convention<sup>114</sup> in a functional rather than sequential manner. The dispute related to two hotels located in Egypt that were leased to Wena in 1989 and 1990 by the Egyptian Hotel Company (EHC), a state-owned company with its own legal personality.<sup>115</sup> Certain disputes arose between Wena and EHC relating to

<sup>107</sup> *Ecuador v Occidental*, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, 9 September 2005, [2005] EWCA Civ 1116, para. 19 (Lord Phillips of Worth Matravers MR, Clarke, Mance LJJ) (references omitted).

<sup>108</sup> See generally Chapter 4 (on the scope of the arbitration agreement: claims and counterclaims of a national and/or international nature).

<sup>109</sup> See A.J. van den Berg, *International Commercial Arbitration: Important Contemporary Questions* (The Hague, Kluwer Law International, 2003), 367; C. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, at 10, available at <[http://www.univie.ac.at/intlaw/pdf/csunpublpaper\\_1.pdf](http://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf)> (last visited 1 May 2012); *Merrill & Ring Forestry L.P. v Canada*, Award, 31 March 2010 (F.O. Vicuña, K.W. Dam, J.W. Rowley, arbs), at para. 187; Chapter 1, fns 45–46.

<sup>110</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>111</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

<sup>112</sup> See Spiermann, fn. 9, at 90; ILA, Committee on International Commercial Arbitration, *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, Rio de Janeiro, 21 August 2008, Resolution No. 6/2008, Recommendation 8; T. Giovannini, 'What are the Grounds on which Awards are most often Set Aside?' (January 2001) 1 *Bus. L. Int'l* 8. But see G.C. Moss, 'Is the Arbitral Tribunal Bound by the Parties' Factual and Legal Pleadings?' (2006) 3 *Stockholm Inv'l Arb. Rev.* 1, 26 ('[T]he tribunal is not expected to simply act as an umpire and choose between the parties' arguments; if it is entitled to develop its own legal argumentation, it must also be entitled to draw the legal consequences of this argumentation, and these at times might entail remedies that were not requested by the parties').

<sup>113</sup> *Wena v Egypt*, fn. 1, Award, 8 December 2000 (M. Leigh, I. Fadlallah, D. Wallace, arbs), para. 75 (references omitted) (in its Memorial on the Merits, the investor claimed that 'Egypt violated the [contract], Egyptian law and international law by expropriating Wena's investment without compensation').

<sup>114</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 42(1), second sentence (hereinafter ICSID/Washington Convention) (in the absence of an agreement by the parties on the applicable law, '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>115</sup> *Wena v Egypt*, fn. 1, Decision on Annulment, at para. 15.

their respective obligations under the lease agreements.<sup>116</sup> On the basis that, according to Egypt, Wena had failed to pay rent or to fulfil its development obligations to the hotels, Wena was evicted from one of the hotels, while the other was placed in judicial receivership.<sup>117</sup>

The investor raised two substantive claims before the ICSID Tribunal. First, it argued that Egypt had unlawfully expropriated its investments without ‘prompt, adequate and effective’ compensation in violation of the United Kingdom–Egypt BIT, as well as other international law and Egyptian law.<sup>118</sup> Secondly, it claimed that Egypt had breached the BIT, and other international norms, by failing to accord Wena’s investments ‘fair and equitable treatment’ and ‘full protection and security’.<sup>119</sup>

As to the applicable law, the tribunal first stated, in language similar to that employed by the ICSID Tribunal in *AAPL v Sri Lanka*,<sup>120</sup> that the provisions of the BIT would primarily be applied to the dispute:

As both parties agree, ‘this case all turns on an alleged violation by the Arab Republic of Egypt of the agreement for the promotion and protection of investments that was entered into in 1976 between the United Kingdom and the Arab Republic of Egypt.’ Thus, the Tribunal, like the parties (in both their submissions and oral advocacy), considers the [BIT] to be the primary source of applicable law for this arbitration.<sup>121</sup>

The tribunal went on to observe that ‘beyond the provisions of the BIT, there is no special agreement between the parties on the rules of law applicable to the dispute’.<sup>122</sup> It further noted that the parties in their arguments had not treated the BIT as containing all the rules of law applicable to their dispute; in particular, the host state had relied on Egyptian law.<sup>123</sup> Thus, the tribunal concluded that the second sentence of article 42(1) ICSID Convention was applicable.<sup>124</sup> Still, it noted, ‘the provisions of the [BIT] would in any event be the *first* rules of law to be applied by the Tribunal, both on the basis of the agreement of the parties and as mandated by Egyptian law as well as international law’.<sup>125</sup>

The investor prevailed on merits.<sup>126</sup> Egypt sought an annulment of the award, arguing, *inter alia*, that the tribunal had manifestly exceeded its powers by failing to apply Egyptian law in contravention of article 42(1) of the ICSID Convention.<sup>127</sup> According to Egypt, the law of the host state, and not international law, should be considered the primary source of law; and it thus objected to the fact that the tribunal had regarded and applied the provisions of the BIT as the primary source of law.<sup>128</sup> The ad hoc committee (2002) started by fully agreeing with one of the points put forward by Egypt, namely the ‘legitimate principle that a country that attracts foreign investment is entitled to insist that investors comply with the laws of that country’.<sup>129</sup>

<sup>116</sup> *Wena v Egypt*, Decision on Annulment, at para. 15.

<sup>117</sup> *Wena v Egypt*, Decision on Annulment, at para. 15.

<sup>118</sup> *Wena v Egypt*, fn. 113, Award, at para. 80.

<sup>119</sup> *Wena v Egypt*, Award, at para. 80.

<sup>120</sup> See Section 2.1.2 (on express or implied agreement on the application of international law in investment treaties); Chapter 3, Section 3.1.2 (on express and implied choice of law).

<sup>121</sup> *Wena v Egypt*, fn. 113, Award, at para. 78 (references omitted).

<sup>122</sup> *Wena v Egypt*, Award, at para. 79.

<sup>123</sup> *Wena v Egypt*, Award, at para. 79.

<sup>124</sup> *Wena v Egypt*, Award, at para. 79.

<sup>125</sup> *Wena v Egypt*, Award, at para. 79 (emphasis added).

<sup>126</sup> *Wena v Egypt*, Award, at para. 131.

<sup>127</sup> *Wena v Egypt*, Decision on Annulment, fn. 1, at para. 21.

<sup>128</sup> *Wena v Egypt*, Decision on Annulment, at para. 23.

<sup>129</sup> *Wena v Egypt*, Decision on Annulment, at para. 24.

However, in its view, the issue was more ‘whether the resort to international law in any way contradicts the principle stated’.<sup>130</sup> The determinant factor, according to the committee, was that the dispute did not concern ECH’s contractual obligations vis-à-vis Wena, but rather the State of Egypt’s obligations under the BIT toward British investors such as Wena.<sup>131</sup> For that reason, it found it irrelevant that the lease contracts between Wena and EHC were subject to Egyptian law.<sup>132</sup>

The committee then entered into a discussion on the interrelation between national and international law pursuant to the second sentence of article 42(1) ICSID Convention, noting the divergent approaches in practice and literature in favour of either a restrictive or a broad role of international law.<sup>133</sup> It observed that ‘[t]here seems not to be a single answer as to which of these approaches is the correct one’; and that the circumstances of each case may justify one or another solution.<sup>134</sup> Importantly, according to the committee, the use of the word ‘may’ in the second sentence of article 42(1) indicates that the ICSID Convention does not draw a sharp line of distinction of the scope of international and national law, and that ICSID tribunals have a certain margin and power for interpretation.<sup>135</sup> Moreover, the committee found it ‘clear [...] that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role’.<sup>136</sup> Thus, it reasoned, the law of the host state can be applied in conjunction with international law ‘if this is justified’, and international law can be applied by itself ‘if the appropriate rule is found in this other ambit’.<sup>137</sup>

This approach, and particularly the statement by the committee that international law may be applied without reference first to national law, can be characterized as a shift not only in methodology, but also in the outlook on the relationship between national and international law when both sources are applicable.<sup>138</sup> Still, this difference in approach becomes less ‘revolutionary’ when considering the different character of the disputes at hand. Indeed, while certain statements made during the drafting of the ICSID Convention as well as subsequent practice do give support to the primary

<sup>130</sup> *Wena v Egypt*, Decision on Annulment, at para. 24.

<sup>131</sup> *Wena v Egypt*, Decision on Annulment, at para. 33. See also at para. 36.

<sup>132</sup> *Wena v Egypt*, Decision on Annulment, at para. 28. But see Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *Brit. Y.B. Int’l L.* 151, 205–7 (Douglas criticizes the award and the decision on annulment for the ‘prominent failure to heed to the *lex situs* choice of law rule with respect to matters concerning the existence and extent of the investment’). See further Section 3.1.1 (on the prohibition against expropriation without compensation).

<sup>133</sup> *Wena v Egypt*, Decision on Annulment, at paras 37 *et seq.*

<sup>134</sup> *Wena v Egypt*, Decision on Annulment, at para. 39.

<sup>135</sup> *Wena v Egypt*, Decision on Annulment, at para. 39.

<sup>136</sup> *Wena v Egypt*, Decision on Annulment, at para. 40.

<sup>137</sup> *Wena v Egypt*, Decision on Annulment, at para. 40. In concluding that the tribunal did not exceed its powers by applying the rules of the BIT, the committee partly relied on the fact that according to Egyptian law, treaties have the force of national law. See at paras 42–45. See also Chapter 5, Section 3.1.1 (on international law as part of the ‘law of the land’). Cf. G. Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?’ in *Annulment of ICSID Awards* (E. Gaillard and Y. Banifatemi, eds, New York, Juris Publishing, 2004) 189, at section II(B)(2).

<sup>138</sup> See *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (F.O. Vicuña, M. Lalonde, F. Rezek, arbs), para. 116 (describing the annulment decision in *Wena* as ‘a more pragmatic and less doctrinaire approach [...] allowing for the application of both domestic law and international law if the specific facts of the dispute so justify’); E. Gaillard, ‘The Extent of Review of the Applicable Law in Investment Treaty Arbitration’ in *Annulment of ICSID Awards* (E. Gaillard and Y. Banifatemi, eds, New York, Juris Publishing, 2004), 223, 241. Spiermann refers to this choice-of-law methodology as the ‘horizontal approach’, which he distinguishes from the traditional, ‘vertical approach’. Spiermann, fn. 9, at 105. See also at 108.

applicability of national law,<sup>139</sup> it should be kept in mind that the Convention was ‘drafted principally with investor–State contracts in mind where domestic law would play the critical (if not exclusive) role’.<sup>140</sup> Indeed, none of the ICSID awards referred to in Chapter 5 on the primary applicability of national law on the basis of considerations of host state sovereignty were brought under an investment treaty.<sup>141</sup> It seems only appropriate to distinguish such earlier cases from those in which the arbitration agreement explicitly recognizes the procedural right of investors to invoke the international responsibility of the host state.

This interpretation has been endorsed in scholarship. Referring to the ‘Wena doctrine’, Gaillard and Banifatemi defend the possibility that ICSID tribunals primarily apply international law to claims of an international nature.<sup>142</sup> In their view, the legislative history relating to article 42(1), second sentence of the ICSID Convention does not support the proposition that international law should solely play a complementary and supervening role vis-à-vis national law. Rather, they state, the second sentence of article 42(1) allows for a truly independent body of substantive rules that may be applied by themselves, and not through the filter of the law of the host state.<sup>143</sup> Gaillard puts it this way:

If the word ‘and’ in the second sentence of Article 42(1) of the Washington Convention is to be given a meaning, the choice of law rule contained in the second sentence of Article 42(1) should be understood as the ‘law of the Contracting State … and such rules of international law as may be applicable,’ rather than as ‘the law of the Contracting State party to the dispute and, in case of lacunae, or should the law of the Contracting State be inconsistent with international law,’ or even as ‘the law of the Contracting State party to the dispute and, subject to its collision with fundamental rules of international law.’ In other words, international law constitutes a legal order fully operating in both its public policy function and as a body of substantive rules (thus understood as covering the entirety of the sources set forth in Article 38 of the Statute of the International Court of Justice).<sup>144</sup>

Significantly, the ‘Wena approach’ has also been followed by other investment tribunals, also of a territorialized nature, so that the preferred method is now directly to apply international law to claims characterized as international. Thus, the ICSID ad

<sup>139</sup> See Chapter 3, Section 3.2.2.1 (on the ICSID Convention); Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>140</sup> N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford, Oxford University Press, 2009), 484–5. See also A.R. Parra, ‘Applicable Law in Investor–State Arbitration’, TDM 6 (November 2007); Gaillard, fn. 138, at fn. 11; Kaufmann-Kohler, fn. 137, at section II(B)(2); *Duke Energy International Peru Investments No. 1, Ltd v Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011 (C. McLachlan, D. Hascher, P. Tomka, committee members), para. 129.

<sup>141</sup> Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>142</sup> E. Gaillard and Y. Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18(2) *ICSID Rev-FILJ* 375. See also Gaillard, fn. 138, at section III.

<sup>143</sup> Gaillard and Banifatemi, fn. 142, at 397. See also at 381–3, 393, 403 (the authors cast doubt on the necessity of primary recourse to the history of the Convention as the principal means of interpretation of the second sentence of article 42(1) when the ordinary meaning supports the conclusion that national and international law are as relevant).

<sup>144</sup> E. Gaillard, fn. 138, at 234 (references omitted). See also A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1972-II) 136 *Recueil des Cours* 392; Shihata and Parra, fn. 97, at 192; G. Sacerdoti, ‘Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards’ (2004) 19(1) *ICSID Rev-FILJ* 1, 6; Z. Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009), 81 (Rule 10). But see V.C. Igobokwee, ‘Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations’ (2006) 23(4) *J. Int'l Arb.* 267, 278.

hoc committee held in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (2002) that '[t]he BIT claim will be determined by reference to its own proper or applicable law, namely international law'.<sup>145</sup> According to the ICSID Tribunal in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile* (2004), '[t]he breach of an international obligation will need, by definition, to be judged in terms of international law'.<sup>146</sup> The ICSID Tribunal in *LG&E Energy Corp. et al. v Argentina* (2006) reasoned as follows:

The intention in the language of the original draft was not to establish an order of preference, but rather to establish the possibility of alternatives. Initially, scholarly authorities and some ICSID Tribunals admitted that the conjunction 'and' meant that 'and in case of lacunae, or should the law of the Contracting State be inconsistent with international law.' However, any limitation to the role of international law under these terms would imply accepting that international law may be subordinate to domestic law and would obviate the fact that there are a growing number of arbitrations initiated on the basis of bilateral or multilateral investment treaties.<sup>147</sup>

In its view, the fact that the dispute at hand did not involve a claim for breach of contract 'favors in the first place, the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by domestic law'.<sup>148</sup> The same line of approach was adopted by the ICSID ad hoc committee in its decision on annulment in *Azurix Corp. v Argentine Republic* (2009):

Each of Azurix's claims in this case was for an alleged breach of the BIT. The BIT is an international treaty between Argentina and the United States. By definition, a treaty is governed by international law, and not by municipal law. [...] In any claim for breach of an investment treaty, the question whether or not there has been a breach of the treaty must therefore be determined, not through the application of the municipal law of any State, but through the application of the terms of the treaty to the facts of the case, in accordance with general principles of international law, including principles of the international law of treaties. Bearing in mind that an investment treaty, whether bilateral or multilateral, is itself a source of international law as between the States parties to that treaty, the applicable law in any claim for a breach of that treaty can thus be said to be the treaty itself specifically, and international law generally.<sup>149</sup>

As to the ICSID Convention in particular, the committee found that 'Article 42(1) cannot possibly be understood as having the effect that, in the absence of an express choice of law clause, the municipal law of the Contracting State will be the applicable law in claims for alleged breaches of an investment treaty'.<sup>150</sup> Also the award in *El Paso v Argentina* (2011) can serve as an example.<sup>151</sup> The claimant had relied on Argentina's responsibility for the violation of various provisions of the BIT; and referring to the ILC

<sup>145</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (L.Y. Fortier, J.R. Crawford, J.C. Fernández Rozas, committee members), at para. 60. See also at para. 102.

<sup>146</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (A.R. Sureda, M. Lalonde, R.O. Blanco, arbs), para. 204. See also Decision on Annulment, 21 March 2007 (G. Guillaume, J. Crawford, S.O. Noriega, committee members), paras 61, 72.

<sup>147</sup> *LG&E Energy Corp. et al. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (T.B. de Maekelt, F. Rezek, A.J. van den Berg, arbs), para. 81.

<sup>148</sup> *LG&E Energy*, at para. 98. See also at para. 92.

<sup>149</sup> *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009 (G. Griffith, B. Ajibola, M. Hwang, committee members), para. 146.

<sup>150</sup> *Azurix v Argentina*, at para. 147. See also Award, 14 July 2006 (A.R. Sureda, M. Lalonde, D.H. Martins, arbs), para. 67.

<sup>151</sup> *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

Articles on State Responsibility, the ICSID Tribunal concluded that ‘the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions’.<sup>152</sup>

Reference should also be made to the award in *CME Czech Republic B.V. v Czech Republic* (2001/03), in which the relevance of national and international law was extensively debated.<sup>153</sup> The UNCITRAL Tribunal interpreted the BIT at hand to allow it directly to apply international law; and in solving the dispute on the merits, it paid little regard to the national law of the host state.<sup>154</sup> This it did on the basis of the following interpretation of the applicable law clause: it ‘is broad and grants to the Tribunal a discretion, without giving precedence to the systems of law referred to’.<sup>155</sup> In other words, it concluded, ‘[t]here is no ranking in the application of the national law of the host state, the Treaty provisions or the general principles of international law.’<sup>156</sup> Although the tribunal’s disregard of national law may be criticized,<sup>157</sup> we agree in principle with the tribunal’s receptivity of and non-hierarchical approach to the applicability of the various sources of law.

On the merits, the tribunal by majority found that the Czech Republic had violated several provisions of the BIT.<sup>158</sup> The host state sought to have the partial award annulled at the tribunal’s juridical seat, Sweden, partly on the basis that the tribunal had exceeded its mandate by failing to apply the law as set out in the BIT, and especially Czech law.<sup>159</sup> The Svea Court of Appeal denied the request, stating that an annulment

<sup>152</sup> *El Paso v Argentina*, at para. 130 (referring to ILC Articles on State Responsibility (2001), art. 3); *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (D.R. Robison, S.A. Alexandrov, Y. Turbowicz, arbs), para. 233; *Saipem S.p.A. v The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (G. Kaufmann-Kohler, C.H. Schreuer, P. Otton, arbs), para. 99.

<sup>153</sup> *CME Czech Republic B.V. v Czech Republic*, Partial Award, 13 September 2001 (W. Kühn, S.M. Schwebel, J. Händl, arbs), para. 419; Dissenting Opinion Händl; Final Award, 14 March 2003 (W. Kühn, S.M. Schwebel, I. Brownlie, arbs), paras 503, 506, 507; *Czech Republic v CME Czech Republic B.V.*, Case T 8735-01-77, Svea Court of Appeal, 15 May 2004, 42 I.L.M. 919, 963–5 (2003); G. Sacerdoti, *Case T 8735-01-77, The Czech Republic v CME Czech Republic B.V.* (Expert Opinion) TDM 2(5) (2005) 15 October 2002; C. Schreuer and A. Reinisch, *Legal Opinion Submitted to the Svea Court of Appeal*, 22 May 2002; C. Schreuer and A. Reinisch, *Res judicata, Duty to Apply the Proper Law, Joint Tortfeasors*, 20 June 2002; C. Schreuer, *Comments relating to Applicable Law*, 30 March 2003. See also Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>154</sup> *CME v Czech Republic*, fn. 153, Partial Award; Final Award. See also Final Award, at para. 397 (the tribunal refers to article 3(5) of the treaty: ‘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’ [emphasis in original]).

<sup>155</sup> *CME v Czech Republic*, Final Award, para. 402. Cf. Netherlands–Czech/Slovak Republic BIT, art. 8(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’). See also *CME v Czech Republic*, fn. 153, Final Award, at paras 89–91 (referring to a common position between the Netherlands and the Czech Republic on the interpretation of article 8(6) of the BIT).

<sup>156</sup> *CME v Czech Republic*, Final Award, at para. 402.

<sup>157</sup> See Section 3.1.1 (on the prohibition against expropriation without compensation). See also Igobokwee, fn. 144, at 289–98.

<sup>158</sup> *CME v Czech Republic*, Final Award, fn. 153, at paras 51–52.

<sup>159</sup> *Czech Republic v CME Czech Republic B.V.*, fn. 153, Svea Court of Appeal.

would require proof of ‘an almost deliberate disregard of the designated law’.<sup>160</sup> In line with this high threshold, it considered it sufficient for its assessment to ‘clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal has not based its decision on any law at all but, rather, judged in accordance with general reasonableness’.<sup>161</sup> The Court found that there had been no excess of mandate.<sup>162</sup> In reaching this conclusion, it focused on the fact that the four sources of law listed were neither numbered, nor exhaustive:

The wording that the arbitral tribunal shall ‘take into account in particular although not exclusively’ must be interpreted such that the arbitrators may also use sources of law other than those listed. The four sources of law are not numbered, nor are they otherwise marked in such a manner that governing law in the relevant contracting state should primarily be applied and general principles of international law applied thereafter. The un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied.<sup>163</sup>

Lending support to the approach taken by the UNCITRAL Tribunal, it continued by suggesting that ‘[i]f the case concerns an alleged violation of the Investment Treaty, it might be relevant first of all to apply international law, in light of the Investment Treaty’s purpose of affording protection to foreign investors by prescribing norms in accordance with international law’.<sup>164</sup>

This interpretation resonates with Sacerdoti’s expert opinion for CME before the Swedish court. He bases his endorsement of the tribunal’s choice-of-law methodology partly on the object and purpose of investment treaties, namely to allow investors directly to obtain protection of those treaty rights and redress for any breach through binding impartial arbitration without any need to resort to diplomatic protection:

It stems logically therefrom that claims made in the CME-[Czech Republic] arbitration by CME, based on those treaty standards and obligations and claiming alleged infringements thereof, must be evaluated and decided by the tribunal ‘on the basis’ of international law, represented by the BIT, any other agreement between the parties and the general principles. In a case where claims are for treaty violations, as here, international law alone is relevant because international obligations of States are governed exclusively by international law.<sup>165</sup>

<sup>160</sup> *Czech Republic v CME Czech Republic B.V.*, at 963–4. See also Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice); Chapter 3, Section 2.

<sup>161</sup> *Czech Republic v CME Czech Republic B.V.*, at 965.

<sup>162</sup> *Czech Republic v CME Czech Republic B.V.*, at 965.

<sup>163</sup> *Czech Republic v CME Czech Republic B.V.*, at 965. See also at 965 (‘In the Agreed Minutes, it is stated concerning the interpretation of the choice of law clause that the arbitral tribunal must “take into account as far as they are relevant to the dispute the law in force of the Contracting Party concerned and the other sources of law set out in Article 8.6.” The interpretation which can be given to the wording of the clause is thus hereby confirmed, namely that the clause leaves to the arbitral tribunal to take into account Czech law and other sources of law insofar as such are relevant in the dispute’).

<sup>164</sup> *Czech Republic v CME Czech Republic B.V.*, at 965. For criticism of the decision, see G.C. Moss, ‘Is the Arbitral Tribunal Bound by the Parties’ Factual and Legal Pleadings?’ (2006) *Stockholm Int’l Arb. Rev.* 1, 10; C. McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., Kluwer, Alphen aan den Rijn, Kluwer Law International, 2009), 95, 117; C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int’l & Eur. L.* 147, 194–5; S. Soltynski and M. Olechowski, ‘Observations on the CME Svea Court Award’ (2003) 2 *Stockholm Arb. Rep.* 215, 277.

<sup>165</sup> Sacerdoti, fn. 153, at 47–8.

The applicable-law clause in the Netherlands–Czech Bilateral Investment Treaty was also at issue in *Eastern Sugar B.V. v Czech Republic* (2007).<sup>166</sup> Referring to a common position reached between the states parties to the Netherlands–Czech Bilateral Investment Treaty with respect to the interpretation of article 8.6 ('To the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law'), the SCC Tribunal held:

This does not mean that international law applies only when it is in conflict with national law. On the contrary, it means that international law generally applies. It is not just a gap-filling law. It is only where international is silent that the Arbitral Tribunal should consider before reaching any decision how non conflicting provisions of Czech law might be relevant, and if so, could be taken into account.<sup>167</sup>

A similar approach has been followed by the Iran–United States Claims Tribunal. Its practice gives ample evidence of the possibility directly to apply international law to claims of an international nature. This is consistent with the observation by Toope that '[t]he application of any particular category of sources would depend upon the nature of the underlying dispute. It would be unlikely that all sources should apply in any given case'.<sup>168</sup> Hence, in *Mobil Oil Iran v Iran* (1987) it was held that 'allegations of breach [of contract] and allegations of expropriation raise different and distinct legal issues which thus must be considered separately'.<sup>169</sup> With regard to the latter issue, the tribunal concluded 'that the lawfulness of an expropriation must be judged by reference to international law. This holds true even when the expropriation is of contractual rights. A concession, for instance, may be the object of a nationalization regardless of the law the parties chose as the law of the contract'.<sup>170</sup> We further note the case *Phillips Petroleum Company v Iran* (1989), in which the claimant argued that Iran had breached and repudiated their mutual contract; and alternatively, that Iran was liable for the expropriation of its contractual rights.<sup>171</sup> The tribunal considered that 'the acts complained of appear more closely suited to assessment of liability for the taking of foreign-owned property under international law than to assessment of the contractual aspects of the relationship', and so it decided to consider the claim in that light.<sup>172</sup>

The decision to apply international law to expropriation claims may be partly explained on the basis of the 1955 Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, which contains an explicit provision on expropriation:

<sup>166</sup> *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (R. Volterra, P.A. Karrer, E. Gaillard, arbs).

<sup>167</sup> *Eastern Sugar*, at para. 373. See also *BG Group Plc v Argentina*, Award, 24 December 2007 (A.M. Carro, A.J. van den Berg, G.A. Alvarez, arbs), para. 91 (it is 'clear and not subject to dispute by the Parties [...] that the substantive standards for treatment of investors are matters governed by the treaty, without any need for reference to Argentine law. Indeed, the preeminence of the BIT as *lex specialis* governing this dispute, on matters expressly covered by this bilateral treaty, is expressly acknowledged by both Parties' [references omitted]); see also at para. 95.

<sup>168</sup> S.J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge, Grotius, 1990), 373–4. Cf. W. Mapp, *The Iran–United States Claims Tribunal: The First Ten Years 1981–1991* (1993), 107. See also Chapter 4, Section 3.2 (on arbitration without privity).

<sup>169</sup> *Mobil Oil v Iran*, fn. 66, Partial Award, at para. 58.

<sup>170</sup> *Mobil Oil v Iran*, at para. 73. For the law applicable to allegations of breach of contract, see Section 2.2.1 (on express or implied 'internationalization' of investment contracts).

<sup>171</sup> *Phillips Petroleum Company v Iran*, Award, 29 June 1989, para. 75.

<sup>172</sup> *Phillips Petroleum Company v Iran*, Award, para. 75.

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.<sup>173</sup>

In *Amoco International Finance Corporation v Iran* (1987), the tribunal dismissed the objection by Iran that the treaty 'did not create rights or duties for private persons'.<sup>174</sup> According to the tribunal, it was indisputable that certain provisions of the treaty set standards of treatment that each state party must accord to the nationals and companies of the other party.<sup>175</sup> In its view, these foreign investors, entitled to receive such treatment, should also be able to invoke its provisions.<sup>176</sup> This is particularly so, held the tribunal, in an adjudication before an international tribunal such as itself, which is expressly authorized by article V of the Claims Settlement Declaration to apply the rules and principles of international law.<sup>177</sup> On this basis, it found it 'immaterial whether or not the enforcement of such treaty rights and law by domestic courts would be dependent on the enactment of legislation introducing the provisions of the treaty into the law of the State'.<sup>178</sup>

Before concluding on this point, it should be observed that the primary application of international law in cases where both national and international law could apply has also been questioned. Commenting on the international law approach of the Iran–United States Claims Tribunal, Judge Aldrich remarks:

[I]t is the question of when we decide a case involving the taking of property, are we deciding it, a typical international law case of State responsibility for expropriation, or are we simply deciding a taking of property under general principles of law as a result of the [Claims Settlement Declaration], saying we have jurisdiction over actions affecting property rights. Certainly, [...] we have used international legal materials and argued from them, and I think we'll probably continue to do so, but, in fact, there is, of course, quite an argument available that one doesn't need to do that.<sup>179</sup>

<sup>173</sup> Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (1955), art. IV(2). The treaty also requires 'fair and equitable treatment', 'the most constant protection and security [...] in no case less than that required by international law', most-favoured-nation treatment; and it prohibits 'unreasonable or discriminatory measures'. See also art. IV.

<sup>174</sup> *Amoco International Finance Corporation v Iran*, Partial Award, 14 July 1987, para. 103.

<sup>175</sup> *Amoco v Iran*, Partial Award, at para. 103.

<sup>176</sup> *Amoco v Iran*, Partial Award, at para. 103.

<sup>177</sup> *Amoco v Iran*, Partial Award, at para. 103.

<sup>178</sup> *Amoco v Iran*, Partial Award, at para. 103. See also *Ina Corporation v Government of the Islamic Republic of Iran*, Award, 13 August 1985, 8 Iran–United States C.T.R. 373, at 378; *American International Group, Inc. and American Life Insurance Company v Islamic Republic of Iran and Central Insurance of Iran*, Award, 19 December 1983, Concurring Opinion, Judge Mosk; *Sedco, Inc. v National Iranian Oil Company*, Award, 27 March 1986, Separate Opinion Judge Brower, at section I; *Phelps Dodge Corp. v Islamic Republic of Iran*, Award, 19 March 1986, paras 27–28. But see Dissenting Opinion, Judge Bahrami, at III, A, I ('From the viewpoint of classical international law, the duty of international courts in enforcing treaties is very clear, because private persons do not have the right to bring claim before international fora; and if a state seeks to enforce privileges accorded to its nationals by treaty, it must extend its diplomatic protection and itself bring claim against the state which is a party to the contract in question. Therefore, assuming that a party to the claim (the American claimant) does invoke a bilateral treaty, the Tribunal may not interpret it').

<sup>179</sup> See Toope, fn. 168, at 269–70 (transcript of interview, 13 September 1984).

In this context, reference has also been made to the primacy given to national law in United Nations General Assembly resolutions,<sup>180</sup> and the fact that Iranian law also contains provisions on wrongful expropriation.<sup>181</sup> In particular, Mouri notes that in no expropriation case has the tribunal indicated that it was prepared to consider the national law of either Iran or the US regarding the standard of compensation.<sup>182</sup> He goes on to observe that this has been so even where the investments were made in Iran pursuant to its investment legislation, which specifically guarantees 'fair compensation where promulgation of a special legislation deprives the owner of capital or ownership'.<sup>183</sup>

Also Igobkwee voices criticism against the approach of investment tribunals to primarily apply international law, especially in cases where the parties have agreed to the application of both national and international law:

If the relevant treaty specifically provides for the application of the national law of the host state in addition to other sources of law, the arbitral tribunal has an obligation to consider all the applicable laws specified by the treaty. Failure to examine meticulously all the applicable laws stipulated under the treaty is a fundamental departure from the treaty mandate.<sup>184</sup>

In our opinion, however, the appropriateness of primarily applying national or international law depends more on the nature of the claim invoked by the party.<sup>185</sup> Where the investor specifically bases its claim on sources of international law, the tribunal should be free to apply international law to this claim regardless of whether the parties have agreed to the application of national and international law; or whether there is no agreement on the applicable law.<sup>186</sup> In the words of Parra: the direct application of the substantive provisions of investment treaties 'follows simply from the investor's invocation of those rules in bringing the claim, such reliance on the rules being explicitly or implicitly authorised by the investor-to-State dispute-settlement provisions of the treaty'.<sup>187</sup> In sum, international law can be directly applied to the merits of investment disputes when the nature of the claim, as objectively assessed by the tribunal,<sup>188</sup> is international in nature.

<sup>180</sup> See A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran–United States Claims Tribunal* (Dordrecht, Nijhoff, 1994), 297. See also *Ina Corporation*, fn. 178, Award, Dissenting Opinion by Judge Ameli, at section II (1) ('On 5 February 1974, the United Nations General Assembly [...] adopted Resolution 3171 (XXVIII) on Permanent Sovereignty over Natural Resources, paragraph 3 of which reads [...]').

<sup>181</sup> See *Mousa Aryeh v Iran*, Award, 25 September 1997, para. 83 ('Article 15 of the 1907 Supplementary Constitution, which continued in force at the time of the expropriation in May 1979, states, "[n]o one may be dispossessed of his property, except in cases authorized by religious law, and then only after the fair value (of such property) has been determined and paid"').

<sup>182</sup> Mouri, fn. 180, at 297.

<sup>183</sup> Mouri, at 297–8.

<sup>184</sup> Igobkwee, fn. 144, at 299. See also Begic, fn. 16, at 46 (criticizing the failure of the CME Tribunal to consider national law in its Partial Award, Begic states: 'Only after analyzing the problem from the perspective of Czech law should the Tribunal have examined and applied international law, in particular BIT provisions. If the host State's law violates international law the latter prevails. With such an approach the Tribunal would have acted in compliance with the parties' agreement on applicable law'); Schreuer, fn. 164, at 160 ('[P]ractice suggests that the starting point for an analysis in a case governed by a combined choice of law clause should be the host State's law. [...] [I]t is impermissible to apply international law alone and to ignore or bypass the host State's domestic law in this process').

<sup>185</sup> See Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

<sup>186</sup> See Chapter 7, fn. 14 (on the principle *non infra petita*); fn. 112.

<sup>187</sup> A.R. Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties' (2001) 16 *ICSID Rev.-FILJ* 20, 21.

<sup>188</sup> See Chapter 4, Section 2 (on characterization: the national or international nature of claims).

### 2.3. The superior nature of international law vis-à-vis national law

A more general argument advanced in favour of the primary application of public international law relates to the monist<sup>189</sup> notion of its superiority vis-à-vis national law. As Weil states: ‘no matter how domestic and international law are combined, under the second sentence of Article 42(1) [ICSID Convention], international law always gains the upper hand and ultimately prevails [...]’.<sup>190</sup> Accordingly, he concludes, ‘[t]he reference to the domestic law of the host State, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, the sole *raison d'être* of which is to avoid offending the sensibilities of the host State.’<sup>191</sup>

The superior nature of international vis-à-vis national law was relied upon in *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* (2000), which concerned the amount of compensation owed to the investor for the expropriation of its property by Costa Rica.<sup>192</sup> The ICSID Tribunal noted that the parties had not reached an agreement on the law applicable to their dispute, and concluded: ‘[t]his leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) (“In the absence of such agreement . . .”) and thus apply the law of Costa Rica and such rules of international law as may be applicable.’<sup>193</sup> The investor construed this provision as providing for the primary applicability of national law:

- (i) [T]he Tribunal must apply the law of Costa Rica to the issues in dispute;
- (ii) rules of international law are to be applied only in the event of a lacuna in Costa Rican law or if such law is inconsistent with the international law principles of good faith and *pacta sunt servanda*.
- (iii) In the present case, there is no such inconsistency, with the result that the Tribunal should apply Costa Rican law, though ‘. . . the result would be the same if principles of international law were applied’.<sup>194</sup>

While first observing that the relevant rules and principles of the host state were generally consistent with the accepted principles of public international law on the same subject,<sup>195</sup> the tribunal concluded that international law would be applied to the dispute: ‘[T]he question, therefore, boils down to the following: under international law, what are the applicable principles and rules governing compensation in a case such as this?’<sup>196</sup> The tribunal gave the following reason for the primary application of international law:

<sup>189</sup> On monism and dualism, see Chapter 1, Section 1 (on motivations for the study); Chapter 5, Section 3.2.2 (on the supervening role of international law).

<sup>190</sup> P. Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage à Trois*’ (2000) 15(2) *ICSID Rev.–FILJ* 409.

<sup>191</sup> Weil, ‘The State, the Foreign Investor, and International Law’.

<sup>192</sup> *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, rectified 8 June 2000 (L.Y. Fortier, E. Lauterpacht, P. Weil, arbs), para. 56.

<sup>193</sup> *Compañía del Desarrollo*, at para. 64. But see at para. 35 (Costa Rica submitted that the parties had agreed to the application of international law).

<sup>194</sup> *Compañía del Desarrollo*, at para. 61 (references omitted); see at para. 28 (the investor argued in favour of the application of Costa Rican law, ‘which in this instance, is not incompatible with principles of international law relating to expropriation’).

<sup>195</sup> *Compañía del Desarrollo*, at para. 64.

<sup>196</sup> *Compañía del Desarrollo*, at para. 67.

To the extent to which there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated. The parties' apparently divergent positions lead, in substance, to the same conclusion, namely, that, in the end, international law is controlling. The Tribunal is satisfied that, under the second sentence of Article 42(1), the arbitration is governed by international law.<sup>197</sup>

We further refer to the award of the ICSID Tribunal in *Tokios Tokelés v Ukraine* (2007).<sup>198</sup> In that case, the claimant relied on both national and international law. More specifically, it alleged that the host state, in contravention of the applicable bilateral investment treaty, had failed to grant it full protection and security and fair and equitable treatment, and that it had expropriated its investment.<sup>199</sup> The claimant further relied on provisions of Ukrainian legislation: the host state had 'violated Ukrainian law by failing to protect the Claimant's business investments, refrain[ing] from interfering in [the company's] business activities and failing to compensate for resulting damages'.<sup>200</sup> By majority decision, the tribunal denied the claimant's treaty claims.<sup>201</sup> It then went on to discuss the applicability of Ukrainian law to the case at hand:

The Claimant relies on various provisions of Ukrainian law, specifically:

- (1) those protecting foreign investments and investment activity (including provisions to be found in the Constitution), ensuring stable conditions for foreign investments and compensation to investors in case of expropriation or expropriation-like measures; [...]
- (3) those providing for items of damage additional to compensation which is due for expropriatory measures (such as moral damages, under Article 23 of the New Civil Code).<sup>202</sup>

The claimant argued that 'according to Article 42(1) of the ICSID Convention, the law of the state party to the dispute and the rules of international law are to be applied failing a choice by the parties'.<sup>203</sup> The respondent replied that 'only the Treaty and international law are applicable to settle a dispute arising under the Treaty, the provisions of Ukrainian law serving only the purpose of elucidating the factual background of the case and the Claimant's case'.<sup>204</sup> After having briefly declared its agreement with the approach of the *Wena ad hoc* committee concerning article 42 (1), second sentence, ICSID Convention,<sup>205</sup> the tribunal held that there was no need to consider the Ukrainian provisions concerning protection of foreign investment:

[T]he Claimant itself recognizes the primacy of international agreements over domestic legislation in this field. [...]. Accordingly, the system of protection, guarantees and remedies provided by Ukrainian law with regard to foreign investments is in effect replaced *ratione materiae* by the

<sup>197</sup> *Compañía del Desarrollo*, at para. 64. See also at para. 65 (the tribunal's conclusion was 'reinforced by the history of the dispute, in particular the circumstances in which the dispute was submitted to arbitration and in which the parties' consent was given, as well as the language of the [US] Helms Amendment itself [...]'); and also at para. 24 (on the Helms Amendment).

<sup>198</sup> *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (Lord Mustill, P. Bernardini, D.M. Price, arbs.).

<sup>199</sup> *Tokios Tokelés v Ukraine*, at para. 85.

<sup>200</sup> *Tokios Tokelés v Ukraine*, at para. 86. See also at para. 138.

<sup>201</sup> *Tokios Tokelés v Ukraine*, at paras 122, 137.

<sup>202</sup> *Tokios Tokelés v Ukraine*, at para. 141.

<sup>203</sup> *Tokios Tokelés v Ukraine*, at para. 139.

<sup>204</sup> *Tokios Tokelés v Ukraine*, at para. 139.

<sup>205</sup> *Tokios Tokelés v Ukraine*, at para. 140.

substantive provisions of the Treaty and international law, to the extent the latter govern the same subject-matter.<sup>206</sup>

Since the tribunal had found no breach of the treaty, it concluded that ‘Ukrainian law provisions regarding damages [...] are of no avail’.<sup>207</sup>

It is submitted, though, that the question of supremacy is different from that of whether national or international law should primarily govern the claim at hand. First, from the viewpoint of international law it is recognized that it is up to each state to determine the manner in which it gives effect to international norms in its national legal order, and that all that is required from the perspective of the international legal order is consistency.<sup>208</sup> Secondly, national law may actually contain the same or higher standards of protection for the investor, and thus be considered substantively—or even ‘morally’<sup>209</sup>—equal to or superior to international norms. As noted by Gaillard and Banifatemi:

[I]t is by no means obvious that, in every case, the application of the law of the host State, as opposed to international law, is necessarily favorable to the host State and unfavorable to the investor. Conversely, it is far from clear that the application of the rules of international law is always in the investor’s favor.<sup>210</sup>

In fact, this likely explains why the investor in *Santa Elena* specifically sought the primary application of national law.<sup>211</sup> As Brower and Wong state, under Costa Rican law, the valuation of property expropriated is based on its fair market value measured at the time compensation is actually provided—in this case, at the time of the award in the year 2000.<sup>212</sup> By contrast, cases decided under international law determine that valuation is to be based on the fair market value measured at the time of the

<sup>206</sup> *Tokios Tokelés v Ukraine*, at paras 142–143 (references omitted).

<sup>207</sup> *Tokios Tokelés v Ukraine*, at para. 145.

<sup>208</sup> See A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford, Oxford University Press, 2008), 70. Cf. *Swedish Engine Drivers’ Union v Sweden*, EHRR, 6 February 1976, App. 5614/72, Series A, no. 20, para. 50; EFTA Court, Case E-1/07, 3 October 2007, at p. 12. But see Case 6/64, *Flaminio Costa v E.N.E.L.*, ECJ, Judgment, 15 July 1964 (‘By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’). Cf. Chapter 5, at Section 3.1.1 (on international law as part of the ‘law of the land’).

<sup>209</sup> See P. Guggenheim, I *Traité de droit international public* 57–8 (1953) (‘Les règles de droit international public n’ont pas un caractère impératif. Le droit international admet en conséquence qu’un traité peut avoir n’importe quel contenu, sans limitations ni restrictions d’aucune sorte, et que toute matière peut en faire l’objet [...]. Il est donc erroné de prétendre qu’on peut apprécier la validité d’une convention d’après le critère de sa moralité.’) [The rules of public international law do not have an imperative character. International law recognizes that a treaty can therefore have any content, without any limitations or restrictions of any kind, and it can concern any possible subject matter [...]. It is therefore wrong to say that we can assess the validity of an agreement based on the criterion of morality.]

<sup>210</sup> Gaillard and Banifatemi, fn. 142, at 380–1. See also Spiermann, fn. 9, at 105. Cf. Nollkaemper, fn. 100, at 762.

<sup>211</sup> Cf. *Santa Elena*, fn. 192, Award, at paras 28, 61. Cf. *Tokios Tokelés v Ukraine*, fn. 198, Award, at para. 139 (whereas the foreign investor argued in favour of the application of national and international law, the host state replied that ‘only the Treaty and international law are applicable to settle a dispute arising under the Treaty [...]’); *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, Case No. ARB/81/2, Award, 21 October 1983 (E. Jimenez de Aréchaga, W.D. Rogers, D. Schmidt, arbs), 114 I.L.R. 157 (1999) (the host state argued against the exclusive application of its own law).

<sup>212</sup> C.N. Brower and J. Wong, ‘General Valuation Principles: The Case of *Santa Elena*’ in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 747, 757.

expropriation, which, as both parties agreed, is ordinarily the date of the expropriation decree where such exists—in this case, on 5 May 1978.<sup>213</sup> Brower and Wong note: ‘As more than twenty years had elapsed between the date of expropriation and that of the Award, it was plain that the valuation of the Property based on Costa Rican law would likely yield a higher figure than that based on international law.’<sup>214</sup>

It is therefore suggested that the initial determination of the primary applicability of international law ought to depend on the factor’s party autonomy and the nature of the claim, rather than any *a priori* notions of hierarchical dominance of international law vis-à-vis national law in the sense suggested by the *Santa Elena* and the *Tokios Tokelés* tribunals.<sup>215</sup> It should be emphasized, though, that where a tribunal has made a prior determination that international law governs the claim at hand based on an agreement by the parties to that effect or the international nature of the claim, it is appropriate to invoke the superiority of international law vis-à-vis national law. In such cases, where the claim is based on obligations of the host state founded in the international legal order, it is clear that the host state may not invoke national law in an attempt to preclude the wrongfulness of its acts or omissions.<sup>216</sup> Thus, in *Gami Investments, Inc. v Mexico* (2004), the UNCITRAL Tribunal stated:

Ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate. It was for the Mexican courts to determine whether the expropriation was legitimate under Mexican law. It is for the present Tribunal to judge whether there have been breaches of international law by any agency of the Mexican government. A fundamental postulate in applying NAFTA is that enshrined in Article 27 of the Vienna Convention on the Law of Treaties: ‘A party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty.’ Whether such national laws have been upheld by national courts is ultimately of no moment in this regard.<sup>217</sup>

The important distinction between ‘playing the simple “international trump card”’<sup>218</sup> and first focusing on the international nature of the claim is confirmed by the following statement by Mann:

<sup>213</sup> Brower and Wong, ‘General Valuation Principles’, at 757–8.

<sup>214</sup> Brower and Wong, ‘General Valuation Principles’, at 758.

<sup>215</sup> A separate case against the Ukraine could shed some light on the decision by the *Tokios Tokelés* tribunal to ‘replace’ national law in favour of international law. See *Alpha v Ukraine*, fn. 152, Award, at para. 432 (‘The Tribunal notes that Article 6 of the [Foreign Investment Law (FIL)] states that “[i]f an international agreement of Ukraine provides rules other than that provided for by the legislation of Ukraine, the rules of the international agreement shall apply.” Thus, under Ukrainian law, and at least where there is overlap between the UABIT and Ukrainian law, the UABIT alone governs the merits of the dispute rather than the FIL, the Civil Code, or any other provision of Ukraine domestic law. On this basis alone, the Tribunal rejects Claimant’s domestic law claims’).

<sup>216</sup> See S.M. Schwebel, *Justice in International Law: Selected Writings* (Cambridge, Grotius, 1994), 430; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), arts 3, 32; Vienna Convention on the Law of Treaties (1969), art. 27; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), 171–2; V. Heiskanen, ‘May a State Invoke its Domestic Law to Evade its International Obligations?’ TDM 2(5) (November 2005).

<sup>217</sup> *Gami Investments, Inc. v Mexico*, Final Award, 15 November 2004 (W.M. Reisman, J.L. Muró, J. Paulsson, arbs), para. 41. See also *Petrorobart v Kyrgyz Republic*, fn. 87, Award, at 23–5; *Tecnicas v Mexico*, fn. 79, Award, at para. 120.

<sup>218</sup> Douglas, fn. 132, at 155 ([T]o treat international law as a self-sufficient legal order in the sphere of foreign investment is plainly untenable. Within this domain of private or commercial interests, problems relating to overlapping adjudicative competence and the application of municipal law cannot be resolved by playing the simple “international trump card” of Article 3 [of the ILC Articles on State Responsibility]).

An argument in support of [the doctrine of internationalization of contracts] might be derived from the well-known principle that as a matter of public international law no state can rely on its own legislation to limit the scope of its international obligations. But this rule contemplates obligations governed by public international law and has no bearing upon the scope of obligations which are subject to a system of municipal law [...].<sup>219</sup>

In this context, we are also reminded of the remark by Kumm that one of the dangers in adopting an anti-theoretical attitude with respect to the relationship between national and international law is to ‘get carried away by a cosmopolitan enthusiasm for international law that is perhaps the *deformation professionnelle* of the international lawyer’.<sup>220</sup>

## 2.4. Interim conclusions

Arbitral tribunals should apply international law to the dispute when the parties have so agreed. An implicit choice for international law should not be found unless the intentions of the parties to that effect are manifest. This is particularly the case for contractual claims, as the general rule is that these are governed by national law.

When the parties have not agreed on the law to be applied to the merits of the dispute, and when they have agreed to the application of both national and international law, investors may—depending on the arbitration agreement—bring international claims; and tribunals should solve these by reference to the legal order that gives rise to them, i.e., by applying international law. This approach constitutes a shift in relation to the paradigm of sequential primacy of national law as adopted by previous tribunals.<sup>221</sup>

Finally, considerations of the superior nature of international law vis-à-vis national law ought not to come into play but after the tribunal has made a prior determination that international law should govern the claim.

## 3. The Role of National Law when International Law Primarily Applies

Similar to how international law may play a role where national law primarily applies to the merits,<sup>222</sup> a finding that international law should apply does not necessarily exclude a role for national law. In this section, we will consider first, the indirect application of national law (Section 3.1) and secondly, the corrective role of national law (Section 3.2).

<sup>219</sup> F.A. Mann, ‘State Contracts and State Responsibility’ (1960) 54(3) *Am. J. Int’l L.* 572, 581–2 (reference omitted). Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, Separate Opinion by Judge Schwebel, 26 April [1988] ICJ Rep. 12 (‘It is axiomatic that, *on the international legal plane*, national law cannot derogate from international law’ [emphasis added]).

<sup>220</sup> M. Kumm, ‘Constitutional Democracy Encounters International Law: Terms of Engagement’ in *The Migration of Constitutional Ideas* (S. Choudhry, ed., Cambridge, Cambridge University Press, 2006).

<sup>221</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>222</sup> See Chapter 5, Section 3 (on the role of international law when national law primarily applies).

### 3.1. The indirect application of national law

In cases in which international law primarily applies to a dispute, certain aspects of the case may necessitate recourse to national law.<sup>223</sup> This is so, for instance, with respect to issues of nationality and the capacity of parties to bring claims.<sup>224</sup> The International Court of Justice noted in *Barcelona Traction, Light and Power Company, Limited* (1970):

[I]nternational law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.<sup>225</sup>

This is explicitly recognized in the ASEAN Agreement for the Promotion and Protection of Investments (1987): ‘For the purposes of this Agreement [...] the term “nationals” shall be defined in the respective Constitutions and laws of each of the Contracting Parties.’<sup>226</sup>

At times, the role of national law moves beyond that of jurisdictional and factual significance. As the International Law Commission observes:

Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.<sup>227</sup>

Indeed, as will be demonstrated, arbitral tribunals may be required to apply—rather than merely consider—national law in order to determine the parties’ rights and obligations pursuant to that national law. The interplay between the legal orders created by such an indirect application of national law to the merits is exemplified by the prohibition of expropriation without compensation (Section 3.1.1) and ‘umbrella’ clauses inserted in many investment treaties (Section 3.1.2).

#### 3.1.1. The prohibition against expropriation without compensation

The prohibition against expropriation without compensation is illustrated by the following provision in the Netherlands–Belarus BIT:

<sup>223</sup> See generally M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Alphen aan den Rijn, Kluwer Law International, 2010).

<sup>224</sup> See M. Mohebi, *The International Law Character of the Iran–United States Claims Tribunal* (The Hague, Kluwer Law International, 1999), 111.

<sup>225</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, 5 February [1970] ICJ Rep. 3, para. 38.

<sup>226</sup> ASEAN Agreement for the Promotion and Protection of Investments (1987, as amended in 1996), art. 1(1). See also *AES Corporation v The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (P.-M. Dupuy, K.-H. Böckstiegel, D.B. Janeiro, arbs), para. 78; *Aram Sabet v Iran*, Partial Award, 29 June 1999, Award No. 593-815/816/817-2, para. 32 Douglas, fn. 144, at 77 (Rule 7).

<sup>227</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge, Cambridge University Press, 2002), 89 (commenting on article 4 of the ILC Articles on State Responsibility). See also P.-M. Dupuy, ‘The Unity of Application of International Law at the Global Level and the Responsibility of Judges’ (2007) 1(2) *EJLS* 3.

Neither of the Contracting Parties shall take any measures of expropriation, nationalization or any other measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the measures are taken in the public interest, on a non discriminatory basis, are not contrary to any obligations assumed by the Contracting Party taking such measures, and are taken under due process of law, and provided that provisions be made for compensation.<sup>228</sup>

When an investor alleges a breach of such a provision by the host state, the claim is international in nature and international law will govern.<sup>229</sup> Still, an expropriation presupposes and depends on the existence of an investment in the form of proprietary rights: ‘Since there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place, the legal materialisation of the Claimant’s alleged investment is a fundamental aspect of the merits in this case [...].’<sup>230</sup> Such rights are generally defined by national law;<sup>231</sup> consequently, the arbitrators may need to apply national law in order to determine whether an expropriation has in fact taken place.<sup>232</sup> This is so even where the disputing parties have agreed to the sole application of international law. Roe and Happold explain: ‘The rule or principle that a tribunal must first determine as a matter of national law what the claimant’s rights are (or were until the matters complained of) is itself an applicable rule or principle of international law.’<sup>233</sup> This rule or principle is also supported by Judge Morelli in his separate opinion in the *Barcelona Traction* case:

There is nothing abnormal in this reference of an international rule to the law of a given State. It is wholly untenable to object, as the Belgian Government has done, that in this way the international responsibility of the State is made to depend upon categories of municipal law, thus enabling a State to set up the provisions of its own legal order as a means of evading the international consequences of its acts. In reality, no subordination of international responsibility, as such, to the provisions of municipal law is involved; the point is rather that the very existence of the international obligation depends on a state of affairs created in municipal law, though this is so not by virtue of municipal law but, on the contrary, by virtue of the international rule itself, which to that end refers to the law of the State.<sup>234</sup>

In this context, reference may be made to the United States Model BIT (2012), which includes under the definition of ‘investment’: ‘licenses, authorizations, permits, and similar rights conferred pursuant to *domestic law*.<sup>235</sup> The BIT specifies that the question of whether such instrument has the characteristics of an investment ‘depends on such factors as the nature and extent of the rights that the holder has under *the law of*

<sup>228</sup> Netherlands–Belarus BIT, art. 6.

<sup>229</sup> See Section 2.2 (on the international nature of the claim); Chapter 4, Section 3 (on characterization: the national or international nature of claims).

<sup>230</sup> *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (E. Salpius, J. Voss, J. Paulsson, arbs), para. 8.8.

<sup>231</sup> The law determining the existence of proprietary rights (investment) should be distinguished from the issue of whether the proprietary rights constitute a protected investment under the investment treaty. This latter issue is governed by the treaty at hand, i.e., international law. See Douglas, fn. 144, at 72 (Rule 5).

<sup>232</sup> See Douglas, at 52 (Rule 4); Alvik, fn. 11, at 174–5; Lauterpacht, fn. 22, at 653; *The Panevezys-Saldutiskis Railways Case*, Judgment, 28 February 1939, PCIJ Ser. A/B, no. 76, at 16.

<sup>233</sup> T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, 2011), 51. See also D.F. Donovan, ‘The Relevance (or Lack Thereof) of the Notion of “Mandatory Rules of Law” to Investment Treaty Arbitration’ (2007) 18(1–2) *Am. Rev. Int’l Arb.* 205, 208–9; C. Staker, ‘Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations’ (1987) 58 *British Y.B. Int’l L.* 151.

<sup>234</sup> *Barcelona Traction*, fn. 225, Morelli, J., Separate Opinion, at 234.

<sup>235</sup> See United States Model BIT (2012), art. 1 (emphasis added).

*the Party*'.<sup>236</sup> Also of relevance is the observation by the UNCITRAL Tribunal in *National Grid plc v Argentine Republic* (2008) that the applicable BIT indicated that national law would be relevant in defining the type of assets or property rights making up an 'investment':

Thus, according to Article 1(c)(i)(bb) of the Treaty, Argentine law governs who qualifies as an 'investor' and, while addressing the concept of 'asset' in order to ascertain what is an eligible 'investment' under the Treaty, Article 1(a) specifically indicates that such concept is to be defined pursuant to the law of the host State: '... investment means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made ...'.<sup>237</sup>

The need for investment tribunals to take into account the law of the host state when determining expropriation claims on the merits is illustrated by the award in *Azinian v Mexico* (1999), in which the claimant, a US waste disposal enterprise, alleged that Mexico had violated the NAFTA by expropriating its investment.<sup>238</sup> The tribunal, operating under the ICSID Additional Facility Rules, held in favour of Mexico on the basis that a competent Mexican court had determined that the concession contract in question was invalid under Mexican law; and that accordingly, 'there is by definition no contract to be expropriated'.<sup>239</sup>

A similar approach was followed in *Nagel v Czech Republic* (2003), where the foreign investor alleged that the host state had breached the relevant BIT by expropriating its investment relating to the operation of a telecommunications business.<sup>240</sup> In determining the nature of the rights the investor had derived from the cooperation agreement entered into with a certain state enterprise, the tribunal held that this question was governed by the law of the host State, based on the fact that the agreement had 'strong links with the Government'.<sup>241</sup> While noting that the basis of the investor's claims was the BIT at hand, and that the treaty should be interpreted in accordance with the rules of public international law, it stated that domestic law will be of some relevance: 'the terms "investment" and "asset" in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under [Czech law]. It is therefore

<sup>236</sup> United States Model BIT (2012), at fn. 2 (emphasis added). Cf. Spain–Argentina BIT, art. I(2).

<sup>237</sup> *National Grid plc v Argentine Republic*, Award, 3 November 2008 (A.M. Garro, J.L. Kessler, A.R. Sureda, arbs), paras 81 *et seq.* (referring to article 8(4) of the BIT) (emphasis in original). See also *BG Group v Argentina*, fn. 167, Award, at para. 92 (it is 'beyond dispute that the contours of the concept of "asset" included in the definition of "investment" in Article 1(a) of the Argentina–U.K. BIT, is governed by Argentine law. Article 1(a) of the BIT provides that: "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made [...]'] (emphasis in original, references omitted)); see also at para. 117 ('[T]he *renvoi* of Article 1(a) of the treaty requires this Tribunal to apply the laws of Argentina to the interpretation of this part of the definition of "Investment" in the Argentina–U.S. BIT. As a matter of conventional international law, this demarque is necessary to determine whether rights associated with the MetroGAS License are protected under the BIT').

<sup>238</sup> *Robert Azinian v United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (J. Paulsson, B.R. Civiletti, C. von Wobeser Hoepfner, arbs).

<sup>239</sup> *Robert Azinian*, at para. 100 (emphasis in original).

<sup>240</sup> *Nagel v Czech Republic*, Scc Case 49/2002, Award, 9 September 2003, Stockholm Arb. Rep. 141, 147 (2004:1) (observations by S. François-Poncet and C. Mouawad). Cf. UK–Czech BIT, art. 2(3).

<sup>241</sup> *Nagel v Czech Republic*, at 158 (this conclusion was supported by the parties, but was also reached on the basis that '[o]ne of the parties was a [...] State enterprise and the Agreement concerned cooperation in order to obtain rights to operate [...] in the Republic').

necessary to determine what is the legal significance of the Cooperation Agreement under [Czech law].<sup>242</sup>

Another case on point is *EnCana Corporation v Republic of Ecuador* (2006), in which the investor argued that the host state, in contravention of the BIT, had directly expropriated its investment by wrongfully denying its rights to tax refunds owing to EnCana's subsidiaries under Ecuadorian law.<sup>243</sup> Prior to dismissing this claim on the merits,<sup>244</sup> the tribunal confirmed the need to consider Ecuadorian law, despite the fact that the applicable law clause in the BIT only referred to international law:

The relevant clause, Article XIII(7) of the BIT, provides only [that] a tribunal exercising jurisdiction under the BIT 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.<sup>245</sup>

A further example of the need to resort to national law for the determination of expropriation claims in investment treaty arbitration is *International Thunderbird Gaming Corporation v United Mexican States* (2006).<sup>246</sup> The case concerned a US company that had opened gambling facilities in Mexico that were subsequently closed by Mexican authorities on the basis that they violated the Mexican Federal Law of Games and Sweepstakes (*Ley Federal de Juegos y Sorteos* of 31 December 1947).<sup>247</sup> The UNCITRAL Tribunal first noted that 'Chapter Eleven of the Nafta recognizes in principle the right of a Contracting Party to regulate conduct that it considers illegal',<sup>248</sup> and went on to point out that 'under Mexican law, specifically the *Ley Federal de Juegos y Sorteos* of 31 December 1947, gambling is an illegal activity'.<sup>249</sup> Because of this, and in denying the investor's claim for expropriation, the tribunal held: 'as acknowledged by Thunderbird, compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.'<sup>250</sup>

The same approach has been adopted by the Iran–United States Claims Tribunal. The case of *George E. Davison (Homayounjah) v Iran* (1998) demonstrates this:

The Tribunal notes that in order to meet his burden of proof the Claimant must establish the following elements: that he had *ownership interests or other property rights at issue*, and that an

<sup>242</sup> *Nagel v Czech Republic*, at 161. See also at 164 (the investor's expropriation claim failed, since it could not be found that the rights derived from the agreement had any financial value.)

<sup>243</sup> *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award, 3 February 2006 (J. Crawford, H.G. Naón, C. Thomas, arbs), para. 179.

<sup>244</sup> See *EnCana v Ecuador*, at paras 194, 199.

<sup>245</sup> *EnCana v Ecuador*, at para. 184. But see Partial Dissenting Opinion, H.A. Grigera Náon, at para. 23 ('EnCana's entitlement to its investment and its attached natural components without which an investment is inconceivable—the right to a return and the legitimate economic expectations embodied in such right—which are protected by international law, are not embedded in Ecuadorian law but in the Treaty itself. The entitlement to such rights and expectations crystallizes once the investment has been accepted by Ecuador according to its laws, something that in the present case has undoubtedly happened').

<sup>246</sup> *Thunderbird v Mexico*, fn. 85, Award.

<sup>247</sup> *Thunderbird v Mexico*.

<sup>248</sup> *Thunderbird v Mexico*, at para. 123.

<sup>249</sup> *Thunderbird v Mexico*, at para. 124.

<sup>250</sup> *Thunderbird v Mexico*, at para. 208.

expropriation or other measures amounting to an expropriation affecting his ownership interests or other property rights, attributable to Iran, took place.<sup>251</sup>

The tribunal continued to observe that ‘the Claimant has not provided any official title deeds or other authorized documents showing title to the alleged property. Instead, the Claimant tries to carry his initial burden of proving his ownership through a number of inconsistent statements by himself and his closest relatives.’<sup>252</sup> In concluding that the claimant had no right of ownership to the five buildings in question, the tribunal relied on Iranian law: ‘The Tribunal holds that the Respondent has provided sufficient rebuttal evidence on the applicable provisions of Iranian laws. [...] The documentary evidence submitted by the Respondent shows that such properties must be registered to give the transfer of ownership legal validity.’<sup>253</sup>

The importance of national law for issues of ownership is similarly illustrated by the award in *Frederica Lincoln Riabi v Iran* (2003).<sup>254</sup> In that case, the claimant alleged that Iran had wrongfully expropriated her shares in a company. The respondent, relying on Iranian law, disputed her ownership of the majority of the shares, claiming that certain legal procedures required by Iranian law for share transactions had not been followed.<sup>255</sup> The tribunal agreed. In reaching this conclusion, it seemingly took it for granted that Iranian law governed the issues at hand:

Considering the requirements set forth in Article 40 of the Commercial Code of Iran, as amended in 1969, the Tribunal notes that this Article provides, *inter alia*, that ‘[t]he transfer of registered shares must be entered in the share register of the company’ and that ‘[a]ny transfer which takes place contradictory to the provisions mentioned above shall be considered as null and void as far as the company and third parties are concerned.’ Based on the statements made at Hearing by Mr. Mahloujian and Professor Safai, a transfer is valid *inter partes* if the requirements set forth in the Iranian Civil Code are met.<sup>256</sup>

In light of the fact that the company’s share register had not been made available to it, the tribunal found it necessary to ‘look to other available evidence to determine whether the shares were validly transferred to the claimant in accordance with the Iranian Civil Code’.<sup>257</sup> With respect to certain shares, the tribunal agreed with the respondent that the alleged transfer was outside the scope of any power of attorney:

The clear meaning of Articles 660 and 661 of the Civil Code of Iran is that there are basically two types of powers of attorney in the Iranian legal system, i.e., general and specific. A general power of attorney does not give the attorney the right, e.g., to sell or donate the principal’s property. To enter this kind of transaction, the attorney requires specific authorization. [...] In this respect, the Tribunal, furthermore, finds relevant the provisions of Articles 667 and 674 of the Civil Code of Iran, which deal with the duties of the attorney and the principal. Based on the available evidence, it appears to the Tribunal that Mr. Riabi did not have the right to donate Jahan Shahriar’s shares in Rahmat Abad to the Claimant.<sup>258</sup>

<sup>251</sup> *George E. Davidson (Homayounjah) v Iran*, Award, 5 March 1998, at para. 69 (emphasis added).

<sup>252</sup> *Davidson v Iran*, at para. 70.

<sup>253</sup> *Davidson v Iran*, at paras 71–72. See also at para. 66.

<sup>254</sup> *Frederica Lincoln Riabi v Iran*, Final Award, 27 February 2003, Award No. 600-485-1.

<sup>255</sup> *Frederica Lincoln Riabi v Iran*.

<sup>256</sup> *Frederica Lincoln Riabi v Iran* (references omitted).

<sup>257</sup> *Frederica Lincoln Riabi v Iran*.

<sup>258</sup> *Frederica Lincoln Riabi v Iran* (references omitted). See also *Catherine Etezadi v Iran*, Award, 23 March 1994, at para. 53; *Abrahim Rahman Golshani v Iran*, Final Award, 2 March 1993; Separate Opinion of Judge M. Aghahosseini; *Sea-Land Service, Inc. v Government of the Islamic Republic of Iran, Ports and Shipping Organizations (PSO)*, Case No. 33, Award No. 135-33-1, 22 June 1984, at section I(1)(ii)(a).

In sum, although international law primarily applies to an international claim of expropriation, arbitral practice of both territorialized and internationalized tribunals supports the need to refer to the national law of the host state for questions pertaining to the existence and scope of the investment allegedly expropriated. On that basis, we can concur with the criticism voiced by Douglas against parts of the reasoning of the tribunal and the ad hoc committee in *Wena Hotels Ltd v Arab Republic of Egypt* (2000/02).<sup>259</sup> In its decision on annulment, the ad hoc committee did not consider the findings by arbitration tribunals in Cairo that Wena had breached certain lease agreements.<sup>260</sup> According to Douglas,

The investment was in the form of leaseholds over two hotels. If Wena had breached its obligations under the lease agreements such that Egypt was entitled to terminate the leases in accordance with their governing law, then there would have been no investment to expropriate. [...] In conducting [its] analysis the Tribunal should have considered the previous determinations made by the contractual tribunals or made its own findings on the status of Wena's investment in accordance with the governing law of the lease agreements.<sup>261</sup>

Douglas rightly voices similar disapproval with the decision by the UNCITRAL Tribunal in *CME Czech Republic B.V. v Czech Republic* (2001/03). In deciding whether the host state had expropriated CME's investment in the form of a television licence, the tribunal hardly considered Czech law.<sup>262</sup> The treaty at hand specifically listed national law as a source of law.<sup>263</sup> The potential relevance of national law was also referred to in a common position reached by the states parties to the treaty, viz. the Netherlands and the Czech Republic: 'The arbitral tribunal must [...] take into account as far as they are relevant to the dispute the law in force of the contracting party concerned and the other sources of law set out in Article 8.6.'<sup>264</sup> As Douglas observes: 'If the law of the host state is to have any role in an investment dispute, this is precisely the context in which it must do so. [...] [G]eneral international law cannot purport to regulate the complex problems of proprietary and contractual rights over a television licence.'<sup>265</sup> This is a valid point; which, as previously illustrated, many arbitrators now recognize. Importantly, the same arbitral practice demonstrates that the necessity of indirectly applying national law in expropriation claims does not stand or fall on any explicit choice by the parties that national law shall apply in combination with international law.

<sup>259</sup> Douglas, fn. 132, at 206.

<sup>260</sup> *Wena v Egypt*, fn. 113, Award, at paras 61–62. See also fn. 1, Decision on Annulment, at para. 107. See also Section 2.2 (on the international nature of the claim).

<sup>261</sup> Douglas, fn. 132, at 206.

<sup>262</sup> See *CME v Czech Republic*, fn. 153, Partial Award, at para. 476 ('It is not the Tribunal's role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law'); see also at para. 469 ('The Tribunal need not decide whether the contribution of the "use of the License" in 1993 was legally valid under Czech law'); Final Award, at para. 407 ('The Tribunal in point of fact in its Partial Award addressed various issues under Czech law, which were, however, to a large extent not essential to the Tribunal's decision'). Cf. Begic, fn. 16, at 44, 46. See also Section 2.2 (on the international nature of the claim).

<sup>263</sup> Cf. Netherlands–Czech/Slovak Republic BIT, art. 8(6). See also Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>264</sup> *CME v Czech Republic*, fn. 153, Final Award, at para. 91.

<sup>265</sup> Douglas, fn. 132, at 205. See also Schreuer, fn. 164, at 193–5.

### 3.1.2. 'Umbrella' clauses

The need to resort to national law when deciding international claims on the merits is also illustrated by so-called 'umbrella' clauses inserted in a large number<sup>266</sup> of investment treaties; and which—in various terms—oblige the host state to observe obligations or commitments entered into with respect to investments.<sup>267</sup> Article II(2)(c) of the US–Argentina BIT, for instance, provides that '[e]ach Party shall observe any obligation it may have entered into with regard to investments'.<sup>268</sup> Another example is article 11 of the Swiss–Pakistan Bilateral Investment Treaty: 'Each Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party'.<sup>269</sup>

Arbitral tribunals and scholars have reached quite divergent views with respect to the meaning and scope of such 'umbrella' clauses.<sup>270</sup> While some have considered them incapable of granting a specific cause of action for investors,<sup>271</sup> others—including a contracting party and home state<sup>272</sup>—have found that the clause allows investors to bring claims against a host state having breached 'commitments' or 'undertakings' vis-à-vis the investors.<sup>273</sup> The present author follows this latter view.

<sup>266</sup> See J. Gill et al., 'Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases' (2004) 21(5) *J. Int'l Arb.* 397, 403, fn. 31 ('[I]n a sample of bilateral investment treaties taken from Investment Treaties (ICSID ed., 2003), 94 of 236 (about 40%) contained umbrella clauses'); UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (New York, United Nations, 2007), 73.

<sup>267</sup> See K. Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (2006) 3 *OECD Working Papers on International Investment* 3 (noting that other formulations have also been used: 'mirror effect', 'elevator', 'parallel effect', 'sanctity of contract', 'respect clause', and *pacta sunt servanda*).

<sup>268</sup> US–Argentine BIT, art. II(2)(c), referred to in *El Paso v Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (L. Caflisch, B. Stern, P. Bernardini, arbs), para. 70.

<sup>269</sup> See Swiss–Pakistan BIT, art. 11, referred to in *SGS Société Générale de Surveillance, S.A. v Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003 (F.P. Feliciano, A. Faurès, C. Thomas, arbs), para. 164. See also Energy Charter Treaty (1994), art. 10; and at art. 26 (3) (states parties may enter reservations with respect to the application of investor–state arbitration provisions to the 'umbrella' clause).

<sup>270</sup> See J. Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) *Arb. Int'l* 351, 367 (Crawford identifies four different schools of thought or 'camps', adding that 'some of the dwellers in particular camps may be thought to have a nomadic attitude and to move from camp to camp as the feeling takes them'). For a thorough discussion of these 'camps', see Sasson, fn. 223, at ch. 7, ss 3, 5.

<sup>271</sup> See, e.g., *SGS v Pakistan*, fn. 269, Decision on Jurisdiction, at para. 173; *El Paso v Argentina*, fn. 268, Decision on Jurisdiction; *BP America Production Co. and others v Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006 (L. Caflisch, B. Stern, A.J. van den Berg, arbs), paras 93–115; *Joy Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/02/11, Decision on Jurisdiction, 6 August 2004 (F.O. Vicuña, W.L. Craig, C.G. Weeramantry, arbs); *Eureko BV v Republic of Poland*, Partial Award, 19 August 2005 (S.M. Schwebel, J. Rajski, L.Y. Fortier, arbs), J. Rajski, Dissenting Opinion, at paras 21–25.

<sup>272</sup> *Eureko v Poland*, fn. 271, Partial Award, at para. 254 (subsequent to the decision by the ICSID Tribunal in *SGS v Pakistan* not to give effect to the 'umbrella' clause in the investment treaty between Switzerland and Pakistan, Switzerland stated in a letter to ICSID that it was 'alarmed about the very narrow interpretation given to the meaning of [the umbrella clause] by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions').

<sup>273</sup> See, e.g., *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 (A.S. El-Kosheri, J. Crawford, A. Crivellaro, arbs), para. 127; *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (A.R. Sureda, C.N. Brower, D.B. Janeiro, arbs), 206; *CMS Gas Transmission Company v Argentina*, fn. 138, Decision on Jurisdiction, 17 July 2003, at para. 33; Award, 12 May 2005, at para. 303; *Eureko v Poland*, fn. 271, Partial Award; *Noble Ventures, Inc. v Romania*, ICSID Case No.

More specifically, it is argued that tribunals should follow a three-step process with respect to ‘umbrella’ clauses. First, since the clause is inserted in a treaty, tribunals should interpret the scope of the clause by international rules of treaty interpretation, such as articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>274</sup> A textual interpretation of various clauses supports the view that they create an international cause of action for investors, especially in view of the mandatory language and the principle of effectiveness.<sup>275</sup> According to Sinclair, this conclusion is supported by reference to material contemporaneous to the emergence of the ‘umbrella’ clause, resort to which is helpful in light of the general lack of *travaux préparatoires* for investment treaties.<sup>276</sup> In this respect, he refers to documents relating to the Anglo-Iranian Dispute in the early 1950s,<sup>277</sup> the 1956–59 Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries;<sup>278</sup> the 1959 Abs-Shawcross Draft Convention on Foreign Investment;<sup>279</sup> and the 1967 OECD Draft Convention on the Protection of Foreign Property.<sup>280</sup> In fact, the first designation of such provisions as ‘umbrella’ clauses was used by Seidl-Hohenveldern, who when commenting on the Abs-Shawcross Draft Convention stated that they brought concession contracts under the ‘umbrella of protection’ of an investment treaty.<sup>281</sup>

With respect to the scope of ‘umbrella’ clauses, the language varies, and each clause should therefore be construed in its own terms and in its own right. Crawford observes:

There is no such thing as *the* umbrella clause; rather, there are umbrella clauses. No doubt where these are in identical or nearly identical terms they should be given the same or similar meaning;

ARB/01/11, Award, 12 October 2005 (K.-H. Böckstiegel, J. Lever, P.-M. Dupuy, arbs), para. 62; *Petrobart v Kyrgyz Republic*, fn. 87, Award, at 28–9. See also C. Schreuer, ‘Investment Arbitration: A Voyage of Discovery’ (2005) 71 *Arbitration* 73, 76 (‘The prevailing view is that a clause of this kind puts investment contracts under the protection of the BIT with the consequence that a contract violation also becomes a violation of the BIT’); P.J. Turner et al., ‘Investment Treaty Arbitration: An Australian Perspective’ (2007) 24(2) *J. Int'l Arb.* 103, 121.

<sup>274</sup> See Vienna Convention on the Law of Treaties (1969), arts 31–32. Cf. *Duke Energy Electroquill Partners & Electroquill S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (G. Kaufmann-Kohler, E.G. Pinzón, A.J. van den Berg, arbs), para. 318. It is generally accepted that these articles reflect customary international law. See, e.g., *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009 (S.M. Schwebel, M. Shahabuddeen, P. Tomka, arbs), para. 56.

<sup>275</sup> Cf. UNCTAD, *State Contracts*, UNCTAD Series on Issues in International Investment Agreements 10 (2004); A.C. Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 *Arb. Int'l* 414; C. Schreuer, ‘Investment Treaty Arbitration and Jurisdiction over Contract Claims: The Vivendi I Case Considered’ in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler, ed., London, Cameron May, 2005), 281, 301; H.J. Schramke, ‘The Interpretation of Umbrella Clauses in Bilateral Investment Treaties’, TDM 5 (May 2007), at 21.

<sup>276</sup> See Sinclair, fn. 275, at 411, 413; C. Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’, TDM 3(2) (April 2006), at 9.

<sup>277</sup> See Sinclair, fn. 275, at 434.

<sup>278</sup> 1956–59 Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, art. 4, in H.J. Abs, ‘Proposals for Improving the Protection of Private Foreign Investments’ in *Institut International d'Etudes Bancaires, Rotterdam* (1958), as cited in Sinclair, fn. 275, at 411.

<sup>279</sup> See Draft Convention on Investments Abroad (the Abs-Shawcross Draft), art. II.

<sup>280</sup> Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, art. 2.

<sup>281</sup> I. Seidl-Hohenveldern, ‘The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table’ (1961) 10 *J. Pub. L.* 100, at 104. Cf. Sinclair, fn. 275, at 412–13.

but where different language is used compared with existing standard formulas, it may be presumed that some difference in meaning was intended.<sup>282</sup>

Generally, however, the clauses refer to ‘commitments’ or ‘undertakings’ entered into by the host state with investors or in respect of their investments. Whereas it is clear that the clauses cover contractual commitments,<sup>283</sup> the question has been posed whether they have a wider scope of application.<sup>284</sup> Commenting on the word ‘undertaking’ contained in article 2 of the 1967 OECD Draft Convention on the Protection of Foreign Property, Lauterpacht considered that ‘[a]n “undertaking” can, for example, describe the situation arising out of a general promise made by a State to accord to foreign investors a particular standard of treatment, followed by an actual investment made in reliance on that promise’.<sup>285</sup> This approach was followed by the SCC Tribunal in *Petrobart Limited v Kyrgyz Republic* (2005): ‘Not only has the Kyrgyz Republic breached its contractual obligation to Petrobart, but it has also contravened its obligation under this heading by failing to observe the promise inherent in its Foreign Investment Law in which Petrobart placed trust when making its investment in the Republic.’<sup>286</sup> This decision is representative of a survey of practice according to which ‘tribunals overwhelmingly accept the application of umbrella clauses to obligations

<sup>282</sup> Crawford, fn. 270, at 355 (emphasis in original). See also Sinclair, fn. 275, at 412; Yannacar Small, fn. 267, at 22. Cf. *Salini Costruttori S.p.A. & Italtrade S.p.A. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004 (G. Guillaume, B.M. Cremades, I. Sinclair, arbs) (the tribunal rightly rejected that the following clause could give rise to an ‘umbrella’ clause claim: ‘Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor’).

<sup>283</sup> See UNCTAD, Investor–State Dispute Settlement and Impact on Investment Rulemaking 28 (January, 2008), 28; Alvik, fn. 11, at 183; *Noble Ventures v Romania*, fn. 273, Award, at para. 51.

<sup>284</sup> Cf. UNCTAD, fn. 266, at 75 (“The majority of arbitral tribunals [...] when faced with a “proper” umbrella clause, that is one drafted in broad and inclusive terms, seem to be adopting a fairly consistent interpretation which covers all State obligations, including contractual ones’). But see L. Halonen, ‘Containing the Scope of the Umbrella Clause’ in *Investment Treaty Arbitration and International Law* (T. Weiler, ed., Huntington, NY, JurisNet, 2008), 27, 28 ([U]mbrella clauses should be considered to apply only to contractual (or “quasi-contractual”) obligations made by a state in its capacity as sovereign, and they should bind the state only vis-à-vis the party with whom the obligation is entered into’).

<sup>285</sup> E. Lauterpacht, ‘Drafting of Conventions for the Protection of Investment’ in *Int'l. & Comp. L. Q.*, ‘The Encouragement and Protection of Investment in Developing Countries’ (Suppl. 3, 1962), 218, 229. See also Sinclair, fn. 275, at 422, 428; G. Schwarzenberger, *Foreign Investments and International Law* (London, Stevens, 1969), 116; C.S. Miles, ‘Where's My Umbrella? An “Ordinary Meaning” Approach to Answering Three Key Questions that have Emerged from the “Umbrella Clause” Debate’ in *Investment Treaty Arbitration and International Law* (T. Weiler, ed., Huntington, NY, JurisNet, 2008), 3, 19–20; F.A. Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1981) 52 *Brit. Y.B. Int'l. L.* 241, 246; W. Ben Hamida, ‘La clause relative au respect des engagements dans les traités d'investissement’ in *Nouveaux développements dans le contentieux arbitral transnational relatif à l'investissement international* (Ch. Leben, ed., Paris, L.G.D.J., 2006), 53, at para. 12.

<sup>286</sup> *Petrobart v Kyrgyz Republic*, fn. 87, Award, at 29 (applying the Energy Charter Treaty, and referring to the Kyrgyz Foreign Investment Law, art. 3(1)). But see *CMS Gas Transmission Company v Argentina*, fn. 138, Decision on Annulment, 25 September 2007 (G. Guillaume, N. Elaraby, J.R. Crawford, committee members), para. 95 (obligations ‘must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State’); *SGS v Philippines*, fn. 273, Decision on Jurisdiction, at para. 121 (“For Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all “the municipal, legislative or administrative or other unilateral measures of a Contracting Party””).

assumed unilaterally by host States'.<sup>287</sup> On the basis of this survey, Salinas concludes that 'where a treaty for the protection of investments containing an umbrella clause is applicable, the violation of a unilateral undertaking, made through legislation or otherwise, would amount to a violation of the treaty'.<sup>288</sup> As explained by Begić Šarkinović, though, the reasoning of those tribunals that have found that the scope of protection of umbrella clauses may cover administrative or legislative obligations should be seen in light of the limitation that 'the obligations/commitments covered by umbrella clauses must have been assumed vis-à-vis specific investments and, therefore, do not cover general requirements imposed by the host state's legislation'.<sup>289</sup>

It has further been suggested that contractual commitments should be limited to encompass large-scale investment contracts, and that a breach of an 'umbrella' clause may only be found where the state is abusing its position as a sovereign. Wälde states:

[T]he umbrella clause was originally intended to clarify that contractual rights were protected—as a subcategory of expropriation—against governmental interference; that expropriation covered contractual rights was in the 1950s disputed so that the clause reflects the legal controversies then prevailing. The consequence of taking that 'original intention' seriously, in particular after the 'filter' of government sponsorship of claim disappeared in modern investment treaties, is that I—and most tribunals—consider that even literally very wide 'respect of commitment' or umbrella clauses does [sic] not 'elevate normal commercial disputes to the level of the treaty' and its arbitral jurisdiction, but only captures cases where the State abuses its dual role as regulator and contract party.<sup>290</sup>

Similar qualifications have, however, received opposition in practice and scholarship. According to the ICSID Tribunal in *SGS v Paraguay* (2012), since one can logically characterize every act by a sovereign state as a 'sovereign act', and '[i]t is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible'.<sup>291</sup> Also Crawford notes with persuasion the practical difficulties involved in characterizing breaches in terms of 'significant interference by governments or public agencies with the rights of the investor':<sup>292</sup>

<sup>287</sup> M.C.G. Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 490, 495.

<sup>288</sup> Salias, fn 287.

<sup>289</sup> T. Begić Šarkinović, 'Umbrella Clauses and their Policy Implications' (2011) 24 *Hague Y.B. Int'l L.* 313. Cf. S.W. Schill, 'Enabling Private Ordering—Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18 *Minn. J. Int'l L.* 1, 70.

<sup>290</sup> T.W. Wälde, 'The Specific Nature of Investment Arbitration' in *New Aspects of International Investment Law* (P. Kahn and T.W. Wälde, eds, Leiden, Nijhoff, 2007), 43, 111. See also Wälde, 'The Umbrella (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases', TDM 1(4) (2004), 85; G. van Harten, 'The Public–Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56(2) *Int'l Comp. L.Q.* 371, 392; *Sempre Energy International v Argentine Republic*, ICSID Case No. ARB/0/16, Award, 28 September 2007 (F.O. Vicuña, M. Lalonde, S.M. Rico, arbs), para. 310 ('[O]rdinary commercial breaches of a contract are not the same as Treaty breaches. [...] Such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause').

<sup>291</sup> *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012 (S.A. Alexandrov, D.F. Donovan, P.G. Mexía, arbs), para. 72 (referring to its Decision on Jurisdiction, at para. 135). See also *Duke Energy v Ecuador*, fn. 274, Award, at para. 320; *Siemens v Argentina*, fn. 273, Award, at para. 206.

<sup>292</sup> *CMS Gas Transmission Company v Argentina*, fn. 138, Award, at para. 299 ('Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights

There are two obvious responses to this. The first is that it does not provide a reliable or even a determinate test for determining whether a tribunal has jurisdiction. Instead it calls for an appreciation of the character of or motive for the breach which in most cases would require a hearing on the merits. The second response is that it would be very odd indeed if a State could defend itself against a claim for repudiation of an investment agreement by arguing that it was acting for commercial reasons.<sup>293</sup>

Secondly, tribunals should construe the rights and obligations of the parties in accordance with the proper law of the source of the obligation, most likely the national law of the host state.<sup>294</sup> Hence, the ICSID Tribunal in *SGS v Philippines* (2004) correctly noted that the ‘umbrella’ clause at issue does not convert investment contracts into treaties by way of ‘instant transubstantiation’;<sup>295</sup> and, in particular, it does not change the proper law of the investment contract from the law of the Philippines to international law.<sup>296</sup> Stated differently, the ‘umbrella’ clause does not address ‘the scope of the commitments entered into with regard to the specific investments but the performance of these obligations, once they are ascertained’.<sup>297</sup> In similar language, ICSID ad hoc committee in *CMS Gas Transmission Company v Argentine Republic* (2007) held:

In speaking of ‘any obligations it may have entered into with regard to investments’, it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). [...] The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law.<sup>298</sup>

Next to scholarship,<sup>299</sup> also the award and the decision on annulment in *MTD Equity* (2004/07) support this interpretation.<sup>300</sup> The claimants argued that because a breach of the foreign investment contracts was internationalized by reason of the ‘umbrella’ clause in the BIT at hand, the contracts themselves were governed by international law.<sup>301</sup> The ICSID Tribunal rejected this argument: ‘The Tribunal has to apply the BIT. The breach of the BIT is governed by international law. However, to establish the facts of the breach, it will be necessary to consider the contractual obligations

of the investor’). See also *El Paso v Argentina*, fn. 268, Decision on Jurisdiction, at paras 77 *et seq.*; *BP America Production Co. v Argentina*, fn. 271, Decision on Preliminary Objections, at paras 93–115.

<sup>293</sup> Crawford, fn. 270, at 368. See also Miles, fn. 285, at 13–14; Ben Hamida, fn. 285, at para. 13; Sasson, fn. 223, at 193–4.

<sup>294</sup> This national law will, through the application of the center of gravity test, normally be that of the host State. Cf. Gill et al., fn. 266, at 407. See also Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law). It is noted that the fact that the rights and obligations of the investor are construed according to national law may facilitate the bringing of a counterclaim by the host State. See Chapter 4, Section 4 (on counterclaims by host states).

<sup>295</sup> *SGS v Philippines*, fn. 273, Decision on Jurisdiction, at para. 126 (referring to *SGS v Pakistan*, fn. 269, Decision on Jurisdiction, at para. 172).

<sup>296</sup> *SGS v Philippines*, at para. 126.

<sup>297</sup> *SGS v Philippines*, at para. 126.

<sup>298</sup> *CMS Gas Transmission Company v Argentina*, fn. 286, Decision on Annulment, at para. 95.

<sup>299</sup> See, e.g., Crawford, fn. 270, at 370; Ben Hamida, fn. 285, at para. 63; ‘Where’s My Umbrella? A Look Inside the Umbrella Clause: Panel Discussion’ in *Investment Treaty Arbitration and International Law* (T. Weiler, ed., Huntington, NY, JurisNet, 2008), 39, 42 (observation by Ms Halonen); Sasson, fn. 223, at 194; Mayer, fn. 15, at 36. But see V. Zolia, ‘Effect and Purpose of “Umbrella Clauses” in Bilateral Investment Treaties: Unresolved Issues’, TDM (2(5)) (2005), 42 *et seq.* ([S]ome have argued that the existence and extent of commitments should be determined according to the national system of law in which they were taken. In our view, this proposition suffers from at least three major flaws [...]’ [references omitted]).

<sup>300</sup> *MTD Equity v Chile*, fn. 146, Award, at para. 187.

<sup>301</sup> *MTD Equity v Chile*, Decision on Annulment, at para. 73.

undertaken by the Respondent and the Claimants and what their scope was under Chilean law.<sup>302</sup> A more recent example of an award in which the tribunal found a need to consider national law when assessing an ‘umbrella’ clause claim is *Marion Unglaube v Costa Rica* (2012).<sup>303</sup> According to the tribunal, the failure of the Costa Rican National Environmental Office to process the investor’s environmental assessment did not constitute a breach of the parties’ agreement on two grounds:

[...] first, because of the conditionality of the commitment and the intervening ruling of the Supreme Court; and second, because, as correctly argued by Respondent, the legality of actions of Respondent are a matter which must be resolved under the laws of Costa Rica. Here, Claimants have not established by persuasive evidence that—as a matter of Costa Rican law—Respondent or its agents acted in breach of the Road Map Agreement. Without having established such a breach, Claimants cannot succeed in establishing a violation of the Treaty obligation to ‘observe any other obligation it has assumed with regard to investments by nationals or companies of the other contracting party.’<sup>304</sup>

Would the contract appear to have been violated, though, this would mean a violation of the ‘umbrella’ clause as well,<sup>305</sup> and the investor accordingly has an international remedy. Thus, the third step to be taken is for tribunals to apply rules of state responsibility and to grant the investor a remedy pursuant to international law.<sup>306</sup> This need to differentiate between the law applicable to contractual or property rights and the law applicable to determine state responsibility at the international level has long been recognized:

The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent government is determined solely by international law.<sup>307</sup>

In sum, whereas the investor derives an international cause of action from the host state’s treaty obligation to respect commitments, the precise meaning of these commitments must be analysed pursuant to their proper law, generally national law. One may wish to note that according to the tribunal in *El Paso v Argentina* (2006), the necessary interplay between national and international law created by ‘umbrella’ clauses was in

<sup>302</sup> *MTD Equity v Chile*, Decision on Annulment, at para. 73. See also Award, fn. 146, at para. 187.

<sup>303</sup> *Marion Unglaube & Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012 (J. Kessler, F. Berman, B. Cremades, arbs), para. 191.

<sup>304</sup> *Unglaube v Costa Rica*, at para. 190 (referring to article 7(2) of the Germany–Costa Rica BIT). See also *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (P. Bernardini, A.W. Rovine, Y. Derains, arbs), ICSID Case No. ARB/05/13, para. 319; *Fedax v Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998 (F.O. Vicuña, M. Heth, R.B. Owen, arbs), para. 30; *Eureko v Poland*, fn. 271, Partial Award, J. Rajski, Dissenting Opinion, at para. 5.

<sup>305</sup> See UNCTAD, *State Contracts*, fn. 275, at 10; I.F.I. Shihata, ‘Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties’ in *II The World Bank in a Changing World* (Dordrecht, Nijhoff, 1995), 595.

<sup>306</sup> See A. Sinclair, ‘Bridging the Contract/Treaty Divide’ in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (C. Binder et al., eds, Oxford, Oxford University Press, 2009), 103. Cf. *MTD Equity v Chile*, fn. 146, Decision on Annulment, at para. 72. Cf. Douglas, fn. 144, at 94 (Rule 12).

<sup>307</sup> *Cook v Mexico*, Opinions of Commissioners (1927), 321, Docket No. 663, cited in J.H. Ralston, Supplement to 1926 Revised Edition of *The Law and Procedure of International Tribunals* (Stanford, CA, Stanford University Press, 1936), 49.

fact one of the reasons for *not* construing ‘umbrella’ clauses so as to create an independent cause of action for the investor.<sup>308</sup> In its view, a broad interpretation of the clause at hand would be ‘quite destructive of the distinction between national legal orders and the international legal order’.<sup>309</sup> A more moderate, and better, interpretation of the effects of ‘umbrella’ clauses on the relationship between the legal orders is offered by the ICSID Tribunal in *Noble Ventures, Inc. v Romania* (2005):

[I]nasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.<sup>310</sup>

According to the tribunal, when states include in a BIT a provision to the effect that the host state may incur international responsibility by reason of a breach of its contractual obligations toward the private investor of the other party, the breach of the contract is ‘internationalized’, i.e., assimilated to a breach of the treaty.<sup>311</sup> As such, it concludes, ‘an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law’.<sup>312</sup> This conclusion receives support in the observation by Dolzer and Schreuer that originally, ‘[u]mbrella clauses were seen as a bridge between private contractual arrangements, the domestic law of the host state, and public international law’.<sup>313</sup>

### 3.1.3. National provisions as facts or law

As concerns expropriation and ‘umbrella’ clauses, it could be argued that what is at issue is not a true application of national law, but that it is rather an example of the longstanding practice of international courts and tribunals to refer to national law as facts or evidence for the merits of the international claim. Such practice is illustrated by *Certain German Interests in Polish Upper Silesia* (1926), in which the Permanent Court of International Justice observed:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14<sup>th</sup>, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.<sup>314</sup>

<sup>308</sup> *El Paso v Argentina*, fn. 268, Decision on Jurisdiction, at para. 70.

<sup>309</sup> *El Paso v Argentina*, at para. 82.

<sup>310</sup> *Noble Ventures v Romania*, fn. 273, Award, at para. 53.

<sup>311</sup> *Noble Ventures v Romania*, at para. 53.

<sup>312</sup> *Noble Ventures v Romania*, at para. 55.

<sup>313</sup> Dolzer and Schreuer, fn. 16, at 155. See also at 155 (‘The conventional understanding of the clause is reflected in *Noble Ventures v Romania*’ [references omitted]).

<sup>314</sup> *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Judgment, 25 May 1926, PCIJ Ser. A No. 7, at 19. See also *Nottebohm (Liechtenstein v Guatemala)*, Judgment, 6 April 1955, 1955 ICJ 4, Dissenting Opinion of Judge Read, 36; *M.5.1. India–Patents (US)*, WT/

National law has been treated as a factual matter in several of the aforementioned awards concerning expropriation.<sup>315</sup> After having relied on national law as a necessary part of its analysis, the tribunal in *Nykomb Synergistics Technology Holding AB v Latvia* (2003) went on to emphasize that such references to national law did not constitute an application of national law as such: ‘The situation thus documented are facts interpreted by the Latvian courts concerning the Latvian legal situation that can be taken into regard by this Tribunal, without any need for the Tribunal to embark on any interpretation or application of Latvian national law on its own.’<sup>316</sup>

Likewise, in referring to Mexican law, the tribunal in *International Thunderbird Gaming Corporation* (2006) made it clear that its role was not to determine whether the machines were prohibited gambling equipment under the *Ley Federal de Juegos y Sorteos*.<sup>317</sup> It continued by observing that ‘[i]t is not the Tribunal’s function to act as a court of appeal or review in relation to the Mexican judicial system regarding the subject matter of the present claims, or in relation to the SEGOB administrative proceedings for that matter’.<sup>318</sup> Rather, stated the tribunal, it ‘shall examine whether the conduct of Mexico and the measures employed by [the Mexican authorities] in relation to the [gambling] entities were consistent with Mexico’s obligations under Chapter Eleven of the Nafta’.<sup>319</sup> In assessing whether the Mexican regulatory and administrative conduct had breached the NAFTA, it pointed out that ‘[t]he perspective is of an international law obligation examining national conduct as a “fact”’.<sup>320</sup> The perception of national law as ‘facts’ from the viewpoint of international law was also noted by the ICSID Tribunal in *Noble Ventures, Inc. v Romania* (2005).<sup>321</sup> In its view, the rule that a breach of a contract by a state does not generally give rise to direct international responsibility on the part of that state, ‘derives from the clear distinction between municipal law on the one hand and international law on the other [...], two separate legal systems (or orders) the second of which treats the rules contained in the first as facts’.<sup>322</sup>

It is true that in many cases, national provisions should be classified as a factual matter. For instance, in a case where the investor alleges that they have been discriminatorily

DS50/AB/R, 16 January 1998, paras 65–67; K. Lipstein, ‘The Hague Conventions on Private International Law, Public Law and Public Policy’ (1959) 8(3) *Int’l & Comp. L. Quart.* 506, 522; C. Santulli, *Le statut international de l’ordre juridique étatique* (Paris, Pedone, 2001), 258. But see S. Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge, Cambridge University Press, 2007), 207 *et seq.* (Bhuiyan critically discusses the notion of national law as a question of fact).

<sup>315</sup> See Section 3.1.1 (on the prohibition against expropriation without compensation). Cf. M.N. Kinnear, ‘Treaties as Agreements to Arbitrate: International Law as the Governing Law’ in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Volume 13, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 401, 421.

<sup>316</sup> *Nykomb Synergistics Technology Holding AB v Latvia*, Award, 16 December 2003 (B. Haug, R.A. Schütze, J. Gernandt, arbs), para. 3.7. See also Opinion of O. Bring and R. Happ, August 2003, at para. 5.

<sup>317</sup> *Thunderbird v Mexico*, fn. 85, Award, at para. 125.

<sup>318</sup> *Thunderbird v Mexico*, Cf. *Case Concerning LaGrand*, fn. 100, at para. 52.

<sup>319</sup> *Thunderbird v Mexico*, at para. 126.

<sup>320</sup> *Thunderbird v Mexico*, at para. 127 (emphasis added). See also *Petrobart v Kyrgyz Republic*, fn. 87, Award, at 23.

<sup>321</sup> *Noble Ventures v Romania*, fn. 273, Award.

<sup>322</sup> *Noble Ventures v Romania*, at para. 53 (referring to ILC Articles on State Responsibility, art. 3 (2001)). See also *Alpha*, fn. 152, Award, at paras 232–233; T.W. Wälde, ‘Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues’ in *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (N. Horn, ed., The Hague, Kluwer Law International, 2003), 193, 215; Spiermann, fn. 9, at 110 *et seq.*

treated in contravention of the investment treaty, the arbitral tribunal may need to examine a national law arguably giving rise to such discrimination.<sup>323</sup> In that case, the national law is solely considered—as facts—from the viewpoint of international law; and whereas the tribunal may need to interpret the national law, it does not apply it as such. As stated in the Commentary to the now shelved<sup>324</sup> Norwegian Draft Model Investment Agreement: while investors may only bring claims based on substantive provisions set forth in the Agreement, and that therefore '[t]he Arbitral Tribunal cannot judge on the basis of violations of national law [...], national law constitutes evidence for the Arbitration Tribunal, which must consider whether national law is contrary to the agreement as such or as applied in the current case'.<sup>325</sup>

In the case of expropriation and ‘umbrella’ clauses, however, the tribunal may need to look to national law in order to determine the *rights* and *obligations* of the parties pursuant to the property or contract, respectively.<sup>326</sup> In such cases, the better perspective is to consider national law as being truly *applied* to the merits, albeit indirectly as part of the determination of the international claim. As Lachs, former judge at the International Court of Justice, observes: in the context of diplomatic protection, ‘the Court accepts the relevant municipal laws and contractual stipulations as facts in the case. Nevertheless, it may not be able to avoid constituting and applying them *as law* in reaching its decision.’<sup>327</sup>

Importantly, this conclusion has also received acceptance in the area of investment arbitration. For example, in *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic* (2007), the claimants asserted that ‘domestic law is relevant primarily to factual matters only, such as the nature of the assurances made to the Claimants’.<sup>328</sup> The host state disagreed: ‘domestic law is not confined to factual matters but has a substantive role in defining the rights of the investor, particularly when property rights are involved in the dispute; these rights are not defined by international law but by the local law to which the investor has voluntarily submitted.’<sup>329</sup> The ICSID Tribunal held:

The Respondent is right in arguing that domestic law is not confined to the determination of factual questions. It has indeed a broader role, as it is evident in this very case from the pleadings

<sup>323</sup> See, e.g., *MTD Equity v Chile*, fn. 146, Award, at para. 197 (“This claim is based on the Croatia BIT by way of the MFN clause of the BIT. Article 3(2) of the Croatia BIT reads as follows: “When a Contracting Party has admitted an investment in its territory, it shall grant the necessary permits in accordance with its laws and regulations.” [...]”); see also at para. 204 (“To establish the facts of the breach, it may be necessary to take into account municipal law. In the instant case, the Tribunal will need to establish first whether the Respondent’s failure to modify the PMRS to the benefit of the Claimants was in accordance with its own laws”).

<sup>324</sup> See D. Vis-Dunbar, ‘Norway Shelves its Draft Model Bilateral Investment Treaty’, *Investment Treaty News* (8 June 2009).

<sup>325</sup> Norwegian Draft Model Investment Agreement, Comments on the Model for Future Investment Agreements, at para. 4.3.2. See also at para. 4.3.2: (‘It will be necessary to *interpret the provisions of the agreement* and it will be necessary to consider *the underlying legal situation*. In this situation, both other international law (outside the agreements) and national law may be relevant’ [emphasis in original]).

<sup>326</sup> Cf. C.W. Jenks, *Prospects of International Adjudication* (London, Stevens, 1964), 554, 603; C. McLachlan et al., *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007), 69–70.

<sup>327</sup> M. Lachs, ‘Arbitration and International Adjudication’ in *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1988–1987)* (A.H.A. Soons, ed., Dordrecht, Martinus Nijhoff, 1990), 50 [emphasis in original]).

<sup>328</sup> *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (F. Orrego-Vicuña, A.J. van den Berg, P.-Y. Tschanz, arbs), para. 203.

<sup>329</sup> *Enron v Argentina*, at para. 204.

and arguments of the parties that have relied heavily on the Gas Law and generally the regulatory framework of the gas industry, just as they have relied on many other rules of the Argentine legal system, including the Constitution, the Civil Code, specialized legislation and the decisions of courts. The License itself is governed by the legal order of the Argentine Republic and it must be interpreted in its light.<sup>330</sup>

The award in *Total SA v Argentina* (2010) is also illustrative.<sup>331</sup> When considering the role of Argentina's domestic law in determining the content and the extent of the investor's economic rights as they existed in Argentina's legal system, the ICSID Tribunal rejected the view that Argentinian law was only relevant as 'factual evidence' in the sense suggested by the claimant:

In this regard the Tribunal believes that Argentine law has a broader role than that of just determining factual matters. The content and the scope of Total's economic rights (in Total's words, 'Argentina's commitments to Total') must be determined by the Tribunal in light of Argentina's legal principles and provisions. Moreover, the extensive reliance by the Claimant on Argentina's acts of a legislative and administrative nature governing the gas, electricity and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, is a recognition that Argentina's domestic law plays a prominent role.<sup>332</sup>

The elevated role of national law is also supported in scholarship. Alvik states: 'merely to consider municipal law as facts' in a case where the tribunal must determine whether a violation of contractual promises constitutes an illegal expropriation of the investor's rights, 'would disregard the proactive and independent function required of tribunals in relation to the real legal issues often, or even usually, at stake in an investment dispute'.<sup>333</sup> We share this view, which is also phrased as follows by Jenks:

If, for instance, it is necessary to determine the nature or extent of a property which is the subject of international proceedings [...], the municipal law of one of the parties to the proceedings or of some other State may be relevant and indeed decisive. It is neither necessary nor desirable to describe municipal law when so applied as 'a fact'. It is applied as the proper law of the particular transaction in virtue of international law; as such it constitutes a part of the law applied by international courts and tribunals and an essential element in the promotion of the rule of law in world affairs.<sup>334</sup>

A final comment should be made in this respect, and it relates to the situation where the national law in question violates international law. Due to the fact that the underlying

<sup>330</sup> *Enron v Argentina*, at para. 206. See also *Sempra Energy v Argentina*, fn. 290, Award, at para. 235; *National Grid v Argentina*, fn. 237, Award, at para. 83; *MTD Equity v Chile*, fn. 146, Decision on Annulment, at para. 47. But see *Azurix Corp. v Argentine Republic*, fn. 149, Decision on Annulment, at para. 151 ('[E]ven in this situation, municipal law would not thereby become part of the applicable law under Article 42 of the ICSID Convention for purposes of determining whether there was a breach of Article II.2(c) of the BIT. Rather, any breach of municipal law that might be established would be a fact or element to which the terms of the BIT and international law would be applied in order to determine whether there was a breach of [the "umbrella" clause]').

<sup>331</sup> *Total S.A. v Argentina*, Decision on Liability, 21 December 2010, ICSID Case No ARB/04/1, IIC 484 (2010) (G. Sacerdoti, H.C. Alvarez, L.H. Marcano, arbs).

<sup>332</sup> *Total S.A. v Argentina*, at para. 39 (references omitted).

<sup>333</sup> I. Alvik, 'The Hybrid Nature of Investment Treaty Arbitration: Straddling the National/International Divide' in *The New International Law: An Anthology* (C.C. Eriksen and M. Emberland, eds, Leiden, Nijhoff, 2010), 91, 96. See also at 96–7.

<sup>334</sup> Jenks, fn. 326, at 603. See also Nollkaemper, fn. 208, at 253; Ben Hamida, fn. 285, at para. 65. But see Sacerdoti, fn. 153, at 52 ('[D]omestic law [...] is considered as a fact from the point of view of international law, when the latter has to be applied in order to evaluate the lawfulness or unlawfulness of State conduct under international law'); and see also at 66.

claim is based on international law, the question arises whether in such a case the tribunal should disregard the relevant national provision. A positive answer finds support in the following statement by the ICSID Tribunal in *Duke Energy International v Peru* (2006): '[E]ven if the law of Peru were held to apply to the interpretation of the [investment agreement], this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law.'<sup>335</sup> We also note the objection made by Judge Mosk in his dissenting opinion in *Catherine Etezadi v Iran* (1994).<sup>336</sup> In that case, the Iran–United States Claims Tribunal found that the claimant had failed to prove her ownership in certain property, and accordingly, it dismissed her claim for expropriation.<sup>337</sup> According to Judge Mosk, the Iranian law, as applied by the tribunal, was discriminatory vis-à-vis women:

The majority opinion basically relegates the role of the wife to an inferior position before this Tribunal, for under that opinion, unlike other claimants, she cannot obtain enforceable, beneficial rights by contracting with her husband, and her own property rights vis-à-vis third parties are necessarily dependent on her husband's rights. Although theoretically the majority's opinion would apply if it were an Iranian wife who had the pension and the American husband who claimed as the beneficial owner, in reality such a situation is highly unlikely. Under Iranian law, an Iranian Moslem woman cannot marry a non-Moslem. Civil code of Iran, art. 1059. Moreover, an Iranian woman cannot marry a foreign national without government permission. Id., art. 1060. There are no such requirements imposed upon Iranian males. Iranian nationality is only imposed on a non-Iranian wife, not on a non-Iranian husband. Id., art. 976(6). Thus, the situation presented in the instant case generally would arise so as to detrimentally affect a woman, but not a man.<sup>338</sup>

To Mosk, therefore, her claim for expropriation should be upheld: 'This Tribunal should not place its imprimatur on a result [...] so unjust and so contrary to the rights of women.'<sup>339</sup>

In our opinion, the otherwise applicable national law should be set aside in favour of international law when the international norm in question is of a fundamental nature. This is consistent with the conclusion reached in Chapter 5 concerning the corrective role of international law.<sup>340</sup> It is indeed possible that an award that gives effect to a gender discriminatory property law could be seen to be contrary to the international public policy of several states, including those parties to the European Convention on Human Rights and Fundamental Freedoms.<sup>341</sup> On this basis, the award might either

<sup>335</sup> *Duke Energy v Peru*, fn. 140, Decision on Jurisdiction, 1 February 2006 (G.S. Tawil, P. Nikken, L.Y. Fortier, arbs), at para. 162.

<sup>336</sup> *Catherine Etezadi v Iran*, fn. 258, Award, Dissenting Opinion by Judge E.M. Mosk, at para. 53.

<sup>337</sup> *Etezadi v Iran*, Award, at para. 78.

<sup>338</sup> *Etezadi v Iran*, Dissenting Opinion, Judge E.M. Mosk.

<sup>339</sup> *Etezadi v Iran*, Dissenting Opinion, Judge E.M. Mosk. See also Spiermann, fn. 9, at 114 ('National law will be irrelevant to the extent in conflict with public international law, including the principle *pacta sunt servanda*'); Alvik, fn. 11, at 176–7, 190–1; Sasson, fn. 223, at 201; *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction and Partial Dissenting Opinion, 11 April 2007, para. 195; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London, Routledge, 1997), 64.

<sup>340</sup> See Chapter 5, Section 3.2.2.1 (the parties have agreed to the sole application of national law).

<sup>341</sup> Gender discrimination is prohibited in both national and international law. For an exposé of national and international instruments, see FAO, *Law and Sustainable Development Since Rio: Legal Trends in Agriculture and Natural Resource Management*, at Chapter 9 (Gender), available at <<http://www.fao.org/DOCREP/005/Y3872E/y3872e0a.htm>> (last visited 1 May 2012).

be annulled by a court of the tribunal's juridical seat,<sup>342</sup> or it might be denied enforcement by a third state.<sup>343</sup>

It is also reasonable that the tribunal set up pursuant to an investment treaty would leave aside the relevant national norm in case it is contrary to that very treaty.<sup>344</sup> In such a case, Sasson suggests that the tribunal should rather 'refer to a number of municipal law sources'.<sup>345</sup> Her method, which strikes the right balance between the host state's right to require compliance with its national law, on the one hand, and its obligations under international law, on the other, is as follows: the Morelli (and *Diallo*) approach of referring to a specific national legal order 'runs the risk of submitting the characterization of international law to the municipal law of the host State'.<sup>346</sup> Yet, 'the comparative approach suggested by the ICJ in *Barcelona Traction* runs the risk of importing more vagueness and uncertainty, since it is difficult to find uniformity between the various municipal legal systems'.<sup>347</sup> To Sasson, therefore:

If the application of municipal law affects the international characterization of the disputed act, the municipal law of the host State should be disregarded and reliance should instead be placed on the 'municipal legal system' identified by the ICJ in *Barcelona Traction*. Accordingly, the *renvoi* should not necessarily terminate with the application of the host State's municipal law, but it should not commence by looking to municipal legal systems.<sup>348</sup>

### **3.2. The corrective application of national law**

National law can also play a corrective role vis-à-vis international law. This may occur when international law contains lacunae (**Section 3.2.1**) or the international norm in question conflicts with a fundamental national norm (**Section 3.2.2**).

#### *3.2.1. The complementary role of national law*

International law may not provide answers to specific issues presented to the arbitral tribunal.<sup>349</sup> It has been suggested that in such situations, where international law

<sup>342</sup> See Chapter 2, Section 3.2.1.2 (on annulment as an exercise of control); Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>343</sup> See Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>344</sup> Sasson, fn. 223, at 197.

<sup>345</sup> Sasson, at 197.

<sup>346</sup> Sasson, at 202 (referring to *Barcelona Traction*, fn. 234, Morelli, J., Separate Opinion, at 234–5); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment [2007] ICJ Rep. (II), p. 582).

<sup>347</sup> Sasson, at 202, (referring to *Barcelona Traction*, fn. 225, Judgment).

<sup>348</sup> Sasson, at 202.

<sup>349</sup> Cf. M.J. Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law' (1999) 48 *Int'l & Comp. L. Quart.* 3, 18 ('International law is an incomplete legal order, with gaps in those areas which international regulation has not yet reached'). See also Section 2.1.1 (express or implied 'internationalization' of investment contracts). But see M.G. Kohen, 'L'avis consultatif de la CIJ sur la Licéité de la menace ou de l'emploi d'armes nucléaires et la fonction judiciaire' (1997) 8(2) *Eur. J. Int'l L.* 336, 345 ('C'est une banalité de dire que le droit international—comme n'importe quel autre système juridique—ne comporte pas des règles particulières pour régir chacune des circonstances infinies qui peuvent se présenter dans les relations entre ses sujets. Les règles juridiques sont censées être construites de manière abstraite et il s'agira tout simplement de classifier un fait, acte ou situation dans telle catégorie juridique ou telle autre. C'est là en fait l'"art" de la fonction juridictionnelle. En bref, ce qui n'est pas explicitement prohibé par une règle spécifique peut l'être en fonction d'autres règles plus générales, applicable à la situation en cause'). [It is commonplace to say that international law—like any other legal system—has no specific rules governing each of the infinite number of circumstances that may arise in the relationship between its subjects. Legal rules are supposed

primarily governs the dispute, tribunals may have recourse to the law of the host state in a complementary, or ‘gap-filling’, manner.<sup>350</sup> It might be said that by using national law to complement international law, the incomplete nature of the international legal order is thereby ‘corrected’. It is submitted, however, that where the parties have agreed to the sole application of international law, a tribunal would not be authorized to create new causes of action from national law. Rather, a more appropriate method would be for the tribunal to seek to distil a general principle of law.<sup>351</sup> A different conclusion would be contrary to the principle of party autonomy.<sup>352</sup>

National law could, however, fulfil a complementary role with respect to ancillary questions of law. This possibility is illustrated by the award *SwemBalt AB v Latvia* (2000). When deciding the amount of compensation to which the Swedish investor would be entitled, the UNCITRAL Tribunal held: ‘Under international law there are no rules with regard to the rate of interest to be paid. Therefore it is necessary to find references under national law.’<sup>353</sup> Relying on principles of general private international law, the tribunal decided to apply the law of the seat, Denmark, as the link with Sweden was not sufficiently strong, and because the parties had not provided the arbitrators with information on relevant Latvian law.<sup>354</sup> Similarly, the SCC Tribunal in *Eastern Sugar B.V. v Czech Republic* (2007) concluded that it could apply Czech law where international law was silent.<sup>355</sup> Thus, while applying international law to the question whether the Czech Republic had violated the investment treaty at hand, the tribunal held with respect to damages that [t]he Arbitral Tribunal believes that it should apply the statutory interest provided by the applicable law, which is Czech law, which on this point does not conflict with International Law.<sup>356</sup>

We finally note that the application of national law to issues of compensation may be explicitly stipulated in the applicable investment treaty. As the ICSID Tribunal remarked in *ADC Affiliate Limited, ADC & ADMC Management Limited v Republic*

to be built in the abstract and it is simply a question of classifying a fact, an act or a situation as falling into one legal category or another. This is in fact precisely the ‘art’ of the juridical function. In short, what is not explicitly prohibited by a specific rule can be so on the basis of other more general rules applicable to the situation in question.]

<sup>350</sup> See Igbokwee, fn. 144, at 285–7.

<sup>351</sup> See Igbokwee, at 285–7. See also Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-1, at p. 419 (hereinafter History of the ICSID Convention) (the representative from Italy stated that ‘traditional international law could be supplemented by general principles of the law of obligations recognized by the laws of the Contracting States. That would give greater protection both to the host State and the investor’).

<sup>352</sup> See Chapter 3, Section 3.1 (on party agreement on the applicable law); Chapter 5, Section 3.2.1 (on the complementary function of international law).

<sup>353</sup> *SwemBalt AB v Latvia*, Award, 23 October 2000 (K. Hofer, G. Moller, A. Philip, arbs), para. 46.

<sup>354</sup> *SwemBalt*, at para. 46. But see N. Rubins, *Swembalt AB v Republic of Latvia*, Stockholm Arb. Rep. 126 (2004:2); Rubins, *Swembalt v Latvia: Introduction and the Dilemma of Default*, Stockholm Arb. Rep. 121-2 (2004:2); F. Yala, *Swembalt v Latvia: The Notion of Investment and Attribution of State Responsibility under a BIT*, Stockholm Arb. Rep. 128 (2004:2).

<sup>355</sup> *Eastern Sugar v Czech Republic*, fn. 166, Partial Award, at paras 196, 373. See also Section 2.2 (on the international nature of the claim).

<sup>356</sup> *Eastern Sugar v Czech Republic*, fn. 166, Partial Award, at para. 373. Cf. *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, 3 ICSID Rep. 189, 241–4 (1995). See also *Jan Oostergel and Theodora Laurentius v Slovak Republic*, Final Award, 23 April 2012 (G. Kaufmann-Kohler, M. Wladimiroff, V. Trapl, arbs), para. 140 ('Whenever the BIT is silent on an issue, the Tribunal will resort to either municipal or international law depending on the nature of the issue in question'); *AAPL v Sri Lanka*, fn. 91, Award, at paras 21–22; *LG&E v Argentina*, fn. 147, Decision on Liability, at para. 97.

of Hungary (2006): ‘Article 4(3) of the BIT [...] provides: “The amount of this compensation [for expropriation] may be estimated according to the laws and regulations of the country where the expropriation is made.” In the present case, that law is Hungarian law.<sup>357</sup> Yet, after quoting from the relevant provision in the Hungarian Constitution in this respect, the tribunal went on to apply the default standard contained in customary international law.<sup>358</sup>

### *3.2.2. The supervening role of national law*

In view of the power of national courts to annul and refuse recognition and enforcement of awards,<sup>359</sup> territorialized tribunals are advised to consider the international public policy of various states. This international public policy, we recall, is domestic public policy applied to (foreign) arbitral awards and its content and application remain subjective to each state.<sup>360</sup> Of prime importance is the international public policy of the juridical seat, as disregard for it may lead to annulment by the national courts of that state.<sup>361</sup> Also implicated are the international public policy norms of the state in which enforcement is sought, since a conflict with these norms constitutes a possible ground for non-recognition and enforcement of the award.<sup>362</sup> In *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth* (1985), the US Supreme Court noted: ‘the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the [US] antitrust laws has been addressed.<sup>363</sup> And, as a Canadian court stated in a case concerning the constitutionality of the NAFTA: ‘It could be argued that a NAFTA tribunal should consider the [Canadian] Charter [of Rights and Freedoms] in a particular case.’<sup>364</sup>

With respect to internationalized tribunals, the international public policy of their seat and the state in which enforcement is sought are in principle not relevant.<sup>365</sup> Still, the possibility does exist—not only in theory—that a national court may annul or deny enforcement of an award on the basis that it conflicts with the national constitution, even where such a decision has the potential to run counter to its international obligations.<sup>366</sup> More hypothetically, a state’s international public policy could play a

<sup>357</sup> *ADC v Hungary*, fn. 89, Award, at para. 292.

<sup>358</sup> *ADC v Hungary*, at paras 482 *et seq.*

<sup>359</sup> See Chapter 2, Section 3.2.1.2 (on annulment as an exercise of control); Chapter 3, Section 3.3 (on fundamental national and international norms).

<sup>360</sup> See Chapter 2, Section 3.2.1.2 and Chapter 3, Section 3.3.

<sup>361</sup> See Chapter 2, Section 3.2.1.2 and Chapter 3, Section 3.3.

<sup>362</sup> See Chapter 2, Section 3.2.1.2 and Chapter 3, Section 3.3.

<sup>363</sup> *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, 473 U.S. 614, 638 (U.S., 1985). See also at 635 (noting that a ‘claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy’). Cf. Discussion of *Eco Swiss*, Chapter 5, Section 3.2.2.1 (the parties have agreed to the sole application of national law).

<sup>364</sup> See *Council of Canadians et al v Attorney General of Canada*, Ontario Superior Court of Justice, 8 July 2005, para. 64.

<sup>365</sup> See F.A. Mann, ‘State Contracts and International Arbitration’ (1967) 42 *Brit. Y.B. Int’l L.* 1, 2. Cf. *Reineccius v Bank for International Settlements*, Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares, PCA, 22 November 2002, at para. 124.

<sup>366</sup> See Chapter 5, Section 3.1.1 (on international law as part of the ‘law of the land’). Cf. E. de Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law’ (2004) 15 *Eur. J. Int’l L.* 97, 104; E. Baldwin et al., ‘Limits to Enforcement of ICSID Awards’ (2006) 23(1) *J. Int’l Arb.* 1, 2. But see History of the ICSID Convention, fn. 351, Vol. II, Part 2, at p. 989 (in the case of investments, Mr Broches ‘could not imagine how a decision that a party owed to the other party a certain sum of money could have

role for internationalized tribunals in case the award is rendered<sup>367</sup> or likely to be enforced, in a state not party to the specific treaty regime establishing the tribunal.

Further, it has been argued that both territorialized and internationalized tribunals ought to observe the international public policy of the state most closely connected to the dispute, in our case, the host state.<sup>368</sup> First, mandatory rules of an administrative and regulatory nature are said to be inherently reserved for the host state and not to be subject to contractual waiver.<sup>369</sup> Secondly and relatedly, respect for fundamental norms will better preserve arbitration as an instrument for settling investment disputes, as it is more likely to continue to be supported by host states.<sup>370</sup> These concerns might have prompted the following statement by sole Arbitrator Moss in *Jurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova* (2005):

To evaluate the pleadings presented by the Claimant, the Arbitral Tribunal applies the BIT and the law of the Republic of Moldova. The law of the Republic of Moldova is applicable on the basis of the BIT, is pleaded by the Claimant and is considered applicable by the Arbitral Tribunal on the basis of the choice of law rule contained in article 24 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (*it being the law of the host country of the investment and mandatorily applicable to questions regarding the privatization of state assets*).<sup>371</sup>

In a subsequent article, Moss emphasizes the important role that public policy rules, including mandatory rules of law, play in arbitration proceedings.<sup>372</sup> At the same time,

anything to do with *ordre public*. The [...] Convention provided remedies for attacking the award but once those remedies had been exhausted there ought to be an end to litigation, the parties should be under an obligation to carry out the award and the courts of the Contracting States should be under an obligation to enforce the award'.

<sup>367</sup> To avoid this possibility, the ICSID Convention provides that arbitration proceedings shall be held at the seat of the centre, i.e., in the United States (a contracting party to the ICSID Convention); at the Permanent Court of Arbitration, i.e. in the Netherlands (a contracting party to the ICSID Convention); at the seat of any other appropriate institution with which the centre may make arrangements for that purpose; or at any other place approved by the tribunal after consultation with the Secretary-General of ICSID. See ICSID Convention (1965), arts 62–63.

<sup>368</sup> See K.-H. Böckstiegel, 'States in the Arbitral Process' in *Contemporary Problems in International Arbitration* (J.D.M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 40, 46; G.C. Moss, 'Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties' (2005) 1 *Stockholm Int'l Arb. Rev.* 6. See also M. Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) *J. Int'l Arb.* 39, 61–2 (Blessing lists criteria that need to be considered when determining whether or not a mandatory rule should be directly applied, or at least taken into account). See generally *Mandatory Rules in International Arbitration* (G. Bermann and L. Mistelis, eds, Huntington, NY, Juris Publishing, 2011).

<sup>369</sup> See Sornarajah, fn. 10, at 233; P. Feuerle, 'International Arbitration and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes' (1977) 4 *Yale Stud. World Pub. Ord.* 89, 108.

<sup>370</sup> See B.M. Cremades and D.J.A. Cairnes, 'The Brave New World of Global Arbitration' (2002) 3 *J. World Investment* 173, 207; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, Thomson Sweet & Maxwell, 2006), 610; P. Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arb. Int'l* 274, 285–6.

<sup>371</sup> *Jurii Bogdanov, Agurdino-Invest Ltd, Agurdino-Chimia JSC v Government of the Republic of Moldova*, SCC Institute, Award, 22 September 2005 (G.C. Moss, sole arb.), section 3.2 (emphasis added). Cf. ICC Case No. 2930, Award, 1982 (*Two Yugoslav Enterprises v Swiss Company*), Y.B. Comm. Arb. 105 (1984), in *Collection of ICC Arbitral Awards 1974–1985* (Paris, New York, ICC, 1990), 118, 119–20; ICC Case No. 1990, Award, 1972 (*Italian Claimant v Spanish Respondent*), in *Collection of ICC Arbitral Awards 1974–1985* (Paris, New York, ICC, 1990), 20–1. But see Poudret et al., fn. 370, at 611 (referring to a decision by the Swiss Federal Tribunal).

<sup>372</sup> G.C. Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8(3) *Global Jurist*.

she notes how states differ as to the extent to which they give effect to such rules.<sup>373</sup> It is partly for that reason, and in a manner that reinforces our conclusion from Chapter 3,<sup>374</sup> that she advocates the use of the private international law rules of the tribunal's juridical seat:

The arbitration law of the place of arbitration has, as a matter of fact, a considerable significance for the arbitration proceeding, in that it governs important aspects such as the arbitrability of the dispute, the regularity of the arbitral procedure, the powers of the arbitrators, the possibility by the courts to interfere, the validity of the award, and the fundamental principles of public policy. Therefore, it seems only natural to look to the law of the place of arbitration even when it comes to finding the applicable conflict rules.<sup>375</sup>

To her, and we agree, a lack of reference to a private international law 'is certainly not a recommendable solution from the point of view of predictability'.<sup>376</sup> It is important to note, though, that in investment arbitration the unpredictability of mandatory rules is less than in international commercial arbitration in general, as the mandatory rules in question would, as a rule, be those of the host state. Certainly, it cannot come as a surprise to the foreign investor that the host state's law is of relevance to a dispute arising out of the investment; to the contrary, it is a given.<sup>377</sup> Along similar lines, Donovan observes that whereas in commercial arbitration there may be a tension between the law selected by the parties and an extra-contractual rule of law that purports to apply based on its significant connection to the transaction, '[i]n investment arbitration, there should be no such tension; the national law provided for in an investment contract would generally be the law of the host state, which naturally has the closest links to the transaction'.<sup>378</sup> The interest of other jurisdictions in the application of their mandatory rules is less apparent in this context, Donovan states, and to his knowledge no case has yet arisen where such application has been considered.<sup>379</sup> On this basis, he concludes that '[i]n practice, the mandatory rules debate is largely irrelevant in the context of investment treaty arbitration, and it is therefore not surprising that a discussion of mandatory rules is absent from the case law'.<sup>380</sup>

While Donovan rightly tones down the significance of other national legal orders,<sup>381</sup> the crucial issue for us, however, concerns the possible supervening effect of fundamental norms of the host state's national legal order vis-à-vis primarily applicable international law. Indeed, on occasion, host states have sought to restrict the application of international law by reference to such norms. In so doing, they have pointed to the investor's failure to comply with national law, or they have argued that the application of a particular international norm would be contrary to its national law. In *CMS Gas Transmission Company*, for example, the host state contended that the economic and social crisis in Argentina affected human rights and that 'no investment

<sup>373</sup> Moss, 'International Arbitration', at 20. See also Chapter 3, at Section 3.3.1 (on public policy and mandatory rules: international public policy).

<sup>374</sup> Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>375</sup> Moss, 'International Arbitration', fn. 372, at 40–1.

<sup>376</sup> Moss, 'International Arbitration', at 42. See also B. Wortmann, 'Choice of Law by Arbitrators: The Applicable Conflict of Laws System' (1998) 14(2) *Arb. Int'l* 97, 99.

<sup>377</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>378</sup> Donovan, fn. 233, at 209.

<sup>379</sup> Donovan, at 209.

<sup>380</sup> Donovan, at 209.

<sup>381</sup> That is, other than those of the tribunal's juridical seat and the state(s) in which enforcement is likely to be sought.

treaty could prevail as it would be in violation of such constitutionally recognized rights'.<sup>382</sup> In a different case, *CME v Czech Republic* (2003), the host state argued that the 'Tribunal must apply any Czech laws of mandatory nature'.<sup>383</sup> This contention was also favoured by the dissenting Arbitrator Händl, who strongly criticized his colleagues' 'non-respecting of the provisions of the Czech Law that are of mandatory character, e.g. the Media Law or the Administrative Proceedings Code, thereby violation [sic] of the principle to observe the public policy/order/of the respective country'.<sup>384</sup>

Generally, tribunals have not been swayed by such arguments. One explanation is the general rule, as pointed out by the ICSID Additional Facility Rules Tribunal in *Metalclad Corporation v United Mexican States* (2000), that '[a] State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty'.<sup>385</sup> Further, if national provisions of a fundamental nature are involved, they may either have a parallel in international law, or the national provision may be of such a character that its role would be indirect or factual, rather than supervening.<sup>386</sup> In other words, international law will remain the applicable law. Poudret and Besson explain:

Several authors recognize, in our opinion correctly, that an arbitrator may take account of the effects of the mandatory rules of the country where the contract has to be performed to the extent that these may constitute an unforeseeable impediment (for instance a new export ban), because they can then constitute a case of force majeure or impossibility of performance. It is evidently not a question of applying these laws, but of taking them into account as a matter of fact.<sup>387</sup>

An example of how an ICSID tribunal took into account—while not strictly applying—national and European Union law is *Maffezini v Spain* (2000).<sup>388</sup> In dismissing the investor's claim, the arbitrators found that Spain had 'done no more in this respect than insist on the strict observance of the EEC and Spanish law applicable to the industry in question'.<sup>389</sup>

There are also examples of unsuccessful attempts by Iran to ensure a supervening application of its public policy rules by the Iran–United States Claims Tribunal. One of these attempts concerns the issue of interest. According to Iran, interest should not be awarded, as the payment of interest (usury) is prohibited under the religious rules of Islam.<sup>390</sup> The tribunal in *Anaconda-Iran Inc. v Iran* (1986) applied international law to

<sup>382</sup> *CMS Gas Transmission Company v Argentina*, fn. 138, Award, at para. 114. See also at para. 121 (the tribunal dismissed this claim: 'there is no question of affecting fundamental human rights').

<sup>383</sup> *CME v Czech Republic*, fn. 153, Final Award, at para. 398.

<sup>384</sup> *CME v Czech Republic*, Partial Award, 13 September 2001, Dissenting Opinion by J. Händl, p. 22. See also at 8, 17. Cf. *AAPL v Sri Lanka*, fn. 91, Award, Dissenting Opinion of Asante, 30 I.L.M. 577, 631, 646 (1991).

<sup>385</sup> *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (E. Lauterpacht, B.R. Civiletti, J.L. Siqueiros, arbs), para. 70 (referring to article 27 of the Vienna Convention on the Law of Treaties); *Total v Argentina*, fn. 331, Decision on Liability, at para. 40. See generally Section 2.3 (on the superior nature of international law vis-à-vis national law).

<sup>386</sup> See Section 3.1 (on the indirect application of national law).

<sup>387</sup> Poudret et al., fn. 370, at 609 (references omitted).

<sup>388</sup> *Maffezini v Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (F.O. Vicuña, T. Buergenthal, M. Wolf, arbs).

<sup>389</sup> *Maffezini v Spain*, at para. 71. See also *Ronald S. Lauder v The Czech Republic*, Final Award, 3 September 2001 (L. Cutler, R. Briner, B. Klein, arbs), paras 297–298 (in dismissing the investor's claim, the tribunal emphasized that the company was not exempted from observing the Czech Media Law); *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 345.

<sup>390</sup> See Avanessian, fn. 65, at 253.

the merits of the claim.<sup>391</sup> On the issue of interest, the investor relied on a provision in the contract providing for compound interest.<sup>392</sup> The respondent disputed the investor's entitlement to such interest, contending with reference to Iranian law that any higher rate than simple interest 'would amount to usury'.<sup>393</sup> Although the tribunal decided not to award compound interest, it rejected the argument that Iranian law should be considered: 'As concerns the rates of interest to be applied, and on the basis of its findings on applicable law above, the Tribunal initially rejects [the Respondent's] contention concerning the applicability of Iranian law in general, and Iranian usury provisions in particular.'<sup>394</sup>

Since interest remained a controversial issue, the tribunal was asked by Iran to interpret the Iran–United States Claims Settlement Declaration with respect to whether the tribunal could award interest.<sup>395</sup> One of Iran's arguments was that the tribunal had no authority to award interest because no such specific power was conferred on it by the Claims Settlement Declaration.<sup>396</sup> It also claimed that Iranian law, which it maintained was applicable in most cases as the law of the debtor, prohibits the award of interest; as do the laws of the United States in cases where the judgment debtor is the Government.<sup>397</sup> As to the first argument, the tribunal concluded that 'it is clearly within its power to award interest as compensation for damage suffered'.<sup>398</sup> It also refuted the second argument concerning the applicable law, holding that the issue of interest 'must rest with the Chamber concerned, and the Tribunal therefore concludes that the alternative request for the establishment of general rules governing the award of interest by the individual Chambers must be denied'.<sup>399</sup>

In its subsequent practice, the tribunal has never denied the awarding of interest on the basis that it would contravene the public policy of Iran.<sup>400</sup> It is noted that the tribunal thereby has not endangered the enforceability of awards against Iran, as the Algiers Accords provide for a security account for the payment of awards against that state.<sup>401</sup>

In some cases, however, investment tribunals have entertained at the merits stage the argument by the host state that national law should play a corrective role vis-à-vis the otherwise applicable international law. In these cases, national law has functioned as a 'shield',<sup>402</sup> preventing the application of international law, rather than constituting the basis of a cause of action as such. The ICSID Tribunal held in *Phoenix Action, Ltd v Czech Republic* (2009): 'There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the

<sup>391</sup> *Anaconda-Iran Inc. v Iran*, Award No. ITL 65-167-3, 10 December 1986.

<sup>392</sup> *Anaconda v Iran*, at para. 135.

<sup>393</sup> *Anaconda v Iran*, at para. 137.

<sup>394</sup> *Anaconda v Iran*, at para. 145 (adding that '[t]he Tribunal further finds no support in either commercial trade usages or otherwise for the conclusion that interest rates higher than 12% would amount to usury').

<sup>395</sup> See *Iran v United States*, Case A-19, 30 September 1987.

<sup>396</sup> *Iran v United States*, at para. 6.

<sup>397</sup> *Iran v United States*, at para. 6.

<sup>398</sup> *Iran v United States*, at para. 12.

<sup>399</sup> *Iran v United States*, at para. 13.

<sup>400</sup> On the awarding of interest generally, see C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998), 615 *et seq.*

<sup>401</sup> Iran–United States General Declaration, at para. 7.

<sup>402</sup> See Chapter 3, Section 3.3.1 (on public policy and mandatory rules: international public policy).

merits.<sup>403</sup> Indeed, in *Plama Consortium Limited v Bulgaria* (2008), the host state successfully demonstrated that the foreign investor had violated Bulgarian law; and as a consequence, the ICSID Tribunal held that the foreign investor should be denied the substantive protections of the Energy Charter Treaty (ECT), on which it has relied:

Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protection provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. [...] [I]n light of the *ex turpi causa*<sup>404</sup> defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.<sup>405</sup>

In other cases, allegations of violations of national law, although examined, failed. First, there is *ADC Affiliate Limited, ADC & ADMC Management Limited v Republic of Hungary* (2006), which concerned a claim for expropriation under the BIT between Cyprus and Hungary.<sup>406</sup> After having concluded that Hungary had indeed expropriated the claimants' investment, the ICSID Tribunal went on to discuss arguments of illegality presented by the host state in response to the claimants' claim for damages.<sup>407</sup> According to the tribunal, 'it seems appropriate for the tribunal to deal with [these arguments] at this point and of course, if they are valid, take them in account when assessing quantum'.<sup>408</sup> Specifically, the host state contended that the Operating Period Lease was invalid: since the company received from the Government of Hungary certain operational rights by means of a concession, the company was in nature a concessionaire.<sup>409</sup> As such, Hungary claimed, in order to comply with section 45 of the Hungarian Air Traffic Act, the company should have been incorporated as a company limited by shares, and not as a limited liability company.<sup>410</sup> The tribunal, however, was satisfied that section 45(1)(b) did not apply to the case, as—in its view—the legal requirement in section 45(1)(a) was fully met.<sup>411</sup> It further stated that even if the tribunal were wrong in so concluding, the respondent would still be time-barred in challenging the validity of the Operating Period Lease: '[I]t is the opinion of the Tribunal that the "five-year time bar" rule generally accepted by Hungarian judicial practice applies on the facts of this case'.<sup>412</sup>

The host state further alleged that it was entitled to contest the contract in question on the basis of section 201 of the Hungarian Civil Code, pertaining to situations in which there is a 'grossly unfair difference in value' between service and counter performance.<sup>413</sup> This argument too was dismissed: 'The Tribunal is clearly of the view that section 201 of the Hungarian Civil Code could not have been intended to apply to the facts of this case. This is not a case involving parties with markedly different bargaining power [...].'<sup>414</sup> As an additional ground for dismissing the host state's plea of illegality under national law, the tribunal held:

<sup>403</sup> *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (B. Stern, A. Bucher, J.-Fernández-Armesto, arbs), para. 104. See also at paras 102, 143.

<sup>404</sup> *Ex turpi causa non oritur actio* is Latin for 'from a dishonorable cause an action does not arise' (footnote not in original).

<sup>405</sup> *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (C.F. Salans, A.J. van den Berg, V.V. Veeder, arbs), paras 143–146. See also at para. 97 ('In the Decision on Jurisdiction, the Tribunal concluded that Respondent's allegations on misrepresentation did not deprive it of jurisdiction in this case and, in light of the serious charges raised, the Tribunal decided to examine these allegations during the merits phase').

<sup>406</sup> *ADC v Hungary*, fn. 89, Award.

<sup>407</sup> *ADC v Hungary*, at paras 446–451.

<sup>408</sup> *ADC v Hungary*, at para. 448.

<sup>409</sup> *ADC v Hungary*, at para. 450.

<sup>410</sup> *ADC v Hungary*, at para. 450.

<sup>411</sup> *ADC v Hungary*, at para. 455.

<sup>412</sup> *ADC v Hungary*, at para. 456.

<sup>413</sup> *ADC v Hungary*, at para. 467.

<sup>414</sup> *ADC v Hungary*, at para. 471.

[Hungary] entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. [...] In so far as illegality is alleged, [Hungary] would in any event be seeking to rely upon their own illegality. This matter is put to rest by Section 4 of the Hungarian Civil Code which states: [...].<sup>415</sup>

Secondly, we note the argument made by the host state in *Wena v Egypt* (2000) that the investor improperly sought to influence the Chairman of the Egyptian hotel company with respect to the award of the leases for the hotels in contravention of both Egyptian law and international *bones mores* (morality).<sup>416</sup> The ICSID Tribunal dismissed this argument: '[G]iven the fact that the Egyptian government was made aware of this agreement [...] but decided not to prosecute [the Chairman], the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement [...] was illegal under Egyptian law.'<sup>417</sup> The claim also failed on evidentiary grounds.<sup>418</sup>

In sum, and with the notable exception of *Plama*,<sup>419</sup> national law has rarely played a determinative corrective role at the merits stage in cases where international law was primarily applicable.<sup>420</sup>

It is important to observe, however, that in more than one case national law has been of key significance at the jurisdictional stage. Investment treaties often require investments to be duly made in accordance with the law of the host state; if not, the investments cannot benefit from the protection granted. There are various ways in which states establish the 'accordance with the laws of the host State clause'.<sup>421</sup> One mechanism used is to insert the requirement into the definition of 'investment' itself, making it clear that for the purposes of that investment treaty only those made in

<sup>415</sup> *ADC v Hungary*, at para. 475.

<sup>416</sup> *Wena v Egypt*, fn. 113, Award, at para. 111.

<sup>417</sup> *Wena v Egypt*, at para. 116.

<sup>418</sup> *Wena v Egypt*, at para. 116.

<sup>419</sup> *Plama v Bulgaria*, fn. 405, Award. Other tribunals have also considered the compliance-with-national-law requirement on the merits. See, e.g., *Berschader v Russia*, SCC Case No. 080/2004, Award, 21 April 2006 (B. Sjövall, T. Weiler, S. Lebedev, arbs), 11; *Gustav F.W. Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (B. Stern, B. Cremades, T. Landau, arbs), para. 127. For a discussion on the various approaches taken by tribunals faced with allegations that investors had violated national law, see Kriebaum, fn. 421, at 334; *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011 (P. Tercier, L.O. Baptista, P.-Y. Tschanz, arbs), paras 117–119; A. Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in *Evolution in Investment Treaty Law and Arbitration* (C. Brown and K. Miles, eds, Cambridge, Cambridge University Press, 2011), 187.

<sup>420</sup> For the possibility to apply the law of the host state in a supervening fashion vis-à-vis another applicable national law, see *Joint Venture Yashlar and Bridas S.A.I.P.I.C. v Turkmenistan*, ICC Arbitration Case No. 9151/FMS/KGA, Interim Award, 8 June 1999 (S. Kentridge, J. Paulsson, J. Kolrud, arbs), Part II, paras 244 *et seq.* (in this case, in which the applicable law was English law, the host state argued that the contract at hand was void or voidable under the Turkmenian Civil Code on the basis of collusion by the investor with another company in the bidding process, and that 'such a nullity is a matter of mandatory law which should be given effect even though Turkmenian law is not otherwise applicable to the Agreement'). See also at para. 276 (the tribunal in that case found it 'unnecessary' to resolve the debate about the applicability of Turkmenian law 'because it does not accept the allegations at their simplest factual level').

<sup>421</sup> See *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (R.O. Blanco, B.A. Landy, C. von Wobeser, arbs), para. 135; U. Kriebaum, 'Illegal Investments' (2010) *Austrian Y.B. Int'l Arb.* 307; UNCTAD, 'Scope and Definition' in *II Series on Issues in International Investment Agreements* (1999), 24; C. Knahr, 'Investments "in Accordance with Host State Law"' in *International Investment Law in Context* (A. Reinisch and C. Knahr, eds, Utrecht, Eleven International, 2008), 27. Cf. *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, 20 July 1989, para. 72.

accordance with the laws of the host state will be deemed investments.<sup>422</sup> Another possibility is to exclude from the protection of an investment treaty investments made illegally in the articles that indicate the scope of protection of the treaty in question.<sup>423</sup> Additionally, states may incorporate ‘in accordance with law’ limitations into treaty provisions requiring host states to admit or accept foreign investments.<sup>424</sup> It has also been recognized that the condition of compliance with national law does not need to be expressly included in the treaty. The ICSID Tribunal held in *Phoenix Action, Ltd v Czech Republic* (2009):

In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s view that this condition—the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT.<sup>425</sup>

According to the ICSID Tribunal in *L.E.S.I S.p.A. et ASTALDI S.p.A. v People’s Democratic Republic of Algeria* (2006), though, protection of investments is excluded only if they have been made in breach of fundamental legal principles of the host country (‘en violation des principes fondamentaux en vigueur’).<sup>426</sup>

Illustrative of the role national law can play in investment arbitration by virtue of such treaty clauses is *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (2007).<sup>427</sup> Article 9 of the Germany–Philippines BIT provided that disputes ‘concerning an investment’ may be brought to arbitration.<sup>428</sup> The term ‘investment’ was defined in Article 1(1) of the same instrument as ‘any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...].’<sup>429</sup> The Philippines Supreme Court had declared the concession contracts at issue null and void ab initio on the basis of ‘serious violations of Philippine law and public policy’,<sup>430</sup> and Fraport brought arbitration proceedings. The ICSID Tribunal dismissed the case for lack of jurisdiction:

<sup>422</sup> See *Inceysa v El Salvador*, para. 135.

<sup>423</sup> See *Inceysa v El Salvador*, at paras 187–189.

<sup>424</sup> See *Inceysa v El Salvador*, at paras 187–189.

<sup>425</sup> *Phoenix Action v Czech Republic*, fn. 403, Award, at para. 101. See also at para. 145 ([T]he Tribunal lacks jurisdiction over the Claimant’s request, as the Tribunal concludes that the Claimant’s purported investment does not qualify as a protected investment under the Washington Convention and the Israeli/Czech BIT’). But see *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (H. van Houtte, L. Lévy, E. Gaillard, arbs), para. 112 ([T]he principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be “legal” or “illegal,” made in “good faith” or not, it nonetheless remains an investment’).

<sup>426</sup> *L.E.S.I. S.p.A. et ASTALDI S.p.A. v People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006 (P. Tercier, A. Faure, E. Gaillard, arbs), para. 83. Cf. *Tokios Tokelés v Ukraine*, fn. 198, Decision on Jurisdiction 29 April 2004 (P. Weil, P. Bernardini, D.M. Price, arbs), para. 86.

<sup>427</sup> *Fraport v Philippines*, fn. 389, Award. The award was later annulled as the tribunal failed to respect the right to be heard. Decision on the Application of Annulment, 23 December 2010 (P. Tomka, D. Hascher, C. McLachlan, committee members), para. 197.

<sup>428</sup> *Fraport v Philippines*, Dissenting Opinion by Arbitrator B.M. Cremades, at section 2. Cf. Germany–Philippines BIT.

<sup>429</sup> *Fraport v Philippines*, fn. 389, Award, at para. 300 (emphasis in original).

<sup>430</sup> *Fraport v Philippines*, at para. 217.

The Compliance with the host state's laws is an explicit and hardly unreasonable requirement in the Treaty and its accompanying Protocol. Fraport's ostensible purchase of shares in the Terminal 3 project, which concealed a different type of unlawful investment, is not an 'investment' which is covered by the BIT. As the BIT is the basis of jurisdiction of this Tribunal, Fraport's claim must be rejected for lack of jurisdiction *ratione materiae*.<sup>431</sup>

Another example is the case of *Alasdair Ross Anderson et al v Republic of Costa Rica* (2010), in which the ICSID Tribunal denied jurisdiction on the basis that the investment in question was made in contravention of the host state's national law.<sup>432</sup> Under the Canada–Costa Rica BIT, stated the tribunal, not only must the claimants demonstrate that they own the assets which they assert constitute an investment, but they must also demonstrate that they own or control those assets in accordance with the laws of Costa Rica.<sup>433</sup> The tribunal relied on the following factual findings when concluding that this requirement was not satisfied:

By actively seeking and accepting deposits from the Claimants and several thousand other persons, the Villalobos brothers were engaged in financial intermediation without authorization by the Central Bank or any other government body as required by law. The courts of Costa Rica after a lengthy and extensive legal process determined that Osvaldo Villalobos, because of his involvement in the scheme, committed aggravated fraud and illegal financial intermediation. In securing investments from the Claimants, the Villalobos brothers were thus clearly not acting in accordance with the laws of Costa Rica. The entire transaction between the Villalobos brothers and each Claimant was illegal because it violated the Organic Law of the Central Bank. If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica.<sup>434</sup>

The tribunal emphasized that its interpretation of the words 'owned in accordance with the laws' of the host state 'reflects both sound public policy and sound investment practice'.<sup>435</sup> To the arbitrators, 'Costa Rica, indeed any country, has a fundamental interest in securing respects for its laws'; and further, prudent investment practice requires that investors exercise due diligence and assure themselves that their investments comply with the law of the host State.<sup>436</sup>

Thus, while national law was not applied in a supervening fashion in the meaning adopted in this study, i.e., as the law applicable to the merits, these cases illustrate that in practice, national law may bar a claim in international law.<sup>437</sup>

We finally refer to a separate possibility of applying national norms in a supervening fashion vis-à-vis otherwise applicable international norms. This possibility is exemplified by

<sup>431</sup> *Fraport v Philippines*, at para. 404. See also at para. 402. Cf. *Inceysa v El Salvador*, fn. 421, Award, at paras 144, 162. For a list of the many cases where the evidence has not been sufficient to warrant a dismissal on the basis that the claimant had acquired or established its investment in a manner that constituted abusive or bad faith, see A. Cohen-Smutny and P. Polásek, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' in *A Liber Amicorum: Thomas Wälde: Law Beyond Conventional Thought* (J. Werner and A.H. Ali, eds, London, Cameron May, 2009), 277, at fn. 2.

<sup>432</sup> *Alasdair Ross Anderson et al. v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (S.M. Rico, J.W. Salacuse, R.E. Vinuela, arbs), para. 59.

<sup>433</sup> *Anderson v Costa Rica*, at para. 51.

<sup>434</sup> *Anderson v Costa Rica*, at para. 55.

<sup>435</sup> *Anderson v Costa Rica*, at para. 58.

<sup>436</sup> *Anderson v Costa Rica*, at para. 58.

<sup>437</sup> Cf. A. Reinisch, "'Investment and . . .'—The Broader Picture of Investment Law' in *International Investment Law in Context* (A. Reinisch and C. Knahr, eds, Utrecht, Eleven International, 2008), 201, 203.

the *CME* award, in which the relevant bilateral investment treaty included the following provision:

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.<sup>438</sup>

The effect of this clause is that national norms prevail over international norms to the extent the latter are more favourable to the investor. In other words, the hierarchy between national and international law is case specific, depending on the content of the norm.<sup>439</sup> With respect to its interest claim, and relying on the provision just cited, CME invoked the “governing Czech statutes” fixing the interest rate “at double the Czech National’s official discount rate prevailing on the first day of delay in repayment of the debtor’s monetary obligation” (Art. 517 Czech Civil Code and § 1 Government Decree No. 142/1994, dated July 8, 1994).<sup>440</sup> Agreeing with the investor’s argument on this point, the tribunal also ‘took into account Czech law’ when determining the period of interest, referring to provisions of the Czech Civil Code, a legal opinion of the Czech Supreme Court, as well as Czech legal treatises.<sup>441</sup>

#### 4. General Conclusions

Both territorialized and internationalized tribunals may decide to apply international law to the merits of investment disputes. Two factors in favour of such a decision are, first, an agreement by the parties to the application of international law; and secondly, the international nature of the claim. Arguments pertaining to the superior nature of international law vis-à-vis national law should not play a role in ascertaining the primarily applicable law. Such arguments only have a bearing on the choice-of-law methodology once the tribunal has decided to apply international law to the merits.

In the absence of a choice-of-law agreement by the parties, the decision by the ICSID ad hoc committee in *Wena v Egypt* that tribunals may apply international law directly before assessing the conduct of the host state against national law<sup>442</sup> constitutes a watershed in the practice of ICSID tribunals. Prior to that, international law was generally restricted to a complementary or supervening role.<sup>443</sup> The better approach of allowing tribunals directly to apply international law when ‘the appropriate rule is

<sup>438</sup> *CME v Czech Republic*, fn. 153, Final Award, at para. 397. Cf. Netherlands–Czech/Slovak BIT, art. 3(5).

<sup>439</sup> See Chapter 5, Section 3.2.2.2 (the parties have agreed to the combined application of national and international law or there is no agreement. Cf. K. Vandervelde, *United States Investment Treaties: Policy and Practice* (Deventer, Kluwer Law and Taxation, 1992), 106 (such a provision ‘serves in effect as an explicit choice of law provision for all dispute settlement mechanisms. Because treatment of investment must never be less than that required by international law, international law provides the governing rules of decision, except where national law is more favourable.’).

<sup>440</sup> *CME v Czech Republic*, fn. 153, Final Award, at para. 621.

<sup>441</sup> *CME v Czech Republic*, Final Award, at paras 631–632. See also at paras 642–643, 507.

<sup>442</sup> *Wena v Egypt*, fn. 1, Decision on Annulment, at para. 40. See generally Section 2.2 (on the international nature of the claim).

<sup>443</sup> See generally Chapter 5, at Section 2.2 (host state sovereignty and territorial control over foreign investors and investments).

found in this other ambit',<sup>444</sup> is supported by the practice of the Iran–United States Claims Tribunal, and has been espoused by territorialized tribunals and scholars alike.

The direct application of international law does not necessarily exclude a role for national law, as it may apply indirectly in the determination on the merits of the international claims of expropriation and violations of 'umbrella' clauses. In these cases, the role played by national law is more than that of facts; rather, tribunals will generally need to apply national law in order to determine the parties' right and obligations pursuant to the allegedly expropriated property and breached commitment. Yet, as correctly noted by Sasson, '[t]he principle of *renvoi* does not affect the supremacy of international law. It permits the application of concepts developed for many years at a municipal level when such application does not conflict with international law and does not affect the characterization of an act as internationally wrongful'.<sup>445</sup>

Finally, arbitral tribunals may have recourse to national law in a gap-filling manner for ancillary questions of law; and they are advised to consider, and if necessary apply, relevant national public policy and mandatory rules. Still, there is not much arbitral practice confirming the need to apply national law in a supervening fashion. This can be explained on the basis of the general rule that a state may not invoke its own national law in order to evade its international responsibility, as well as the fact that the international public policy of the tribunal's juridical seat or the state in which enforcement is sought has not been implicated, was not relevant, or that such policy norms were applied indirectly or taken into account as facts underlying the merits of the international claim. However, in recent years, this scarcity of practice has been countered by some important decisions in which violations by the foreign investor of host state national law have led tribunals, at either the merits or the jurisdictional stage, to deny the investor the substantive protections of the investment treaty on which it sought to rely. National law may also play a role where the investment treaty contains a provision allowing investors to rely on more favourable provisions of national law.

<sup>444</sup> *Wena v Egypt*, fn. 1, Decision on Annulment, at para. 40.

<sup>445</sup> Sasson, fn. 223, at 200.

# Concurrent Application of and Reference to National and International Law in Case of Consistency

[C]onsidering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same.<sup>1</sup>

## 1. Introduction

In the previous two chapters, we saw that arbitral tribunals often make a decision to primarily apply either national or international law to the merits of disputes between foreign investors and host states.<sup>2</sup> While the ‘selection’ by arbitrators of one governing legal system is only natural in cases in which the parties have explicitly agreed to its application and/or where the arbitration agreement is limited to claims pertaining to that system, other situations allow for resort to an alternative choice-of-law methodology. This methodology, on which we will focus in this chapter, consists of applying or referring to both national and international law. As we will see, it is frequently resorted to in case of convergence in normative content and, in particular, when the parties disagree on the respective roles of the national and the international legal orders.

This arbitral practice emphasizes the simultaneous relevance of both national and international law for the investor–state relationship.<sup>3</sup> The ICSID Tribunal stated in *CMS Gas v Argentina* (2005): ‘indeed there is here a close interaction between the [Argentinean] legislation and the regulations governing the gas privatization, the License and the international law, as embodied in the Treaty and customary international law. All of these rules are inseparable and will, to the extent justified, be applied by the tribunal.’<sup>4</sup>

The widespread reference to consistency between national and international law by investment tribunals also illustrates the oft-neglected concord that frequently exists between the national and the international legal orders. This consistency is both unsurprising and desirable. The different legal orders often protect the same values; and, in the main, states seek to conform their laws to their international legal

<sup>1</sup> C. L’Heureux-Dubé, ‘The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court’ (1998) 34 *Tulsa L.J.* 15, 39 (Supreme Court Justice, Canada).

<sup>2</sup> See Chapter 5, Section 2 (on reasons for the primary applicability of national law); Chapter 6, Section 2 (on reasons for the primary applicability of international law).

<sup>3</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 3, Section 3.2.2 (on the (non-)applicability of national and international law).

<sup>4</sup> *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (F.O. Vicuña, M. Lalonde, F. Rezek, arbs), para. 117. See also *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004 (F.O. Vicuña, C.N. Brower, P.B. Sweeney, arbs), para. 93.

obligations.<sup>5</sup> As United States Supreme Court Justice O'Connor noted in *Roper v Simmons* (2005): ‘we should not be surprised to find congruence between domestic and international values [...] expressed in international law or in the domestic laws of individual countries [...].’<sup>6</sup> Similarly, Judge Mosk at the Iran–United States Claims Tribunal observed that ‘[a]s a practical matter, in many cases the choice of whether to utilize public international law, general principles of law, municipal law (past or present) or some other law will not affect the result’.<sup>7</sup>

The practice in investment arbitration of parallel application of or reference to both sources of law may in part be seen as a consequence of the choice-of-law methodology referred to in Chapter 5 relating to host state sovereignty and the supervening role of international law.<sup>8</sup> Under this paradigm, national law is primarily applicable but not hierarchically superior, as national law will only be applied to the extent to which it is consistent with international law.<sup>9</sup> Tribunals may therefore be required to consider both national and international law; and this enables arbitrators to point out consistency whenever this is the case. According to the ICSID Tribunal in *Liberian Eastern Timber Corporation v Government of the Republic of Liberia* (1986), the second sentence of article 42(1) 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.’<sup>10</sup> And the ICSID ad hoc committee held in *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1985):

article 42 of the Washington Convention certainly provides that ‘in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute [...] and *such principles of international law as may be applicable.*’ This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is, 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 principles of

<sup>5</sup> See P. Muchlinski, *Multinational Enterprises and the Law* (Oxford, Blackwell, 1999), 503; A.F. M. Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist versus Dualist Controversies’ (2001) 12(2) *Eur. J. Int'l L.* 310, 323; K.M. Meessen, ‘Does International Law Matter?’ (2004) 98 *Am. Soc'y Int'l L. Proc.* 321, 322.

<sup>6</sup> *Roper v Simmons*, 125 S.Ct. 1183, 1216 (2005) (O’Connor, J., dissenting). Cf. A. Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *Vienna Online Journal on International Constitutional Law* 170, 197.

<sup>7</sup> *American Bell International Inc. v Government of the Islamic Republic of Iran et al.*, Interlocutory Award, 11 June 1984, Concurring and Dissenting Opinion by R.M. Mosk, 6 Iran–U.S. C.T.R. 74, at 98. See also *Harnischfeger Corp. v Ministry of Roads and Transportation et al.*, Award, 26 April 1985, Dissenting Opinion of Judge R.M. Mosk, 8 Iran–U.S. C.T.R. 119, 140–1; *Government of the State of Kuwait v American Independent Oil Company (Aminoil)*, Award, 24 May 1982 (P. Reuter, H. Sultan, G. Fitzmaurice, arbs), para. 10; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (F.O. Vicuña, L.Y. Fortier, G. Kaufmann-Kohler, arbs), para. 249; E. Gaillard, ‘The Role of the Arbitrator in Determining the Applicable Law’ in *The Leading Arbitrators’ Guide to International Arbitration* (L.W. Newman and R.D. Hill, eds, Huntington, NY, Juris Publishing, 2004), ch. 10, section I.

<sup>8</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments); Chapter 5, Section 3.2.2.2 (the parties have agreed to the combined application of national and international law or there is no agreement).

<sup>9</sup> See Chapter 5, Sections 2.2 and 3.2.2.2.

<sup>10</sup> *Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, rectified 10 June 1986, 2 ICSID Rep. 343, 358 (emphasis added).

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 [...] and after having applied the relevant rules of the State’s law.<sup>11</sup>

As noted in Chapter 6, this paradigm has to a large extent given way to a more ‘pragmatic approach’<sup>12</sup> whereby tribunals can primarily apply international (or national) law ‘if the appropriate rule is found in this [...] ambit’.<sup>13</sup> Still, we submit that in all cases, including treaty arbitration, there may be valid reasons for tribunals to apply, and/or refer to the consistency that exists between, international law and the national law of the host state.

First, and in line with the principle *non infra petita*, we can conclude that reference to both legal orders is appropriate in cases where the parties, in their submissions, have explicitly requested relief pursuant to both national and international law.<sup>14</sup> If not, and in cases that do not involve fundamental rules of national or international law,<sup>15</sup> a parallel reference to both legal orders is not compulsory.<sup>16</sup>

Secondly, due to frequent divergent interests between the investor and the host state, the substantive applicable law is often a delicate topic in arbitration proceedings. As pointed out by Schreuer, ‘[i]n a particular dispute, the host State will typically insist on the application of its own law, while the investor will seek shelter in international standards.’<sup>17</sup> With this in mind, the choice-of-law methodology of referring to both

<sup>11</sup> *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985 (P. Lalive, A.S. El-Kosheri, I. Seidl-Hohenveldern, committee members), para. 69 (emphasis in underscore added; italics in original; references omitted). See also *Amco Asia Corp. v Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Award, 5 June 1990, para. 40; C.H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2009), 626; C.H. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int'l & Eur. L.* 147, 157–8; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II-2, at p. 800 (Chairman Broches stated that the conjunction ‘and’ in article 42(1), second sentence, was used to avoid the impression that it was necessarily a question of alternatives). See also Convention on the Settlement of Investment Disputes, Vol. II-1, at 268 (Chairman Broches noted that unless the parties had agreed to restrict the competence of the tribunal to determine the validity of the act of expropriation by reference to municipal law, the tribunal could look to municipal as well as international law).

<sup>12</sup> See Chapter 6, Section 2.2 (on the international nature of the claim). Cf. *CMS v Argentina*, fn. 4, Award, at para. 116.

<sup>13</sup> *Wena Hotels Ltd v Egypt*, Decision on Annulment, 5 February 2002 (K.D. Kerameus, A. Bucher, F.O. Vicuña, committee members), para. 40.

<sup>14</sup> Cf. *United Pet Group, Inc. v Texas International Property Associates*, Case No. D2007-1039, WIPO Arbitration and Mediation Center, 25 September 2007, para. 6; T. Giovannini, ‘What are the Grounds on which Awards are most often Set Aside?’ (January 2001) No. 1 *Bus. L. Int'l 8; Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, 12 November 1991, Separate Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva (translation) [1991] ICJ Rep. 53, 120, para. 18; A. Orakhelashvili, ‘The International Court and its Freedom to Select the Ground upon which it will Base its Judgment’ (2007) 56 *Int'l Comp. L. Quart.* 171, 178. See also Chapter 1, Section 1 (on motivations for the study).

<sup>15</sup> See Chapter 5, Section 3.3.2 (on the supervening role of international law); Chapter 6, Section 3.2.2 (on the supervening role of national law). It is posited that the tribunals should also refer to national law in case of expropriation and umbrella clause claims, regardless of whether the investment agreement explicitly refers to national law. See Chapter 6, Section 3.1 (on the indirect application of national law).

<sup>16</sup> But see Chapter 6, Section 2.2, at fn. 184 (on the international nature of the claim) (statements by Igboekwee, Begic, and Schreuer).

<sup>17</sup> C. Schreuer, ‘Investment Arbitration: A Voyage of Discovery’ (2005) 71 *Arbitration* 73, 75. See also Chapter 1, Section 1 (on motivations for the study). Note, however, that in investment treaty arbitration these arguments may reflect the dual role of states as both home state and host state. See

legal orders may be explained in light of the fact that it avoids or mitigates the potentially controversial finding of a primary applicable law.<sup>18</sup> Indeed, the reference to consistency is a common judicial technique,<sup>19</sup> illustrated by the Dutch *antikesregel* ('non-choice rule') which provides that when a Dutch judge finds that the relevant foreign rules are similar to the Dutch rules and would achieve the same results, s/he is released from choosing explicitly which law to apply.<sup>20</sup> Of interest here is the observation that the desire to accommodate the interests of both disputing parties may be more present in arbitration than in other forms of dispute settlement.<sup>21</sup> Lipstein's statement concerning mixed arbitral tribunals can be seen in this light:

[International courts] have felt it necessary to have recourse to general principles in order to lay down their own rules of conflict of laws. With regard to the Mixed Arbitral Tribunals, two trends can be distinguished: a strictly municipal and a comparative trend, according to whether the principal aim of the court was to ascertain the municipal law most apposite to be exclusively applied in the circumstances, or whether it aimed at achieving a degree of harmony between the municipal systems available for choice.<sup>22</sup>

According to the same author, the 'great advantage' of the second trend he mentions 'consists in dispensing altogether with the application of private international law [...]. The easiest method which, at first sight eliminates hardship, and secures the greatest amount of justice, is that of coupling rules of substantive law of the countries concerned.'<sup>23</sup> Lando makes the following comment: 'As the servant of the parties [the arbitrator] must persuade them and especially the losing party of the justice of his award. [...] The arbitrator will often refer to the law of the unsuccessful party to show that this law confirms his findings.'<sup>24</sup> Otherwise formulated: 'considering and

A. Roberts, 'Power and Persuasion in International Treaty Interpretation: The Dual Role of States' (2010) 104 *Am. J. Int'l L.* 179, 218.

<sup>18</sup> Cf. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008), 270 ('It is only where there is a conflict between the host state's law and international law that a tribunal has to make a decision on precedence').

<sup>19</sup> See C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001), 577 ('Avoiding difficult legal questions by declaring them immaterial to the facts under review is a common judicial technique'). Cf. *Klöckner v Cameroon*, fn. 11, Award, 21 October 1983 (E. Jimenez de Aréchaga, W.D. Rogers, D. Schmidt, arbs), at section VI(C); J. Kadelburger, *Applicable Law: Russian or Swedish?*, Stockholm Arbitration Report (1999:2) (Observations on SCC Case 16 1998).

<sup>20</sup> See S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford, Oxford University Press, 2004), 52; X.E. Kramer, 'Dutch Private International Law: Overview 2002–2006' (2007) No. 54 *IPRax*, 59.

<sup>21</sup> See P. Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law' in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (J.D.M. Lew and L.A. Mistilis, eds, Alphen aan den Rijn, Kluwer Law International, 2007), 289, 298, para. 15–46.

<sup>22</sup> K. Lipstein, *Conflict of Laws Before International Tribunals: A Study in the Relation Between International Law and Conflict of Laws*, 27 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read Before the Society in the Year 1941* 143, 150–1 (Cambridge, Cambridge University Press, 1941) (emphasis added), also available at <<http://www.jstor.org/stable/742878>> (last visited 1 May 2012.)

<sup>23</sup> K. Lipstein, *Conflict of Laws Before International Tribunals*, at 151. But see at 152–3 ('[I]t was stated very correctly by the German–Roumanian Tribunal in the case of *Negreanu v. Meyer and Sons* that far from resulting invariably in a reconciliation of municipal systems of laws, this method endangers the strict application of even one municipal system, let alone of two. [...] Where a quick glance shows an apparent identity of solutions, their specific application may reveal far-reaching differences. The comparative method does not, in such cases, yield the expected results and the tribunals have to apply the rules of conflict of laws' [references omitted]).

<sup>24</sup> O. Lando, 'The Law Applicable to the Merits of the Dispute' in *Contemporary Problems in International Arbitration* (J.D.M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 101, 107–8.

comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same.<sup>25</sup>

Thirdly and relatedly, in that the methodology of referring to both legal orders not only balances the interest of the investor who may want the application of international norms with the host state's desire in the application of its own national law,<sup>26</sup> but also reconciles host state sovereignty with the interest of the international community, it may further be said to enhance the legitimacy of the award. From this perspective, this choice-of-law methodology dovetails with the statement that '[t]he requirements of international law in this field [...] represent an attempt at accommodation between the conflicting interests involved'.<sup>27</sup>

Fourthly, arbitrators must arguably attempt to render awards that are enforceable in the country or the countries where enforcement may be sought.<sup>28</sup> Seeing that one of these countries is likely to be the host state and that this state may decline to enforce an award that fails to consider its mandatory laws,<sup>29</sup> this concern may lead tribunals primarily applying international law to find a parallel in the national law of the host state.<sup>30</sup>

Fifthly, and finally, the practice of referring to both national and international law may at times reflect a desire by tribunals to resolve as fully as possible issues that have been raised and discussed by the disputing parties.<sup>31</sup>

## 2. Arbitral Practice

Investment arbitration contains numerous examples of the application of or reference to both national and international law, especially in situations where there is consistency between the norms at hand.<sup>32</sup> Generally, this is a reflection of the arguments presented by the parties; although at times, tribunals rely on national or international law ex officio. In illustrating this practice, we will give examples, first, of the concurrent or consecutive application of both national and international law (*seriatim*); and secondly, awards in which the tribunal, while primarily applying norms from either legal order, has emphasized the consistency that exists with norms from the other legal order.

<sup>25</sup> L'Heureux-Dubé, fn. 1, at 39. See also at 26–7.

<sup>26</sup> See fn. 17.

<sup>27</sup> R. Jennings and A. Watts, *Oppenheim's International Law* (Harlow, Longman, 1996), 933, quoted in C. McLachlan et al., *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007), 21. See also McLachlan et al. (the authors refer to 'a conscious effort to discern an appropriate balance between protection of the rights of foreign investors on the one hand, and recognition of the legitimate sphere of operation of the host State on the other. After all, host States have a responsibility to govern in the interest of all those within their jurisdiction, and to promote many other public objectives as well as investment').

<sup>28</sup> See Chapter 2, Section 3.2.3 (on the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

<sup>29</sup> See Chapter 2, Section 3.2.3.

<sup>30</sup> Cf. Lando, fn. 24, at 107–8.

<sup>31</sup> Cf. S.D. Myers, *Inc. v Canada*, First Partial Award, 13 November 2000 (B.P. Schwartz, E.C. Chiasson, J.M. Hunter, arbs), Separate Concurring Opinion by B. Schwartz, para. 90.

<sup>32</sup> Cf. Schreuer et al., fn. 11, at 618; M.N. Kinnear, 'Treaties as Agreements to Arbitrate: International Law as the Governing Law' in *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, 2006 Montreal Volume 13, A.J. van den Berg, ed., Alphen aan den Rijn, Kluwer Law International, 2007), 401, 423; I. Marboe and A. Reinisch, 'Contracts between States and Foreign Private Persons' in *Max Planck Encyclopedia of Public International Law*, para. 19, available at <<http://www.mpepl.com/home>> (last visited 1 May 2012).

While we will see that the distinction between application of and reference to legal norms is not always clear-cut, the following awards do display the existence of congruency between national and international law and the importance tribunals place on such congruency in solving the dispute on the merits. In order to better demonstrate this practice, it is worthwhile quoting more comprehensively from the various awards.

## **2.1. Concurrent application of national and international law and reference to consistency**

The concurrent application of both national and international law, including, in particular, the reference to consistency, is illustrated by the practice of both territorialized and internationalized tribunals. As for the former category, we refer to *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic* (1977).<sup>33</sup> The choice-of-law methodology employed must partly be seen as a function of the choice-of-law clause, which provided that '[t]he 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 principles of law as may have been applied by international tribunals'.<sup>34</sup> After having examined in more detail the sources that comprise Libyan domestic law, Arbitrator Mahmassani concluded that 'Libyan law in general and Islamic law in particular have common rules and principles with international law [...].'<sup>35</sup>

Accordingly, the arbitrator referred to both national and international law when deciding the investor's claims on the merits. With respect to the claim of unlawful nationalization, he quoted from the Libyan Petroleum Law and referred to the Islamic Maliki School for the principle that natural resources belong to the Community represented by the state as a privilege of its sovereignty:

This view has been adopted in Libya and expressly laid down in its legislation on mines and petroleum. For instance, article 1 of the Libyan Petroleum Law of 1955 stipulates in the following terms:

*Article 1: Petroleum Property of State:*

1. All petroleum in Libya in its natural state is the property of the Libyan State.
2. No person shall explore or prospect for, mine or produce petroleum in any part of Libya, unless authorized by a permit or concession issued under the Law.

Likewise, under Islamic law, particularly in the Maliki School, mines and underground resources are the property of the Sultan (the State).<sup>36</sup>

Adding support to the same proposition, Mahmassani referred to state practice, several United Nations resolutions, and scholarship on international law.<sup>37</sup>

The methodology of applying both national and international law was carried over to the determination of whether Libya had breached the contract. First, the arbitrator noted that the principle of the sanctity of contracts has always constituted an integral

<sup>33</sup> *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award, 12 April 1977 (S. Mahmassani, sole arb.), 20 I.L.M. 1 (1981).

<sup>34</sup> *LIAMCO v Libya*, at 33 (referring to Clause 28).

<sup>35</sup> *LIAMCO v Libya*, at 37.

<sup>36</sup> *LIAMCO v Libya*, at 48.

<sup>37</sup> *LIAMCO v Libya*, at 48–53.

part of most legal systems, including Libyan law and Islamic law.<sup>38</sup> In this context, he pointed out that 'Libya adopted and incorporated this legal principle in its Article 147 of the Civil Code';<sup>39</sup> and he observed with reference to Islamic law that 'no less than the Great Caliphs Omar Ibn Al-Khattab and Imam 'Ali accepted to abide by their agreements and to appear before the Cadis (Judges) as ordinary litigants without feeling that this conduct was against their sovereign dignity'.<sup>40</sup> Second, Mahmassani emphasized that '[t]he said Libyan law, whether in the text of the civil code or the complementary Islamic Jurisprudence appears clearly consistent with international law in this connection, as exemplified by international statutes and custom'.<sup>41</sup>

Mahmassani also relied on both Libyan and international law when determining the remedies to which the investor was entitled.<sup>42</sup> Thus, on the claim of *restitutio in integrum*, he stated: 'This principal claim shall be examined in the light of the principles of municipal law of Libya which are common to those of international law, and which in fact are also consistent with the general principles of law'.<sup>43</sup> As this claim failed,<sup>44</sup> he went on to state that 'the principle of the necessity indemnification, being unanimously and equally supported by municipal and international legal theory and practice, should be applied in this dispute as being the proper law of the concession agreements, in compliance with Clause 28 thereof'.<sup>45</sup>

As concerns internationalized tribunals, we may refer to *Amco Asia Corporation v Republic of Indonesia* (1984).<sup>46</sup> In that case, the investor alleged that the host state, having cancelled its investment licence and having seized, in a military action, its investment in the form of a hotel, was liable for breach of contract and expropriation.<sup>47</sup> Since the disputing parties had not expressed an agreement as to the applicable law, the ICSID Tribunal found that, in accordance with article 42(1) ICSID Convention, it had to 'apply Indonesian law, which is the law of the Contracting State Party to the dispute, and such rules of international law as the Tribunal deems to be applicable, considering the matters and issues in dispute'.<sup>48</sup> As to international law rules, the tribunal noted that 'the parties not only did not deny their applicability, but constantly referred to them in their pleadings and in the final oral arguments'.<sup>49</sup>

On the merits, the tribunal applied both national and international law.<sup>50</sup> In concluding that Indonesia was in fact liable for wrongful expropriation,<sup>51</sup> the arbitrators relied on the Indonesian Law of Foreign Investment,<sup>52</sup> as well as international law

<sup>38</sup> *Liamco v Libya*, at 54–8.

<sup>39</sup> *Liamco v Libya*, at 54.

<sup>40</sup> *Liamco v Libya*, at 56–7.

<sup>41</sup> *Liamco v Libya*, at 56.

<sup>42</sup> *Liamco v Libya*, at 61–77.

<sup>43</sup> *Liamco v Libya*, at 63.

<sup>44</sup> *Liamco v Libya*, at 66.

<sup>45</sup> *Liamco v Libya*, at 67.

<sup>46</sup> *Amco Asia*, fn. 11, Award, 20 November 1984 (B. Goldman, E.W. Rubin, I. Foighel, arbs), paras 1, 142, 149.

<sup>47</sup> *Amco Asia*, fn 46, Award.

<sup>48</sup> *Amco Asia*, fn. 46, Award, at para. 148.

<sup>49</sup> *Amco Asia*, fn. 46, Award, at para. 148.

<sup>50</sup> See *Amco Asia*, fn. 11, Resubmitted Case, Award, 89 I.L.R. 580, 622 (1992) ('There are thus indications, *both as a matter of Indonesian and international law*, that the circumstances surrounding BKPM's decision tainted the proceedings irrevocably' [emphasis added]).

<sup>51</sup> *Amco Asia*, fn. 46, Award, at para. 178. See also at para. 156 ('The question now is whether this taking is or amounts to an expropriation which according to Indonesian law and to international law can give rise to a claim for compensation').

<sup>52</sup> *Amco Asia*, at para. 157. See also at para. 157: ('In Article 21 of the Indonesian Law of Foreign Investment No. 1/197) it is stated [...] [that] 'the Government has the obligation to provide compensation, the amount, type and payment-procedure of which shall have been agreed upon by both parties in accordance with *principles valid in international law* [...]' [emphasis added].)

as expressed in scholarship<sup>53</sup> and the International Law Commission Draft Articles on State Responsibility.<sup>54</sup>

With respect to the claim for breach of contract, the tribunal held that in order to characterize the investment application and its approval in the case at hand, it would primarily apply Indonesian law, but that it would also resort to principles common to several legal systems:

[A] ‘community’ of legal concepts is to be sought in the common definition of contract in several legal systems, and in particular in the civil law systems, since Indonesian private law, largely influenced by Dutch law, has a close affinity to said systems; and of course, before even trying to find out such common principles, one has to consider Indonesian law itself, which as previously stated, is applicable as being the law of the country which is a party to the dispute at hand.<sup>55</sup>

The tribunal concluded that under both Indonesian law and general principles of law, the contract at issue had binding force.<sup>56</sup> Concerning the manner in which the licence was revoked, the tribunal held that ‘the procedure was contrary, not only to the Indonesian regulations concerning the warning or warnings to be given before a revocation of an investment authorization, but to the general and fundamental principle of due process as well’.<sup>57</sup> It applied Indonesian law when finding that Indonesia was unjustified in revoking the licence.<sup>58</sup>

Having established that the acts by the host state constituted a failure to abide by its obligations vis-à-vis the investor,<sup>59</sup> the tribunal held that Indonesia was liable toward the investor ‘under Indonesian as well as under international law, that is to say under the two systems of law applicable in the instant case’.<sup>60</sup> In this respect, it relied on the principle *pacta sunt servanda*, ‘embodied in the Indonesian Civil Code by Article 1338 (contracts are the law of the parties);<sup>61</sup> and article 1365 of the Indonesian Civil Code, according to which ‘persons responsible for any act in violation of the law which results in a loss to another party are obliged to replace said loss’.<sup>62</sup> It added that *pacta sunt servanda* reflected international law ‘because of it being a general principle of law in the meaning of Article 38 of the Statute of the International Court of Justice, since it is common to all legal systems in which the institution of contract is known’.<sup>63</sup> Finally, the tribunal applied the international principle of acquired rights.<sup>64</sup>

<sup>53</sup> *Amco Asia*, at para. 158 (referring to B. A. Wortley, *Expropriation in Public International Law* (Cambridge, Cambridge University Press, 1959)); and at para. 172 (referring to O’Connell, *International Law*, 2nd edn. Vol. 2).

<sup>54</sup> *Amco Asia*, at para. 172.

<sup>55</sup> *Amco Asia*, at para. 172.

<sup>56</sup> *Amco Asia*, at paras 183–184.

<sup>57</sup> *Amco Asia*, at para. 201. See also at para. 198 (‘In the instant case, this protection was not made available to the Claimants, who were thus deprived of due process, contrary to Indonesian law as well as contrary to general principles of law’).

<sup>58</sup> *Amco Asia*, at para. 219.

<sup>59</sup> *Amco Asia*, at para. 243.

<sup>60</sup> *Amco Asia*, at para. 244 (emphasis added).

<sup>61</sup> *Amco Asia*, at para. 247.

<sup>62</sup> *Amco Asia*, at para. 247.

<sup>63</sup> *Amco Asia*, at para. 248 (the tribunal refers to the law of the US, France, England, and Islamic law).

<sup>64</sup> *Amco Asia*, at para. 248. (the tribunal refers to judgments and awards of the Permanent Court of Justice and the Iran–United States Claims Tribunal, as well as the *Aramco* award and the *Shufeldt* claim). For criticism of the award, see S.J. Toope, *Mixed International Arbitration* (Cambridge, Grotius, 1990), 243–4, 251.

*Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia* (1986)<sup>65</sup> is a further illustration of the concurrent application of national and international law and the attempt by arbitrators amicably to resolve differences between the parties as to the respective roles of national and international law. The ICSID Tribunal found that the reference in the parties' agreement to the legislation of Liberia appeared 'to indicate an express choice by the parties of the Law of Liberia as the law governing the Concession Agreement'.<sup>66</sup> It went on to state, however, that even if there was no express choice, Libyan law would apply by virtue of the second sentence of article 42(1) ICSID Convention, alongside international law.<sup>67</sup> The tribunal observed that 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 a divergence on a particular point between national and international law; and in this respect, it stated: '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>68</sup>

On the merits, we note that the tribunal considered *ex proprio motu* the possibility that the host state's action in depriving LETCO of its concession agreement could have been 'justifiable both under the law of Liberia and under international law, if accompanied by payment of appropriate compensation'.<sup>69</sup> For a 'generally accepted statement of the international law governing acts of nationalization', the tribunal referred to United Nations Resolution 1803 (XVII) of 1962 relating to Permanent Sovereignty over natural resources, scholarship, and arbitral jurisprudence.<sup>70</sup> Applying these standards to the case at hand, the tribunal concluded that 'even if the argument as to nationalization had been raised, it would have failed'.<sup>71</sup>

Under the heading 'Breach of contract and Right to remedies According to Liberian Law', the tribunal pointed out that it had 'obtained statements from experts in Liberian law, relevant articles of the Liberian Code of Laws of 1956 and reported decisions of the Liberian Courts'.<sup>72</sup> Quoting extensively from this Code as well as scholarship on Liberian law, it held that the Government of Liberia had 'acted in plain breach of the terms of the Concession Agreement'.<sup>73</sup>

In its decision on damages, the tribunal referred to the approach taken by other arbitral tribunals; but it noted that while these decisions may serve as a 'useful guide to this Tribunal, these cases, in and of themselves, are inadequate'.<sup>74</sup> Consequently, it continued, '[t]he Tribunal, once again, returns to the law of the Republic of Liberia as

<sup>65</sup> *LETCO v Liberia*, fn. 10, Award.

<sup>66</sup> *LETCO v Liberia*, at 358.

<sup>67</sup> *LETCO v Liberia*, at 358. (pursuant to this provision, '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' [emphasis added]).

<sup>68</sup> *LETCO v Liberia*, at 359. But see P. Peters, 'The Semantics of Applicable Law Clauses and the Arbitrator' in *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil* (C.C.A. Voskuil et al., eds, Dordrecht, Nijhoff, 1992), 231, 249 ('The designation of the host country law as "paramount" and the finding, without any supporting detail, that there was no divergence in this case between Liberian law and international law, are flaws in this award which, had it been submitted to the scrutiny given to the Klöckner award [...] might have led to a similar verdict').

<sup>69</sup> *LETCO v Liberia*, at 366.

<sup>70</sup> *LETCO v Liberia*, at 366.

<sup>71</sup> *LETCO v Liberia*, at 367.

<sup>72</sup> *LETCO v Liberia*, at 367.

<sup>73</sup> *LETCO v Liberia*, at 369.

<sup>74</sup> *LETCO v Liberia*, at 371.

the law applicable in this case and therefore determinative of the nature of damages to be awarded.<sup>75</sup>

The parties in *AGIP S.p.A. v People's Republic of Congo* (1979) had agreed to the application of 'the law of the Congo, supplemented if need be by any principles of international law'.<sup>76</sup> The case concerned the nationalization of AGIP pursuant to a Congolese order subsequently ratified as law.<sup>77</sup> Apart from wrongful nationalization,<sup>78</sup> the foreign investor also claimed various breaches of the contract it had entered into with the host state, including breach of stabilization clauses.<sup>79</sup>

While construing the choice-of-law clause to provide a primary role for national law,<sup>80</sup> the tribunal noted the relevance of international law: 'The nationalization decreed by Order No. 6/75 requiring the transfer of all Company assets and share to the Hydro-Congo State Corporation must be considered first in relation to Congolese law. The Tribunal must then consider whether the matter must also be examined from the standpoint of international law.'<sup>81</sup>

On the merits, the tribunal first evaluated the respondent's conduct in accordance with national law. As to the scope of this law, it introduced the relevance of French legislation in the Congolese legal order, the Constitution of the Popular Republic of the Congo, and the Congolese Basic Act of the Military Committee of the Party.<sup>82</sup> It also observed that 'Congolese law consists on the one hand of constitutional rules and on the other of civil and commercial law rules'.<sup>83</sup> It found that the measures taken against the company were wrongful, although they were in accordance with the forms required by Congolese constitutional law.<sup>84</sup> In this respect, the tribunal found the stabilization clauses to be of particular relevance:

Congo had a contractual relationship with AGIP which under Congolese law obliged it not to alter the company's status unilaterally. [...] As regards civil law, Article 1134 of the French Civil Code, which asserts the principle that 'agreements legally arrived at have the force of law for those making them,' provides a juridical [*sic*] basis for the agreement signed between the parties to the present dispute. It cannot be denied that the measures taken under the law cited above ignored the obligation of the contracting State to perform the contract.<sup>85</sup>

The tribunal proceeded to state that its observations with respect to Congolese law did not exempt it from examining the acts of nationalization from the point of view of international law: 'Indeed, the disputed Ordinance, being itself a piece of Congolese Law, one must establish why it cannot thereby be considered as providing a juridical basis for the measures taken pursuant to it.'<sup>86</sup> Observing that the parties had specifically stipulated that Congolese law can be 'supplemented' when the occasion arises by

<sup>75</sup> *LETCO v Liberia*, at 371.

<sup>76</sup> *AGIP S.p.A. v People's Republic of Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, paras 18, 43, 79.

<sup>77</sup> *AGIP v People's Republic of Congo*, at para. 28.

<sup>78</sup> *AGIP v People's Republic of Congo*, at para. 74.

<sup>79</sup> *AGIP v People's Republic of Congo*, at paras 48 *et seq.* See also at paras 84, 95.

<sup>80</sup> The primacy of national law is supported by the reliance on national law in the discussion of damages. See *AGIP v People's Republic of Congo*, at paras 98–114.

<sup>81</sup> *AGIP v People's Republic of Congo*, at para. 71. Cf. N. Nassar, 'Internationalization of State Contracts: ICSID, The Last Citadel' (1997) 14(3) *J. Int'l Arb.* 185, 199.

<sup>82</sup> *AGIP v People's Republic of Congo*, fn. 76, Award, at paras 46–47.

<sup>83</sup> *AGIP v People's Republic of Congo*, at para. 72.

<sup>84</sup> *AGIP v People's Republic of Congo*, at para. 73. See also at paras 76–79.

<sup>85</sup> *AGIP v People's Republic of Congo*, at paras 76–77.

<sup>86</sup> *AGIP v People's Republic of Congo*, at paras 79–80.

principles of international law,<sup>87</sup> the tribunal concluded that the Congolese nationalization Ordinance was contrary to international law.<sup>88</sup> Again, the tribunal focused on the stabilization clauses, resulting from the ‘common will of the parties expressed at the level of international juridical order’.<sup>89</sup>

It is sufficient to focus the examination of the compatibility of the nationalization with international law to the stabilization clauses. [...] It is in fact in regard to such clauses that the principles of international law supplement the rules of Congolese law. The reference to international law is enough to demonstrate the irregular nature, under this law, of the act of nationalization which occurred in this case.<sup>90</sup>

The tribunal concluded that the wrongful conduct, as established both under national and international law, gave rise to a duty on the part of the Government to compensate AGIP.<sup>91</sup>

The arbitration in *Goetz v Republic of Burundi* (1999) was based on a bilateral investment treaty, which stipulated:

The arbitral body decides on the basis of:

the domestic law of the contracting party to the dispute, on the territory of which the investment is located, including its rules relating to the conflict of laws;  
the provisions of the present Treaty;  
the terms of the particular agreement which might have taken place regarding the investment;  
the generally admitted rules and principles of international law.<sup>92</sup>

In its analysis of the applicable law, the ICSID Tribunal first noted the various responses that the ‘problem of the links’ between national and international law had received in the context of article 42(1), second sentence, ICSID Convention.<sup>93</sup> Finding that the present case related to the first sentence of this article, the tribunal concluded that on the basis of the terms of the applicable law clause, which, like the second sentence of article 42(1), included reference to both national and international law, ‘a complementary relationship must be allowed to prevail’.<sup>94</sup>

The applicability of both national and international law to the case at hand is further illustrated by the fact that the tribunal requested counsel for the claimants ‘to explain further a number of matters and invite[d] him to submit written responses’.<sup>95</sup> These questions included the following:

22.6 What is the hierarchy between the sources of law set out in Article 8 of the Treaty between the Belgium-Luxembourg union and the Republic of Burundi?

22.7 Has international law been incorporated into the domestic Burundian legal order?

<sup>87</sup> *AGIP v People's Republic of Congo*, at para. 82.

<sup>88</sup> *AGIP v People's Republic of Congo*, at para. 88.

<sup>89</sup> *AGIP v People's Republic of Congo*, at para. 85.

<sup>90</sup> *AGIP v People's Republic of Congo*, at paras 87–88.

<sup>91</sup> *AGIP v People's Republic of Congo*, at para. 97.

<sup>92</sup> *Antoine Goetz et al. v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (P. Weil, M.M. Bedjaoui, J.-D. Bredin, arbs), para. 98 (referring to Belgium–Burundi Investment Treaty, art. 8(5)).

<sup>93</sup> *Goetz v Burundi*, at para. 97. See also Chapter 1, Section 1 (on motivations for the study).

<sup>94</sup> *Goetz v Burundi*, fn. 92, Award, at para. 98 (emphasis added).

<sup>95</sup> *Goetz v Burundi*, at para. 13.

- 22.8 What are, according to Burundian administrative law, the circumstances required in order to be given compensation in the event of the changing of a regulation by the Burundian State (the said case-law of the legislating State, invoked by the claimant)?
- 22.9 Does the International Pact on economic and social rights quoted in the memorial bind the parties in this case?<sup>96</sup>

According to the tribunal, the need to apply Burundian law was ‘beyond doubt’ since this source was cited in the first place by the applicable law clause of the treaty at hand.<sup>97</sup> As regards international law, the tribunal found its application to be ‘obligatory’ for two main reasons: ‘First, because, according to the indications furnished to the Tribunal by the claimants, Burundian law seems to incorporate international law and thus to render it directly applicable [...].’<sup>98</sup> Secondly, stated the tribunal, ‘the Republic of Burundi is bound by the international law obligations which it freely assumed under the Treaty for the protection of investments, just as it can benefit from the rights conferred on it under the Treaty [...].’<sup>99</sup> Accordingly, it explained, the tribunal’s role was not limited to examining the legitimacy and the legal consequences of the disputed decision in relation to Burundian law, but it must necessarily extend to examining the legitimacy and the legal consequences of the disputed decision in relation to the international rights and obligations of the Burundian state.<sup>100</sup>

The need to apply both national and international law was further supported by article 7 of the investment treaty, which specifically allowed foreign investors to invoke provisions, national or international, being more favourable to them.<sup>101</sup> The tribunal stated:

Far from establishing *a priori* a hierarchy between the two systems of law which govern the relationship between Burundi and Belgian investors and must serve as a base for the Tribunal’s settlement of the dispute, the Belgium–Burundi investment treaty obliges the Tribunal to examine the legal situation created in the wake of the [governmental measure] in the context of both: each must reign in its own sphere of application, and in case of conflict between the two it is, by common accord of the parties, the provisions which are more favourable to the investors which must be applied.<sup>102</sup>

On the merits, the tribunal first analysed ‘[t]he Problem as it relates to Burundian Law’.<sup>103</sup> The claimants had alleged that the decision taken by the Burundi Government withdrawing their free zone certificate violated Burundian law.<sup>104</sup> Having dismissed

<sup>96</sup> *Goetz v Burundi*, at para. 22. See also at para. 56 (‘As regards the law, the Tribunal regrets not being able to hear the views of the defendant on Burundian constitutional and administrative law’); para. 8 (‘The President expressed his regret, in the name of the arbitral Tribunal, that the Republic of Burundi had not submitted its counter-memorial and was not present for the opening of oral proceedings’); and at para. 53.

<sup>97</sup> *Goetz v Burundi*, at para. 98.

<sup>98</sup> *Goetz v Burundi*, at para. 98 ([B]y reason of the non-appearance of the defendant, the Tribunal is not however in a position to reach a definite conclusion on this point). See also Chapter 5, Section 3.1.1 (on international law as part of the ‘law of the law’).

<sup>99</sup> *Goetz v Burundi*, at para. 98. See also at para. 120 (‘Whatever the mastery over its domestic law that the Burundian State derives from its sovereignty, it is obliged, by virtue of this same sovereignty, to respect its international undertakings’).

<sup>100</sup> *Goetz v Burundi*, at para. 98.

<sup>101</sup> *Goetz v Burundi*, at para. 95.

<sup>102</sup> *Goetz v Burundi*, at para. 99 (emphasis by underlining added).

<sup>103</sup> *Goetz v Burundi*, at paras 100–119.

<sup>104</sup> *Goetz v Burundi*, at para. 101.

this claim,<sup>105</sup> the tribunal proceeded to consider '[t]he Problem as regards International law', and, in particular, any violation of the claimants' rights pursuant to the investment treaty.<sup>106</sup> It concluded that, in order not to incur international responsibility, the Republic of Burundi would need, within a reasonable period, 'to give an adequate and effective indemnity to the claimants as envisaged in Article 4 of the Belgium–Burundi investment treaty, unless it prefers to return the benefit of the free zone regime to them'.<sup>107</sup>

Finally, we note the case of *Sempra Energy International v Argentine Republic* (2007).<sup>108</sup> On the interplay between national and international law, the ICSID Tribunal first observed: 'While writers and decisions have on occasion tended to consider domestic law and international law as mutually incompatible in their application, this is far from actually being the case. Both have a role to perform in the resolution of the dispute, as has been recognized'.<sup>109</sup>

In examining the claimant's allegation that Argentina had incurred a liability in consequence of its conduct, the tribunal found 'that there is generally no inconsistency between the Argentine law and international law insofar as the basic principles governing the matter are concerned'.<sup>110</sup> While noting that international law would prevail in case of any inconsistency with national law,<sup>111</sup> it concluded that it would 'consider both Argentine law and international law to the extent each is relevant to a determination on liability'.<sup>112</sup> On the merits, it held:

The Tribunal's inescapable conclusion is that in considering the claims solely from the point of view of the Argentine legislation as the law applicable to the dispute, the obligations and commitments which the Argentine Republic owed in relation to the License were not observed. Whether the question is examined from the point of view of the Constitution, the Civil Code or Argentine administrative law, the conclusion is no different. Liability is the consequence of such a breach, and there is no legal excuse under the legislation that could justify the Government's non-compliance since the very conditions set out by the legislation and the decisions of courts have not been met. As will be examined further later, these conclusions are no different from those that could be reached under the Treaty and international law [...].<sup>113</sup>

<sup>105</sup> *Goetz v Burundi*, at para. 119.

<sup>106</sup> *Goetz v Burundi*, at para. 120 *et seq.* See also at para. 121 (The tribunal also considered, but quickly dismissed the applicability of the International Covenant on Economic, Social and Cultural Rights).

<sup>107</sup> *Goetz v Burundi*, at para. 133. See also ICSID Rep. 3, 46 (2004) (the parties' Settlement Agreement).

<sup>108</sup> *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/0/16, Award, 28 September 2007 (F.O. Vicuña, M. Lalonde, S.M. Rico, arbs).

<sup>109</sup> *Sempra Energy*, at para. 236.

<sup>110</sup> *Sempra Energy*, at para. 238.

<sup>111</sup> *Sempra Energy*, at para. 239.

<sup>112</sup> *Sempra Energy*, at para. 240.

<sup>113</sup> *Sempra Energy*, at para. 268. Cf. *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (F. Orrego-Vicuña, A.J. van den Berg, P.-Y. Tschanz, arbs), para. 209 ('The Tribunal must also note that in examining the Argentine law as pertinent to various issues disputed by the parties, it finds that there is generally no inconsistency with international law as far as the basic principles governing the matter are concerned. The Tribunal will accordingly apply both Argentine law and international law to the extent pertinent and relevant to the decision of the various claims submitted'). See also *M.C.I. Power Group v Republic of Ecuador*, ICSID Case No. ARB/03/6), Award, 31 July 2007 (R.E. Vinuesa, B.J. Greenberg, J. Irarrázabal, arbs), para. 305 ('[T]he Tribunal finds that the action of the Ecuadorian authorities in revoking Seacoast's permit to operate in Ecuador did not in itself constitute an act in conflict with domestic law or with the BIT').

In accordance with the foregoing, we may conclude that both territorialized and internationalized investment tribunals have applied national and international law in a consecutive or concurrent fashion both in situations in which the parties have agreed to the application of both sources of law, and where there is no agreement on the applicable law.<sup>114</sup> We further observe that tribunals often emphasize the consistency that exists between the applicable sources of national and international law.

## 2.2. Reference to consistent national and international law

Arbitral tribunals may also decide to solve the dispute by primarily applying either national or international law.<sup>115</sup> Such primacy notwithstanding, tribunals frequently point to the normative convergence between the two legal orders on relevant issues.<sup>116</sup> The same technique is used by national courts. Based on a survey undertaken by the International Law Association's Committee on International Law in National Courts, Guillaume observes: 'it appears that national courts do on occasion justify their decision by additional reference to international law such as by confirming that national law already reflects, or has a parallel in, international law.'<sup>117</sup>

From the practice of territorialized tribunals, one example of this choice-of-law methodology is the ICC award in *SPP (Middle East) Ltd v Arab Republic of Egypt* (1983).<sup>118</sup> The dispute in that case arose subsequent to the termination by the host state of a tourist development project in the vicinity of the Egyptian pyramids; a project that was based on agreements entered into between SPP and the Egyptian General Company for Tourism and Hotels (EGOTH).<sup>119</sup> The 1974 'Heads of Agreement' stated in the recital that the agreement was made in accordance with several Egyptian laws.<sup>120</sup> A subsequent 'Agreement for the Development of Two International Tourist Projects in Egypt—the Pyramid and Ras-El-Hekma Area' contained the same references to the law of Egypt.<sup>121</sup> The tribunal did not find this to constitute an agreement on the applicable law.<sup>122</sup>

<sup>114</sup> But see C. McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in *50 Years of the New York Convention* (ICCA Congress Series no. 14, A.J. van den Berg, ed., The Hague, Kluwer, 2009), 95, 111. (Commenting on the *Goetz v Burundi* case, the author states: 'This approach of considering every issue in terms respectively of host state law and international law has not gained traction in subsequent investment treaty arbitrations. Despite some distinguished support [see C. Schreuer, 'Failure to Apply the Governing Law in International Investment Arbitration' (2004) 7 *Austrian Rev. Int'l & Eur. L.* 147, 160], it is submitted that it cannot be accepted either as required by the clause in the treaty or, more generally, by the logical methodology necessary to resolve such cases. Instead [...] the tribunal must undertake a *choice of law* analysis in order to determine which of the range of designated rules of law is applicable to the issue in question' [emphasis in original]).

<sup>115</sup> See Chapter 5, Section 2 (on reasons for the primarily applicability of national law); Chapter 6, Section 2 (on reasons for the primary applicability of international law).

<sup>116</sup> It is noted that in referring to consistency, rather than applying the relevant norms as such, the tribunals enjoys a higher degree of flexibility with respect to the principle *non ultra petita* and the parties' right to be heard. See Chapter 6, Section 2.2 (on the international nature of the claim), at fn. 112. See also G. Petrochilos, *Procedural Law in International Arbitration* (Oxford, Oxford University Press, 2004), 145; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Decision on the Application of Annulment, 23 December 2010 (P. Tomka, D. Hascher, C. McLachlan, committee members), para. 197; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), 258, 290–8, 357, 398.

<sup>117</sup> G. Guillaume, 'The Work of the Committee on International Law in National Courts of the International Law Association' (2001) 3 *International Law FORUM du droit international* 39.

<sup>118</sup> *SPP (Middle East) Ltd v Arab Rep. of Egypt*, ICC Award No. 3493, Award, 16 February 1983 (G. Bernini, A.H. Elghatit, M. Littman, arbs).

<sup>119</sup> *SPP v Egypt*. <sup>120</sup> *SPP v Egypt*, at para. 12.

<sup>121</sup> *SPP v Egypt*, at paras 14–20. <sup>122</sup> *SPP v Egypt*, at para. 49.

In their pleadings, the claimants had emphasized the superior nature of international law vis-à-vis national law: ‘no rules and/or principles drawn from the body of domestic Egyptian law should be allowed to override the principles of international law applicable to international investment projects of this kind.’<sup>123</sup> On its part, the host state had refuted the claimants’ argument in favour of the so-called ‘denationalisation’ of the applicable law, concluding rather that ‘the law governing the substantive issues could be nothing but the Egyptian legal system’.<sup>124</sup>

In an obvious attempt to reconcile these differences, the tribunal observed that the parties had come to conclusions that only partially diverged: ‘They both agree that in view of the circumstances of the case the relevant domestic law is that of Egypt.’<sup>125</sup> The tribunal went on to conclude that ‘[i]n the case at issue the governing law is, in our opinion, the law of Egypt. The Agreements were both made in Egypt. The place of performance was almost entirely Egypt. There are numerous references to Egyptian law in the agreements.’<sup>126</sup> Still, it emphasized that also international law was applicable to the case at hand: ‘we find that reference to Egyptian law must be construed so as to include such principles of international law as may be applicable and that the national laws of Egypt can be relied upon only in as much as they do not contravene said principles.’<sup>127</sup> Indeed, also at a later point it gave hierarchical primacy to international law: ‘We have already found [...] that the general principles of international law are the ultimate yardstick for the adjudication of Claimant’s claim.’<sup>128</sup>

In reaching its decision on the applicability and importance of international law, the tribunal relied first on the claimant’s statement that the law of Egypt should be deemed to include general principles of international law.<sup>129</sup> This position, it noted, was supported by Egyptian law specialists whose opinion aimed at demonstrating that principles of international law such as *pacta sunt servanda* and just compensation for expropriatory measures were not incompatible with the Egyptian legal system.<sup>130</sup> The tribunal observed:

Both Dr. Oteifi and Mr. Mansour point out that these principles are deeply rooted in the Egyptian legal tradition, characterised by the general rule of ‘sivadat el kenoun’, i.e. supremacy of the law [...]. They further specifically refer inter alia to Articles 147 and 148, Egyptian Civil Code [...] and to Articles 34 and 35 of the Egyptian Constitution [...], expressly stating that ‘the contract makes the law of the parties’ and that ‘private ownership is safeguarded [...] and may not be expropriated except for public use and with just compensation’.<sup>131</sup>

Secondly, and less convincingly, the tribunal invoked the reference in Egyptian Law no. 43 of 1974 to the ICSID Convention, which entered into force for Egypt in 1972.<sup>132</sup> According to the tribunal, ‘[t]he adherence to the ICSID convention should then be treated as conclusive evidence of Egypt’s declared intent to abide by these [general] principles, which indeed represent the basic philosophy adopted by the Convention’s drafters.’<sup>133</sup> According to the present author, one should be cautious in construing a reference in national law to the ICSID Convention as ‘conclusive evidence’ of any

<sup>123</sup> *SPP v Egypt*, at para. 49.

<sup>124</sup> *SPP v Egypt*, at para. 49.

<sup>125</sup> *SPP v Egypt*, at para. 49.

<sup>126</sup> *SPP v Egypt*, at para. 49.

<sup>127</sup> *SPP v Egypt*, at para. 49.

<sup>128</sup> *SPP v Egypt*, at para. 54.

<sup>129</sup> *SPP v Egypt*, at para. 49.

<sup>130</sup> *SPP v Egypt*, at para. 49.

<sup>131</sup> *SPP v Egypt*, at para. 49.

<sup>132</sup> *SPP v Egypt*, at para. 49.

<sup>133</sup> *SPP v Egypt*, at para. 49. Thirdly, the tribunal referred to article 13(5) of the ICC Arbitration Rules in force at that time, which stated that ‘in all cases the arbitrator shall take into account the provisions of the contract and the relevant trade usages’. *SPP v Egypt*, fn. 118, at para. 49 (citing Fouchard, *L’Arbitrage Commercial International* (Paris, Dalloz, 1965), 101, at para. 175).

intent on the part of the state to agree to the application of international law. This is particularly so in light of the procedural, rather than the substantive, nature of the Convention.<sup>134</sup>

On the merits, the tribunal found it established that the host state, by its various actions, had prevented all further performance of the Pyramids Oasis Project; and thereby it had committed such breaches of its obligations as amounted to total repudiation.<sup>135</sup> In this respect, it referred to ‘the general principle (recognised both under Roman Law as well as under common law traditions) whereby a party is barred from taking a contrary course of action [...] after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party’.<sup>136</sup>

The tribunal proceeded to ‘consider the various grounds upon which the Defendants justify the action that was taken’.<sup>137</sup> One of Egypt’s arguments was that the steps it took were ‘measures of a legislative and executive character [that] amount to an Act of State, and as such cannot be condemned as a breach of contract’.<sup>138</sup> The tribunal rejected this defence:

The issue is whether submission to international arbitration by States and public entities should be regarded as an implicit waiver of immunity thus preventing concurrent application of other international or municipal rules granting sovereign immunity. In finding upon the governing law we implicitly answered in the affirmative. It would indeed be frustrating to recognise full force and effect of general principles of international law aimed at protecting foreign investors and then admit that a state may, before an arbitral tribunal, rely upon domestic or international principles granting sovereign immunity as an excuse for acts amounting to contractual breaches.<sup>139</sup>

In finding in favour of the investor, the tribunal further relied on ‘the principle “*pacta sunt servanda*” (common to both the Egyptian and the international legal systems)’.<sup>140</sup> It also perused articles 157 and 158 of the Egyptian Civil Code dealing with dissolution of contracts, and which in its view, ‘embody a number of principles which are fairly common under civil law systems [...].’<sup>141</sup>

Additionally, the host state argued that ‘the shameful record of the Claimant’s operations in Egypt from the very first day demonstrates clearly that they came to Egypt not as investors, not as promoters, but with the sole purpose of obtaining by fraudulent means exorbitant and illegal benefits’.<sup>142</sup> In considering ‘with great care this grave statement’, the tribunal, *ex proprio motu*, referred to Egyptian law:

No reference is made by Defendants to the provisions of the Egyptian Civil Code. The subject matter of the contention, however, is expressly dealt with in Article 125, providing as follows: ‘A contract may be declared void on the grounds of fraudulent misrepresentation, when the artifices practised by one of the parties, or by his representative, are of such gravity that, but for them, the other party would not have concluded the contract. Intentional silence on the part of one of the parties as to a fact or as to the accompanying circumstances constitutes fraudulent

<sup>134</sup> See Chapter 2, Section 4.2 (on ICSID tribunals); Chapter 3, Section 3.2.2.1 (on the ICSID Convention). Further, a distinction should be made between the superiority of international law in the international legal order and the primacy of international law vis-à-vis national law as the law applicable to the merits. See further Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law).

<sup>135</sup> *SPP v Egypt*, fn. 118, at para. 51.

<sup>136</sup> *SPP v Egypt*, at para. 51.

<sup>137</sup> *SPP v Egypt*, at para. 51 *et seq.*

<sup>138</sup> *SPP v Egypt*, at para. 52.

<sup>139</sup> *SPP v Egypt*, at para. 54.

<sup>140</sup> *SPP v Egypt*, at para. 54.

<sup>141</sup> *SPP v Egypt*, at para. 58.

<sup>142</sup> *SPP v Egypt*, at para. 59.

misrepresentation if it can be shown that the contract would not have been concluded by the other party had he had knowledge thereof [...].'<sup>143</sup>

The tribunal then observed that it was again 'faced with principles, generally prevailing within the civil law systems'.<sup>144</sup> Concluding that the host state had failed to prove any substantial breaches on the part of the investor, and that in any event, if any breaches did occur, they were not of such a character as to justify the cancellation of the contract,<sup>145</sup> the tribunal continued to determine the measure of damages according to the law of Egypt.<sup>146</sup>

*CME v Czech Republic* (2001/03) is a further example of a case in which the respective roles of national and international law were disputed, and in which the tribunal pointed to congruence.<sup>147</sup> In its first and partial award, the UNCITRAL Tribunal relied solely on international law in holding that the host state was liable for violating the BIT.<sup>148</sup> In its Final Award, however, it also relied on national law, which, it pointed out, was consistent with international law:

The Tribunal's position is consistent with Art. 438(1) Czech Civil Code, according to which tort-feasors are jointly and separately liable. Only for good reasons may a court decide that someone who caused the damage shall be liable only in respect to the damage caused by him personally (Art. 438(2) Czech Civil Code).<sup>149</sup>

Compatibility between the relevant provisions of international and national law was also referred to during the tribunal's discussion of the proper date for fixing the fair market value of CME's investment: 'This date is in accordance with Art. 443 of the Czech Civil Code [and] [i]t is in accordance with customary international law, with the provisions of bilateral investment treaties, and with the holdings of tribunals applying international law.'<sup>150</sup> This reference to national law may be seen as a response to the criticism raised against its focus in the Partial Award on international law. Schreuer states: 'The detailed reliance on Czech law in the Final Award is in clear contrast to the Partial Award. It creates the impression that its treatment in the Partial Award of the Applicable law, especially Czech law, was out of order and that it was necessary to make amends.'<sup>151</sup>

*BG Group Plc v Argentina* (2007) is illustrative as well.<sup>152</sup> Also in that case, the parties had presented diametrically opposed arguments as to the applicability of national and international law: 'Where Claimant and Respondent disagree is on [...] whether Argentina's alleged liability is exclusively a function of domestic law, as argued by Respondent, or whether this issue falls squarely under the terms of the BIT

<sup>143</sup> *SPP v Egypt*, at para. 59.

<sup>144</sup> *SPP v Egypt*, at para. 59.

<sup>145</sup> *SPP v Egypt*, at para. 60.

<sup>146</sup> *SPP v Egypt*, at para. 62.

<sup>147</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments); Chapter 6, at Section 2.2 (on the international nature of the claim).

<sup>148</sup> *CME Czech Republic B.V. v Czech Republic*, Partial Award, 13 September 2001 (W. Kühn, S.M. Schwebel, J. Händl, arbs), paras 580–584; Final Award, 14 March 2003 (W. Kühn, S.M. Schwebel, I. Brownlie, arbs), para. 452.

<sup>149</sup> *CME Czech Republic*, Final Award, at para. 452.

<sup>150</sup> *CME Czech Republic*, at para. 492; and at para. 629 ('Czech law also provides interest on late payments'). Cf. Schreuer, *Failure to Apply the Governing Law in International Investment Arbitration*, fn. 11, at 191–2.

<sup>151</sup> C.H. Schreuer, *Comments Relating to Applicable Law on the Stockholm Tribunal's Final Award of 14 March 2003*, TDM 2(3) (2005), 4–5.

<sup>152</sup> *BG Group Plc v Argentina*, Award, 24 December 2007 (A.M. Carro, A.J. van den Berg, G.A. Alvarez, arbs).

and underlying principles of international law, as argued by the Claimant.<sup>153</sup> Before primarily applying international law to the claims set forth by the foreign investor,<sup>154</sup> the UNCITRAL Tribunal explained why it considered immaterial the question of any hierarchy between the legal orders in the case at hand:

Regarding the remission in Article 8(4) of the BIT to national and international law, the Parties seem to make much of the issue whether international law and Argentine law are to be deemed of equal rank, as proposed by Respondent, or whether the latter ought to yield to the former, as contended by Claimant. In the opinion of the Tribunal this focus is misplaced. In the first place, the doctrinal and jurisprudential authorities brought to the attention of the Tribunal fail to yield any collision or contradiction between the protection to which Claimant's property rights are entitled under Argentine constitutional and administrative law and the protection it receives under international law. [...] Thus, the question of the hierarchy that one source of law bears with regard to the other fades in relevance in this case, where property rights would be fully protected under Argentine domestic law in any event.<sup>155</sup>

Also internationalized tribunals have frequently referred to the consistency between national and international law. In the ICSID case *Adriano Gardella S.p.A. v Côte d'Ivoire* (1977), the parties had agreed on the application of 'the law of the Ivory Coast within the framework of public international law'.<sup>156</sup> Before proceeding to solve the dispute on the basis of national law,<sup>157</sup> the tribunal stated:

Both parties admit that their agreement is governed by the law of the Ivory Coast. Gardella has pleaded, it is true, that the law of the Ivory Coast ought to apply, in this case, within the framework and in the context of public international law. However, Gardella has not drawn any other conclusion from that argument than that it is necessary to have regard to the rule 'pacta sunt servanda' and to the principle of good faith, principles which are equally recognized by the law of the Ivory Coast as well as by French law.<sup>158</sup>

Another case on point is *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1983).<sup>159</sup> The ICSID Tribunal first concluded that French law applied to the dispute.<sup>160</sup> Still, it referred to general principles of law when concluding that Klöckner had failed to respect its duty of confidence and loyalty vis-à-vis its contractual partner: 'the principle according to which a person who engages in close contractual relations, based on confidence, must

<sup>153</sup> *BG Group*, at para. 93.

<sup>154</sup> *BG Group*, at para. 95 ('[T]he Tribunal must rely on the terms of this bilateral treaty as the primary source of law').

<sup>155</sup> *BG Group*, at para. 96 [references omitted]. See also at para. 97 (the tribunal placed importance on the fact that the relevant sources of international law are incorporated into Argentine domestic law, superseding conflicting domestic statutes). For other cases in which territorialized tribunals have pointed to the consistency between national and international law, see, e.g., *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, at section VI; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Final Award, 3 February 2006 (J. Crawford, H.G. Naón, C. Thomas, arbs), Partial Dissenting Opinion by H.G. Naón, at para. 25; *National Grid plc v Argentine Republic*, Award, 3 November 2008 (A.M. Garro, J.L. Kessler, A.R. Sureda, arbs), para. 88.

<sup>156</sup> *Adriano Gardella S.p.A. v Côte d'Ivoire*, Case No. ARB/74/1, ICSID Rep. 283 (1993) (excerpts).

<sup>157</sup> *Gardella*, at 288, 291, 294 (referring to articles 1832, 1865, 1869, and 1872 of the Civil Code of the Ivory Coast).

<sup>158</sup> *Gardella*, at 287.

<sup>159</sup> *Klöckner v Cameroon*, fn. 19, Award.

<sup>160</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under the other national codes which we know of.<sup>161</sup>

Applying the principle *exceptio non adimpleti contractus*, the tribunal, after having discussed the principle pursuant to French law, decided to point out, ‘in view of the parties’ divergence as to the applicable law’, that ‘English and international law reach similar conclusions’.<sup>162</sup> Interestingly, in its decision on annulment of the award, the ad hoc committee found it necessary to comment critically on the tribunal’s reference to the consistency between national and international law: ‘This superfluous observation is rather difficult to reconcile with the Tribunal’s previous decision [...] that, as the Claimant argued, “only that part of Cameroonian law that is based on French law should be applied in the dispute.”<sup>163</sup>

Reference should also be had to the ICSID case *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (1992).<sup>164</sup> As we recall from Chapters 3 and 5, the applicable law in that case was subject to much debate between the parties as well as the arbitrators.<sup>165</sup> In particular, El Mahdi, in his dissenting opinion, criticized the majority for not having found an agreement in favour of the application of Egyptian law, as well as the majority’s decision that, in light of lacunae in the Egyptian legal system, international law would apply regardless of any implied choice.<sup>166</sup> In what could be seen as an attempt to accommodate the divergent positions of the opposing parties on the applicable law, the ICSID Tribunal reached its decision on the unlawfulness of the respondent’s measures by applying both Egyptian and international law:

The rules of Egyptian law and international law governing the exercise of the right of eminent domain impose an obligation to indemnify parties whose legitimate rights are affected by such exercise. Article 34 of the Egyptian Constitution provides: [...] The obligation to pay fair compensation in the event of expropriation applies equally where antiquities are involved. Thus, Article 11 of Law No. 215 of 1951 for the Protection of Monuments and Antiquities provides: [...].<sup>167</sup>

We further note the case *Desert Line Projects (DLP) v Republic of Yemen* (2008).<sup>168</sup> Having found that the respondent had violated the BIT’s provision on fair and

<sup>161</sup> *Klöckner v Cameroon*, fn. 19, Award, at section VI(B). See also fn. 11, Decision on Annulment, at para. 69 (‘The language employed by the tribunal indicates that it ‘may have wanted to base, or thought it was basing, its decision on the general principles of law recognized by civilized nations, as that term is used in Article 38(3) [sic] of the Statute of the International Court of Justice’).

<sup>162</sup> *Klöckner v Cameroon*, Award, fn. 19, at section VI(C) (referring for international law authority to *Diversion of Water from the Meuse*, Permanent Court of International Justice, 28 June 1937, Opinion of Judge Anzilotti, Ser. A/B, No. 70, p. 50).

<sup>163</sup> *Klöckner v Cameroon*, fn. 11, Decision on Annulment, at para. 168. See also Schreuer et al., fn. 11, at 620 (‘Such a parallel application may seem reasonable where compliance with mandatory standards of international law is at stake. It is much less convincing where the rules of international law derive from general principles of law. If a clear rule is offered by the host State’s domestic law, a comparative search for general principles is of doubtful value. It will be difficult to argue that there is a general principle of law which is at variance with the host State’s law. Moreover, general principles of law do not necessarily set mandatory minimum standards which must be complied with’).

<sup>164</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (E. Jimenez de Arechaga, R.F. Pietrowski, M.A.E. El Mahdi, arbs).

<sup>165</sup> Chapter 3, Section 3.1.2 (on express and implied choice of law); Chapter 5, Section 3.2.1 (on the complementary function of international law).

<sup>166</sup> *SPP v Egypt*, Award, fn. 164, Dissenting Opinion of M.A.E. El Mahdi, sections III(3)(i), III(3)(iv).

<sup>167</sup> *SPP v Egypt*, Award, at para. 159. Cf. G.R. Delaume, ‘L’affaire du Plateau des Pyramides et le CIRDI. Considérations sur le droit applicable’ (1994:1) *Revue de l’Arbitrage* 39, 47–8.

<sup>168</sup> *Desert Line Projects (DLP) v Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (P. Tercier, J. Paulsson, A.S. El-Kosheri, arbs), para. 104.

equitable treatment by exerting pressure on the claimant to sign a settlement agreement subsequent to the rendering of an arbitral award in favour of the claimant,<sup>169</sup> the ICSID Tribunal concluded that the arbitral award must be implemented in its entirety.<sup>170</sup> According to the tribunal,

This conclusion emerges from the combined effect of two basic rules having paramount place within the Yemeni legal order and shared by all other systems of law as well as by international law. [...] First, *pacta sunt servanda* [...]. Second, the mandatory implication of the fundamental general principle of law commonly known as the legal doctrine of estoppel, which originated over twelve centuries ago in the Islamic Jurisprudence [...] the precise wording of which can be translated in English to read: 'whoever tries to undo what he previously undertook, such act on his part shall be turned against him'.<sup>171</sup>

A final example of the practice of ICSID tribunals of referring to consistency between national and international law is the case *Aguaytia Energy LLC v Republic of Peru* (2008), which concerned an alleged breach of contract by the host state.<sup>172</sup> As the parties had not agreed on the applicable law, the tribunal stated that 'basically the laws of the Republic of Peru shall apply together with such rules of international law as may be applicable'.<sup>173</sup> In any event, the parties did not dispute the primary applicability to the contract of the Peruvian Civil Code, especially seeing the consistency between national and international law. Counsel for the applicant stated: 'We submit that Peruvian law, properly understood and applied, and international law lead to the same conclusion, so the issue is really of limited currency'.<sup>174</sup> With this in mind, the tribunal 'reached the conclusion that for the resolution of this dispute it need not look beyond Peruvian law'.<sup>175</sup> On the merits, the arbitrators referred to and quoted extensively from different expert opinions on the exact meaning of relevant provisions on Peruvian law.<sup>176</sup>

With respect to the Iran–United States Claims Tribunal, it has been observed that national law has played a limited role in its jurisprudence.<sup>177</sup> According to Crook, the seeming reluctance to apply national law should be seen in light of the generally tense nature of US–Iranian relations.<sup>178</sup> Indeed, he opines, 'the sometimes strained

<sup>169</sup> *Desert Line Projects*, at para. 194.

<sup>170</sup> *Desert Line Projects*, at para. 205.

<sup>171</sup> *Desert Line Projects*, at paras 205–207. See also *S.A.R.L. Benvenutti & Bonfanti v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, at para. 4.64 ('This principle of compensation in case of nationalization is in accordance with the Congolese Constitution and constitutes one of the generally recognized principles of international law as well as of equity'); *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, rectified 8 June 2000 (L.Y. Fortier, E. Lauterpacht, P. Weil, arbs), para. 64 (before proceeding to apply international law to the claim at hand, the tribunal noted that it was 'satisfied that the rules and principles of Costa Rican law which it must take 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').

<sup>172</sup> *Aguaytia Energy LLC v Republic of Peru*, ICSID Case No. ARB/06/13, Award, 11 December 2008 (R. Briner, J.W. Rowley, C. von Wobeser, arbs).

<sup>173</sup> *Aguaytia v Peru*, at para. 71.

<sup>174</sup> *Aguaytia v Peru*, at para. 72. See also para. 73 (counsel for the respondent stated: 'The question is, does it matter, and maybe for different reasons both Parties are of the view that it does not ultimately matter because Peruvian law applies here, and it is consistent in all material respects with international law').

<sup>175</sup> *Aguaytia v Peru*, at para. 74.

<sup>176</sup> *Aguaytia v Peru*, at para. 78 *et seq.*

<sup>177</sup> J.R. Crook, 'Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience' (1989) 83 *Am. J. Int'l L.* 278, 297 ('[N]ational law has played a limited role in the Tribunal's jurisprudence').

<sup>178</sup> Crook, 'Applicable Law in International Arbitration', at 310.

atmosphere of the Tribunal itself, [has] perhaps stimulated recourse to solutions that do not give predominance to the law of either arbitrating party.<sup>179</sup> A similar observation is made by Brower and Brueschke:

Perhaps surprisingly, where gaps or ambiguities have existed in contracts that could not be resolved by reference or analogy to the terms of the contract itself, the Tribunal rarely has turned to either Iranian or United States municipal law. This reflects a reluctance on the part of the Tribunal to place one party's municipal law above the other's.<sup>180</sup>

Relatedly, Judge Mosk, in his dissenting opinion to the award in *Harnischfeger Corp. v Ministry of Roads and Transportation, et al.* (1985), observed:

I recognize that it is not always necessary to discuss the source of the law utilized, even when multiple jurisdictions are involved. It may be difficult for the Tribunal to obtain any consensus on the appropriate source of the legal principles applied. Often the parties do not raise any choice-of-law questions. Moreover, under Article V of the Claims Settlement Declaration, the Tribunal has great flexibility in its choice of law. Accordingly, the Tribunal sometimes has rejected the application of municipal law and has applied general principles of law.<sup>181</sup>

While it is true that the tribunal has more often than not relied on the contract at issue and public international law, including in particular general principles of law,<sup>182</sup> it should be emphasized that it has repeatedly called attention to the consistency that exists between international law and national law. It is partly on the basis of such practice that Crook draws the conclusion that counsel might have greater success if it were to rest arguments upon rules that have received wide international acceptance, or that can be shown to be general principles of law accepted by many legal systems.<sup>183</sup> Further, he suggests, where conflict-of-laws arguments are appropriate, 'it is advantageous to be able to show a "false conflict," where all relevant conflict rules produce the same result'.<sup>184</sup>

By way of example, we may refer to the interlocutory award in *American Bell International Inc. v Iran, et al.* (1984).<sup>185</sup> A pertinent issue in that case was whether the respondent could rely on a clause in the contract that allegedly would limit its liability. The tribunal rejected this, finding that 'under principles of law acknowledged [sic] in many legal systems, limitation-of-liability clauses in general will not be given effect for a specific default when that default arose through an intentional wrong or

<sup>179</sup> Crook, 'Applicable Law in International Arbitration'. See also P. Bellet, 'Foreword: Symposium, The Iran–United States Claims Tribunal' (1986) 16 *Law Pol'y Int'l Bus.* 667, 673; A. Avanessian, *The Iran–United States Claims Tribunal in Action* (London, Graham & Trotman/Martinus Nijhoff, 1993), 248; C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998), 662–4, 169–71 (referring to the physical assault by Iranian judge Kashani on Swedish judge Mangård, 3 September 1984); R. Briner, 'The Iran–United States Claims Tribunal and Disputes Involving Sovereigns' (2002) 18(3) *Arb. Int'l* 299, 301; A.H. Hermann, 'Disputes between States and Foreign Companies' in *Contemporary Problems in International Arbitration* (J.D.M. Lew, ed., London, Centre for Commercial Law Studies, 1986), 250, 251; Toope, fn. 64, at 358–9. For correspondence concerning the physical assault on Judge Mangård, see R. Briner, 'The Appointing Authority' in *The Iran–United States Claims Tribunal and the Process of International Claims Resolution* (D.D. Caron and J.R. Crook, eds, Ardsley, NY, Transnational Publishers, 2000), 157, 175 (Documents 12-1).

<sup>180</sup> Brower and Brueschke, fn. 179, at 637.

<sup>181</sup> *Harnischfeger Corp. v Ministry of Roads and Transportation*, fn. 7, Award, Dissenting Opinion of Judge R.M. Mosk, 8 Iran–U.S. C.T.R. 119, 140–1.

<sup>182</sup> *Harnischfeger Corp.*, at 310 ('In lieu of applying national law, the Tribunal has regularly looked elsewhere for legal principles common to the parties or to international commercial conduct').

<sup>183</sup> *Harnischfeger Corp.*, at 311.

<sup>184</sup> *Harnischfeger Corp.* (references omitted).

<sup>185</sup> *American Bell v Iran*, fn. 7, Interlocutory Award.

gross negligence on the part of the one invoking the limitation'.<sup>186</sup> It added that '[i]t would appear that the law governing the contracts in question [i.e. Iranian law] takes that position'.<sup>187</sup>

At a subsequent stage in the proceedings, the claimant contended that the actions by Iran constituted expropriation under international law for which Iran was responsible.<sup>188</sup> On its part, the respondent argued that the acts in question did not amount to expropriation or usurpation under Iranian law, the governing law of the contracts.<sup>189</sup> The tribunal stated:

[I]n the circumstances of the present case there is no need to discuss the applicable law at length. Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law—international or domestic—is inevitable, unless there is clear justification for the seizure.<sup>190</sup>

Another example of how the Iran-US Claims Tribunal relies on and cites sources of both a national and an international nature is *Benjamin R. Isaiah v Bank Mellat* (1983):

Restitutionary theories such as unjust enrichment and *enrichissement sans cause* are found in the laws of many nations. See J. Dawson, *Unjust Enrichment: A Comparative Analysis* (1951). In Iranian law, Articles 301 and 303 of the Civil Code provide as follows [...]. In international law unjust enrichment is an important element of state responsibility. See 8 Whiteman, *Digest of International Law* 1035–36; 1 Schwarzenberger, *International Law* 577–79 (3rd ed.).<sup>191</sup>

Finally, reference is made to the case of *Morrison-Knudsen Pacific Limited v Ministry of Roads and Transportation (MORT) and Iran* (1984).<sup>192</sup> In that case, the respondents argued that the right to terminate the contract, as provided by its article 16, was the exclusive remedy for any delayed performance by MORT.<sup>193</sup> The tribunal objected to this contention on the basis that it was raised in an untimely manner.<sup>194</sup> However, it went on to state that, in any event, the termination provision was not exclusive; and that as a general principle of law, a party may recover for losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate the contract.<sup>195</sup> It added that '[n]othing in Iranian law has been called to the Tribunal's attention that contradicts this general legal principle'.<sup>196</sup>

<sup>186</sup> *American Bell v Iran*, at section IV, para. 6.

<sup>187</sup> *American Bell v Iran*, at fn. 5.

<sup>188</sup> *American Bell v Iran*, Award, 19 September 1986, at para. 149.

<sup>189</sup> *American Bell v Iran*, at para. 149.

<sup>190</sup> *American Bell v Iran*, at para. 150.

<sup>191</sup> *Benjamin R. Isaiah v Bank Mellat*, Award, 30 March 1983, at section IV.

<sup>192</sup> *Morrison-Knudsen Pacific Limited v Ministry of Roads and Transportation (MORT) and Iran*, Award, 13 July 1984.

<sup>193</sup> *Morrison-Knudsen*, at section III(1).

<sup>194</sup> *Morrison-Knudsen*, at section III(3)(b).

<sup>195</sup> *Morrison-Knudsen*, at section III(3)(b).

<sup>196</sup> *Morrison-Knudsen*, at section III(3)(b). For other awards in which the tribunal referred to consistency between national and international law, see, e.g., *Dic of Delaware, et al. v Tehran Redevelopment Corp. et al.*, Award No. 176-255-3, Award, 26 April 1985, at section B(1); *R.N. Pomeroy v Iran*, Award, 8 June 1983, at section V(1); and Concurring Opinion of Judge R.M. Mosk; *Oil Field of Texas, Inc. v Iran, National Iranian Oil Company, Oil Service Company of Iran*, Interlocutory Award, 9 December 1982, 1 Iran-U.S. C.T.R. 347, 361–2 (1982); *Bendone-DeRossi Int'l v Iran*, 11 March 1988, Concurring Opinion, H.M. Holtzmann, Award No. 352-375-1, at section II; and Concurring Opinion of Judge A. Noori.

In sum, also in situations where tribunals do not solve the dispute through a consecutive or concurrent application of national and international law, they often reconcile the two legal orders by pointing out any consistency that may exist.

### 3. General Conclusions

In this chapter, we saw that investment tribunals of both a territorialized and internationalized nature frequently apply or refer to national and international law in resolving the dispute at hand. This choice-of-law methodology reflects the common practice by the disputing parties to invoke and rely on provisions from both legal orders; and hence it also instances the simultaneous applicability of both national and international law to the investor–state relationship.

Moreover, we discussed the tendency of arbitral tribunals to refer to consistency between the two legal orders. This methodology contrasts with the focus placed in previous chapters on the primary application of either national or international law.<sup>197</sup> Naturally, the foreign investor and the host state each favour the application of the legal order that best protects its own interest; and any decision on the applicable law may therefore cause discord. With this in mind, it is not surprising that arbitrators seek to accommodate the interests of both parties by pointing to consistency.

To conclude, it is submitted that this choice-of-law methodology can be advocated not only on the basis that it enhances the legitimacy of the award for the disputing parties; in seeking and, if possible, emphasizing the concord that frequently exists between national and international law it also contributes to a more harmonious outlook on the relationship between the legal orders.

<sup>197</sup> See Chapter 5, Section 2 (on reasons for the primary applicability of national law); Chapter 6, Section 2 (on reasons for the primary applicability of international law).

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# 8

## Concluding Observations

While on occasions writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognized.<sup>1</sup>

In this study, we set out to analyse the interplay between national and international law as the law applied to the merits in arbitral proceedings between foreign investors and host states. To this end, we first sought to determine the nature of the arbitral tribunals (**Chapter 2**).<sup>2</sup> This enabled us to conclude, in **Chapters 2 and 3**, that for their choice-of-law methodology, one category of tribunals—territorialized tribunals—operates pursuant to the national framework provided by the state in which they are seated.<sup>3</sup> These tribunals include those set up pursuant to various arbitration rules, such as the UNCITRAL Arbitration Rules,<sup>4</sup> the London Court of International Arbitration (LCIA) Arbitration Rules,<sup>5</sup> and the ICSID Additional Facility Rules.<sup>6</sup> The other category—internationalized tribunals—i.e., ICSID tribunals and the Iran–United States Claims Tribunal, are grounded in the international legal order; and consequently, these tribunals need to look to the choice-of-law rules set out in their constituent documents as well as general rules of international law.<sup>7</sup>

Amongst our central findings was the observation in **Chapter 3** that states, in their national arbitration laws as well as in treaties promulgated on the international level in the form of the ICSID Convention<sup>8</sup> and the Iran–United States Claims Settlement Declaration,<sup>9</sup> grant the disputing parties and the arbitrators considerable flexibility as to the applicable law. More specifically, the parties may stipulate the application of either national or international law; and as a rule, an agreement to the combined application of national and international law is respected.<sup>10</sup> Where there is no choice-of-law

<sup>1</sup> *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (F. Orrego-Vicuña, A.J. van den Berg, P.-Y. Tschanz, arbs), para. 207 (references omitted). See also *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (F. Orrego Vicuña, M. Lalonde, S. Morelli Rico, arbs), para. 236.

<sup>2</sup> Chapter 2 (on territorialized and internationalized arbitration tribunals).

<sup>3</sup> Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>4</sup> UNCITRAL Arbitration Rules (as revised in 2010).

<sup>5</sup> London Court of International Arbitration (LCIA) Arbitration Rules (effective 1 January 1998).

<sup>6</sup> ICSID Additional Facility Rules (as amended and in effect from 10 April 2006).

<sup>7</sup> See Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>8</sup> The (ICSID/Washington) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 17 U.S.T. 1270, 4 I.L.M. 524.

<sup>9</sup> For the text of the Algiers Accords, including the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), see 1 Iran–U.S. C.T.R. 3 (1981–2).

<sup>10</sup> See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law).

agreement, the tribunals can generally apply national and/or international law.<sup>11</sup> Accordingly, this latter situation closely resembles that in which the parties have made an agreement for the application of national and international law: in both cases the tribunals may apply both/either national and/or international law.<sup>12</sup>

As was seen, this flexible framework, which is also reflected in arbitration rules adopted by institutions such as the Stockholm Chamber of Commerce<sup>13</sup> and the Dubai International Arbitration Centre,<sup>14</sup> frequently results in a situation in which norms from national and international law are *prima facie* applicable to the investment dispute. Importantly, this is so regardless of whether the tribunal in question operates in the international legal order; or whether it is subject to the national law of its juridical seat. In this respect, investment tribunals distinguish themselves from national and international courts, as the latter have less occasion to apply international or national law, respectively.<sup>15</sup>

The flexibility that the parties and the arbitrators enjoy as to the applicable law can be placed in the context of a global development whereby states seek to stimulate and attract international commercial arbitration as a form of dispute resolution, and thereby also commercial activity, such as foreign investment.<sup>16</sup> Indeed, the lack of restrictions placed on the arbitral process encompasses all stages of the proceedings; and it is compounded by the deference granted to tribunals by national courts and ad hoc committees at the annulment and enforcement stage.<sup>17</sup>

Procedural flexibility, finality, and enforceability of decisions are attractive features of all systems of dispute resolution. Yet, in investment arbitration, lack of restrictions as to the application of national and international law takes on added significance in light of the concurrent relevance of both sources of law to the investor–state relationship.<sup>18</sup> Judging from our examination of awards, it is clear that any other choice-of-law rule, vetoing the possibility of arbitrators to apply either national or international law, would be under-inclusive.<sup>19</sup> It is for that very reason that the applicable law provision in the UNCITRAL Arbitration Rules was revised in order to enable the parties, and in default of their agreement, the arbitrators to decide on the application of national and/or international law to the various disputes.<sup>20</sup>

At the same time, an inherent attribute of flexibility is ambiguity.<sup>21</sup> Such ambiguity comes to a forefront when we consider the often dissonant arguments by the parties as

<sup>11</sup> See Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>12</sup> See Chapter 3, Section 4 (general conclusions).

<sup>13</sup> Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2007).

<sup>14</sup> Dubai International Arbitration Centre (DIAC) Arbitration Rules (2007).

<sup>15</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 3, Section 3.2.3 (interim conclusions).

<sup>16</sup> See Chapter 2, Section 3.3 (on the influence of the delocalization theory on state practice).

<sup>17</sup> See Chapter 2, Section 3.3; Chapter 2, Section 4 (on internationalized tribunals); Chapter 3, Section 2 (on the linkage between *lex arbitri* and choice-of-law methodology).

<sup>18</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>19</sup> See Chapter 3, Section 3.2.3 (interim conclusions).

<sup>20</sup> UNCITRAL Arbitration Rules (2010), art. 35. Cf. UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, Vienna, 10–14 September 2007, 25 September 2007, A/CN.9/641, at para. 111. See also Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law); Chapter 3, Section 3.2.2 (on the (non-) applicability of national and international law).

<sup>21</sup> Cf. J.D.M. Lew, ‘Proof of Applicable Law in International Commercial Arbitration’ in *Festschrift für Otto Sandrock zum 70. Geburtstag* (K.P. Berger et al., eds, Heidelberg, Recht und Wirtschaft, 2000), 581, 599.

to the application of national or international law.<sup>22</sup> It is a characteristic of any dispute that the opposing parties invoke the rules that best protect their respective interests. Thus, while foreign investors may advocate the application of international law in cases where its provisions contain a higher degree of protection, the host state may insist on the application of its own national law not only to retain control over the investment or investor in question, but also to make a (political) statement on the satisfactory quality of its laws.<sup>23</sup>

With this in mind, a study of investment arbitration is bound to constitute a stimulating ‘field trip’ for anyone interested in and attempting to create a sense of structure as concerns the interplay between the national and the international legal order. Our examination of scholarship and practice revealed several organizing considerations that have been suggested and applied in order to guide tribunals in their application of national and/or international law. In brief, both territorialized and internationalized tribunals will follow one of the following approaches, depending on the scope of the arbitration agreement and the nature of the claims set forth by the parties:<sup>24</sup> they can primarily apply (i) national<sup>25</sup> or (ii) international<sup>26</sup> law to the merits; or they can apply (iii) both national and international law successively or concurrently.<sup>27</sup> Another possibility is (iv) primarily to apply national law, while at the same time referring to consistency with international law;<sup>28</sup> or they may (v) primarily apply international law, but also point out consistency with national law.<sup>29</sup>

The use of the adverb ‘primarily’ serves to indicate that a decision by the tribunal that national law applies does not exclude a role for international law and vice versa. This is partly a consequence of our observation in Chapter 3 that choice-of-law rules are designed to balance the interests of the parties with those of a particular state or the international community as a whole.<sup>30</sup> To this effect, they differ between three situations: whether the parties have agreed on the applicable law, or not; and whether there is a fundamental national or international norm that needs protection.<sup>31</sup> As was amply demonstrated in the foregoing chapters, the aforementioned scheme may result in a rather intricate interplay between national and international law. Where national law is primarily applicable (Chapter 5), international law may be applied or given effect (a) in an indirect manner as part and parcel of the applicable national law or through international-law-friendly interpretation.<sup>32</sup> Since international law applies as function of the national law itself, this form of interplay is less likely to undermine host state sovereignty than (b) the corrective role that international law may play where a relevant national norm conflicts with an international norm of a fundamental nature.<sup>33</sup>

<sup>22</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 7, Section 1 (introduction).

<sup>23</sup> See Chapter 1, Section 1 and Chapter 7, Section 1. Cf. C. Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Rev. Int'l & Eur. L.* 147.

<sup>24</sup> See Chapter 4, Section 2 (on characterization: the national or international nature of claims); Chapter 4, Section 3 (on the scope of the arbitration agreement: national and/or international claims).

<sup>25</sup> See Chapter 5, Section 2 (on reasons for the primary applicability of national law).

<sup>26</sup> See Chapter 6, Section 2 (on reasons for the primary applicability of international law).

<sup>27</sup> See Chapter 7, Section 2.1 (on the concurrent application of national and international law and reference to consistency).

<sup>28</sup> See Chapter 7, Section 2.2 (reference to consistent national and international law).

<sup>29</sup> See Chapter 7, Section 2.2.

<sup>30</sup> See Chapter 3, Section 3 (on fundamental national and international norms).

<sup>31</sup> See Chapter 3, Section 3.

<sup>32</sup> See Chapter 5, Section 3.1 (on the indirect application of international law).

<sup>33</sup> See Chapter 5, Section 3.2.2 (on the supervening role of international law). International law can also play a corrective role by filling lacunae in the national legal order. It is emphasized, however, that

By reason of this corrective role, we concluded that while national law may be of sequential primacy, it is not necessarily hierarchically superior; and this is the case for territorialized and internationalized tribunals alike.<sup>34</sup> It is noted, though, that the corrective function of international law has a different basis for internationalized tribunals than for territorialized tribunals. For the former, fundamental rules of international law must be respected by virtue of the fact that they constitute the *ordre public* of the international legal order in which the tribunals operate.<sup>35</sup> Territorialized tribunals ought to observe similar norms because they form part of the international public policy of their juridical seat or the state in which enforcement will be sought.<sup>36</sup> Still, since domestic international public policy commonly encompasses (the same normative content as) fundamental rules of international law, this may often, but not always, constitute a distinction with more academic than practical relevance.<sup>37</sup>

When international law is primarily applicable (Chapter 6), the international cause of action may necessitate an indirect application of national law in order to determine the parties' rights and obligations pursuant to that law, such as in cases involving expropriation and 'umbrella' clause claims.<sup>38</sup> It is inaccurate to characterize the role of national law in these cases as that of facts: national norms are indeed applied, albeit as a constituent element of an international claim.<sup>39</sup> The necessity to resort to national law in these cases is evidenced by an increased willingness by investment treaty tribunals explicitly to recognize the relevance of that law.<sup>40</sup> Further, in some cases, national law may be used in a complementary or supervening manner; and we also saw the important role national law can play at the jurisdictional stage in treaty arbitration.<sup>41</sup> Whereas in this latter case national law is not applied to the merits, and thereby does not fall within the exact scope of this study, this feature is still noteworthy in that it may counterweigh the otherwise comparatively limited role of national law in treaty arbitration.

While the primary application of either national or international law by virtue of the rule of party autonomy is widely accepted,<sup>42</sup> the situation in which there are two potentially applicable *leges causae* is inherently subject to more debate. Amongst the approaches taken in jurisprudence and scholarship, we found that tribunals may give primacy to and apply norms from one legal order. As observed in Chapter 5, factors that have been offered in favour of the primary applicability of national law are (i) host state territorial sovereignty over the investor/investment in question, and (ii) the

nowadays, most national legal systems are so advanced that the question of lacunae will rarely occur. See Chapter 5, Section 3.2.1.

<sup>34</sup> This observation may explain the comment by Schwebel that 'it appears to be assumed that international arbitral tribunals, including those sitting between states and aliens, are "monist" rather than "dualist" in the place they accord to international law'. S.M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), 140.

<sup>35</sup> See Chapter 3, Section 3.3 (on fundamental national and international norms); Chapter 5, Section 3.2.2.1 (the parties have agreed to the sole application of national law).

<sup>36</sup> See Chapter 3, Section 3.3; Chapter 5, Section 3.2.2.1.

<sup>37</sup> See Chapter 3, Section 3.3; Chapter 5, Section 3.2.2.1.

<sup>38</sup> See Chapter 6, Section 3.1 (on the indirect application of national law).

<sup>39</sup> See Chapter 6, Section 3.1.3 (national provisions as facts or law).

<sup>40</sup> Cf. G.A. Alvarez and S. Montt, 'Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State": Towards a Jurisprudence of "Modesty" in Investment Treaty Arbitration' in *Looking to the Future: Essays in Honor of W. Michael Reisman* (M.H. Arsanjani et al., eds, Leiden, Nijhoff, 2011), 579, 600.

<sup>41</sup> See Chapter 6, Section 3.2 (on the corrective role of national law).

<sup>42</sup> See Chapter 3, Section 3.1.1 (the parties may stipulate the application of national and/or international law); Chapter 5, Section 2.1 (on party agreement on the application of national law); Chapter 6, Section 2.1 (on party agreement on the application of international law).

national nature of the particular claim or counterclaim.<sup>43</sup> In Chapter 6, we noted that primacy has been given to international law on the basis of either (a) the international nature of the claim at hand or (b) the professed supremacy of international law vis-à-vis national law.<sup>44</sup>

It is worthy of special emphasis that there does not appear to be a marked difference in the approach of territorialized and internationalized tribunals in their decision on the primary applicability of either national or international law. For instance, ICSID tribunals have frequently found national law primarily to apply on account of considerations of host state sovereignty,<sup>45</sup> and territorialized tribunals have considered international law to be of primary applicability on the basis of a (perceived) superiority of international law vis-à-vis national law.<sup>46</sup> While national courts often apply international law,<sup>47</sup> the practice of internationalized tribunals of interpreting and applying national law is relatively unique. Alvik comments: ‘the novel aspect here lies in the application of municipal law by international tribunals (instead of vice versa) [...]. [F]or investment tribunals, municipal law is not an incidental part of the factual background of the case, but an integrated part of the applicable law.’<sup>48</sup> To him, ICSID tribunals can in fact be perceived not solely as ‘agents of international law’, but also as ‘substitutes for municipal courts with an independent responsibility to apply municipal law instead of, and in the place of, the otherwise competent municipal courts’.<sup>49</sup> Paulsson’s recommendation that investment tribunals give full effect to their mandate of applying national law, to the point where they—much as courts of first and last instance<sup>50</sup>—may strike down ‘unlawful laws’ without reference to international law by broadly construing the concept of national law,<sup>51</sup> even hints at a converse form of *dédoulement fonctionnelle* in the sense suggested by Scelle,<sup>52</sup> whereby the role of investment tribunals can be compared to that of agents of the national legal order of the host state.<sup>53</sup>

<sup>43</sup> Chapter 5, Section 2 (on reasons for the primary applicability of national law).

<sup>44</sup> Chapter 6, Section 2 (on reasons for the primary applicability of international law).

<sup>45</sup> See Chapter 5, Section 2.2 (on host state sovereignty and territorial control over foreign investors and investments).

<sup>46</sup> See Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law).

<sup>47</sup> See Chapter 1, Section 1 (on motivations for the study).

<sup>48</sup> I. Alvik, ‘The Hybrid Nature of Investment Treaty Arbitration: Straddling the National/International Divide’ in *The New International Law: An Anthology* (C.C. Eriksen and M. Emberland, eds, Leiden, Nijhoff, 2010), 91, 94.

<sup>49</sup> I. Alvik, ‘The Hybrid Nature of Investment Treaty Arbitration’, at 95. One possible comparison can be made with internationalized or hybrid criminal courts/tribunals. Cf. W.W. Burke-White, ‘International Legal Pluralism’ (2004) 25 *Mich. J. Int'l L.* 963, 976–7 (‘Such courts are generally established based on an agreement between a national government and the United Nations that provides for the enforcement of international criminal law, while allowing the national government some discretion with respect to judicial personnel, procedure, and even the applicable law’ [references omitted]).

<sup>50</sup> See Chapter 1, Section 1 (on motivations for the study) (investment tribunals function as ‘one-stop shops’).

<sup>51</sup> J. Paulsson, *Unlawful Laws and the Authority of International Tribunals* (Lalive Lecture, Geneva, 27 May 2009) (2008) 23(2) *ICSID Rev.-FILJ* 215.

<sup>52</sup> G. Scelle, *II Précis de droit des gens: principes et systématique* (Paris, Recueil Sirey, 1934), 10–12; G. Scelle, ‘La phénomène juridique de dédoublement fonctionnel’ in *Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt, Klosterman, 1956), 324. Cf. A. Casse, ‘Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law’ (1990) 1(1) *Eur. J. Int'l L.* 210.

<sup>53</sup> See Chapter 5, Section 3.2.2.1 (on situations in which the parties have agreed to the sole application of national law).

Of the factors that are used to decide on the primary applicability of national or international law, those that involve theories of (sequential) hierarchy are inherently more value-laden and partial, as they—at least *prima facie* and from the point of view of the parties—may be seen to favour the position of the host state or the foreign investor.<sup>54</sup> It is suggested therefore, that the preferred method is to rely on the nature of the claim, rather than host state sovereignty and a professed superiority of international law vis-à-vis national law. Not only does the choice-of-law technique of characterization benefit from more objectivity,<sup>55</sup> allowing the parties to invoke the provision that is most favourable to them—be it national or international in nature—is more efficacious from an enforcement perspective. This method is also less complex and consequently more predictable, in that it significantly curtails the need for ‘escape clauses’ in the form of complementary and supervening roles for either international<sup>56</sup> or national law,<sup>57</sup> respectively. In fact, arbitral practice indicates that both territorialized and internationalized tribunals now favour the characterization approach. The ICSID Tribunal stated in *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador* (2008): ‘The question is not about the preeminence of one rule over the other but about applying the relevant rule depending on the type of norm that has been breached. It is the tribunal’s task to identify the specific rules that dictate the consequences for each of these breaches.’<sup>58</sup>

In this context, it is notable that many investment treaties, in a non- or variable hierarchical fashion, explicitly allow the foreign investor to invoke the norm—national or international—that offers the best protection. The Austria–Libya BIT, for instance, stipulates:

If the *laws 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 nationals or enterprises 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>59</sup>

This focus on the quality rather than the origin of the norm resonates with judicial and scholarly developments in other areas of law such as human rights. Especially in the

<sup>54</sup> Cf. J.H. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97 *Am. J. Int'l L.* 782, 783 (‘National government leaders and politicians, as well as special interest representatives, too often invoke the term “sovereignty” to forestall needed debate. Likewise, international elites often assume that “international is better” (thus downplaying the importance of sovereignty) and this is not always the better approach’).

<sup>55</sup> See Chapter 4, Section 2 (on characterization: the national or international nature of claims).

<sup>56</sup> See Chapter 5, Section 3.2 (on the corrective application of international law).

<sup>57</sup> See Chapter 6, Section 3.2 (on the corrective application of national law).

<sup>58</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (G. Kaufmann-Kohler, E.G. Pinzón, A.J. van den Berg, arbs), para. 441. But see A. Kulick, ‘The Integration of International Investment Law’ (2010) 23 *Hague Yearbook of International Law* 171, 172 (Kulick concludes that ‘recent investment case law describes the legal order applicable in investment disputes as a specific *mélange* of domestic and international law that defines a clear-cut hierarchy of the two sources from which it draws, with international law at the top’).

<sup>59</sup> Austria–Libya BIT, art. 8(2) (emphasis added). See also Netherlands–Czech BIT, art. 3(5). Cf. *Antoine Goetz and others v Republic of Burundi*, ICSID Case No. ARB/95/3, Award (embodying the parties’ Settlement Agreement), 10 February 1999, (P. Weil, M. Bedjaoui, J.-D. Bredin, arbs), paras 95, 99. See Chapter 5, Section 3.2.2.2 (the parties have agreed to the combined application of national and international law or there is no agreement); Chapter 6, Section 3.2.2 (on the supervening role of national law); Chapter 7, Section 2.1 (on concurrent application of national and international law and reference to consistency).

wake of the *Kadi* decision rendered by the European Court of Justice,<sup>60</sup> scholars have voiced the ‘need to qualify and refine the sacred principle of supremacy of international law’ where national law offers better protection.<sup>61</sup> Thus to Peters, ‘what counts is the substance, not the formal category of conflicting norms.’<sup>62</sup>

A separate commendable method, next to characterization, was discussed in Chapter 7. There we observed that frequently, the relevant norms of national and international law do not conflict. In such cases, territorialized and internationalized tribunals habitually emphasize such normative convergence either when applying both systems of law concurrently or consecutively,<sup>63</sup> or when primarily applying national or international law.<sup>64</sup> The repeated reliance by arbitrators on consistency, also in cases in which it would—at least in theory—be possible to decide the case on the basis of solely one legal order, not only demonstrates the importance arbitrators place on reaching a balanced solution to the dispute with respect to the applicable law; it also corroborates the relevance of both legal orders in the field of investment law and manifests that their application is not reciprocally exclusive. While fairness is a hallmark of all dispute resolution systems attempting to ‘do justice’, the following remark by Mayer recalls the origin of the word ‘compromise’ and suggests that it might play a comparatively more important role in arbitration in general, and in proceedings involving states in particular:

It is also frequently said (Cicero shared that view) that arbitrators would be more inclined than judges to go halfway, to find a compromise which would not entirely dissatisfy any party. Three-member arbitral tribunals would be particularly prone to adopt such an attitude. There is certainly an element of truth in this remark, particularly as regards cases involving relationships between states, thus necessarily introducing a diplomatic perspective.<sup>65</sup>

In conclusion, whereas the starting point of national and international courts is national or international law, respectively, both territorialized and internationalized arbitral tribunals settling disputes between foreign investors and host states are generally freed from such (constitutional) restrictions, and may ascertain the more appropriate law on the basis of more liberal considerations. In view of that, it is posited that we may,

<sup>60</sup> Joined Cases C-402/05P and C-415/05P, *Kadi v Council of the European Union* [2009] AC 1225.

<sup>61</sup> See A. Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *Zeitschrift für öffentliches Recht* 65, 83; A. von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law’ (2008) 6 *Journal of International Constitutional Law* 397, 398.

<sup>62</sup> A. Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *Vienna Online Journal on International Constitutional Law* 170, 197. See also W.M. van Gerven, ‘Plaidoyer pour une nouvelle branche du droit: le “droit des conflits de règles”’ (2011) 350 *Recueil des Cours* 9, 69 (conférence inaugurale, session de droit international privé).

<sup>63</sup> See Chapter 7, Section 2.1 (on concurrent application of national and international law and reference to consistency).

<sup>64</sup> See Chapter 7, Section 2.2 (on reference to consistent national and international law).

<sup>65</sup> P. Mayer, ‘Reflections on the International Arbitrator’s Duty to Apply the Law’ in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (J.D.M. Lew and L.A. Mistelis, eds, Alphen aan den Rijn, Kluwer Law International, 2007), 289, 298, para. 15–46. The word ‘compromise’ has its origin in the Old French *compromis*, from late Latin *compromissum* (‘a consent to arbitration’) *Oxford English Dictionary* (Oxford, Oxford University Press, 2005). See also Center for International Legal Studies (CILS), ‘Second Biennial Conference on International Arbitration and ADR Salzburg Austria 20–23 June 2002’ (2001) 14(4) *Leiden J. Int'l L.* 957, 958 (‘Determining the applicable law becomes a Gordian knot where with the arbitral rules, party autonomy, the *lex arbitri*, the public policy and mandatory rules of “interested” jurisdictions, and arbitrators’ *Solomonic inclinations* interact’ [emphasis added]).

in the area of investment arbitration, perceive of a development away from the traditional hierarchical doctrines of dualism and monism with their frequent focus on conflict,<sup>66</sup> in the direction of a system of ‘complementarity’ or even ‘mutualism’.<sup>67</sup> According to this postulate, the two legal orders do not only coexist and may be applied simultaneously; they are also interdependent, each complementing and informing the other both indirectly and directly for a larger common good: enforcement of rights and obligations regardless of their national or international origin. To end with the visionary statement by Mann from 1959:

It is no longer attractive to suggest that international law and private international law, respectively, have fields of application which are clearly and perhaps even inflexibly defined and which are determined by *a priori* or conceptualist reasoning [...]. Both branches of the law are branches of the same tree. They apply in conformity with the demands of reasonable justice and practical convenience. They overlap and pervade each other [...].<sup>68</sup>

<sup>66</sup> See Chapter 1, Section 1 (on motivations for the study); Chapter 5, Section 3.2.2 (on the supervening role of international law); Chapter 6, Section 2.3 (on the superior nature of international law vis-à-vis national law).

<sup>67</sup> Cf. *Goetz v Burundi*, fn. 59, Award, at paras 97–98 (portraying the relationship between national and international law as ‘complementary’); Alvik, fn. 48, at 97; Alvik, *Contracting with Sovereignty* (2011), 3, 5; T. Buergenthal, ‘Proliferation of International Courts and Tribunals: Is it Good or Bad?’ (2001) 14 *Leiden J. Int'l L.* 267, 270; C. Chinkin, ‘Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law’ in *New Perspectives on the Divide Between National & International Law* (J. Nijman and A. Nollkaemper, eds, Oxford, Oxford University Press, 2007), 134, 157.

<sup>68</sup> F.A. Mann, ‘The Proper Law of Contracts Concluded by International Persons’ (1959) 35 *Brit. Y.B. Int'l L.* 34, 56.

# *Index*

## Introductory Note

References such as '138–9' indicate (not necessarily continuous) discussion of a topic across a range of pages. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or only the most significant discussions of the topic are listed. Because the entire volume is about 'applicable law' and 'arbitration', the use of these terms (and certain others occurring throughout the work) as entry points has been restricted. Information will be found under the corresponding detailed topics.

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