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GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL INVESTMENT ARBITRATION

EXECUTIVE SUMMARY AND RECOMMENDATIONS

In the absence of a comprehensive global or regional instrument on the substantive law applicable to international investments, this Guide aims to build bridges for interdisciplinary dialogue across the interrelated fields of public international law, private international law and international investment arbitration.

The purpose in addressing the evolution and relevant developments related to substantive applicable law matters that have been occurring in these fields is to clarify several issues that come up in practice, minimize uncertainties, and thereby improve the climate for foreign investment in the Americas.

The Guide identifies relevant international instruments, including those developed by the Organization of American States (OAS) and explains how these instruments interact (or can do so). In particular, the Guide aims to promote a greater understanding of the solutions offered by the *Guide on the Law Applicable to International Commercial Contracts in the Americas* (OAS Contracts Guide) and illustrate how these can be used to resolve numerous issues that may arise in international investment arbitration.

REC. 1.1 The objective and purpose of this Guide should be taken into consideration by OAS Member States, in particular, by legislators considering reform of domestic legal regimes related to international investment arbitration, by negotiators and administrators of multilateral and bilateral investment treaties, by parties to international investment contracts and their counsel and by adjudicatory bodies and counsel involved in Investor-State Dispute Settlement (ISDS) as well as parties to such disputes and their counsel. All these actors may benefit from the Guide, at different stages of investment relations and dispute resolution.

Foreign Direct Investment (FDI), where the investor seeks to establish a long-term relationship with the host State or its entities, is distinct from other types of international commercial activities such as sale of goods and services. Often (but not always) because of the length of time and size of investment involved, and sometimes due to perceived or actual political risk, it is afforded special legal protection, usually by means of a treaty and or international investment contract. International investment arbitration may also trigger the application of norms that arise from other sources of law, including the domestic legal regime, as well as public and private international law.

REC. 2.1 OAS Member States are encouraged to review their domestic laws that govern international investment arbitration with a view towards: 1) considering the various sources of law that may be relevant in the event of a dispute, taking note of the ongoing role of customary international law and general principles of international law, particularly in the absence of applicable treaty provisions; and, 2) ensuring that guarantees for foreign investment as prescribed in their domestic laws align with international standards.

International investment protection has a long history that involves the delicate balance of the interests of the foreign investor and the host State. When States breach their international obligations, generally, the characterization and consequences of the violation are governed by public international law.

Although treaties, specifically bilateral investment treaties (BITs), are the primary method for investor protection, customary international law still has an important role in ISDS, particularly in the absence of an applicable treaty or for interpretative purposes, or where specific mention is made within the treaty. customary international law can offer solutions on matters such as the national treatment, fair and equitable treatment standard, protection against illegal expropriation, prohibition of the denial of justice, and State responsibility for injury to aliens.

Application of the general principles of commercial law or uniform law to the substance of an investment dispute may be relevant where the arbitral tribunal is considering a contract-related claim and the broad language in the applicable treaty covers disputes or investments. Ascertaining whether a breach of the treaty has occurred may require analysis of the contractual relationship and the parties' conduct. For this purpose, the general principles of commercial law or uniform law could be relevant.

REC. 3.1 Legislators considering reform of the domestic legal regime related to international investment arbitration and negotiators of investment treaties are encouraged to consider the various sources of law and to include, where possible, references to relevant international standards and uniform law.

REC. 3.2 Adjudicatory bodies, including arbitral tribunals and domestic courts, are encouraged to consider the role of customary international law, particularly in the absence of applicable treaty provisions or when appropriate for interpretative purposes, and also to consider general principles of international law, *jurisprudence constante,* and scholarly writings with care and with a view towards building a coherent and predictable body of jurisprudence on the law applicable to international investment arbitration.

Unlike domestic or international commercial contracts, international investment contracts may be subject to a combination of private and public international law and the domestic law of the host (or other) State or uniform law. In the absence of an international corpus of substantive law applicable to international investment contracts, this combination of laws may be applicable at one or more stages throughout the contractual process of negotiation, conclusion, operation, and termination of such contracts.

REC. 4.1 In order to foster greater predictability and efficiency for both States and investors, the absence of an international corpus of substantive law applicable to international investment contracts should be borne in mind:

- by legislators considering reform of the domestic legal regime related to international investment arbitration;
- by negotiators of investment treaties, who should be encouraged to include clear provisions:

i. on the scope and content of the rules contained and their application to investment contracts and,
ii. to enable contracting parties to exclude the application of the treaty, derogate from it or vary its effect, expressly declare some norms as mandatory, or as default rules, with specific opt-out provisions; and

- by parties to international investment contracts and their counsel in the drafting of such contracts.

Private law, private international law, and uniform law may all be relevant to various contractual issues that can arise in international investment claims; these issues include choice of law and dispute resolution clauses, provisions on currency adjustment, exclusivity, *force majeure*, limitation of liability or waiver of liability clauses, linguistic discrepancy, notification, penalty, price, renegotiations, stabilization clauses and economic equilibrium, termination clauses, as well as other interpretive matters.

Modern private international law can be characterized as working towards the goals of coordination, cooperation, unification, and harmonization through formally binding conventions and protocols, non-binding (soft law) instruments and rules, hortatory principles, legislative guidance, and best practices. Nonetheless, the conflict of laws methodology still has a role to play in several issues related to the applicable substantive law in investment arbitration and tribunals will continue to use it when necessary.

As multilateral and bilateral investment treaties typically do not include choice of law rules, or, even if included such rules may not be comprehensive, tribunals often resort to private international law and its principles to fill the gaps. In such instances, OAS instruments can be of great assistance.

REC. 5.1 OAS Member States are encouraged to review and clarify their private international law rules as relevant to the law applicable in the international investment context. In this regard, solutions offered by OAS instruments on private international law, including the *Inter-American Convention on the Law Applicable to International Contracts* (Mexico Convention) as elucidated by the OAS Contracts Guide, should be considered, and may be incorporated into domestic law.

REC. 5.2 OAS Member States and their negotiators of international investment treaties and investor-State contracts are encouraged to consider and to include clear choice of law provisions into the text of such treaties and agreements.

The International Institute for the Unification of Private Law's (UNIDROIT) Principles have enormous potential for application in the field of international investment arbitration. Those provisions that reflect principles generally accepted worldwide qualify as expressions of "general principles of law" that can be applied in the contractual context and also to treaties. In addition to their primary application, the UNIDROIT Principles may also be used on a subsidiary basis to interpret or supplement, as an interpretive aid, as a corroboration of national law and for supplementary or corrective function.

The complexity of the contractual frameworks involved in investor-State relations is such that one may not find appropriate solutions in traditional notions of contract law and conflict of law mechanisms within the domestic legal regime. The uniform law method advocates in favor of substantive transnational solutions and ideally should govern the contractual aspects of international investment contracts unless the application of a particular national law is desirable to achieve a specific purpose.

Many of the UNIDROIT Principles, particularly on formation, validity, performance, and non-performance of contracts, are well-suited to international investment contracts. Parties may choose the UNIDROIT Principles either directly or indirectly. When chosen directly, this election is considered the applicable law, regardless of whether the election was made before or after a dispute arises. Tribunals may also apply the UNIDROIT Principles when the parties have made a generic reference to uniform law through the use of terms such as *lex mercatoria*, general principles or the like.

REC. 6.1 OAS Member States are encouraged to review their domestic legal regimes on the law applicable to international investment contracts and to recognize and clarify choice of non-State (or uniform) law.

REC. 6.2 Adjudicators, specifically arbitrators, parties to international investment contracts and their counsel are encouraged, in relation to non-State (or uniform) law, to consider the UNIDROIT Principles and to recognize the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

Private international law, which includes both uniform law and conflict of laws rules, is relevant for ISDS although its application in the context of arbitration may differ from litigation. Arbitrators face not only the question of which law applies but also, which system of private international law applies.

REC. 7.1 Adjudicators, including judges and arbitrators, are encouraged to consider private international law, in terms of both uniform law and conflict of laws rules, in the determination of international investment claims and to keep abreast of relevant developments in private international law.

The *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention) provides a "self-contained system of arbitration" that enables investors to pursue States directly, however, it provides only a procedural framework and does not contain substantive rules governing the relationship between host State and foreign investor. Apart from ICSID, arbitration is also carried out by the Permanent Court of Arbitration (PCA) and other "non-ICSID" tribunals, including *ad hoc* tribunals organized pursuant to an investment treaty or agreement, that operate in accordance with the *Arbitration Rules* of the United Nations Commission on International Trade Law (UNCITRAL) or similar rules.

REC. 8.1 Adjudicators, specifically arbitrators, parties to international investment contracts and their counsel, are encouraged to consider the peculiarities of ICSID and "non-ICSID" forms of arbitration in relation to the applicable substantive law.

Arbitral tribunals generally do not have any "choice of law rules of the forum" and are therefore in need of their own "transnational" choice of law rules. Some investor-State contracts and investment treaties that provide for arbitration specify the applicable law, which is usually a blend of the national law of the host State and general principles of international law. Other treaties either do not address this issue at all or refer in various ways to broad and generic principles. Similarly, the law to be applied by the tribunal also varies from one dispute mechanism to another; some give ample discretion to the tribunal while others refer specifically to conflict of laws rules or rules of international law. Therefore, the choice of dispute resolution forum can influence the choice of law to be applied to the dispute.

ICSID tribunals can find guidance in the provisions contained in the ICSID Convention (Article 42) and Additional Facility (Rule 68), which essentially offer direction to look at the full range of sources of international law to resolve disputes, similarly as does the International Court of Justice (ICJ).

Most jurisdictions are aligned with the UNCITRAL *Model Law on International Commercial Arbitration* regarding the applicable substantive law (Article 28). International investment instruments that do not refer to ICSID arbitration usually apply UNCITRAL or UNCITRAL-inspired arbitration rules. These rules grant the tribunal a great flexibility in determining the law (Article 35). From the provisions contained in the Rules and Model Law, arbitrators can choose a conflict of laws system or rule, or they can "directly" determine the appropriate law or rules of law to govern the appropriate law or rules of law to govern the dispute in question. General principles of private international law may become essential in this regard.

REC. 9.1 Negotiators of international investment treaties and investor-State contracts are encouraged to consider and to include clear choice of law provisions into the text of such treaties and agreements.

REC. 9.2 Adjudicators (arbitrators), in determining the applicable substantive law, are encouraged to refer to the OAS instruments for guidance on general principles of private international law.

Choice of law is founded on the internationally-recognized principle of party autonomy and as such, it is respected by arbitral tribunals and enshrined in the ICSID Convention (Article 42) and the UNCITRAL Model Law (Article 28). The choice of law emanates either from an investment treaty (between States), an international investment agreement (between a State and investor) or, provisions within domestic law may also constitute consent to the arbitral process and the applicable law.

REC. 10.1 OAS Member States are encouraged to take into account the recommendations of the OAS Contracts Guide concerning choice of law as applicable in the international investment context and to ensure that their domestic legal regime,

- affirms clear adherence to the internationally-recognized principle of party autonomy;
- provides that a choice of law, whether express or tacit, should be evident or appear clearly from the circumstances;
- provides that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties;
- confirms that a choice of law applicable to international investment contracts cannot be contested solely on the ground that the contract to which it applies is not valid;
- provides that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties;
- provides that no connection is required between the law chosen and the parties or their transaction;
- excludes the principle of *renvoi* to provide greater certainty as to the applicable law; and,
- admits the "splitting" of the law (*dépeçage*).

REC. 10.2 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to take the above recommendations into account when drafting such treaties and agreements, all with a view towards providing greater clarity in the choice of law applicable to international investment disputes.

Many investment treaties do not contain explicit choice of applicable law provisions. Similarly, in many international investment agreements, parties either fail to make a choice of law or the choice is ineffective. In any of these circumstances, the applicable law will be determined by the adjudicator in accordance with relevant conflict of laws rules. However, investment tribunals tend to avoid clear statements regarding the applicable substantive law and numerous conflict of laws formulas have been advanced in the absence of a choice of law (*e.g.*, place of characteristic performance, law of the place where the contract was formed, etc.). Application of these different formulas depends on the relevant issue and the conflict of laws system governing the relationship, which may be any of the following: (i) conflict of laws system of the host State, (ii) cumulative application of the rules of all States with a connection to the dispute, (iii) conflict of laws rules of another State, (iv) application of general principles of private international law or public international law, (v) application of uniform (non-State) law, and (vi) law of the contract or *voie directe*.

The approach also varies depending on the arbitral mechanism. The ICSID Convention provides a two-step process which requires that tribunals first determine whether a law was chosen and in the absence of such a choice (or if unclear), the arbitrators "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" (Article 42(1)). General principles of private international law may become relevant in this regard for consideration by ICSID tribunals.

For investment claims conducted in accordance with UNCITRAL-inspired mechanisms, the Model Law also recognizes party autonomy and states that in the absence of a choice of law, the arbitral tribunal shall apply "the law determined by the conflict of laws rules which it considers applicable" (Article 28(2)). General principles of private international law may also become relevant for consideration by tribunals established under this mechanism. In practice, for treaty claims, tribunals generally apply the substantive provisions of the treaty itself (such as fair and equitable treatment) and other sources of public international law, such as international customary law or general principles. The laws of the host State usually have a role to play in these cases as well.

REC. 11.1 The domestic legal regime on the law applicable to international investment contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the "closest connection."

REC. 11.2 Adjudicators faced with absence of an effective choice of law should resort to the relevant choice of law rules of the applicable arbitral mechanism. If no such mechanism is deemed applicable or does not include such choice of law rules, adjudicators should apply the flexible criteria of the "closest connection," as a general principle of private international law.

Numerous jurisdictions around the world provide for arbitration *ex aequo et bono* (or *amiable compositeur*), as reflected in the UNCITRAL Model Law (Article 28(3)). However, parties rarely agree to such arbitration in equity due to its perceived unpredictability, thus, it must be expressly agreed upon, either before or during the proceedings.

Arbitrators using *ex aequo et bono* may depart from the contractual terms to achieve a fair and equitable result, provided that they do not rewrite the material terms. Nonetheless, arbitrators are always bound by mandatory rules of law and recourse to conflicts of laws rules still may be necessary.

REC. 12.1 Parties to international investment contracts and their counsel are encouraged to consider the guidance on applicable substantive law contained in this Guide also for arbitration in equity or *ex aequo et bono.*

The supplementary or corrective role of international law can be expressly recognized in a treaty or contracting parties may accord international law such a role through their choice of law or of an arbitral mechanism (for example, consider ICSID Article 42 and UNCITRAL Model Law Article 28(4)). Tribunals use a variety of techniques to supplement gaps in the applicable law including convergence of international and domestic law, incorporation of international into domestic law, use of *renvoi* back to international law or consideration of *lacunae* in domestic law. If the application of domestic law would violate international norms or result in less than the minimum standard of protection for the investor, tribunals apply international law in a corrective manner and in such circumstances, international law applies directly rather than by supplementation. Although in the exercise of their autonomy parties may choose the sole application of domestic law, an international tribunal may not disregard questions of international law and must consider their possible prevalence.

REC. 13.1 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to include in the relevant choice of law clauses clear acceptance of the supplementary and corrective role of international law and are encouraged to consider the use of uniform law, where appropriate.

REC. 13.2 Arbitrators implementing a choice of law or faced with absence of an effective choice of law in an investment treaty or contract are reminded, in light of the complex relationship between international and domestic law, that there are various techniques to apply international law for supplementary or corrective purposes and are encouraged to consider the use of uniform law, where appropriate.

Public policy precludes use of the applicable law if the result would be "manifestly incompatible" with the public policy of the forum. It also requires that "overriding mandatory rules" of the forum must be applied irrespective of the applicable law.

Public policy in international investment arbitration may arise on several issues, such as in relation to norms (access to information, environmental protection), subjective non-arbitrability (incapacity of the State to arbitrate), objective non-arbitrability (for example, public interest issues, such as climate change or natural resources) or immunity from jurisdiction. Host States may not rely on national public policy to override a rule or principle of international or transnational public policy, or international law applicable under the relevant investment treaty.

REC. 14.1 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to consider relevant international or transnational public policy and any possible conflict with national law or policy in relation to the foreign investment.

REC. 14.2 Arbitrators should consider and, where appropriate, make express reference to the application of international or transnational public policy principles.

ACRONYMS

ALI: American Law Institute

CCJA: Common Court of Justice and Arbitration

CETA: Comprehensive Economic and Trade Agreement

CIDIP: Inter-American Specialized Conferences on Private International Law

CISG: UN Convention on Contracts for the International Sale of Goods

CJEU: Court of Justice of the European Union

CJI: Inter-American Juridical Committee

CPIL: Code on Private International Law

EU: European Union

European Convention: European Convention on International Commercial Arbitration

EVFTA: EU-Vietnam Free Trade Agreement

FIDIC: International Federation of Consulting Engineers

Guide: Guide on the Law Applicable to International Commercial Contracts in the Americas

Hague Principles: Principles on Choice of Law in International Commercial Contracts

HCCH: The Hague Conference on Private International Law

IBRD: International Bank for Reconstruction and Development

ICC: International Chamber of Commerce

ICJ: International Court of Justice

ICSID: International Centre for Settlement of Investment Disputes

ICSID Convention: 1965 Convention on the Settlement of Investment Disputes between States and Other Nationals

IMF: International Monetary Fund

LCIA: London Court of International Arbitration

MERCOSUR: Southern Common Market

Mexico Convention: Inter-American Convention on the Law Applicable to International Contracts

Montevideo Treaties: Montevideo Treaties on International Commercial Law

New York Convention: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

OAS: Organization of American States

OHADA: Organization for the Harmonization of Business Law in Africa

Panama Convention: Inter-American Convention on International Commercial Arbitration

Rome Convention: Convention on the Law Applicable to Contractual Obligations

Rome I: Regulation on the Law Applicable to Contractual Obligations.

SCC: Stockholm Chamber of Commerce

TFEU: Treaty on the Functioning of the European Union

UNCITRAL: United Nations Commission on International Trade Law

UNCITRAL Model Law: UNCITRAL Model Law on International Commercial Arbitration

UNCTAD: United Nations Conference on Trade and Development

UNIDROIT: International Institute for the Unification of Private Law

UNIDROIT Principles: UNIDROIT Principles of International Commercial Contracts

UPICC: used by some to refer to the UNIDROIT Principles

UNILEX: “Intelligent” database of international case law and bibliography on the UNIDROIT Principles and on the CISG

USMCA: United States-Mexico-Canada Agreement

VIAC: Vienna International Arbitral Centre

WTO: World Trade Organization

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PART 1: INTRODUCTION

I. Rationale

The importance of the applicable substantive law in international investment arbitration cannot be overstated; it can determine the outcome of a dispute and application of the wrong law can lead to the annulment of an award. *Lacunae*, ambiguities, or interpretive divergences on the applicable substantive law not only complicate the resolution of investment disputes but can also contribute to their emergence. If the parties do not know which rules apply to their relationship, they may inadvertently contribute to the conflict by failing to comply with unclear obligations. Or, a party acting in bad faith might take advantage of any uncertainty related to the applicable law and attempt to use it to serve its own self-interest.

Foreign investment is one of the oldest fields within international law; however, it has remained remarkably underdeveloped for most of for most of its history. In 1970, the famous *Barcelona Traction* case was heard by the International Court of Justice (ICJ), which wrote that "[…] considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane."[1]

Some decades after *Barcelona Traction*, rapid changes began to occur within the body of law, jurisprudence, and scholarly commentary related to the field. However, while today there exists an impressive web of treaties, national laws, and other sources of substantive law on foreign investment, several flaws within the current system persist regarding the applicable substantive law. Many of these problems emerge from the fact that this web of sources offers substantive standards or principles that are largely incomplete, elusive or abstract, which creates uncertainties regarding their application.

Apart from the lack of a corpus that comprehensively addresses substantial legal issues, matters related to international investment intersect with several areas of law, including administrative law and the policy-making powers of States, environmental matters, and human rights issues, among others that also still lack an appropriate regulatory framework. These issues remain unaddressed in most investment treaties, or they are covered in a manner that is often not comprehensive.

Not surprisingly, divergent interpretations arise, usually during adjudication. Although treaties, investment contracts, and even national laws usually provide for dispute resolution through arbitration, by their very nature, arbitrators typically concentrate on resolving the dispute rather than on the "shape and direction" of legal matters in foreign investment. Uncertainties in the field often lead to inconsistent awards, despite several databases that collect arbitral decisions.[2]

For some critics, reliance on arbitration to settle investment disputes also calls into question the legitimacy of this mechanism in general, as decisions do not emanate from international courts staffed by public servants but rather, from private arbitrators. Controversies relate to questions of transparency in arbitrator appointment, possible conflicts of interest, and the high costs involved in arbitral proceedings, among others.

In some corners of academia, governments, and even the European Union, it is argued that the installation of permanent international tribunals staffed by State-appointed adjudicators (as is the case, for example, with the ICJ) would improve the current dispute resolution mechanism. Several critics of the international investment system envision these courts functioning at least as an appellate body, thereby

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[1] *Case concerning the Barcelona Traction, Light and Power Co. [Belgium v. Spain*], Judgment 5 February, 1970. ICJ Rep. 1970), p. 47, https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf (last accessed 3 March 2022).

[2] *See, e.g*. UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement; World Bank Group, ICSID Database of Cases, https://icsid.worldbank.org/cases/case-database; ISLG Investment Treaty Arbitration Law, (https://www.italaw.com/, (last accessed 20 September 2023). In addition, there are several other databases are also available that operate on a subscription basis.

ensuring – so it is argued – jurisprudential uniformity in contrast to the contradictory awards that currently co-exist in several substantive areas of the foreign investment legal regime.

Many of these issues have received international attention, most notably in three fora: the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), and the ICSID. At UNCITRAL, work has been ongoing since 2019 on the topic of investor-state dispute settlement reform, the scope of which includes a proposal to create a Multilateral Investment Court or an appellate mechanism, among other matters.[3] To its advocates, the work carried out by UNCITRAL may help to establish institutional mechanisms that would generate greater predictability.

UNCTAD advances the less ambitious agenda of modernizing so-called "old-generation" treaties to contemplate human rights, environmental, health, and other concerns.[4] In turn, ICSID approved in 2022 an amendment to its arbitration rules, seeking greater transparency and providing the option to fast-track proceedings.[5] The International Institute of Sustainable Development (IISD) also has an important voice in the debate on balancing investment protection with environmental protection and has advanced a Model International Agreement on Investment for Sustainable Development.[6]

However, a core issue remains unaddressed in most of these reform discussions, namely: the substantive law applicable to foreign investments. An adjudicator, whoever and however appointed, faces numerous uncertainties in the absence of an appropriate substantive regulatory framework.

While there is currently no global initiative to develop a comprehensive corpus addressing the substantive applicable law concerns, promising recent projects at the international level are starting to look into this matter. In particular, in 2021 the International Institute for the Unification of Private Law (UNIDROIT) published, together with the International Fund for Agricultural Development (IFAD), a legal guide addressing the specific topic of agricultural investment contracts, focusing on the contractual aspects of the relationship and their interplay with public law and the regulatory framework, entitled the Legal Guide on Agricultural Investment Contracts – (ALIC Guide).[7]

More recently, in 2022, the International Chamber of Commerce (ICC) Institute of World Business Law and UNIDROIT have joined forces in a project that will explore the interaction between the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and common provisions in international investment contracts. Considering the transformations occurring in international investment law and the growing relevance of investment contracts in the decades ahead, the project aims to explore how contracts between foreign investors and States (or their controlled entities), could be

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[3] "Such as third-party funding, dispute prevention methods, exhaustion of local remedies, shareholder claims and reflective loss, treaty parties' interpretations, security for costs, frivolous claims, third-party participation, multiple proceedings and counterclaims, code of conduct, selection and appointment of arbitrators, and the creation of an advisory center." *See* Note by the Secretariat *Possible reform of ISDS*, UN Doc. A/CN.9/WG.III/WP.166 30 July 2019; *see also*, "Note by the Secretariat *Report of Working Group III (ISDS Reform) on the work of its forty-fifth session*", A/CN.9/1131, 14 April 2023.

[4] *See* "Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties", IIA Issues Note, June 2017); *See also*: UNCTAD, *Investment Policy Framework for Sustainable Development*, Doc. No. UNCTAD/DIAE/PCB/2015/5.

[5] ICSID, *Rules and Regulations Amendment*, July 2022,: https://icsid.worldbank.org/resources/rules-amendments (last accessed 17 June 2022).

[6] International Institute for Sustainable Development (IISD), *Model International Agreement on Investment for Sustainable Development*, April 2005, www.iisd.org/investment (last accessed 3 March 2022).

[7] UNIDROIT/IFAD *Legal Guide on Agricultural Land Investment Contracts* (ALIC), September 2021, https://www.unidroit.org/instruments/agriculture/alic/ (last accessed 18 September 2023).

modernized, harmonized, and standardized, particularly against the background of the UNIDROIT Principles and ICC standards, with a view to achieving more legal certainty.[8]

II. The necessity of interdisciplinary dialogue

Given that there is no realistic hope for the negotiation, much less the ratification, of a universal instrument to comprehensively address the applicable substantive law in investment arbitration, the focus must shift towards current developments in areas of the law that are relevant to investment arbitration and to do so through an interdisciplinary approach.

International investment arbitration developed within public international law as one of its oldest and most central disciplines. By contrast, the relationship between international investment arbitration and private international law (including private law in general) has received relatively little consideration. In recent decades there have been profound changes in the fields of private international law, international arbitration, and foreign investment. Private international law has experienced remarkable shifts ranging from a restructuring of its theoretical foundations to changes in its regulation and everyday practice. Significant developments within the field of international arbitration have also transformed some of its core concepts and regulatory framework, in addition to expanding its use in cross-border disputes. Lastly, foreign investment-related litigation has also evolved exponentially in ways unimaginable in the first half of the twentieth century.

However, there has not been adequate cross-fertilization between these disciplines. An absence of interdisciplinary dialogue may explain why inconsistencies are common in case law, regulation, and scholarly writing on international investment arbitration. Moreover, unlike commercial arbitration, investment arbitration typically involves discussions about the sovereign powers of States and as such, is uniquely situated as a form of arbitration governed also by public international law. Left unresolved, such inconsistencies only further uncertainty, lead to lack of confidence among users and undermine the legitimacy of investment arbitration as an effective dispute settlement mechanism.

III. Purpose and objectives of Guide

The purpose of this Guide on the Law Applicable to International Investment Arbitration (Guide) is to build bridges for interdisciplinary dialogue across the fields of public international law, private international law, and international investment arbitration to address the evolution that has been occurring in these fields to minimize uncertainties on the law applicable to international investment arbitration and thereby improve the climate for foreign investment in the region.

To fulfill its purpose, this Guide has several objectives, namely:

a. to propose a current formulation of the law applicable to international investment arbitration, taking into account the interaction between public international law, private international law and international arbitration in light of recent developments;

b. to identify relevant international instruments, including several that have been developed by the Inter-American Juridical Committee (CJI) of the OAS, and to explain how these instruments interact with each other;

c. to promote greater understanding of the solutions offered by various instruments developed by the CJI and to illustrate how these can be useful in resolving numerous issues that may arise in international investment arbitration;

d. to provide guidance on the law applicable to international investment arbitration to assist those OAS Member States that are considering signing or renegotiating investment treaties or modernizing their domestic laws in accordance with international standards;

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[8] UNIDROIT, *International Investment Contracts, Study L-IIC*. https://www.unidroit.org/work-in-progress/investment-contracts-upicc/ (last accessed 5 October 2023).

e. to assist contracting parties in the Americas and their advisors in the drafting and interpretation of substantive law clauses as applicable to international investment arbitration;

f. to provide guidance to arbitrators and judges in the Americas in the interpretation and enhancement of regulatory instruments on foreign investments with regard to the matter of applicable law.

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Accordingly, it is hoped that this Guide will be of use to OAS Member States, their legislators, judges, arbitrators and other adjudicators, contracting parties, and also members of academia, students and the practicing bar in the interest of fostering a favorable investment environment in the Americas.

PART 2: SOME BASIC NOTIONS ON INTERNATIONAL INVESTMENT PROTECTION

I. A regime different from others governing international commercial transactions

FDI must be distinguished from other international commercial activities, such as sale of goods and services. In very general terms, FDI refers to investment into assets in another country (such as purchase of land and buildings, a subsidiary, etc.); although FDI need not necessarily involve the host State, typically FDI involves situations in which the investor intends to establish a long-term relationship in the host country, usually with the State itself or a public entity. In FDI, the investor's stakes are in general comparatively larger than in comparison with other commercial activities. Thus, because of the length of time and size of investment, the legal protection afforded FDI must be distinguished from the regime governing international transactions in goods and services, which may not garner this special international protection.

II. Terminology

The international investment protection regime is sometimes referred to as "international investment law", "international development law" or by other analogous terms. In the specific context of foreign investment contractual arrangements, it is also possible to find the expression "international contract law."

An "international investment contract" is used to regulate the long-term relationship between the host State and the foreign investor. For example, in the Trade Promotion Treaty concluded between Colombia and the United States of America, an international investment contract is defined as "a written agreement between a national authority of a Party and a covered investment or an investment of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution or sale; (b) to supply service to the public on behalf of the party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines, that are not for the exclusive or predominant use and benefit of the government."[9]

Such contracts are common in sectors in which the State exercises a monopoly under local legislation.[10] They may govern projects such as public service concessions, public-private partnerships, or build-operate-transfer work within the construction industry, among others. The substantive rules of these

[9] US-Colombia Trade Promotion Agreement, Ch 10, Art. 10.28.

[10] United Nations Conference on Trade and Development State Contracts, UNCTAD *Series on issues in international investment agreements*, 2004, p. 3. https://unctad.org/en/Docs/iteiit200411_en.pdf (last accessed 3 March 2022).

agreements are frequently complemented by a provision specifying the law applicable to the relationship and generally include an arbitration clause.

The expression ISDS is widely used today to refer to the range of international dispute resolution mechanisms available to the investor when "the rules of the game have changed."[11]

III. Definition of investment

There are varying definitions of the term "investment" within national laws. Indeed, some domestic laws do not even define the term. For this reason, investment treaties usually refer to types and forms of investments in broad terms, referring to "every kind of asset" and then listing the forms of investment non-exhaustively, such as property rights, and interests of every nature.[12]

One approach to defining the term "investment" consists of analyzing the wording of the particular investment treaty, as done by an ICSID tribunal in *MHS v. Malaysia.*[13]

Another method examines the traits common to many large-scale investments, such as a significant contribution of money or other assets of economic value, a certain duration of time for the investment, an element of risk, and a contribution to the host country's economic development.[14] This approach, known as the *Salini* test, has been influential in several ICSID cases but controverted and even ignored in others.[15]

Some arbitral tribunals consider that the contribution to the economic development of the host State is impossible to ensure, however, the jurisprudence appears oriented towards a presumption that investments made within the framework of a commercial activity are made with the purpose of creating a greater economic value and, depending on the circumstances, this presumption can be reversed.[16] For example, in the case *Philip Morris v. Uruguay*, the arbitral tribunal did not assume the *Salini* test, noting that Article 25 of the ICSID Convention intentionally covers a wide range of economic operations; therefore, the tribunal determined that it is for the parties to determine its definition through the bilateral investment treaty.[17] In *Electrabel v. Hungary,*[18] the arbitrators held that although there is not complete unanimity among different tribunals on the elements that make up an investment, there is a general consensus that three objective criteria are necessary, namely: a contribution, a certain duration and an

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[11] For instance, UNCITRAL established a Working Group on "Investor-State Dispute Settlement Reform", https://uncitral.un.org/en/working_groups/3/investor-state (last accessed 11 May 2022). Ch IV, Art.33 of the Charter of the United Nations and Statute of the International Court of Justice lists the following methods for the pacific settlement of disputes between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements (to which good offices should be added). *See* https://www.icj-cij.org/en/history (last accessed 11 May 2022).

[12] See UNCTAD *Scope and Definitions (A Sequel)*, Series on Issues in International Investment Agreements II (2011) http://unctad.org (last accessed 3 March 2022).

[13] *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16April, 2009, ¶¶ 58-61.

[14] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23July, 2001), ¶ 52.

[15] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13*, Decision on Jurisdiction 6 August 2003; *AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17,* Decision on Jurisdiction 26 April 2005; *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; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13*, Decision on Jurisdiction 16 June 2006; *Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07*, Decision on Jurisdiction 21 March 2007; *RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6*, Award 13 March 2009; *Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16*, Award 8 November 2010.

[16] *See* Phoenix *Action, Ltd v. Czech Republi*c, ICSID Case No. ARB/06/5, Award, 15April, 2009, para. ¶ 85.

[17] *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award ¶ 187.

[18] *Electrabel SA v. Hungary*, ICSID Case No. ARB/07/19, Award 25 November 2015, ¶ 5.43, p. 18.

element of risk. Although economic development of the host State was one of the objectives of the ICSID Convention, it is not necessarily an element of an "investment."

Loans, government bonds, and related security entitlements have also been considered "investments" for the purposes of legal protection under the broad headings in treaty definitions of the term, such as "assets," "claims to money", or "obligations." Tribunals usually do not look at these transactions in isolation but consider the operation as a whole. Several financial instruments have been found to qualify as investments in recent cases.[19] As to government bonds or sovereign debt securities, however, decisions have been highly controversial and there is a tendency to exclude such assets from protected investments under BITs.[20]

Portfolio investments present a particular problem. These investments involve the acquisition of shares or the raising of capital through security instruments for ventures in another country without obtaining a controlling interest in the company in question.[21] The ensuing problem is that several treaties include shares in their definition of foreign investment, which raises the following question: what happens when the foreign venture does not have 'control'? Moreover, granting portfolio investments the same protection that foreign direct investments are afforded under treaties negates the alleged underlying benefits of international investment legal regimes. This situation happens insofar as, for example, the transfer of knowledge and increase in employment that typically result from foreign direct investment are not as easy to identify in the case of portfolio investments. The matter has been the subject of extensive debate.

Having learned the lessons of the past, modern investment treaties now address many of the matters that had previously remained unsettled.[22] Thus, many of the issues addressed above have now been clarified.[23] Nonetheless, portfolio investments, loans, bonds, and related security entitlements raise particularly challenging private international law questions considering the multiple jurisdictions that can be involved.

The study of the definition of "investment" is relevant for two reasons: 1) the determination of the scope and application of the protection provided in an investment treaty; and 2) the determination of the jurisdiction of the arbitral tribunal. For instance, Article 25 of the ICSID Convention extends the power of ICSID tribunals to "investment" disputes. Party autonomy alone is not sufficient to transform any business relationship into an "investment" for the purposes of the ICSID Convention: an objective test is required.

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[19] Although this outcome depends on the applicable treaty and the facts of the case. *See* ICC Commission Rep., Financial Institutions and International Arbitration, International Chamber of Commerce (ICC) 2016, https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf (last accessed 3 March 2022), p. 7.

[20] Agreement between Australia and the Republic of Uruguay on the Promotion and Protection of Investments, entry into force 27 January 2022, Art. 1 (a)(ii) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download (last accessed September 18, 2023)

[21] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3*, Decision on Annulment 3 July 2002; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12,* Decision on Jurisdiction 8 December 2003; *National Grid plc v. The Argentine Republic, UNCITRAL*, Decision on Jurisdiction 20 June 2006; *Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17,* Award 21 June 2011.

[22] *See e.g.* US Model BIT's 2004 and 2012 versions, Art. 1

[23] Recent treaties have narrowed the scope of protection by expressly excluding portfolio investments, including the European Free Trade Association (EFTA), the Mexico FTA, signed 27 November 2000, entered into force on 1 July 2001, Art. 45; and commercial contracts (for example Canada Model BIT 2004, Art. 1), or by requiring that investments have certain inherent characteristics by reference to criteria associated with the *Salini* test (United States Model BIT 2012). Other States have limited the scope of their treaties by excluding certain classes of disputes arising out of investments in certain sectors. For instance, in 1974, Jamaica excluded legal disputes arising directly out of an investment relating to minerals or other natural resources.

IV. Nationality of the foreign investor

Whether an investment can be considered "foreign" depends on the nationality of the investor.[24] Existing domestic law and investment treaty provisions will be relevant in this regard, which usually refer to the law of the State where nationality is claimed.[25] This approach is consistent with State sovereignty in determining the criteria for nationality.[26] The issue of dual nationals submitting investment claims between a host State and a contracting State has been controversial.[27] There is also a debate in some cases as to whether the origin of the capital and existence (or not) of a cross-border movement of capital is a component of the qualification of the investment as "foreign."

The nationality of legal entities or juridical persons is determined by the criteria of incorporation or the seat of the company, subject to relevant agreements, treaties, and legislation.[28] Some treaties provide additional requirements for protection under the treaty, such as the effective conduct of business in the home State. Even where these additional requirements are not present, tribunals generally conduct a review of the definition of an "investor" under the treaty.[29] As a result, investors frequently make use of particular corporate structures to ensure investment treaty protection.[30] Tribunals have declared this type of corporate strategizing valid unless undertaken with lack of good faith, or as an "abusive manipulation of the system"[31] in the case of claims arising before the corporate restructuring.[32] Nonetheless, there is an ongoing debate on the matter, especially when control of the corporate entity rests with nationals of the host State. In *Venoklim*, the tribunal referred to the guiding principle of ICSID's *rationae personae* jurisdiction that seeks to prevent nationals from acting against their own state and yet to allow national entities controlled by

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[24] For a recent decision on nationality and jurisdiction *ratione personae*, *see*, *1. Alberto Carrizosa Gelzis, 2. Felipe Carrizosa Gelzis, 3. Enrique Carrizosa Gelzis v. The Republic of Colombia*, PCA Case No. 2018-56, Award 7 May 2021.

[25] *See e.g.,* deciding in this sense: *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award July 07, 2004, ¶ 55.

[26] Some treaties also include additional requirements such as residence, *see e.g*. Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments, signed on 24 June 1976, entered into force on 14 April 1980, Art. 1(3)(b); or domicile, *see e.g.* Agreement between the Government of Denmark and the Government of the Republic of Indonesia Concerning the Encouragement and the Reciprocal Protection of Investments, signed on 30 January 1968, entered into force on 10 March 1970, Art. 1.

[27] The ILC addressed the issue in: International Law Commission, Fifty-eighth session Geneva, 1 May-9 June and 3 July-11 August 2006, *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 Martti Koskenniemi, A/CN.4/L.682 https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (last accessed 3 March 2022), ¶ 218 ff.

[28] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005,¶ 78; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5,* Decision on Jurisdiction 27 September 2001; *Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3,* Decision on Jurisdiction 21 October 2005; *Mobil Corporation, Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27,* Decision on Jurisdiction 10 June 2010.

[29] *See e.g. Mobil Corporation, Venezuela Holdings B.V. and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction 10 June, 2010), ¶ 165. *See also TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/05/5, Award 19 December 2008, ¶ ¶ paras 160–162.

[30] This procedure was recognized as valid, *See e.g. Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction 21 October, 2005, ¶ 330.

[31] *See, e.g.*, *Mobil Corporation Venezuela Holdings B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction 10June, 2010, ¶ 176. *See also Tidewater Inc. and Others v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction 8 February 2013, ¶ 146.

[32]These historical cases of abuse of process (in which said abuse functioned as a barrier to restructuring) were not cases where control was held by nationals of the receiving state. This is a substantial difference from the situation today; allowing nationals access to arbitration merely to discuss legal structure would constitute a mockery of the system. For cases where corporate control is in the hands of nationals, the requirements are not necessarily the same and must be analyzed from a holistic perspective and not merely from a formal point of view.

foreigners to have the opportunity to arbitrate their disputes.[33] Otherwise, all business groups in the world could convert their assets into foreign investments simply with the interposition of a foreign entity in their chain of command to gain access to the ICSID dispute mechanism.[34]

V. Foreign investment – dispute resolutions alternatives

The existence of international law mechanisms does not eliminate the need to encourage the development of domestic court remedies where rights are adjudicated in an impartial, fair, and predictable manner. However, domestic courts do not always offer an appropriate environment for the adjudication of international investment claims. As a result, other dispute resolution mechanisms have emerged.

Historically, foreign investors that had been wronged in an international transaction invoked the diplomatic protection of their States to espouse their claims.[35] In the modern era, arbitration has become an expansive mechanism for the resolution of investment-related conflicts. In fact, although local or domestic mechanisms continue to be used for dispute resolution in general, arbitration is now consolidated as a method of resolving international disputes between States and foreign investors, whether natural or legal persons (such as corporations).[36]

VI. International Arbitration and Foreign Investments

Out of these alternatives, arbitration offers common ground between submitting international disputes to domestic courts and State intervention through diplomatic protection. By referring disputes to arbitration, the parties entrust one or more arbitrators to decide disputes that arise from their agreement, which has certain advantages. It is an alternative to decisions by domestic courts composed of public servants rather than adjudicators with subject-matter expertise; it offers finality, in contrast to the uncertainty typical of appellate review mechanisms under national court systems; and arbitral awards generally can be scrutinized only under the narrow lenses of procedural fairness, jurisdiction, and public policy. As a result, arbitrators have significant latitude to apply substantive law.[37] Undoubtedly, parties who choose arbitration over judicial proceedings can expect some differences in the handling of legal sources of law as well as in the process itself.

In recent decades, international commercial arbitration, which is used to resolve disputes between private parties, has once again regained momentum. Commercial arbitration has several specificities that distinguish it from labor and consumer arbitration, which have also seen a recent expansion. The leading institution offering dispute resolution services in international commercial arbitration is the International Chamber of Commerce.[38]

The focus of this Guide is on international investment arbitration, and particularly on developments in the applicable substantive law that has been brought about by the explosive expansion of such arbitration

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[33] *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSD Case No. ARB/12/22. 3 April 2015, ¶ ¶ 154 – 156;

[34] *Agroinsumos Ibero-Americanos, S.L., Inica Latinoamericana, S.L., Proyefa Internacional, S.L., Verica Atlántica, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/16/23 23 March 2022.

[35] See *Case Concerning Ahmadou Sadio Diallo [Republic of Guinea v. Democratic Republic of the Congo]*. Judgment of 30 November 2010 and Judgment of 19 June 2012, ICJ.

[36] See, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement World Bank Group, ICSID Database of Cases, https://icsid.worldbank.org/cases/case-database ISLG Investment Treaty Arbitration Law, https://www.italaw.com/ (last accessed September 20, 2023). In addition, there are several other databases are also available that operate on a subscription basis.

[37] Of course, such latitude must be exercised with caution. *See e.g.,* Article 52 (1)(b) of the ICSID Convention, Art. 2, which establishes the grounds for annulment due to manifest excess of powers, which is understood as the non-application of the applicable law or the improper assumption or rejection of jurisdiction. In this sense, at least under this Convention, it does not seem that arbitrators have broad power to determine the applicable law, but rather that there is only one applicable substantive law and that its lack of application implies the nullity of the award.

[38] *See* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (last accessed 3 March 2022).

in recent years, primarily under the ICSID.[39] Other fora are also gaining prominence, in particular, the PCA, an entity that has had a pioneering role in contemporary international investment arbitration, a role that promises to expand in coming years.[40]

VII. Blurring of the public-private law divide and investment arbitration

In ancient Rome, Ulpianus connected public law to the State and private law to the individual.[41] Centuries later, Francis Bacon referred to public law as the sinews of government and to private law as the sinews of property.[42] Thus, under the classical understanding, public law addresses interactions between individuals and the State, comprising topics such as constitutional, administrative, criminal and tax law, while private law governs relationships between private individuals, such as property, contract, torts and unjust enrichment.

The public-private law distinction may serve as a primitive and initial guide. However, there is an absence of a consensus concerning the dividing line. Furthermore, the twenty-first century has seen an expansion of the grey area that exists between public and private law, one where mercantile activities involve States' regulatory interests as well as their commercial conduct. Entire fields of law exist within this grey area – administrative contracts, the regulation of corporations, and patent law, to name a few. The State also acts as a commercial party in a variety of legal arrangements that range from buying and selling property, to contracting with citizens and foreigners, to investing in private businesses, joint ventures, and State-owned enterprises.

Even though public and private international law emerged from a single international law of nations, the close relationship between them began to fade in the nineteenth century. By the early years of the twentieth century, the notion of both as entirely separate disciplines had prevailed. The general understanding was that while public international law deals with the relationships between sovereign States and international organizations, private international law encompasses transactions between individuals and private entities.

The above conception of both disciplines is no longer accurate. Public international law also deals with the rights and obligations of individuals and other non-State entities, such as international corporations. Private international law is not limited to domestic regulation – it also includes international rules and procedures that are applicable to private law relationships. The relationship between public and private international law has proven to be far more nuanced than traditional distinctions would suggest. For too long, the theoretical separation between the two disciplines has masked the functional connections that exist between them. Moreover, public international law concepts (State immunity) and private international law concepts (jurisdiction, conflict of laws, acts of State, non-justiciability) are often applied together in the same dispute.

While the distinction between public international law and private international law may increasingly become less meaningful, it still ought to be considered given the current state of affairs. In a globalized world featuring a modern multilevel legal structure, private and public international law must be thought of as complementary. Furthermore, a range of legal reasoning techniques are available to public international law lawyers, but it is unclear whether they are appropriate to address several issues in the new context. In such cases, private international law may be a potential source of methods more useful to address these questions, an alternative that is considered later in this Guide.

In international investment arbitration, disputes are examined from the perspectives of both, public and private law. For instance, in *PSEG v. Turkey*, one of the central issues involved a concession contract and its ultimate private law status.[43] As has been illustrated in several cases, investment tribunals may make

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[39] ICSID Convention, Washington, 17 UST 1270, TIAS 6090, 575 UNTS 159, 18 March 1965
[40] *See* PCA *Home*, https://pca-cpa.org/en/home (last accessed 3 March 2022).
[41] The Institutes of Justinian, Book I, Ch. 1, 4.
[42] E. Works of 1803, VII, 440.
[43] *See PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award, (19January, 2007), ¶ 194.

use of both public and private international law in questions related to jurisdiction,[44] or to the applicability of choice of law rules.[45]

VIII. Sources of legal protection for international investments

Several sources may govern the substantive and procedural rights and obligations of the foreign investments regime in a given country. Domestic legislation in the field typically includes specific regulations in areas such as property ownership, taxation, currency control, transfer of technology, environmental obligations, and corporate governance. Generally, this domestic legislation will apply to any legal claims brought within the territory of the host State and may also serve as a residual source of law for gap-filling or interpretive purposes. Foreign investment protection of the host State's domestic law may also be invoked in international claims, provided the tribunal has jurisdiction to do so.

Violation of a multilateral or bilateral international treaty is usually what triggers a claim and the treaty itself is the source of the rules that will govern the dispute, imposing a set of open-textured substantive standards of protection, such as guarantees of non-expropriation without compensation,[46] or of a fair and equitable treatment,[47] among others.

The investment laws or codes of most domestic legal regimes are concerned primarily with administrative matters and usually do not contain provisions for determining the applicable law. In turn, treaties typically establish broad standards of protection but do not include comprehensive treatment of the applicable law and its intricacies.[48] While mechanisms for arbitration refer mainly to procedural aspects of

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[44] *See Rep. of Indonesia*, ICSID Case No. ARB/81/1, 1 ICSID Rep. 398, 1983, where consent to arbitration was interpreted both based on Indonesia's private international law and the ICSID Convention; *See also,* SPP*(ME) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 3 ICSID Rep. 142 1988. In this case, the tribunal recurred both to the Vienna Convention on the Law of Treaties according to public international law, and to the Egyptian rules of statutory interpretation according to private international law.

[45] *Fedax N.V. v. Rep. of Venezuela*, ICSID Case No. ARB/96/3, 1998 ¶ 30;. *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, 5 ICSID Rep. 419, 2000, ¶ ¶ 50–57, 77. *Antoine Goetz v. Republic of Burundi*, ICSID Case No. ARB/95/3, 6 ICSID Rep. 3, 1999. *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 2000.

[46] *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1*, Award 30 August 2000; *Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1,* Award 16 December 2002; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8*, Award, 12 May 2005; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3,* Award 20 August 2007; *Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1,* Award 31 March 2010; *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19,* Award 30 July 2010; *Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5*, Decision on Liability, 14 December 2012; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5,* Award 13 March 2015; *Casinos Austria International GmbH and Casino Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32*, Award, 5 November 2021.

[47] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1,* Decision on Liability 3 October 2006; *Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17*, Award, 21 June 2011; El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011; *Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1*, Award, 25 August 2014; *Infinito Gold Ltd. v. Republic of Costa Rica, ICISD Case No. ARB/14/5,* Award, 3 June 2021; *Lion Mexico Consolidated LP v. United Mexican States, ICSID Case No. ARB(AF)/15/2,* Award, 20 September 2021.

[48] The clauses are usually drafted in very general terms, words to the effect "[t]he Arbitral Tribunal will issue its decision based on the rules of this Agreement, those of other agreements that govern the relationship of the Parties, the law in force in the State in which the investments were made and the universally recognized principles of international law." See also the standard language from models provided by the World Bank Group or UNCTAD, etc.

dispute resolution and may also include a provision on applicable substantive law, this too, leaves several questions open that will be considered later in this Guide, at Parts 10 et seq.

Although arbitration is usually the dispute settlement mechanism "by default" in the majority of investment treaties, this may not always be the case in the domestic laws of states in the region.[49] Thus, in this context the importance of investment treaties to arbitration is self-evident. If an investment claim arises under such a treaty, however, only the State is bound to accept this recourse to arbitration; investors are not obliged to do so. This raises the question of whether, in the absence of privity, one could recur to arbitration. The issue was resolved in the affirmative in the famous *SPP v. Egypt* case.[50] Several ICSID decisions invoking the unilateral offer to arbitrate have followed this ruling. Therefore, agreements to ICSID jurisdiction may be expressed by States in investment contracts, in treaties or in their domestic law.

Apart from the treaty itself, other sources of public international law may also apply and add additional safeguards. Such is the case for customary international law that may be relevant, for instance, on issues that are unaddressed or may be complementary to the investment treaty, issues such as nationality or standards of treatment. See Part 3, Section III, Subsection E.

IX. Contextual Background

The origins of foreign investment legal protection may be traced to ancient times; however, developments leading to the current state of affairs began to unfold in the Middle Ages. At the time, the flourishing cities of medieval Western Europe attempted to attract foreign merchants by concluding commercial treaties guaranteeing freedom of trade and by rendering the circulation of goods exempt from taxation. An agreement between Venice and Pavia dating back to 840 is the oldest on record, and others extended throughout the centuries in Europe and even outside the Latin Christian world. Rulers also offered help to merchants who had been mistreated by advancing claims on their behalf against foreign governments.

In international relations, arbitration clauses first appeared within treaties as early as the twelfth century, but only became commonplace towards the end of the thirteenth century. To use modern terminology, international arbitration claims corresponded mostly to mediation or amiable composition proceedings, however, the language used in such affairs was imprecise.

In the Middle Ages, it became difficult to distinguish between private and public arbitration proceedings since both mechanisms overlapped. For example, conflicts between two princes often passed from the private to the public sphere. Procrustean attempts at placing medieval arbitration proceedings into a modern categorical framework proved unhelpful.

A. Investment protection in the birth of Public International Law

In its birth, public international law borrowed legal concepts from ancient Roman private law thanks to the academic work of jurists such as Hugo Grotius, Francisco de Vitoria, Alberico Gentile, and Emer de Vattel, who in the seventeenth century devised justifications for protecting the economic interests of Western Europe resulting from its investments in its fledgling colonies.

Sovereigns and governments received advice from experts trained as civil lawyers, who turned their attention to the legal affairs of States. Modern international law was developed beginning with the Peace of Westphalia in 1648 until the middle of the nineteenth century, during which time the vast majority of experts were lawyers trained in the Roman system. As such, it is unsurprising that the historical source of international law is Roman law, in particular its law applicable to all people of the Roman Empire or *ius*

[49] A useful exercise would be to compile a list of those states in the region whose domestic laws effectively opt for arbitration with foreign investors in the event of a dispute, aside from any commitment to arbitrate as imposed by investment treaties.

[50] See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction 14 April, 1988, ¶ 118.

gentium, which merged with the old Roman *ius civile* or civil law into a single system in the latter days of the Roman Empire.

In the aftermath of hostilities ended by the Treaty of Utrecht in 1713, States began to conclude treaties that incorporated provisions protecting property and economic interests.[51] A network of similar instruments dominated the European legal landscape in the middle of the seventeenth century. These texts were the antecedents to modern bilateral investment treaties. They covered a wide range of issues beyond investment and trade, also incorporating provisions on immigration, taxation, and matters that are today understood as human rights.

Certain minimum standards of protection were eventually consolidated over time, thanks to their adoption in numerous treaties of "Friendship, Commerce and Navigation", and through the creation of special international tribunals or "mixed claims commissions" that resolved international investment disputes and gradually created a rudimentary case law as a result.

The jurisprudence at the time frequently used concepts entrenched in Roman private law of its *ius gentium* and progressively developing after the Middle and Modern Ages, such as good faith, estoppel, strict performance, and unjust enrichment. The decisions that emerged therefrom became recognized as established rules within public international law. Thus, for centuries, private law has shaped public international law. What better than the *ratio scripta*[52] – which is how Roman law was applied – to fill the gaps in an incipient discipline such as this? Its suitability was reinforced by Rome's strong protection of the right to property, recognition of appropriate compensation for damages, and defense of the sanctity of contracts; in other words, all the ingredients desired by those who advocated meaningful legal protection of European economic interests across the full breadth of their colonial empires.

B. Friendship, Commerce and Navigation treaties

Grotius' view that local law should not apply to Europeans, who were already subject to their "more civilized law", was enshrined in Friendship, Commerce and Navigation treaties. This exclusion was essential to ensure that investors received better treatment than natives in local communities. Local law often provided extreme punishments such as execution for petty crimes, emphasizing the need to maintain order in an environment lacking a permanent military presence.

Over time, the preferential treatment given to foreigners was phased out by the notion of an international minimum standard of protection. This standard has survived as of today as a principle of customary international law, offering a check on the arbitrariness of the exercise of State power over individuals.[53]

Friendship, Commerce and Navigation treaties provided a framework for international protection of foreign investments. They were also sources of transnational norms, as the contents of many treaties contained significant overlap and included a series of basic rights granted to individuals in their commercial activities. Merchants also benefited from such provisions, even though they were not parties to these treaties. The equal treatment of foreigners and nationals in regard to taxation and access to justice was also typically included and later became commonplace, as well as what later became known as the "most favored

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[51] Treaty of Peace and Friendship between Great Britain and Spain, signed 13 July 1713, 28 Consol. TS 295, Articles VII, VIII, IX, XV.

[52] Literally "written reasons."

[53] As reflected, for instance, in: *Pope & Talbot Inc. v. The Government of Canada, UNCITRAL,* Award on Merits, 10 April 2001; *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2*, Award, 11 October 2002; ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 09 January 2003; *Gami Investments Inc. v. Mexico, UNCITRAL*, Award, 15 November 2004; *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL*, Award 26 January 2006; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12*, Award, 14 July 2006; *Glamis Gold, Ltd. v. The United States of America, UNCITRAL*, Award, 08 June 2009.

nation clause" (MFN): each party was entitled to equal treatment under the local State law, and the extension to them of the same favorable treatment provided to parties of other nationalities.[54]

As the name of these treaties suggests, and contrary to modern bilateral investment agreements, Friendship, Commerce and Navigation agreements were not exclusively (or even primarily) vehicles to protect investments abroad. The treaties included some protections for investors, but their primary objective was to promote international trade and improve international relations, allowing access to ports and granting navigation rights through territorial waters.

These agreements concluded by major colonial powers for centuries became a common part of foreign investment policy in the United States until after World War II. However, their popularity had largely faded by the 1960s. Countries that gained their independence after World War II were often unwilling to accept the obligations contained in such agreements, leading to the birth of a new type of investment protection enshrined in BITs.

C. International mixed claims commissions

Even though arbitration is one of the oldest international dispute resolution mechanisms, its popularity declined steadily after the Middle Ages until it was revived with the mixed claims commissions, established by the Jay Treaty of 1794. This instrument is considered the predecessor to the prevailing modern methods for resolving international investment claims.

The Jay Treaty established mixed claims tribunals (or commissions) with sitting arbitrators. This allowed States, for the first time, to bypass direct diplomatic channels in their negotiations. Unlike modern commissions, these mixed claims tribunals followed a strictly juridical procedure and delivered reasoned awards. They importantly influenced the development of public international law when affirming that an arbitral ruling should necessarily conform to the essential principles of the law of peoples (*ius gentium*).

The main issues dealt with by these commissions related to the measure of damages and the tribunal's right to determine its own jurisdiction. Several of these judgments borrowed solutions from private law in matters related to damages, prescription, and admission. The decisions that emerged therefrom became recognized as established rules within public international law.

These tribunals heard many cases, and a significant body of case law emerged. Over the course of five years, the mixed claims commissions that had been established under the Jay Treaty issued 536 awards. These mixed commissions also provided a model for many of the standing tribunals that the United States formed with Latin American States in the nineteenth century.

Withdrawal of British support for the mixed claims commissions' system led to its eventual collapse. Nonetheless, States increasingly showed their willingness to accept arbitration. By the end of the nineteenth century and the beginning of the twentieth, approximately three hundred bilateral arbitration treaties had been concluded.

D. Developments in Latin America

The early slow development of the international foreign investment legal regime can be explained by reference to the colonial expansion of the eighteenth and nineteenth centuries. At the time, the protection enjoyed by colonial powers was largely sufficient for them to safely invest in their colonies without further legal safeguards. As such, there was no pressing need for the development of public international law for the purpose of protecting investments.

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[54] Examples of modern cases dealing with this standard are the following: *National Grid plc v. The Argentine Republic, UNCITRAL,* Decision on Jurisdiction 20 June 2006; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States,* ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007; *Corn Products International, Inc. v. United Mexican States,* ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2008; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009.

In this context, colonial powers used force to guarantee the extraterritorial application of their national law in order to protect investor rights. Known as "gunboat diplomacy," this strategy was in many ways an antecedent of modern diplomatic protection. Through gunboat diplomacy, States exercised their discretion to intervene on behalf of their citizens abroad, demanding protection and compensation from the host State directly.

The development of an international system for assigning responsibility for injuries to the property of aliens occurred primarily in regions with no colonial regime in place, particularly in Latin America. In the nineteenth century, Latin American countries defended the application of their own laws and constitutions, while the United States insisted on applying international standards. That tension gave rise to the so-called "Calvo Doctrine", named after the Argentine jurist Carlos Calvo (1822-1906), whose views gained broad acceptance in the region.

E. The Calvo Doctrine

The Calvo Doctrine advocated applying the national laws of the countries receiving foreign investment and the judicial supremacy of national courts, rather than international tribunals, which were hardly in existence at that time. As such, investors would have little need of diplomatic protection from their own governments.

The Calvo Doctrine brought about the following question: does it make sense that the Calvo Clause is expressed as an obligation for foreign investors to renounce diplomatic protection if the latter is understood to be an entirely discretionary attribute of the States? If granting diplomatic protection is a right of the State and not a right of the individual, is it appropriate for the individual to negotiate the rights of the State? Critics observed that this doctrine contravened safeguards needed for foreign investment to flourish, since host countries could alter protection standards – as they have, in fact, done repeatedly through changes in their regulations – and consequently, could leave those ventures at the mercy of domestic political vicissitudes and judgments by local courts frequently shaped by the sensibility that "in my backyard, my rules prevail." The Calvo Doctrine extended to regions beyond Latin America. Later resolutions, even within the framework of the United Nations in the 1960s and 70s, have also echoed this doctrine.

The Calvo Doctrine gave rise to the Calvo Clause, a contractual provision to the effect that the investor agrees to adjudication with the State concerned of any dispute that may arise between the contracting parties. Nonetheless, whether Calvo Clauses were valid became one of the most disputed questions within international diplomacy and jurisprudence. Those who advocated for their invalidity argued that States had inherent rights to bring claims on behalf of their nationals due to violations of their rights as alien investors. Any waiver in this regard could not be enforced against a foreign State.

In fact, few decisions have admitted the total validity of the Calvo Clauses. They have been declared valid when the relationship in question is between the foreign investor and the defendant State. However, the same is not true for matters between the injured individual and the claimant State. Calvo Clauses have not been considered in case of any denial of justice and have even been declared categorically null in such situations.[55]

In the International Law Commission 2002 Third Report on Diplomatic Protection to the UN General Assembly, the Special Rapporteur noted that the Calvo Clause was of limited effect in that it did not constitute a complete bar to diplomatic intervention. Moreover, an alien could not by means of a Calvo Clause waive rights that under international law belonged to his government.[56]

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[55] A leading decision in this regard was rendered by the United States–Mexican Claims Commission in the following case: *North American Dredging Co. of Texas (United States v. United Mexican States)* 31 March 1926, AJIL, Vol. 20 (1926), p. 800.

[56] See these and other arguments in UNGA, Diplomatic Protection, Report of the International Law Commission Fifty-fourth Session (29 April to 7 June and 22 July to 16 August 2002) GAOR 57th Session Supp. No. 10 (A/57/10) Ch. V, p. 162.

Most Latin American countries abandoned the Calvo Doctrine when they adopted Bilateral Investment Treaties (BITs) *en masse*. Notably, the recent United States-Mexico-Canada Trade Agreement (USMCA) eliminates resort to international dispute settlement mechanisms between the United States and Canada.[57] Nonetheless, a return to the Calvo Doctrine can occur *de facto* if States follow UNCTAD's lead in replacing treaties with others so constrained with respect to resort to international dispute settlement mechanisms that few claimants will, in fact, use them.

F. Creation of the first world arbitration court

Dispute resolution between States through arbitration had become widespread after 1815 because of its frequent use among the young Latin American republics. By the end of the nineteenth century, it became necessary to introduce arbitration mechanisms not only for existing disputes, but also to address the possibility of future claims between States. The idea crystallized in the creation of the PCA.

The Permanent Court of Arbitration (PCA) emerged through the Convention on the Pacific Settlement of Disputes,[58] which entered into force in 1900. The Convention's main achievement is the establishment of what is sometimes referred to as the world's first international court, dealing not only with arbitration but also with other methods of peaceful dispute resolution, such as good offices and mediation.

The label "permanent" seems appropriate, as the institution continues to exist to the present day. The word "court" was perhaps less happily chosen since the term usually relates to judicial settlement. In addition, the "court" or rather "panel" does not have a fixed standing or continuous existence; after arbitrators appointed to a specific panel discharge their task, they must await a future summons that might, or might not, take place. Evidently, the PCA's name and its objectives were a compromise to achieve consensus for the instrument.

The Convention also established a permanent bureau in The Hague, with similar functions to those of a court registry or secretariat. Moreover, the Convention laid down rules of procedure to govern the conduct of arbitrations.

The PCA began operating in 1902; its first two cases involved Latin America. The second case concerned foreign investment in Venezuela.[59]

G. The Drago Doctrine, the Porter Convention, and the equality of States

At the Second Hague Peace Conference of 1907, negotiators made serious efforts to establish an international court of justice, which only materialized years later. This was also the first international conference to hold a discussion regarding the standing of individuals to bring cases against States before international courts beyond questions of diplomatic protection. Member States later authorized the PCA to use the ample mandate given by this and the prior Hague conventions to administer, in 1934, the first arbitration involving a non-State party (*Radio Corporation of America v. China*).[60] Until then, the PCA had administered exclusively inter-State disputes.[61]

The Second Hague Peace Conference of 1907 adopted the Convention of the Peaceful Resolution of International Disputes, and the Convention on the Limitation of Employment of Force for Recovery of

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[57] *See* US-Australia BIT, the EU-China Investment Agreement, and the EU-UK Trade and Cooperation Agreement.

[58] Its constitutive instruments are the Convention for the Pacific Settlement of International Disputes of 1899, 29 July 1899, 32 Stat 1779, TS 392; Convention for the Pacific Settlement of International Disputes, 18 October 1907, 36 Stat 2199, 1 Bevans 557.

[59] *Preferential Treatment of Claims of Blockading Powers against Venezuela Germany, Great Britain and Italy v. Venezuela,* Final Award, 21 February 1904.

[60] *Radio Corporation of America v. National Government of the Republic of China,* 3 UNRIAA 16211934-01, Award, April 13, 1935..

[61] Three PCA tribunals heard investment cases: (i) *The Orinoco Steamship Company Case [United States of America v.Venezuela]*, (1909). 11 UNRIAA 227; (ii) *Canevaro claim (Italy/Peru)*, 1910-01, (1910). 11 UNRIAA 227; and (iii) *Arbitraje sobre las Reclamaciones Francesas contra Perú (Francia/Perú),* (1914). 1 UNRIAA 215.

Contract Debts[62] also known as the Porter Convention in honor of its chief proponent, American diplomat Horace Porter. This instrument concretized the idea of the sovereign equality of States, a cornerstone of contemporary international law.

The Porter Convention has only ever occupied a modest place in the history of international law, due to the limitations it set upon the use of armed force. This was the first such restraint ever included within a multilateral instrument. The Convention also set arbitration as an alternative to the use of force, becoming the first instrument to guarantee protection for State investments. As such, it provided the framework for the conclusion of bilateral arbitration treaties that granted investors a direct cause of action.

According to the Calvo Doctrine, the standards established by each State should apply within its territory. In 1902, when the United Kingdom, Germany, and Italy subjected Venezuela to a naval blockade, this position was supplemented and narrowed by the "Drago Doctrine", advanced by Luis María Drago, the Argentinean Minister of Foreign Affairs. Drago sustained that States should not resort to the use of force to collect debts on behalf of their nationals: State sovereignty in accordance with international law should lead to immunity from execution measures, but not immunity from adjudication.

The Porter Convention did not, however, completely prohibit the use of armed force in service of the collection of debt for private parties. Because the instrument left the question of armed intervention up to the investor powers and considering that Latin American States did not ratify the Convention (except for Mexico), this "acceptance" of the Drago Doctrine did not allay the fears and suspicions of the nations in this region.

H. The creation and consolidation of the world's court of justice

In 1920, the League of Nations approved the creation of the Permanent Court of International Justice (PCIJ), tasked not only with hearing international disputes, but also with rendering advisory opinions about any claim or question referred to it by the League of Nations. The PCIJ maintained its permanent seat at the Peace Palace in The Hague alongside the Permanent Court of Arbitration. Unlike the PCA, however, the PCIJ became a permanently constituted body, accessible to States for the judicial settlement of international disputes. Between 1922 and 1940, the PCIJ decided 29 contentious cases. At the same time, several hundred treaties and other international instruments granted the PCIJ jurisdiction over disputes.

The outbreak of World War II was the death knell of the PCIJ. In 1945, the newly established United Nations created the ICJ as one of its organs alongside the General Assembly, the Security Council, the Economic and Social Council, and others. For the sake of continuity, however, the ICJ based its statute on the enabling statute of the PCIJ, which was formally dissolved in 1946.

The ICJ also has its seat in The Hague. The Court is tasked with settling international disputes and rendering advisory opinions on legal questions referred to it by authorized United Nations organs and other specialized agencies. The ICJ is composed of fifteen judges who are elected for nine-year terms by the United Nations General Assembly and the Security Council. The Registry is the permanent administrative secretariat of the Court.[63]

One of the characteristics of our time is the multiplication of international courts. Nonetheless, the ICJ undoubtedly remains the solar center for international disputes, adjudicating many of the most publicly visible cases. Despite its international importance, however, the ICJ has only played a modest role in developing international investment law. Because its jurisdiction is limited to State-to-State disputes, whether an investment dispute will be heard before the ICJ is contingent on the willingness of States to submit such disputes to the Court. Many States have generally proven to be unwilling to exercise this right and the ICJ has construed the consent of States quite narrowly. Moreover, the Court has been reluctant to

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[62] Convention for the Pacific Settlement of International Disputes, 18 October 1907, 36 Stat 2199, 1 Bevans 557. Convention on the Limitation of Employment of Force for Recovery of Contract Debts, signed in 1907, in force in 1910, 36 Stat 2241, 1 Bevans, 607.

[63] ICJ, *The Court*, https://www.icj-cij.org/en/court (last accessed 3 March 2022).

move beyond positive law – that is, to establish norms of behavior where there is no corresponding treaty or comparable evidence of universal consensus to determine the issue.

Three foreign investment-related cases were submitted to the Court after World War II, and all were dismissed. In all three, the ICJ avoided dealing with the underlying question of host State responsibility vis-à-vis foreign investors.[64] For instance, in the *Anglo-Iranian* case,[65] the ICJ determined that it lacked jurisdiction. Similarly, the *ELSI* case[66] added little to the existing international investment legal landscape. In *Barcelona Traction*, the best-known of the ICJ investment cases,[67] the Court ruled that special agreements could provide substantive protections or avenues for dispute settlement. However, customary law would not be developed from these agreements, or at least had not been consolidated at the time.

In matters related to foreign investments, the ICJ (as well as other tribunals and national courts) has faced a lack of consensus in the field, ambiguous precedents, and even ideological conflicts. Many decisions have avoided relevant legal issues or have relied on conflict of laws doctrine to avoid having to make general declarations on the substantive law applicable to the international dispute. Moreover, arbitral tribunals generally have ordered compensation for foreign investors deprived of their property by the host State but have differed on calculating reparation amounts.[68]

X. Diplomatic protection

Traditionally within public international law, individuals have lacked both legal subjectivity and standing, as their home States represented and provided them with legal protection. In this way, *diplomatic protection* was the main procedural mechanism used to remedy the situation. In the 1924 *Mavrommatis Palestine Concession* case, the Permanent Court of International Justice recognized diplomatic protection as "an elementary principle of international law."[69] Other PCIJ and ICJ cases since have followed this ruling.[70]

Customary international law was generally understood to accept a minimum standard of treatment for the protection of investment property. Lack of compliance with this standard generated State responsibility and entitled a foreign State to intervene. Injury to an investor became, by extension, an injury to the State, which could respond to such an injury on behalf of its own nationals. State responses varied from military intervention to diplomatic appeals. Regarding the latter, renowned decisions of the PCIJ and ICJ such as the *Chorzów Factory* case,[71] the *Barcelona Traction* case,[72] and the *ELSI* case[73] all involved investment claims brought by way of diplomatic protection.

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[64] Unlike what happened in the *Case Concerning Chorzów Factory* case decided by the PCIJ, discussed in Part 3, 1 (b).

[65] *Anglo-Iranian Oil Co. [United Kingdom v. Iran]*, Preliminary Objection, July 22, 1952, ICJ Rep. 93.

[66] *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, (1987).

[67] *Case Concerning Barcelona Traction, Light and Power Company, Limited [Belgium v. Spain]*, Judgment, 5 February, 1970.

[68] *See e.g., Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan,* ICSID Case No. ARB/12/1, Award, 12 July 2019.

[69] *Mavrommatis Palestine Concession [Greece v. United Kingdom]*, Judgment Objection to Jurisdiction of the Court (30 August, 1924, 19 PCIJ Rep Series A No 2.

[70] *See Panevezys-Saldutiskis Railway [Estonia v. Lithuania]*, Judgment 28 February, 1939, PCIJ, Series A/B, No. 76, p. 16.

[71] *Certain German Interests on Polish Upper Silesia [Germany v. Poland],* Judgment 25 August, 1926, PCIJ (Serie A) No. 7; *Factory [Germany v. Poland],* Judgment,September 13, 1928, PCIJ (Serie A No. 17.

[72] *See supra*

[73] *Elettronica Sicula S.p.A. (ELSI) [United States of America v. Italy]*, Judgment, 20 July, 1989, ICJ Rep. 15, ¶ 128. Recently, *Ahmadou Sadio Diallo [Republic of Guinea v. Democratic Republic of the Congo]*, Preliminary Objections (24 May, 2007) ICJ Rep. 582; *Ahmadou Sadio Diallo [Republic of Guinea v. Democratic Republic of the Congo]*, Judgment, 30 November, 2010, ICJ Rep. 639.

After World War II, important changes began to occur, as injured individuals were increasingly granted standing and empowered by investment tribunals and human rights courts. In this scenario, diplomatic protection is no longer optimal for foreign investors.

Once the investor's home government has espoused the claim, it effectively "owns" it and thereafter, controls how the claim will be made, the conditions of a settlement, if any, or even the abandonment of a claim if this is considered justified in light of other factors in the relationship with the host country, such as security considerations or broader economic concerns. Consequently, this decision of the State on whether or not to pursue the case on behalf of its nationals usually derives from political considerations in a process that many investors and capital-exporting States have perceived as inadequate. Moreover, since the end of the gunboat diplomacy era, diplomatic protection in many cases did not necessarily result in a meaningful remedy. It often ended in an exchange of written or oral statements between governments, since the matter could only be brought to an international tribunal with the consent of the States concerned.

Despite these pitfalls, diplomatic protection still plays a considerable role in the safeguarding of the injured individual at the international level. The continued importance of diplomatic protection is reflected in the 2006 adoption of the International Law Commission (ILC) Draft Articles on Diplomatic Protection with commentaries.[74]

XI. Efforts for a global instrument on foreign investment protection

Unlike trade in goods, there is no single definitive multilateral treaty text on foreign investment equivalent to, for instance, the General Agreement on Tariffs and Trade (GATT), or a sole overarching institution comparable to the World Trade Organization (WTO). This state of affairs remains stalled, but not for lack of trying. Six codification projects for foreign investment matters were advanced between the 1920s and the 1990s. Four of these were initiatives by States and two were from private actors.[75] None were successful.

A. Harvard Draft of 1929

The first of these was the 1929 Harvard Draft on "The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners." At the 1930 Hague Codification Conference, the disparity of views regarding its content reflected a lack of consensus in customary international law on the matter and led to abandonment of the project.

B. Havana Charter of 1948

The Havana Charter of 1948[76] was another effort to negotiate rules regarding foreign investment under the auspices of an attempt by the United Nations to form an international trade organization. Although the Havana Charter never came into force, it did pave the way for the negotiation and finalization of the GATT.[77] The Charter was ultimately officially dropped in 1950, for reasons other than those related to the existing investment provisions.

C. Abs-Hartley Shawcross Draft Convention on Investments Abroad of 1959

After the failure of the Havana Charter, a wave of expropriations occurred in the 1950s in communist countries and numerous States that had recently become independent. Several proposals were made in reaction to these events.

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[74]United Nations, *Draft Articles on Diplomatic Protection with commentaries*, 2006,https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

[75] The Abs-Shawcross Draft Convention and the Harvard Convention were initiatives by private actors.

[76] United Nations *Havana Charter for an International Trade Organization,* 1948 UN Doc E/CONF.2/78.

[77] General Agreement on Tariffs and Trade, adopted 30 October 1947, entered into force 1 January 1948. 55 UNTS 187; General Agreement on Tariffs and Trade, 1947 and 1994. It laid the foundation for the multilateral trading system.

In 1959, Herman Abs and Hartley Shawcross advanced the most influential document. Their Draft Convention on Investments Abroad[78] was inspired by an earlier proposal from Shawcross. This Draft Convention, formally endorsed by the International Chamber of Commerce (ICC) was never tabled for ratification by States. Nonetheless, it provided a template for bilateral investment treaties, which had a huge impact on subsequent treaty practice. Its substantive standards represented an acceptable articulation of the consensus that had been reached within customary international law. Importantly, the Draft pioneered the idea of the injured party's right to also have access to arbitration claims against the State responsible for the injury caused. The Abs-Shawcross Draft Convention was submitted to the Organization for Economic Co-operation and Development (OECD), which never adopted the instrument.

D. 1961 Harvard Draft Convention

In 1961 the Harvard Draft Convention on the Responsibility of States for Injuries to the Economic Investment of Aliens included a moderate principle of qualified protection for foreign investments. The Harvard Draft Convention was not ratified by any State, nor is it cited by modern-day international tribunals.

E. 1962 OECD Draft Convention

The 1962 OECD Draft Convention on the Protection of Private Foreign Investment,[79] essentially a modified version of the Abs-Shawcross Draft Convention, did not gain traction due to partisan overtones and implicit rejection by the vast majority of States, which, in fact, did not participate in its drafting. The slow death of the Draft Convention accelerated in earnest when capital-exporting governments realized that they could obtain more robust investment law standards through the negotiation of bilateral treaties. Despite its failure, together with its predecessors, the Draft Convention significantly influenced the drafting of bilateral instruments negotiated in the 1960s and 1970s.

F. Later developments and OECD MAI draft of 1995

By the beginning of the 1980s, little additional progress had been achieved. As a result, other international actors came under pressure to act or respond, such as the World Bank, the OECD, and the World Trade Organization.

Although the World Bank had already established the ICSID dispute resolution mechanism, in 1992 the Bank adopted a set of guidelines or non-binding principles on foreign investments.[80] The Uruguay Round, the same negotiating forum that had led to the creation of the WTO, also resulted in the adoption of the Agreement on Trade-Related Investment Measures (TRIMs), which applies to investment measures affecting trade in goods.[81]

For its part, the OECD began to draft an ambitious Multilateral Agreement on Investment (MAI) in 1995. This agreement aimed to create a comprehensive general framework to guide international investment, also available to non-OECD countries, that incorporated high standards of liberalization, investment protection and effective dispute settlement procedures.[82] Unfortunately, negotiations for the formal adoption of the MAI discontinued in 1998 due to failure to reach consensus on several issues, and

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[78] Abs and Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, *Journal of Public Law*, Vol. 9, 1960, p. 115.

[79] OECD, *Draft Convention on the Protection of Foreign Property*, 2 Intl. Legal Materials 241, 1962https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf (last accessed 03 March 2022).

[80] World Bank Group, *Legal Framework for the Treatment of Foreign Investment,* Vols. 1 and 2, Washington, 1992. The text of the guidelines is reproduced in 1992 31 ILM 1363.

[81] WTO, *Agreement on Trade Related Investment Measures*, OECD, https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm#:~:text=The%20Agreement%20on%20Trade%2DRelated,which%20violate%20basic%20WTO%20principles (last accessed 23 July 2022).

[82] *OECD Begins Negotiations on A Multilateral Agreement on Investment*. https://www.oecd.org/investment/internationalinvestmentagreements/43389907.pdf (last accessed 03 March 2022).

also due to lack of participation by developing nations in the formal discussions, which generated strong resistance from countries such as India. Influential non-governmental organizations also expressed strong concerns regarding issues such as labor and environmental standards.

XII. United Nations resolutions on international investments

At the same time, several efforts were being made to address the regulation of customary international law, first at the League of Nations, and then at the United Nations. After the 1950s, the UN adopted several resolutions that may be applied by incorporation into an agreement, by reference to a treaty, or by extension due to their reflection of customary international law in matters such as nationalization. The award in the ICSID case *Amco v. Indonesia*[83] is an example of this argumentation.

One of the fundamental principles of the UN Charter is the sovereign equality of States.[84] Accordingly, developing countries pushed to introduce the sovereignty of States doctrine into the UN agenda. In 1952, the idea of economic self-determination was supported in General Assembly Resolution 626 (VII) and subsequently, in 1955, a draft article on the right of self-determination was adopted by the Third Committee of the General Assembly.[85]

In 1958, the Commission on Permanent Sovereignty over Natural Resources was established. Alongside the Economic and Social Council, this Commission conducted efforts that led to General Assembly Resolution 1803 (XVII) of 1962 on the Permanent Sovereignty of States over their Natural Resources. This resolution was the first document regarding expropriation under certain conditions (including appropriate compensation) to gain near-universal support. It included the aspirations of developing nations, as well as parts of the Hull Formula. The famous *Texaco v. Libya* award of 1977,[86] constituted a forceful and influential attempt to treat Resolution 1803 as a reflection of customary international law. This Resolution also declared that controversies were to be referred to the jurisdiction of the State that had committed the alleged wrongful act, but parties could agree to settle their dispute by arbitration or international adjudication (the choice of which was binding).[87]

In 1966, the UN General Assembly adopted Resolution 2158 on the Permanent Sovereignty over Natural Resources. This Resolution received substantial criticism for lack of clarity; however, it became highly relevant for the discussions that followed.

Some years later, General Assembly Resolution 3171 of 1973 went so far as to claim that expropriations do not create an obligation for "appropriate compensation" according to domestic standards.[88] It received 108 votes in favor, one against, and sixteen abstentions, including ten Western European countries and the United States, indicating their lack of support for the resolution.

After obtaining a majority of votes, developing nations attempted to introduce an agenda to establish a New International Economic Order (NIEO). The initiative was recognized by the General Assembly through Resolution 3201 (S-VI) of 1974 and the Programme of Action on the Implementation of the Declaration was achieved through Resolution 3202 (S-VI); shortly afterward, the Charter of Economic Rights and Duties of States was adopted via General Assembly Resolution 3281 of 1974.

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[83] *Amco Asia Corp. and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November, 1984.
[84] The Charter of the United Nations signed on 26 June, 1945, Art. 2.
[85] It stated the following: "The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".
[86] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Ad hoc. Award on the Merits 19 January, 1977, 17 ILM 1.
[87] Declaration 4 of Resolution 1803, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/193/11/PDF/NR019311.pdf?OpenElement (last accessed 3 March 2022).
[88] United Nations GA Res. 3171, 28 UN GAOR Supp. No. 30, at 52, 17 December, 1973, UN Doc. A/9030, repr. In AJIL, Vol. 68 (1974), p. 381.

This was a radical change. Not only were States not compelled to grant preferential treatment to foreign investment – something not incorporated as such into public international law – but it appeared that now there did not exist any right to equal treatment. Simply put, now there was no prohibition of arbitrary or discriminatory treatment of foreign investment or investors. The right to nationalize or expropriate foreign-owned property was restated, with no requirement of public purpose or public utility.

The Charter of Economic Rights and Duties of States adopted the "appropriate compensation" standard but rejected some of the key aspects of the Hull Formula. Instead, the document emphasized the application of national rather than public international law on matters related to expropriation and nationalization. For this reason, many developed countries did not support the Charter. The reasoning in the influential *Texaco v. Libya* case even dismissed the idea that the Charter reflected customary international law and considered this circumstance as one of the reasons for its lack of acceptance.[89]

XIII. United Nations Draft Articles on State Responsibility

State responsibility may derive from any breach of public international law, ranging from an error made by a petty official to an act of aggression. Originally, the doctrine of State responsibility was concerned with a State's public responsibility due to the breach of an international obligation owed to another State.

After the nineteenth century, difficulties began to arise regarding outrageous behavior by States towards aliens. To evaluate such conduct, an appreciation of the law of State responsibility was required in the context of emerging customary law on foreign investments. In these situations, States were only indirectly injured when their nationals were affected, by comparison with the direct harm sustained and generally under consideration in discussions of direct State responsibility. The law of "State responsibility" developed in this narrower sense to consider the indirect injury by a State that affects the national of another country.

Today this is reflected to a large extent in the work of the International Law Commission. At the 1930 League of Nations Conference, an attempt to codify this matter was launched.[90] The United Nations later took up the initiative and, after almost forty-five years and thirty reports, a draft was finally approved.[91]

Special Rapporteur and Cuban jurist F.V. García-Amador wrote an initial report in 1956 that attempted a comprehensive codification on the responsibility stemming from injury to aliens.[92] García-Amador was succeeded in 1961 by Italian jurist Roberto Ago, who established the basic structure and orientation of the project to codify the law of State responsibility. Ago contributed more abstract general rules relating to State responsibility that offered a distinction between primary and secondary rules. This approach avoided some of the contentious issues that had previously posed problems.

As such, Ago's proposal does not deal with the content of international obligations, which is the focus on the primary rules of State responsibility "whose codification would involve restating most of substantive customary and conventional international law."[93] Instead, emphasis is placed upon the secondary rules, or "the general conditions under international law for the State to be considered

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[89] *See supra,* ¶ 88.

[90] United Nations, *Report to the General Assembly*, ILC Y.B., 1949, p. 281.

[91] Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (last accessed 3 March 2022).

[92] V. García-Amador, *First Report on International Responsibility,* ILC Y.B., 1956, p. 175, ¶ 6, UN Doc. A/CN.4/SER.A/1956/Add.1.

[93] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p. 31, ¶ 1, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 11 March 2022).

responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[94] Ago's proposal determines which acts qualify as internationally wrongful, the circumstances under which wrongful action may be attributed to the State, the general defenses to liability, and the consequences of liability.

The final version of the United Nations International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts was adopted by Resolution 56/83 of 2001 [Draft Articles on State Responsibility].[95] This initiative was brought "to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[96]

There appears to be a general consensus that the Draft Articles on State Responsibility is currently the most authoritative document on the law of State responsibility, although it does not cover all of its aspects under public international law. The draft articles were cited by the ICJ in the *Gabčíkovo-Nagymaros Project* case.[97]

REC. 2.1 OAS Member States are encouraged to review their domestic laws that govern international investment arbitration with a view towards: 1) considering the various sources of law that may be relevant in the event of a dispute, taking note of the ongoing role of customary international law and general principles of international law, particularly in the absence of applicable treaty provisions; and, 2) ensuring that guarantees for foreign investment as prescribed in their domestic laws align with international standards.

PART 3: SOURCES OF PUBLIC INTERNATIONAL LAW AND FOREIGN INVESTMENTS

When States breach their international obligations, the characterization and consequences of the violation are governed by public international law.[98] According to Article 2 of the International Law Commission's Draft Articles on State Responsibility, an internationally wrongful act will be found when two conditions are met. First, the conduct (either an action or an omission) must be attributable to the State under international law. Second, it must constitute a breach of one of the State's international obligations.

In turn, Article 3 of these Draft Articles provides that whether an action is considered internationally wrongful will be governed by international law.[99] This determination is independent from, and prevails over, applicable domestic legal rules. However, as explained in the official commentary to Article 3:

> […I]nternal 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.[100]

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[94] ILC Y.B. 1970, Vol. II, p. 306, ¶ 66, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1970_v2.pdf (last accessed 11 March 2022).
[95] United Nations, Sixth Committee (Legal) — 68th session, https://www.un.org/en/ga/sixth/68/StateRes.shtml (last accessed 18 May 2022).
[96] GA Res. 56/83, 12 December, 2001, ¶ 3, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement (last accessed 11 March 2022).
[97] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (September 25, 1997), ¶¶ 47, 50, 79, 83.
[98] ICJ, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 18 July 1950, I.C.J. Rep., 1950, p. 221. "It is clear that refusal to fulfill a treaty obligation involves international responsibility."
[99] This principle was codified in the VCLT in Art. 27. Regardless of whether a State has signed the Convention, the principle will apply since it reflects the codification of customary international law.
[100] ILC, Commentary to Art. 3, ¶ 7, reprinted in Crawford, p. 89. J. Crawford, "Treaty and Contract in Investment Arbitration", *Arbitration International*, Vol. 24, No. 3, LCIA, 2008, p. 354, 357.

In line with these provisions, the ad hoc Committee in the *MTD* case "characterized international law as the *lex causae* in a case based on a breach of an investment treaty."[101] In *Wena v. Egypt*, the Tribunal held that "international law can be applied by itself, if the appropriate rule is found in this ambit." In deciding that compound interest should be awarded in the case, the Tribunal relied on public international law, as interest is an integral part of the calculation of damages under the well-known formula of prompt, adequate, and effective compensation. In this case, it would have been unwise to rely on principles of national law that are clearly less generous in the granting of interest.

Historically, the most important attempt to specify sources of international law comes from Article 38 of the statute of the PCIJ,[102] copied almost verbatim in Article 38 of the statute of the ICJ. The provision does not mention the term "source" and deals strictly with "court law." However, Article 38 is applied by the ICJ as its governing provision and is frequently cited by other tribunals. As such, Article 38 is considered an authoritative statement of the sources of international law and is now generally accepted in practice.

I. International Customary Law and Foreign Investments

A. Notion of International Customary Law

"International custom", or "customary international law" "is unwritten law deriving from practice accepted as law."[103] On the one hand, the notion refers to the *process* by which certain rules of international law are formed. On the other hand, it consists of the *rules themselves* that were created through this process.

Article 38(1) of the ICJ Statute states that "the Court shall apply: […] b. international custom, as evidence of a general practice accepted as law […]". The wording of this provision is *prima facie* defective. It alludes to "international custom, as evidence of a general practice accepted as law." However, the existence of a custom does not mean that it has been generally accepted.

The standard conception of customary international law has created significant uncertainty and has generated endless debates. This is particularly striking in international investment matters, towards which a very permissive and loose concept of customary law developed in the pre-1945 era.

In any case, custom is generally assumed to have two principal requirements: practice and *opinio juris*. The latter is understood not as a subjective inquiry into the motives for following the practice, but as the general sentiment among States that there is a requirement of law.[104] Hence, when there is a practice but no *opinio juris*, no "custom" can be born – the practice is a mere "usage" with no corresponding sense of obligation.[105] "Custom" and "usage" are terms of art which have different meanings in public international law. Unlike custom, a usage is a general practice which does not correspond to any obligation[106]; for example, ceremonial salutes at sea or the granting of parking privileges to diplomatic vehicles. In sum and to follow the wording of the ICJ, both the existence of a general practice and the

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[101] *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Application for Annulment 21 March, 2007, ¶¶ 72, 61. It was stated in *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14*,* Award 08 December, 2008, ¶ 113. The ILC's Articles on State Responsibility contains no rules and regulations of State responsibility vis-à-vis non-State actors: tribunals are left to determine "the ways in which State responsibility may be invoked by non-State entities" from the provisions of the text of the particular treaty under consideration".

[102] 16 December 1920, 112 BFSP 317.

[103] ILC, Rep. on the work of the seventieth session, 2018, Ch. V - Identification of customary international law, Document A/73/10 https://legal.un.org/ilc/reports/2018/english/chp5.pdf (last accessed 3 March 2022), p. 122.

[104] *See supra* p. 125.

[105] The requirement both of consistent practice, and of the general opinion, is implicit in the well-known passage from the judgment of the International Court of Justice in the *Asylum* case [*Colombia v. Peru]*, Judgment, 20 November, 1950, ICJ Reports 1950, p. 276-277.

[106] Conclusion 9 of an ILC Rep. https://legal.un.org/ilc/reports/2018/english/chp5.pdf (last accessed 3 March 2022).

acceptance of that practice as law (*opinio juris*) "must be fulfilled" in order for that practice to become custom.[107]

In 2012, the International Law Commission included the question of customary international law in its program of work,[108] and the debates summarized in the resulting report underscore that customary law remains highly relevant despite the growth of other sources, particularly treaties. The Report also notes that while treaties are only binding upon the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." Moreover, Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty […] becoming binding upon a third State as a customary rule of international law, recognized as such."[109] The 2018 United Nations General Assembly resolved to "take note in a resolution of the draft conclusions [of the ILC Report] on identification of customary international law" and to "ensure their widest dissemination."[110] This Report can be considered the most authoritative recent statement to offer guidance on customary international law.[111]

B. Investment standards developed under customary international law

1. International Minimum standard

In principle, foreign investors should be subject to at least the same treatment or the "national treatment standard" of its locals, advocated in particular by Latin American countries in the nineteenth century. However, this treatment was insufficient for aliens if it was not in accordance with a minimum standard generally accepted by colonial nations. Customary international law asserted that a minimum standard of treatment to aliens could not be evaded by national law.[112] Even though customary international law did not grant aliens the right to acquire property, exercise a profession, or work in foreign territory, its international minimum standard granted them protection against expropriation.

The scope of application of this international minimum standard was restricted to curtail clearly excessive State measures. In the *Neer* case decided in 1926, the Mexico-United States General Claims Commission ruled that isolation of this minimum standard of treatment "[…] should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[113]

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[107] *North Sea Continental Shelf [Federal Republic of Germany/Netherlands]*, Judgment, 20 February, 1969, ICJ Reports 1969, p. 44, ¶ 77, *Jurisdictional Immunities of the State [Germany v. Italy: Greece intervening]*, Judgment, 02February, 2012, ICJ Reps. s 2012, p. 99, at p. 122–123, ¶ 55; *Continental Shelf [Libyan Arab Jamahiriya/Malta]*, Judgment, 21 March, 1984, ICJ Reps, 1985, p. 13, p. 29–30, ¶27.

[108] In 2012, this commission included in its program of work the topic "Formation and evidence of customary international law". The Commission decided to appoint Mr. Michael Wood as Special Rapporteur for the topic. In 2013, the Commission received the first report, and decided to change the title of the topic to "Identification of customary international law" https://legal.un.org/ilc/summaries/1_13.shtml (last accessed 3 March 2022).

[109] ILC, *Rep. on the work of the seventieth session,* 2018, Ch. V - Identification of customary international law, Document A/73/10, https://legal.un.org/ilc/reports/2018/english/chp5.pdf (last accessed 3 March 2022), p. 143.

[110] The work of the Commission on the topic as described above has been proceeding in accordance with the successive resolutions adopted by the General Assembly. General Assembly resolution 67/9 of 14 December 2012; 68/112 of 16 December 2013; 69/118 of 10 December 2014; 70/236 of 23 December 2015; and 71/140 of 13 December 2016.

[111] ILC *Rep.on the work of the seventieth session* (2018), Ch. V - Identification of customary international law, Document A/73/10, p. 123.

[112] In a recent case, the tribunal recognized that the standard of minimum level of treatment is part of customary international law. *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 743.

[113] *L. Fay H. Neer and Pauline Neer [USA v. United Mexican States]*, Decision, 15 October, 1926; *BG Group P.L.C. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December, 2007, IIC 321, 2007, ¶¶ 275–310. Other claim

The scope and content of the international minimum standard remains the object of incommensurable controversy, thereby putting into question the customary status commonly attributed to that rule. The emerging specific needs and prerogatives of developing nations, and a greater emphasis on human rights have moved the needle forward and helped create new perspectives related to the minimum acceptable standard of treatment for investors. As of today, this and other controversies regarding the standard remain unsettled.

2. Compensation for expropriation

Another ongoing controversy concerns compensation for expropriation. According to the Calvo Doctrine, State sovereignty results in all land and other natural resources belonging to the State. Thus, no foreign investor can own the resources of another State. Developing countries have followed this rule in the past, launching expropriation and nationalization campaigns. For several countries, the social function of property recognized in their laws did not grant those States a right to expropriate without compensation. However, compensation did not need to be prior or prompt, and the State's ability to pay was an important factor in determining its appropriate amount.

The United States' Secretary of State, Cordell Hull, advanced views in 1938 on appropriate compensation. In an international investment context, Hull advocated in favor of prompt, adequate, and effective payment for expropriation and nationalization. His views are referred to as the "Hull Formula," which is generally followed by developed countries and by the United States in particular. The formula is reflected in many investment treaties (see, for example, Article 13(1) of the Energy Charter Treaty, discussed in Part 3, Section II, Subsection C). According to the Hull Formula, the fair market value of an expropriated resource should be determined according to the price that willing buyers and sellers would agree to pay in an arm's-length transaction.[114] Later formulas advocated for "just" or "appropriate" compensation, taking into account, in some circumstances, the State's capacity to pay the amount. Several recent cases suggest that lack of prompt payment does not make the expropriation illegal *per se*, but that this depends on the specific circumstances.

Notably, Rapporteurs of the Revised Restatement (Third) of the Foreign Relations Law of the United States refused, in early stages of its drafting, to insert the "prompt, adequate, and effective" formula as black letter, asserting that they did "not think that that can be said as an honest statement of customary international law."[115]

Regarding breaches other than expropriation, the classic and often-cited precedent for determining compensation emerged from the *Chorzów Factory* case.[116] The decision in this case established the principle that reparations must, as far as possible, negate all the consequences of the illegal act and return the injured party to the position they would have been in, had the wrongful act not been committed. Some consider that the *Chorzów Factory* case established the basic principle of compensation. Others interpret it as advancing the proposition that unlawful expropriation (for instance with discriminatory treatment) entitles the injured party to greater compensation. Yet another interpretation maintains that the *Chorzów*

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cases reached similar conclusions. *See e.g.*, ALI, Restatement of the Law 2nd citing '*France v. Great Britain,* 1933, 27 AJIL 153, 160.

[114] In recent times, the Tribunal in *Starrett Housing Corporation v. Iran*, referred to the fair market value as "[…] the price [at which] a willing buyer would buy […] and the price at which a willing seller would sell […] on condition that none of the two parties [is] under any kind of duress and that both parties have good information about all relevant circumstances involved in the purchase" (*Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, Iran-United States Claims Tribunal, Award No. 314-24-1 (August 14, 1987), paras 18, 27, and 274).

[115] Revised Restatement (Third) of the Foreign Relations Law.

[116] *Factory at Chorzów (Germany v. Poland)*, Judgment (September 13, 1928), *P.C.U., Series A, No. 17* (1928), p. 28.

Factory case does not reflect customary law at all. Nonetheless, it remains one of the most cited cases in the history of investment claims, until recently.[117]

C. Recent developments in customary international law

Customary international law developed particularly to ascertain and fill gaps in Friendship, Commerce and Navigation treaties, which did not address several issues related to investors and evolved around the practice and home laws of aliens. General principles of law, case law, and doctrinal writings relied upon these developments.

However, customary international law was highly unsatisfactory. The often vague international customary rules were subject to varying interpretations. This situation was reflected, for instance, in the manner of how compensation was to be calculated. Disagreements between nations of the Global North and South aggravated the divergences. Several countries considered mainstream customary international law as an imposition of the developed world. Moreover, no effective enforcement dispute resolution was available to investors. In sum, international customary law was incomplete, vague, contested, and without an effective enforcement mechanism. This situation led to the negotiation of investment treaties.

Today, the role of customary international law in foreign investments has changed. This is particularly true amidst the proliferation of treaties since the 1990s due to the fall of the Iron Curtain and the growing number of bilateral instruments that have been concluded in the interim. Customary law still has an important position in public international law, particularly in the absence of an applicable treaty. In this situation, customary international law provides answers to matters such as the minimum standard for the treatment of aliens, the prohibition of the denial of justice, and State responsibility for injury to aliens.

There are numerous precedents in which ICSID tribunals have applied the rules of customary international law, such as the principles of State responsibility,[118] the consequences of a state of necessity,[119] or compensation for expropriation,[120] including the aforementioned *Chorzów Factory* standard for determining the appropriate amount of compensation for wrongful expropriation.[121]

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[117] Examples of modern cases applying the *Chorzów* formula are: *MTD Equity Sdn Bhd & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May, 2004, ¶¶ 570, 633; *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 14 2006, ¶¶ 409, 423; *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award,13 November, 2000, IIC 249, ¶¶ 311, 313; *Metalclad Corporation v. The United Mexican States*, ARB(AF)/97/1, Award, 30August, 2000; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August, 2019.

[118] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July, 2003, ¶ 108; *Azurix Corporation v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July, 2006, ¶ 50.

[119] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May, 2005, ¶¶ 304-331; *LG&E Energy Corp.*, *LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October, 2006), ¶¶ 245-266; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May, 2007), ¶¶ 294-313; *CMS Gas Transmission Co. v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic 25 September, 2007, ¶¶ 101-150; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28September, 2007, ¶¶ 333-354, 392-397.

[120] *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February, 2000), ¶¶ 68-95.

[121] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 30 August, 2007, ¶¶ 8.2.2-8.2.7; *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April, 2006, ¶¶ 117-136; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May, 2007, ¶ 396; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July, 2003, ¶ 48; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May, 2005, ¶¶ 144, 145; *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May, 2005, ¶¶ 156-157.

Foreign investments have also generated a wide array of soft law or non-binding instruments, particularly in topics that lack the international consensus required for the establishment of a treaty. Such matters include, for instance, corporate responsibility, which the UN Global Compact has been working on since 1999 and that comprises a list of ten principles in the areas of human rights, labor rights, environmental protection, and anti-corruption.[122] Other related soft law initiatives include the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003),[123] the UN Guiding Principles on Business and Human Rights (2011),[124] and the influential OECD Guidelines for Multinational Enterprises (first issued in 1976, most recently updated in 2011).[125]

On July 14, 2014, the UN Human Rights Council adopted a resolution on the elaboration of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[126] It emphasized that States have an obligation and the primary responsibility for promoting and protecting human rights and fundamental freedoms and protecting against any abuses committed within their jurisdiction, including by third parties such as corporations. Towards this end, the Council created an open-ended intergovernmental working group to elaborate a legally binding agreement on human rights applicable to transnational corporations and other business enterprises. In the Americas and at a regional level, the Organization of American States (OAS) has also addressed the issue of "conscious and effective regulation of business in the area of human rights."[127]

Another relevant recent development is the ALIC Guide.[128] It provides guidance to promote more sustainable investments, particularly on how to incorporate public policy commitments - that derive from soft law on local community involvement, traditional agriculture, social and human rights standards and environmental considerations - into agriculture land investment contracts and ensure their effective implementation.

In sum, although its role has changed, customary international law is still important in foreign investment, and thus, also in investor-state arbitration.

II. Treaties and Foreign Investments

A. Notion of Treaties

Article 38 (1) of the Statute of the ICJ mentions international conventions at the outset as one of the sources of public international law.[129] Today there are more than 70,000 treaties dominating the international law landscape.

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[122] See in: https://www.unglobalcompact.org/what-is-gc/mission/principles

[123] United Nations, Sub commission on the Promotion and Protection of Human Rights, 55th Session, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 26 August 2003. https://digitallibrary.un.org/record/501576#record-files-collapse-header (last accessed 11 March 2022).

[124] United Nations Guiding Principles on Business and Human Rights, 2011
. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (last accessed 11 March 2022).

[125] OECD Guidelines for Multinational Enterprises. https://www.oecd.org/daf/inv/mne/48004323.pdf (last accessed 11 March 2022). The OECD, in turn, has a *Code of Liberalization of Capital Movements* (OECD, 2023), http:// https://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf (last accessed 20 February 2023).

[126] A/HRC/RES/26/9.

[127] See Documents CJI/RES. 232 (XCI-O/17); CJI/doc.522/17 rev.2; CJI/RES. 205 (LXXXIV-O/14) and AG/RES. 2887 (XLVI-O/16). See also General Assembly Resolutions AG/RES. 1786 (XXXI-O/2001); AG/RES. 2887 (XLVI-O/16); and A/HRC/RES/26/9, https://www.oas.org/en/sla/iajc/annual_reports.asp> (last accessed 18 June 2022), p. 141 ff.

[128] UNIDROIT/IFAD *Legal Guide on Agricultural Land Investment Contracts* (ALIC), September 2021, https://www.unidroit.org/wp-content/uploads/2021/10/ALICGuidehy.pdf > (last accessed 23 May 2022).

[129] *See* Statute of the International Court of Justice, Art. 38(1) https://www.icj-cij.org/en/statute (last accessed 3 March 2022).

Certain characteristics are unique to treaties alone, reflected in the widely-ratified Vienna Convention on the Laws of Treaties (VCLT),[130] which is an instrument generally accepted as reflecting public international law on the matter. Article 2(1)(a) of the VCLT defines a treaty as "[…] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[131]

The ICJ has interpreted this definition as reflective of customary international law,[132] and most States and writers endorse this statement as well.[133] However, this definition has also been widely recognized as incomplete. For instance, agreements by other non-State subjects of international law would not qualify under this definition, which would constitute an omission to customary international law.[134]

The primary international legal effect of a treaty is to trigger the foundational international legal principle of *pacta sunt servanda*, according to which its provisions become binding upon the parties and must be performed by them in good faith.[135] Moreover, a treaty also carries with it secondary international legal effects, including those emerging from the law of treaties, State responsibility, and any other specific regimes tied to the treaty's subject matter. The VCLT, and customary international law more generally, governs the validity, interpretation, application, breach, and termination of a State's treaties.[136]

In addition, treaties exert influence on the formation of customary rules - declaring, crystalizing or even generating such rules - and may provide indicators of what is considered good practice in international law. As such, treaties are important international tools that influence national-level policy and legal decision-making, as well as business decisions, for instance regarding free, prior and informed consent for investments affecting indigenous people.[137]

B. Treaties and international investments

As seen in the wording of Friendship, Commerce and Navigation treaties that were signed from the seventeenth century onwards, certain substantive obligations emerged which evolved under international customary law. Attempts at a multilateral level to codify these substantive obligations faced significant setbacks after World War II. Since these initiatives, no other significant codification project within the field of foreign investment law has been undertaken. Instead, States have predominantly opted in large measure to conclude bilateral, regional, and multilateral investment treaties, as well as free trade agreements that incorporate specific chapters to regulate foreign investments.[138]

While customary international law traditionally prevailed in the past in disputes that involved foreign investments, treaties are now the primary means through which aliens seek protection of their rights.

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[130] Vienna Convention on the Law of Treaties("VCLT"). (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 2(1)(a)

[131] See VCLT Art. 2(1)(a) (last accessed 3 March 2022).

[132] *Maritime Delimitation in the Indian Ocean, (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Rep. 2017, p. 3, 21, ¶ 42; *Land and Maritime Boundary between Cameroon and Nigeria, [Cameroon v. Nigeria: Equatorial Guinea Intervening]*, Judgement, ICJ Rep. , 2002, p.303 ¶ 263.

[133] On this topic, see the recent document approved by the Inter-American Juridical Committee of the Organization of American States and presented by United States jurist Duncan Hollis, acting as Rapporteur: "Guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements", http://www.oas.org/en/sla/iajc/docs/themes_recently_concluded_Binding_and_Non-Binding_Agreements_GUIDELINES.pdf (last accessed 3 March 2022).

[134] This is the case in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted on 21 March 1986, not yet in force), 25 ILM 543 (1986).

[135] VCLT, Art. 26.

[136] VCLT Part V.

[137] UNIDROIT/IFAD *Legal Guide on Agricultural Land Investment Contracts* (ALIC), p. 22. (last accessed 23 May 2022).

[138] UNCTAD maintains a complete and user-friendly *International Investment Agreements Navigator* https://investmentpolicy.unctad.org/international-investment-agreements (last accessed 3 March 2022).

Contemporary treaties sometimes incorporate the classic rules of customary law while in other instances, they extend beyond such rules.

A controversy relates to the interaction between treaties and customary international law.[139] The ILC Articles on State Responsibility recognize the existence of distinct regimes of State responsibility by incorporating an important *lex specialis* reservation in Article 55. If a treaty exists, it prevails over customary international law. In relation to this matter, an ILC report explains that systemic interpretation must be performed under…

[…] two presumptions, one positive, the other negative: (a) According to the positive presumption, parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"[648]; (b) According to the negative presumption, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.[140]

Investment cases refer to customary international law, for instance, where the treaty rule is unclear or open-textured or has a recognized meaning in customary international law. Examples flow from the construction of the terms "fair and equitable treatment" and "full protection and security", interpreted by the NAFTA Free Trade Commission in *Pope & Talbot v. Canada.*[141]

C. Investment treaty regime

Severalinstruments incorporate a certain degree of investment protection, ranging from those specific to foreign investments, such as bilateral or multilateral investment treaties,[142] to others that are broader in scope but contain some provisions on the topic. For instance, numerous World Trade Organization agreements contain certain rules on investment that are rather marginal when compared to the treatment of investments in bilateral investment treaties.

The international investment regime has largely been constructed bilaterally, rather than multilaterally. In contrast to the World Trade Organization, no multilateral international organization exists to support the foreign investment regime.

1. Bilateral Investment Treaties (BITs)

a. The first BITs and later evolution

The 1959 agreement between Germany and Pakistan (which entered into force in 1962) is generally considered the first modern bilateral investment treaty.[143] Much of the inspiration for this treaty and later treaties came from the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1962 OECD Draft Convention on the Protection of Foreign Property[144]. Although these first versions of modern investment treaties did not contain a dispute resolution clause that could be invoked by injured investors, these treaties laid the floor for subsequent instruments for investment protection. The 1968 BIT between

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[139] *Ghella S.p.A. v. República Bolivariana de Venezuela and C.A. Metro de Valencia*, ICC Case No. 24776/JPA, Final Award, 16 March 2022, ¶ 163 (the tribunal determined that invoking the ILC as a source of consent leading to jurisdiction is not possible).

[140] See ILC Fragmentation Report, ¶ 465.

[141] *Pope & Talbot Inc. v. Canada* (, UNCITRAL, Award in respect of damages, 31 May 31, 2002), ¶ 10 (citing the interpretation of the NAFTA Free Trade Commission). *See* ILC Fragmentation Report, p. 235.

[142] The UNCTAD website provides a database of international investment agreements http://investmentpolicyhub.unctad.org/IIA (last accessed 3 March 2022).

[143] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment, signed on 25 November 1959, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387(last accessed 3 March 2022).

[144] See earlier discussions, above at: Part 2, XI E.

Indonesia and the Netherlands was the first to introduce a provision to settle claims with foreign investors via an arbitration offer.[145]

By 1989, there were 385 BITs in force. UNCTAD reported the existence of approximately 900 BITs at the beginning of the 1990s. [146] According to UNCTAD, by the end of July 2019 there were 2,971 BITs globally, of which 897 were between African States.[147]

b. Common features in most BITs

There is a "surprising degree of uniformity" between most BITs. BITs converge in structure, scope, and content, which is particularly striking considering the failures to achieve a global multilateral investment treaty and the flexibility that a bilateral instrument provides for tailoring specific rights and obligations. Despite the degree of uniformity, BITs are not identical. The wording of each treaty may have minor or major differences that result in diverse and unique interpretations of the same standards of protection. This is perhaps one of the reasons why there is no "consistent jurisprudence" in international investment arbitration.

Most bilateral investment treaties are divided into three parts: scope, substantive protection, and dispute settlement. They are generally preceded by a preamble, followed by definitions of "investment" and "investors", and then conditions on the admission of a foreign investor. They also contain standards and guarantees to be observed by host States, followed by miscellaneous protections such as currency transfer and labor provisions. Finally, BITs incorporate dispute settlement mechanisms geared toward resolving issues between the contracting States and, more significantly, between one contracting State and investors (usually setting arbitration as the default mechanism).

Thus, investors can avail themselves of the treaty protections both in terms of the standards of treatment as well as the choice of forum. In addition, BITs typically grant investors standing to claim on their own.

c. Substantive standards included in BITs

Legal protection of international investments usually extends to the following items:

i. Guarantee of non-expropriation or equivalent measures without compensation

This guarantee is generally articulated within investment treaties. It usually requires that expropriation is done for a public purpose, performed in accordance with due process, and accompanied by payment of prompt, adequate, and effective compensation.

To qualify for compensation, expropriation can be either direct or indirect. Direct expropriation refers to the outright physical seizure of property or its title. By contrast, indirect expropriation originates from measures that amount to a substantial deprivation of the use and value of the investment, regardless of the fact that actual title to the asset may still remain with the investor.

In determining whether an indirect expropriation has occurred, tribunals usually consider the economic impact and duration of the governmental measures affecting the investment and the degree to

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[145] Agreement on economic cooperation (with protocol and exchanges of letters dated on 17 June 1968), signed 7 July 1968.
https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1987/indonesia---netherlands-bit-1968 (last accessed 18 May 2022).

[146] UNCTAD Investment Policy Monitor, Issue 24, February 2021, p. 7-8.

[147] UNCTAD "International Investment Agreement Database" http://investmentpolicyhub.unctad.org/IIA (last accessed 03 March 2022).

which they have interfered with the investor's reasonable expectations.[148] In exceptional circumstances, the burdensome imposition of taxes can qualify as indirect expropriation.[149]

Governmental actions conflicting with governmental assurances or undertakings may also be classified as indirect expropriation. However, in the absence of such assurances or undertakings, a State exercising its *bona fide* capacity to regulate through the use of its police powers, should not be deemed to engage in indirect expropriation, as was decided in the *Methanex v. USA* case.[150]

In *Philip Morris v. Uruguay*, the tribunal considered whether Uruguay's cigarette packaging measures constituted an indirect expropriation. The claimants argued that the host State's cigarette packaging regulations indirectly expropriated their intellectual property and destroyed their brand equity, with a substantial effect on profits. The tribunal concluded that the measures in question were a valid exercise by Uruguay of its police powers aimed at protecting public health and subsequently rejected the expropriation claim.[151]

Despite the wealth of case law on expropriation, its interpretation, and the scope of the right to compensation in the context of environmental or public health regulation remains unsettled. One reason for this situation is the additional complexity involved in determining the applicable law in such cases entails additional complexity. For example, despite a growing number of international environmental instruments, few address jurisdiction or applicable law.

Other tribunals have determined that indirect expropriation can result from cumulative measures that together substantially reduce the value of the investment (known as creeping expropriation).[152] Many investment treaties refer to both direct and indirect expropriation, precisely in order to include creeping expropriations.

Indirect expropriations always involve prior assurances given to an investor followed by government action that wholly or significantly deprives the investor of their reasonable expectations. As such, tribunals have ruled that it is the effect, rather than the intention of the expropriation, that is determinative.[153]

Moreover, since the typical expropriation provision usually includes concepts such as discrimination and due process, it is not surprising that potential exists for blurring the lines between expropriation and other standards of treatment. In general, tribunals have shown a tendency to construe indirect expropriation narrowly, considering the potential for the concept to encompass a broad range of measures if not restricted.

Essentially, simple contractual breaches by the State outside of its sovereign regulatory capacity do not constitute an indirect expropriation.[154] This is not the case, however, when the State acts in its regulatory

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[148] *LG&E Energy Corporation and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October, 2006, ¶ 190.

[149] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 14, 2012), ¶ 375.

[150] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 19 August, 2005, ¶ 7.

[151] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 08 July, 2016.

[152] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17January, 2007, ¶ 263. Similarly, a tribunal determined that the refusal of a local agency to renew a permit for a landfill constituted expropriation, even though legal ownership of the assets was not affected. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May,2003, ¶ 116.

[153] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 21, November 2000, ¶ 7.5.20; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17February, 2000, ¶ 71–72; *Phillips Petroleum Co. Iran v. Islamic Republic of Iran,* Iran-United States Claims Tribunal, Award No. 425-39-2, 29 June 1989, ¶¶ 115–116.

[154] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April, 2004), ¶ 175. *See also Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July, 2006, ¶ 315; *Suez,*

capacity and expropriates contractual rights by terminating the agreement by decree[155] or by performing a series of "sovereign acts designed illegitimately to end the concession or to force its renegotiation."[156] Indeed, such acts will fall within the category of indirect expropriation.

ii. Fair and Equitable Treatment

The fair and equitable treatment standard is frequently invoked in investment claims and it is contained in almost all relevant investment treaties.[157] At a minimum, this standard means there can be no discrimination by nationality or origin concerning aspects such as access to local courts and administrative bodies, applicable taxes, or governmental regulations. Fair and equitable treatment is generally included as an independent clause in investment treaties to distinguish it from other standards and emphasize its applicability even in the absence of discrimination.

The arbitral tribunal in the *Waste Management v. Mexico* case described the standard in the following manner:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[158]

More recently, in *Mesa Power v. Canada,*[159] the tribunal referred to the award issued in the *Waste Management v. Mexico* case, confirming the elements mentioned in this decision.[160]

One of the most important functions of the fair and equitable treatment standard is to fill in the gaps left by specific standards. Its popularity and success are related to the fact that a violation of this standard may be easier to establish than an expropriation, for example.

In recent years, there have been a series of overly broad readings of the fair and equitable treatment standard, which raises concerns.

Moreover, an issue arises repeatedly when the drafters of treaties use – as they often do – the expression "fair and equitable treatment in accordance with international law." Does this wording imply the traditional customary international law protection related to the minimum standard of treatment?

The "international minimum standard of treatment" (MST) within customary international law, enshrined in the *Neer* standard, referred to "an outrage", "bad faith", "willful neglect of duty", or "an insufficiency of governmental actions."[161] This formula was considered to be of quite limited application and for this reason it was later expanded through treaties and through the notion of "fair and equitable treatment" and "full protection and security" of foreign investments. Much case law has extensively

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Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July, 2010), ¶¶ 140–145.

[155] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January, 2007, ¶ 271.

[156] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August, 2007, ¶ 7.5.22.

[157] *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II, A sequel,* United Nations, New York and Geneva, 2012, pp. 17–35. http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last accessed 3 March 2022).

[158] *Waste Management, Inc. v. Mexico*, Award, ICSID Case No. ARB(AF)/00/3 (April 30, 2004), para 98.

[159] *Mesa Power Group L.L.C. v. Government of Canada*, PCA Case No. 2012-17, Award (March 24, 2016).

[160] Ibid., para 501.

[161] *L. Fay H. Neer and Pauline Neer (USA) v. United Mexican States*, Decision, 15 October 1926, ¶ 4.

discussed the intricacies of the fair and equitable treatment standard. Nevertheless, the debate regarding its content remains ongoing.[162]

In fact, there is significant disagreement on whether the fair and equitable treatment principle and the minimum international treatment standard are synonymous. Some consider both to be one and the same. Yet another view asserts that both standards are distinct. In particular, State respondents to treaty claims argue that "fair and equitable treatment" is a discrete and objective treaty standard, a particular form of *lex specialis* which can be found in many treaties, but not in all, that does not necessarily correspond to the treatment required under customary international law.

The debate remains unsettled, however. In this regard, the ICSID Tribunal in the *Vivendi v. Argentina* case stated the following: "The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment […] one should also look to contemporary principles of international law, not only to principles from almost a century ago."[163]

In contrast, the NAFTA tribunal in *Mondev v. USA* considered the *Neer* standard to have evolved. According to the tribunal, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[164] Indeed, this perspective suggests a departure from the application of the minimum standard within customary international law.

Recently, tribunals have appeared less interested in the theoretical discussion regarding the distinction between the customary law minimum standard and the principle of fair and equitable treatment and have focused their attention instead on determining the content of the latter.[165]

In *Tecmed v. Mexico,* the tribunal wrote that fair and equitable treatment requires that "the basic expectations that were taken into account by the foreign investor to make the investment" be respected.[166] Subsequent decisions (that cited the *Tecmed v. Mexico* and *Waste Management v. Mexico* cases) stressed the need for a transparent and stable legal framework to identify the investors' "legitimate expectations" that require protection. This principle of legitimate expectations is present in many domestic legal systems and is often referenced in arbitral awards based on treaty clauses that provide for fair and equitable treatment.[167] As part of their general duty of fairness, States should act in a manner consistent with their prior statements of policy or intention, meeting the investor's expectations.

In this regard, the legitimate expectations of investors are relevant considerations for tribunals. Analysis of these expectations involves examining how the measure impacts "the reasonable investment-

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[162]United Nations, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, 1999, http://unctad.org/en/Docs/psiteiitd11v3.en.pdf (last accessed 3 March 2022), pp. 39–40.

[163] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November, 2000, ¶ 7.4.7. See also *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22May, 2007, ¶ 258.

[164] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Final Award, 11 October, 2002), ¶ 116.

[165] *See Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March, 2006, ¶¶ 292–295. See also *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May, 2005, ¶ 284.

[166] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 154.

[167] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ Judgement, ICJ Reports 2018, p. 507 ¶ 162. (The ICJ has noted that "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment." However, the court went on to state that "it does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation)."

backed expectations of the investor and whether the state is attempting to avoid investment-backed expectations that the state created or reinforced through its own acts."[168] However, as decided in the *LG&E v. Argentina* case, "[…] the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns."[169]

Case law considers breaches of the fair and equitable standard to imply the failure of public authorities to ensure due process, consistency, and transparency.[170] Additionally, these breaches indicate the absence of a predictable and stable environment, contrary to the legitimate expectations of the investor.[171]

A fine balance must be drawn between State action and the fair treatment of investors in concordance with their legitimate expectations. While States should not preserve their regulatory autonomy, they must refrain from treating investors unfairly or inequitably.[172]

It is highly contested whether the "unfair, unreasonable or inequitable" standard for State action truly protects an investor's "legitimate expectations" regarding regulatory changes. To use contract law terminology, does the fair and equitable treatment standard include an implied "stabilization" clause? A growing number of cases use concepts such as non-discrimination, fair and equitable treatment and legitimate expectation to the same end, but in completely different directions.

Investors expect State actions to be consistent, free from ambiguity and totally transparent. If these expectations of State behavior are met, aliens will be aware of the rules governing the investment well in advance and can plan their actions accordingly.[173]

Another important requirement for State behavior is that the regulations affecting foreign investments cannot be discriminatory in favor of domestic entities.[174] At a minimum, "fair and equitable treatment" means no discrimination by nationality or origin in matters such as access to local courts and administrative bodies, applicable taxes, and administration of governmental regulations. States must also ensure basic protection of their judicial systems; the violation of this protection can amount to a "denial of justice."[175]

iii. The Right to National Treatment

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[168] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, ¶ 157.

[169] *LG&E Energy Corporation and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 130.

[170] *LG&E Energy Corporation and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 304. See also *MTD Equity Sdn Bhd & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶¶ 176–178.

[171] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (2000), ¶ 83; *Encana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 03 February 2006, ¶ 158.

[172] *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (2005), ¶ 276; *Occidental Petroleum Corporation and Others v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 01 July 2004, ¶ 183.

[173] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 284. *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 131; *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, 01 July 2004, ¶ 191.

[174] *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 293.

[175] NAFTA tribunals held that a denial of justice constitutes a breach of the standard; *See The Loewen Group Inc. and Raymond L Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April, 2004, ¶ 98; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January, 2006, ¶ 194; *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 102.

Customary international law and investment treaties in general impose an obligation on the host State to treat the foreign investor in a manner that is at least as favorable as that granted to its own nationals in like circumstances. Foreign individuals should not be subject to additional requirements that put them at a competitive disadvantage in comparison to national investors. The notion of "national treatment" has been described in a 1999 UNCTAD document as the "single most important standard of treatment enshrined in international investment agreements."[176]

Tribunals tend to approach claims of national treatment by asking three questions: are circumstances alike? Has the treatment been different? Is there a reasonable justification for such differential treatment? This three-pronged test was established in *Saluka v. Czech Republic*[177] and was later replicated by several other tribunals.[178]

iv. The Rights to Most-Favored-Nation (MFN) Status and to Non-Discriminatory Treatment

The most-favored-nation (MFN) and non-discriminatory treatment standards "are not autonomous but comparative protection standards, as such varying case by case. They are usually contemplated in treaties and recognized in case law."[179] As a consequence, the advantages secured in the benefits granted to one State automatically extend to others. In addition to leveling the field among investors from different States, the MFN clause has the ancillary objective of promoting global harmony by preventing favoritism on the grounds of nationality.

Typically, the MFN treatment clause concerns to how a State deals with foreign goods and individuals upon their entry into its territory and thereafter. The standard essentially evaluates how the State treats investors during the post-establishment phase.

Non-discriminatory treatment prohibits measures which discriminate against the foreign investor. The MFN standard, on the other hand, guarantees that the nationals of one foreign country must not be treated less favorably than those of another State. Of course, States are not obligated to treat all foreign nationals equally. However, a detrimental discriminatory differential treatment could be considered a violation of this standard. A decision in this regard was rendered in *Maffezini v. Spain.*[180] The tribunal did not find a violation of the MFN standard but rather, used it to broaden the scope of the dispute settlement provisions.

The MFN standard only applies "in like circumstances" between the foreign and domestic investor.[181] It applies to substantive rights such as taxation benefits, but cases have also extended its application to procedural matters, such as the determination of the dispute resolution mechanism.[182] As a

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[176] "National Treatment", *UNCTAD Series on Issues in International Investment Agreements*, New York and Geneva, United Nations, 1999, p. 1.

[177] *Saluka v. Czech Republic*, UNCITRAL, Partial Award (2006). This award has been criticized for extending treaty protection to self-induced investor expectations.

[178] *Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 247; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶ 344. The third element must be assessed under the specific circumstances of each case, as stated by the tribunal in *Parkerings-Compagniet A.S. v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 368.

[179] *Antoine Goetz and Others v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶ 121; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC, Award, 16 December, 2003), ¶ 64; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 2006, ¶ 313.

[180] *Emilio Agustin Maffezini v. The Kingdon of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ¶¶ 38-64.

[181] *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 2007, ¶ 368; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award, 24 May, 2007, ¶¶ 173–184.

[182] *Gami Investments Inc. v. The Government of the United Mexican States*, Award, UNCITRAL, 15 November, 2004, ¶ 114; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 929.

result, recent investment treaties have tended to explicitly exclude procedural rights from MFN clauses. In the absence of an explicit reference in the treaty, the matter remains debatable.

v. Full protection and security (FPS)

The full protection and security standard (FPS) is also difficult to define. In contrast with other clauses imposing restrictions or prohibitions, the "full protection and security" standard imposes positive obligations on the host State.

The FPS standard relates to the prevention of physical damages in the State's exercise of its governmental functions through policing and through the maintenance of law and order.[183] As decided in *AAPL v. Sri Lanka*[184], the standard is one of the most significant initiatives requiring the host State to exercise, within its means, due care (or the *obligation de moyens*), to protect investments. This standard does not impose "strict liability."[185] While the tribunal in *AAPL v. Sri Lanka* did not conclude that the government officials were themselves responsible for the harm done to the investment in question, they concluded that they failed to take the appropriate precautionary measures to prevent such harm.

The tribunal in *Wena v. Egypt*[186] assigned responsibility to Egypt for the harm done even if the State itself had not instigated the actions or participated in them. In turn, the tribunal in the *Eurotunnel Arbitration* case. considered that the obligation to guarantee full protection and security was not simply a "best endeavors" obligation or an "obligation of means", but rather the imposition of an "obligation of conduct" on the host State.[187] Thus, the FPS standard is distinct from the protection provided by the State to its own nationals or to nationals of other countries.[188]

The scope of the FPS standard has been extended to other circumstances beyond requiring the State to offer physical protection for investments.[189] For instance, other violations of the FPS standard include withdrawing an authorization or approval that is vital to the operation of the investment[190] or initiating a change in the legal framework governing an investment that makes it impossible for it to continue or

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[183] Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II, A Sequel, United Nations, New York and Geneva, 2012, p. 59, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last accessed 3 March 2022); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3 Final Award, 27 June, 1990); *American Manufacturing and Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February, 1997, Part 3, sec. VI; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhst*an, ICSID Case No. ARB/05/16, Award 29 July 2008, ¶¶ 668–669.

[184] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 1990, ¶ 85.

[185] *UNIDROIT Principles of International Commercial Contracts 2016*. Published by the International Institute for the Unification of Private Law (UNIDROIT), Rome, 2016, Art, 5.1.4.

[186] *Wena Hotels Ltd. v. Egypt,* ICSID Case No. ARB/98/4, Award, 08 December 200, ¶ 84.

[187] *Channel Tunnel Group and Another v. UL Secretary for Transport and Another,* PCA Case No. 2003-06, Partial Award, 30 January 2007 ¶ 352. "It was incumbent on the Principals to maintain conditions of normal security and public order…" (and not as the Governments had argued, that this was an obligation of means, not an obligation of result).

[188] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶¶ 81–84.

[189] *American Manufacturing and Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 21, 1997, Part 3, section VI.

[190] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 01 July, 2009, ¶¶ 445–448; *AES Summit Generation Ltd. and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 30 September 2010, ¶ 13.3.2; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 20212, ¶ 281. Other tribunals have rejected this extension of the standard *See, e.g.*, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award 29 July 2008, ¶¶ 668–669; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July, 2010, ¶¶ 174–177.

maintain its contractual basis.[191] In short, the guarantee of full protection and security for investments has been extended to ensuring an investor's legal security.

vi. No arbitrary or discriminatory measures impairing the investment

Not all investment treaties use the term "arbitrary"; some instead refer to "unreasonable or discriminatory" measures. In the *National Grid* case, the tribunal explained that both terms are synonymous: "[i]t is the view of the Tribunal that the plain meaning of the terms "unreasonable" and "arbitrary" is substantially the same in the sense of something done capriciously, without reason."[192]

Treaties typically do not define the concepts of "arbitrary" or "discriminatory" measures. For instance, Article II(3)(b) of the United States-Ecuador BIT provides that "[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments […]."[193]

In the *ELSI* case, the ICJ stated: "[a]rbitrariness is not so much something opposed to a rule of law […] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[194]

While the intent of a discriminatory measure is relevant, its effect is the most important consideration.[195] Bad faith is not required to determine measures as arbitrary or discriminatory.[196] Instead, whether the measure discriminates without a reasonable basis regarding other investors in a similar or comparable situation will be indicative of arbitrary or discriminatory treatment.[197]

As an example, the *Azurix v. Argentina* case involved an investment in a water concession subjected to government measures that incited consumers not to pay their bills, required the concessionaire not to apply the new tariffs resulting from a review, and denied the concessionaire access to documentation on the basis of which it had been sanctioned. These governmental measures were considered by the tribunal to be arbitrary.[198]

vii. Free transfer of funds related to investments

This standard protects investors against restrictive foreign exchange controls or other related actions by the host State. Investments that qualify under this standard are, of course, the invested funds themselves, in addition to any amount related to the investment, including profit, dividend, interest, capital gain, royalty payment, management, technical assistance or other fee, or returns in kind. The relaxation of foreign exchange controls is crucial for attracting foreign investments. Without the ability to effectively transfer capital across borders, foreign investments would lack strategic commercial purpose.

Treaties often include exceptions allowing certain currency transfers to be restricted during unusual periods of low foreign exchange or balance of payments problems within the host State.

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[191] *Antoine Goetz and Others v. République du Burundi*, ICSID Case No. ARB/95/3, Award (1999), ¶¶ 125–131.
[192] *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award, 30 November 2008, ¶ 197.
[193] Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993, entered into force on 11 May 1997.
[194] *Elettronica Sicula S.p.A.,* Judgment, ICJ (Reports 1989) p.15 ¶ 128 ¶ 128. *See also LG&E Energy Corporation and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 158.
[195] *LG&E Energy Corporation and Others v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 03 October 200, ¶ 262.
[196] *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May, 2012, ¶ 263.
[197] *The Loewen Group Inc. and Raymond L Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award 26 June, 2003, ¶ 127.
[198] *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 393. In another case the tribunal did not find arbitrariness in the measures taken by Argentina; *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 2011), ¶¶ 319–325.

Few awards have considered this protection for the free transfer of funds. After Argentina moved in 2001 to restrict the transfers of currency abroad, the arbitral tribunal in *Metalpar v. Argentina* understood that the investor did not comply with the domestic procedure for the transfer of funds and therefore could not allege a breach.[199] Similarly, in *Continental Casualty v. Argentine Republic,* the tribunal held that not every cross-border movement of funds will be "related to the investment" protected by the investment treaty.[200] In *White Industries v. India,* the tribunal dismissed a claim due to the fact that it related to the assertion of contractual rights, rather than to the movement of capital and the exchange of currency.[201]

viii. Umbrella clauses

Umbrella clauses require host States to comply with specific obligations they have entered into with the investor, allowing the possibility of elevating contractual disputes to the international forum. For instance, the final sentence of Article 2(2) of the Argentina-United States BIT states that "[e]ach Party shall observe any obligation it may have entered into with regard to investments."[202] Given that not every contractual breach constitutes a treaty breach, umbrella clauses raise several issues that will be addressed in Part 4, Section III.

d. Evolution of the content of BITs

The 1987 United States Model BIT established a model that was followed by several subsequent BITs, particularly in the 1990s. The 2004 US Model BIT, as well as most United States investment protection instruments that have been drafted afterwards, includes important amendments that have remedied prior challenges arising out of the negotiation of BITs and subsequent dispute resolution.

When early international investment treaties were being negotiated in the 1950s,[203] the main concern was to protect investors against direct expropriation. Conversely, in today's international business environment, direct expropriation is rare. Most investment claims involve more subtle forms of alleged harmful government action, for instance, related to the renewal of licenses or to environmental or health concerns. As such, it has become difficult to determine where to draw the line between reasonable actions taken by the State and indirect expropriation.

To circumvent such issues, modern treaties tend to specifically address health, environmental, and human rights matters.[204] In particular, human rights issues have become relevant to investment arbitration in several contexts. Among the almost 3,000 investment treaties reported by UNCTAD, the term "human rights" has been included in 363, of which 260 are currently in force.[205]

Several soft law instruments on human rights relate to foreign investments, such as the OECD Guidelines for Multinational Enterprises, the International Law Organization Tripartite Declaration of

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[199] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, ¶ 179.

[200] *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, 05 September 2008, ¶ 242.

[201] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, ¶ 13.2.3.

[202] Treaty between United States of America and the Argentine Republic concerning the Reciprocal encouragement and protection of investment, signed 14 November 1991, entered into force 20 October 1994.

[203] See topic "The first BITS" under the section "E. Bilateral Investments Treaties" above.

[204] This approach in the new generation of BITs expands beyond human rights to reflect a correlation between the obligations of both the State and the investor. For example, a BIT might include provisions that oblige the State not to reduce environmental protection standards with a view towards attracting foreign investment, consistent with the right of States to regulate through measures to achieve legitimate public policy objectives. Accordingly, the specific provisions concerning investment agreements that arise from such BITs should be considered within the context of the overarching legal framework of the Host State. As to the investor's obligations in the face of these new BITs, provisions may impose due diligence to ensure its conduct is consistent with national standards on environmental protection and anti-corruption, among others.

[205] UNCTAD, Investment Policy Hub, International Investment Agreements Navigator
. https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed 3 May 2022).

Principles concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles.

In addition, many contemporary treaties highlight that investors "should" adhere to international human rights standards or "encourage" international corporations to be mindful of corporate social responsibility standards.[206] Moreover, some treaties contain "legality clauses" that require foreign investors to comply with the domestic laws of the host State, including its human rights provisions.[207] Violation of these human rights standards can turn an infringement of domestic law into a treaty violation as well.

2. Global initiatives on international investment

Several global instruments deal with particular aspects related to foreign investments.

a. MIGA

The 1985 Convention establishing the Multilateral Investment Guarantee Agency (MIGA) was designed as an additional mechanism to protect foreign investment and to alleviate concerns related to non-commercial risks, thereby promoting the flow of resources to developing countries.[208] MIGA provides guarantees to investors against risks such as war, civil disturbance, or expropriation. Together with the World Bank and the International Finance Corporation, MIGA also offers advice to its members on attracting foreign investment.

Similarly, the ICSID Convention, the MIGA Convention does not impose on Member States any direct obligations that relate to the treatment of foreign investment. This is one of the reasons for its acceptance by several countries that were critical of bilateral investment treaties. States view the MIGA insurance framework as involving fewer restrictions on sovereignty.

b. The 1992 Guidelines on the Treatment of Foreign Direct Investment

In 1992, the World Bank and the International Monetary Fund (IMF) asked MIGA to prepare a "legal framework" to promote foreign direct investment. The result was the Guidelines on the Treatment of Foreign Direct Investment.[209] Although these Guidelines were advanced under the auspices of the World Bank and the IMF, while authoritative, they are not a treaty-like binding instrument.

The United States' Overseas Private Investment Corporation (OPIC), now known as the United States International Development Finance Corporation (DFC), also provides political risk insurance against losses incurred due to currency inconvertibility, government interference, and political violence (including terrorism). The DFC also offers reinsurance to increase underwriting capacity.[210]

c. The WTO and foreign investments

The establishment of the World Trade Organization (WTO) in 1995 was the greatest advance in international trade reform since World War II. Developed on the emerging number of bilateral trade agreements negotiated during and after the reconstruction, it became evident that the system established by the GATT was insufficient in terms of appropriate rules for international trade. Following several rounds of multilateral trade negotiations conducted within the framework of the GATT, the nature of the multilateral trading system was transformed during the Uruguay Round and the GATT was replaced with

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[206] For instance, Art. 14(2)(b) of the Brazilian Model Cooperation and Facilitation Investment Agreement (2015).
[207] For example, Art. 12.1 of the Indian Model BIT (2016),
[208] Convention Establishing the Multilateral Investment Guarantee Agency, 1508 *United Nations Treaty Series* 100, signed on 10 November 1985, entered into force on 12 April 1988 ("MIGA Convention"). *See also*: https://www.miga.org/about-us (last accessed 3 March 2022).
[209] The World Bank, *Legal Framework for the Treatment of Foreign Investment*, Vol. II, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment. http://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf (last accessed 3 March 2022).
[210] Overseas Private Investment Corporation's legislative charter, 22 *United States Code Annotated* §§ 2191-2200b, 2010.

the WTO. The new system of trade rules that was established under the WTO, however, did not affect, nor was it intended to replace, the existing framework of bilateral treaties.

Nonetheless, "investment issues" were added to the WTO Agreements. However, only a few of the dispute cases referred to the WTO's Dispute Settlement Body (DSB), the specialized body in charge of hearing and resolving disputes between WTO members, have dealt with foreign investment matters. The DSB is limited to interpret provisions of the WTO agreements. Unlike ICSID cases, the DSB does not deal with traditional issues relating to foreign investment. Overall, the DSB has a limited role in settling investment-related disputes related to, for instance, trade-related investment measures or other relevant WTO agreements.[211]

d. The Energy Charter

The Energy Charter Treaty (ECT), applies only to the essential sector of energy, principally the fossil fuel industry. Over 50 States, plus the European Union and the European Atomic Energy Community, are parties to the ECT, which entered into force in 1998.[212] The treaty was a response to the contemporary desire of European States to cooperate with Russia and the new Eastern European and Central Asian States regarding the establishment of rules on foreign investments in the energy sector. The origins of the ECT trace back to the European Energy Charter, but its signatories extend beyond Europe, including States such as Japan in addition to Russia. The ECT has an important global reach and is by no means considered a regional treaty. Furthermore, it does not limit itself to international investment matters, but also encompasses trade, transit, and environmental matters.

The ECT chapter on investment has given rise to significant investor–State litigation in recent years. Article 26 of the ECT concerns options for dispute resolution, according to which investors may choose to submit their disputes either to the national courts of the contracting party, a previously agreed-upon dispute settlement procedure, or to arbitration.

The ECT has been criticized as a significant obstacle in the transition to renewable energy sources and efforts to combat climate change. For example, it may deter States from compliance with commitments under the Paris Agreement due to potentially significant financial losses. Despite efforts at reform, several calls have been made for states to withdraw; Italy withdrew in 2016 and other States have announced intentions to do so.[213]

The ruling of the Court of Justice of the European Union (CJEU) in the *Achmea* case has caught the attention of the international investment arbitration community with regard to the question of whether its scope applies to the ECT's dispute resolution provision for intra-EU BITs. The CJEU declared that the Dutch-Slovak arbitration clause had an adverse effect on the autonomy of the EU law and, as such, rendered it unenforceable and incompatible with the EU legal framework. Particularly, the CJEU reasoned that the effectiveness of EU law may be undermined if EU-related disputes are referred to bodies that are outside of the jurisdiction of the EU.[214]

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[211] Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS435, DS441, DS458 and DS467. The Panel (and subsequently the Appellate Body) analyzed whether the adopted plain packaging measures were inconsistent with Australia's obligations under the TRIPS Agreement, among others.

[212] Energy Charter Treaty, 2080 *United Nations Treaty Series* 95, signed on 17 December 1994, entered into force on 16 April 1998.

[213] International Energy Charter, Written Notifications of Withdrawal from the Energy Charter Treaty. https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/ (last accessed 19 September 2023).

[214] This matter has generated numerous cases at ICSID, mostly deriving from the ECT. The first case to dismiss an intra-EU objection at an ICSID level was the *Electrabel v. Hungary* case. *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012. The repercussions of the *Achmea* decision will have an impact worth monitoring in the years to come.

The Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union recently entered into force and implements the CJEU's reasoning within the *Achmea* case.[215] However, the agreement does not apply to intra-EU proceedings under the ECT. Instead, it expressly provides that "the EU and its Member States will deal with this matter at a later stage."[216]

3. Regional investment initiatives

a. North America

The North American Free Trade Agreement (NAFTA) between Mexico, Canada, and the US entered into force in 1994.[217] Regarding investment protection, Chapter 11 appealed to the establishment of a "secure investment environment through the elaboration of clear rules of fair treatment of foreign investment" and aimed to "remove barriers to investment" and "provide effective means for the resolution of disputes." As such, NAFTA contained elaborate dispute settlement mechanisms. Under several preconditions, Chapter 11 also included provisions contemplating international arbitration against a host State under either the ICSID Convention or its ICSID Additional Facility Rules, or in accordance with the UNCITRAL Rules. NAFTA generated considerable case law and literature.

The United States-Mexico-Canada Trade Agreement (USMCA), signed in November 2018, is the successor to NAFTA.[218] In December 2019, the three States signed a protocol amending the original text of USMCA and on 1 July 2020, it entered into force. The USMCA covers a range of trade-related issues between the three States and includes chapters on rules of origin, technical barriers to trade, intellectual property, competition policy, labor, procurement, the environment, and investment.

In comparison with NAFTA's Chapter 11, ISDS is narrowed under Chapter 14 of the USMCA. Although Chapter 14 still protects investment and investors through substantive obligations related to national treatment, MFN, and direct expropriation, it departs from the previous Chapter 11 of the NAFTA. Primarily, the USMCA severely limits investors' abilities to enforce the substantive rights afforded to them under the Agreement, specifically in Canada, which was excluded from the ISDS mechanism provided in Chapter 14. As such, only Mexican and American investors may submit claims and these may be on the basis of national treatment, MFN treatment, or direct expropriation, excluding, to some extent, common grounds for investment claims, such as fair and equitable treatment and indirect expropriation. In addition to exclusion of Canada, Chapter 14 now includes a local litigation requirement as a prerequisite for ISDS claims, except when "recourse to domestic remedies was obviously futile or manifestly ineffective."[219]

b. Central America

The 2006 Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) was concluded between the Dominican Republic, El Salvador, Costa Rica, Guatemala, Honduras, Nicaragua, and the US and is the first free trade agreement between the United States and Central American nations.[220] Chapter 10 of the CAFTA-DR specifically relates to investments. The chapter contemplates certain generic

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[215] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, signed on 5 May 2020, entered into force on 29 August 2020, preliminary considerations. https://eur-lex.europa.eu/eli/agree_eums/2020/529/oj (last accessed 3 March 2022).

[216] The Preamble states in full that "CONSIDERING that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings based on Article 26 of the ECT. The European Union and its Member States will deal with this matter at a later stage". See ibid.

[217] North American Free Trade Agreement, signed on 17 December 1992, entered into force on 1 January 1994, Chap. 11.

[218] The treaty also carries two other names: Canada has adopted it as the *Canada – United States – Mexico Agreement* (CUSMA), while Mexico has settled on the title *El Tratado entre México, Estados Unidos y Canadá* (T-MEC).

[219] USMCA, Article 14.D.5(b), footnote 25.

[220] CAFTA-DR Agreement, signed on 5 August 2004, entered into force on 1 March 2006. https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last accessed 03 March 2022).

treaty guarantees that are frequently included within BITs and an option for the investor to enforce those treaty guarantees directly in binding international arbitration against a host State.[221]

c. South America

In South America, the Common Market of the Southern Cone (MERCOSUR) prepared protocols related to the reciprocal promotion and protection of investments in 1994. To date, the only instrument in force related to the matter is the Protocol on Cooperation and Facilitation of Intra-MERCOSUR Investments, approved by MERCOSUR via Decision 3/17[222] and ratified by Uruguay, Brazil, and Argentina.

One noteworthy feature of this Protocol is the list of exclusions from the term "investment", including debentures, loans, and portfolio investments. Moreover, the fair and equitable treatment and full protection and security standards are expressly not covered by the Protocol, nor are indirect expropriations. Among the protections, the protocol *does* offer to investments non-discrimination and protection against direct expropriations.

In relation to investment claims, the Protocol first establishes a dispute prevention procedure that any Member State may initiate. Only after exhausting this procedure a Member State may activate any dispute resolution mechanism in force in MERCOSUR. Initiating either the dispute-prevention or the dispute-resolution procedure of the Protocol precludes the possibility of activating any arbitration right established under other BITs or agreements that might otherwise have been applicable.

On June 28, 2019, the European Union and the MERCOSUR trade bloc reached a political agreement for the creation of a trade agreement which will aim at increasing bilateral trade and investment between the regions. A final version is still pending.[223] Although the agreement does not include a chapter on investment protection standards or investor-state dispute settlement, it does include a dispute resolution chapter and specific provisions for dispute resolution in trade and development.

d. Asia

In 2009, the Association of South-East Asian Nations (ASEAN), comprised of ten South-East Asian States, signed the Comprehensive Investment Agreement (ACIA) which entered into force in 2012. The objective of the ACIA is "to create a free and open investment regime in ASEAN" through the progressive liberalization of the investment regimes of Member States, the provision of enhanced protection to investors and investments, the improvement of transparency and predictability of the investment regime, the joint promotion of the region as an integrated investment area, and through the cooperation among ASEAN

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[221] See ibid., Chapter 10, Articles 10.3, 10.4, 10.5 and 10.7. Section B: Investor-State Dispute Settlement, Article 10.16.

[222] The protocol can be accessed at: https://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=+uUEOsWR9wE3v91PDlXvnQ== (last accessed 25 July 2022). This 2017 protocol substituted the 1994 "Protocolo de Colonia", which never entered into force as it failed to gather the four required ratifications as established in the Protocol. https://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=QbqmyvQl7CGPrIugK4Iltg%3d%3d? (last accessed 25 July 2022). Further, a Protocol on the Promotion of Investments from non-MERCOSUR member States was approved via Decision 11/94. However, this protocol has yet to enter into force since it established a requirement of four ratifications and, to date, has only been ratified by three Member States. https://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=MzFrhVNTCm7X+Ji9lTDZ0Q%3d%3d (last accessed 25 July 2022).

[223] The agreement in principle is available at: http://www.sice.oas.org/TPD/MER_EU/Texts/Agt_in_Principle_e.pdf For the EU and the MERCOSUR's press releases, see respectively: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039 (last accessed 3 March 2022), and https://www.mercosur.int/mercosur-cierra-un-historico-acuerdo-de-asociacion-estrategica-con-la-union-europea/ (last accessed 3 March 2022.

member States to create favorable conditions for their investors.[224] Moreover, ACIA section B contains investment dispute settlement provisions and provides for investor-State arbitration.[225]

Signed in 2020, the Regional Comprehensive Economic Partnership (RCEP) is the world's largest free-trade agreement in terms of the population covered and the cumulative GDP of signatory countries. Concluded by fifteen Asia-Pacific economies, it seeks to create an integrated market, rendering the trade of products and services between each country more easily available. Though many of the RCEP provisions share similarities with obligations found in BITs, the RCEP has some variations in the formulation of its investment protection obligations. For example, the amended form of the fair and equitable treatment standard employed in the RCEP limits the scope of such protection to "the customary international law minimum standard of treatment of aliens."[226]

e. Africa

Since the mid-1990s and the early 2000s, African countries have signed numerous BITs. As of July 2019, African States were party to 897 out of the 2,971 BITs signed globally.[227] Presently, Africa comprises a complex web of various regional economic communities (RECs). Each African REC has at least one instrument relating directly or indirectly to investment.

Among these efforts, the Common Market for Eastern and Southern Africa (COMESA) was established in 2007, but it is still not in force since the required threshold of ratification of at least six Member States has not been met. In 2016, COMESA finalized a Common Investment Agreement which revises the 2007 agreement.[228]

Also noteworthy are different instruments regulating investments within the Economic Community of West African States (ECOWAS).[229] among them the 2008 ECOWAS Supplementary Act on Investments[230] and the 2018 ECOWAS Common Investment Code (ECOWIC), all modernizing the investment framework in the region.

In turn, the 2006 Southern Africa Development Community (SADC) advanced a Protocol on Finance and Investment (SADC Investment Protocol), currently in force.[231] In 2016, the SADC Investment Protocol was amended but is yet to be ratified. The SADC region also adopted a Model Treaty, aiming to enhance harmonization of investment regimes in the region and to provide an effective tool for the future conclusion of international investment agreements (IIAs) by SADC Member States.

At the continental level, the Pan-African Investment Code, concluded in 2015, constitutes the first African-continent-wide investment code. It serves as the basis for the negotiations on the Investment

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[224] ACIA, signed on 26 February 2009, entered into force on 29 March 2012, Section A, Article 1, Objective. http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf (last accessed 03 March 2022).
[225] Ibid., Section B, Article 33.
[226] Regional Comprehensive Economic Partnership (RCEP), signed on 15 November 2020, entered into force on 1 January 2022, see more information at https://rcepsec.org/ (last accessed 3 March 2022).
[227] UNCTAD "International Investment Agreement Database" http://investmentpolicyhub.unctad.org/IIA (last accessed 03 March 2022).
[228] UNCTAD, "World Investment Report 2018—Investment and New Industrial Policies" (UNCTAD 2018) 90, available at: <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> (last accessed 03 March 2022).
[229] ECOWAS Treaty, signed on 28 May 1975, entered into force on 20 June 1975, revised on 24 July 1993); revised Treaty entered into force on 23 August 1995; the ECOWAS Protocol on Movement of Persons and Establishment; the ECOWAS Energy Protocol; as well as the ECOWAS Supplementary Act on Investments; available at: https://investmentpolicy.unctad.org/international-investment-agreements/groupings/26/ecowas-economic-community-of-west-african-states- (last accessed 03 March 2022).
[230] ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008).
[231] SADC Protocol on Finance and Investment (signed 18 August 2006). http://investmentpolicyhub.unctad.org/Download/TreatyFile/273 (last accessed 03 March 2022).

Protocol to the Agreement establishing an African Continental Free Trade Area (AfCFTA), and also has the long-term goal of securing sustainable development.

Relevant regional tribunals include the COMESA Court, established in 1988 as COMESA's judicial organ, the main purpose of which is to "[ensure] the adherence to law in the interpretation and application of [the] Treaty [establishing the Common Market for Eastern and Southern Africa]". The Community Court of Justice of ECOWAS was established in 1991 by the Protocol on the Community Court of Justice[232] and has the power to act as the arbitral tribunal of the community.[233] It remains to be seen if the AfCFTA Investment Protocol will incorporate dispute resolution through a regional investment court.

f. Middle East

The Middle East relies upon a Unified Agreement for the Investment of Arab Capital in the Arab States, signed in 1980 and in force since 7 September 1981. The statutes of the Arab Investment Court came into force in 1988. Most members of the League of Arab States ratified the investment agreement.

g. Europe

In Europe, the Treaty on the Functioning of the European Union includes provisions regarding international investment among the States of the Union, particularly in its Title IV, regarding the Free Movement of Persons, Services and Capital.[234] Furthermore, the Lisbon Treaty, made effective in 2009, grants European Union institutions exclusive competence over foreign direct investment, an area previously within the exclusive competence of the Member States. After assuming competence over international investment for its members, the European Union negotiated several treaties on the matter, among them the 2016 EU–Canada Comprehensive Economic and Trade Agreement[235] and the 2019 EU–Vietnam Investment Protection Agreement.[236]

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement signed in 2018 by eleven countries in the Asia-Pacific.[237] It contains strong investment protections and guarantees.[238] The chapter related to investment covers the full life cycle of an investment and includes the core obligations of national treatment, MFN treatment, expropriation and compensation, performance requirements, and transfers. Although the Agreement does include investor-State dispute settlement provisions, the CPTPP has actually narrowed the scope for investors to make claims and excludes, for example, claims relating to investment contracts entered into with the government.

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[232] Protocol A/P.l/7/91 on the Community Court of Justice (signed 6 July 1991, entered into force provisionally 6 July 1991, definitively 5 November 1996); now amended by the Supplementary Protocol A/SP.1/01/05.

[233] ECOWAS, Revised Treaty of the Economic Community of West African States (revised 24 July 1993), Art. 16.

[234] Consolidated Version of the Treaty on the Functioning of the European Union entered into force on 10 October 2022, OJ C 329/49, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (last accessed 03 March 2022).

[235] Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and its Member States, of the Other Part, signed on 30 October 2016. https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by- chapter/ (last accessed 03 March 2022).

[236] Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part, signed 30 June 2019. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download (last accessed 03 March 2022).

[237] The CTPP entered into force on 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand, Singapore, on 14 January 2019 for Vietnam, and on 19 September 2021 for Peru. The ratification process in Brunei Darussalam, Chile, and Malaysia is still to be completed. See: https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership (last accessed 03 March 2022).

[238] CPTPP, signed on 8 March 2018, entered into force on 30 December 2018 https://www.mti.gov.sg/-/media/MTI/improving-trade/multilateral-and-regional-forums/CPTPP/cptpp_legal_text_21022018.pdf (last accessed 03 March 2022).

Finally, the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA had the potential to create a large and plurilateral regime that would have included rules on almost all aspects of trade and investment between the parties. However, negotiations were halted during the Trump Administration and, in 2019, the Council of the European Union declared that the negotiating directives for the TTIP have become obsolete.[239]

III. General Principles and International Investments

A. General Principles in Public International Law

In current legal practice and commonplace scholarly writing, the term "principles", sometimes together with the words "general", "universal", and "recognized", usually refers to rules of a more abstract and general character (such as *pacta sunt servanda* or good faith). On occasion, these general legal rules are qualified by the term "fundamental", which suggests ties to abstract basic values, such as those enshrined in the national constitutions of various States. At other times, the term "principles" is used as a synonym for "rules without the force of law", as in the UNIDROIT Principles[240] or the HCCH Principles.[241] For a brief discussion on the topic of principles in the general context of private international law and uniform law, see the Guide on the Law Applicable to International Commercial Contracts in the Americas (OAS Contracts Guide, Part Six, II).

In public international law, the term "principle" has been an object of intense doctrinal debate and is used rather loosely. Sometimes "principles" are equated to "rules," and other times "rules" include "principles." Every so often, the term "principle" refers to a general norm that explains and justifies more specific rules. At times, treaties that are not even in force are considered reflective of "principles of international law."[242] On occasion, courts and tribunals merely state the existence of a principle without explaining from whence it has been derived, for instance in the *Corfu Channel* case.[243]

From the jurisprudence of the ICJ, it appears that, in general, the use of the word "principle" is associated with a type of rule, whether originated by international custom, in treaties,[244] bilateral and multilateral,[245] or in the jurisprudence itself. Similarly, but very rarely, the ICJ refers to "principles" as sources of law. In the *ELSI* case, the International Court of Justice used the terms "rule" and "principle" almost interchangeably,[246] which suggests that the ICJ considered both as one and the same: the applicable

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[239] Council Decision (EU) authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, 9 April 2019.
https://www.consilium.europa.eu/media/39180/st06052-en19.pdf (last accessed 03 March 2022).

[240] See below in this Guide in Part 6.

[241] See below in this Guide in Part 5, IV, C.

[242] In *Phillips Petroleum Company Iran v. Iran* (1989), the tribunal ruled that the 1955 Treaty of Amity between the United States and Iran, whether or not in force, was a relevant source of law. *Phillips Petroleum Company Iran v. Iran* (1989), ¶ 103.

[243] *Corfu Channel Case*, Judgement of 9 April 1949, ICJ Reports 1949, p. 4, p. 22. . *See also* PCIJ *Case Concerning the Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) (*Germany v. Poland*) PCIJ Ser A, No. 9, 2; *The Mavrommatis Palestine Concessions (Greece v. Great)* PCIJ Ser A, No. 2, 12. Cf. Pellet (n 4) 839, ¶ 266.

[244] Maritime Delimitation in the Black Sea (*Romania v. Ukrain*e), Judgement, ICJ Reports 2009. ¶. 33; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement, ICJ Reports 2007, ¶. 426; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain*), Jurisdiction and Admissibility, Judgement, ICJ Reports 1994, ¶ 16; Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), 1991, ¶ 48; Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement, ICJ Reports 1984, ¶ 86; South West Africa, Second Phase, Judgement, ICJ Reports 1966, ¶ 20.

[245] Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*), Preliminary Objections (*Nigeria v. Cameroon*), Judgement, ICJ Reports,, ,¶¶ 12, 18; East Timor (*Portugal v. Australia*) Judgement, ICJ Reports 1995, ¶ 26.

[246] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, 15, 42, ¶ 50. See also A. Rigo Sureda, *Investment Treaty Arbitration*: *Judging Under Uncertainty*, Cambridge University Press, 2012, p. 99.

law. That is to say, both are norms that make up the international legal order - regardless of their origin - and, therefore must serve, as the case may be, as the basis for the decisions taken in the disputes submitted to its jurisdiction. In this sense, for the ICJ the only thing that differentiates principles from rules is their generality and their fundamental character.

The French version of the ICSID Convention uses the expression "*principes de droit international*", the Spanish "*normas de derecho internacional*", and the English "rules of international law" (Article 42(1)). The preparatory work of the ICSID Convention indicates the French term "principes" "should not be accorded any particular significance and should not be used to exclude the application of specific rules." In a highly criticized decision written in French, the ad hoc Committee in *Klöckner v. Cameroon* seemed to be unaware of other versions of the term and distinguished between "rules of law" and "principles of law."[247]

The Permanent Court of International Justice and later the ICJ have occasionally applied general principles as an integral part of public international law in separate opinions issued by their individual judges.[248] The ICJ also tackled the teleological issue of weighing competing principles. Since there exists no overriding principle that can subsume and coordinate an apparent conflict, a weighing of competing principles must be made. In the *Gabčíkovo-Nagymaros* case, the ICJ subsumed economic development and environmental protection under the umbrella of sustainable development.[249]

However, the ICJ as a judicial body has generally remained rather cautious in its application of general principles, resorting to their use when ruling on the existence of international obligations and, to that extent, to determine their fulfillment or non-fulfillment. On some occasions the ICJ has indicated that principles serve as guidelines in the interpretation of other norms or as orientation in the creation of such norms.[250]

As a commentator, ICJ Judge Giorgio Gaja attributes this cautiousness to the "difficulty of engaging […] in a comparative analysis" as well as the "risk of transgressing into the application of equity, which pursuant to Art. 38(2) ICJ Statute requires the parties' particular consent."[251] While neither the ICJ nor its predecessor have ever based a decision entirely on general principles, the same holds true for treaties and custom. These courts rarely base their decisions on only one source. Moreover, no international court has ever indicated that it does not consider general principles as a binding source of international law.[252]

Beyond contradictions that exist within case law, there is a surprising dearth of literature on the use of general principles within public international law, especially as compared to doctrinal writings on treaties and custom as sources of law. The literature relating to principles is "quite time-bound"; waves of

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[247] See *Klöckner r 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, ¶ 68.

[248] "Arguably, the Court has only referred to general principles of law a few times, once negating them, twice affirming them, and on other occasions relying on them in their decision-making. Its references mainly concern issues of procedure or evidence (not as a direct source of rights and obligations." "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78,2018, p.1173.

[249] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, 78 ¶ 140.

[250] ICJ, Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), 2009, ¶. 41; Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*), Judgement, ICJ Reports 2008, ¶. 110; Legality of Use of Force (*Serbia and Montenegro v. United Kingdom*), Preliminary Objections, Judgment, ICJ Reports 2004, ¶¶ 102, 104; Border and Transborder Armed Actions (*Nicaragua v. Honduras*), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, ¶. 94.

[251] "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78, 2018, p. 1173.

[252] *Military and Paramilitary Activities against Nicaragua (Nicaragua v. United States of America)*. Merits Judgment, ICJ Reports, 1986, Rep. 14 14, ¶¶ 98–9.

work were published immediately after the creation of the PCIJ, the ICJ, and later during the 1960s.[253] During other times, commentary on the topic has been scarce.

General principles of law have held a significant role in areas of public international law that involve non-State actors, particularly regarding foreign investments and arbitration. This has been notably observed in the early oil-related investment cases from the 1960s and 1970s.[254]

B. Functions of principles in public international law

The different functions of the principles in public international law may be categorized as follows:

1. Principles as interpretive guides

At a basic level, general principles have a limited role, serving as interpretive guides to be applied alongside the law governing the relationship, which can be either an international treaty or customary law. In accordance with the general rules for interpretation of public international law, general principles may clarify the obscure or uncertain.

2. Principles as subsidiary source of public international law

Principles may apply when disputes cannot be resolved solely through treaty or customary law alone, and the dispute requires an outcome beyond the *status quo* behavior of the parties.

On this topic, a British-United States Claims Arbitral Tribunal held that:

International law […] may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find […] the solution of the problem.[255]

3. Principles offering precision to broad legal issues

General principles may also be applied to offer precision and give context to broad or amorphous legal provisions. For instance, the "fair and equitable treatment" standard for foreign investors is, on its own, an incomplete norm which grants adjudicators a considerable level of discretion in its application. An ICSID tribunal expressly made use of general principles to determine the "precise content" of this standard.[256]

This use of general principles refers to interpretive purposes. It extends beyond, providing specific elements or attributes not expressly enunciated in the broad standards contained in the applicable law itself.

4. General principles as a legal system

Some commentators argue that general principles represent a legal system intermediate between domestic legal systems and public international law. Commentators sometimes refer to the concept as "transnational law", *lex mercatoria* or similar terms. The matter will be further addressed in Part 3, Section VII, Subsection B.3, below.

5. Principles as corrective tools

When the applicable national laws are insufficient to resolve a dispute, do not meet international standards, or would yield an unacceptable result when applied in a particular case, courts and tribunals

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[253] More recent works have also been written on the topic, yet without diminishing the intellectual aura those earlier works still possess.www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml (last accessed 03 March 2022).

[254] *See* below in Section L.

[255] *Eastern Extension, Australasia and China Telegraph Co. Ltd. Case.(*British-United States Claims Arbitral Tribunal, 09 November, 1923, VI RIAA p. 112, 114.

[256] *Merrill and Ring Forstry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1 Award, 31 March 2010, ¶¶ 186–187.

may apply principles to correct or supplement the gaps in national laws.[257] The matter will be further addressed in Part 6, Section III, Subsection E.

The use of general principles as corrective tools is less common when the States involved in the international dispute have legal systems that are relatively developed. It is appropriate to use general principles for corrective purposes when the legal systems of the States involved exhibit a marked contrast on certain important points of law, both in terms of content and the stage of development.

6. Principles as the ultimate source of rules of law

Principles can also be understood as expressions of the sources of the different rules of law. In 1984, the ICJ stated that the terms "rules" and "principles" can be considered as "a dual expression to convey one and the same idea."[258] As stated in an International Law Association (ILA) report, if an argument can be advanced that a specific legal rule is generally accepted, then there is likely a common principle behind it that can be extracted. In this case, the rule becomes an expression of the common principle.[259]

7. Principles as a "superconstitution" of public international law

Some consider general principles to be the embodiment of the most important norms – the "superconstitution" – of international law. According to this view, the existence of general principles is a testament to the fundamental unity of the law. In this sense, general principles operate as "a centripetal force" for the interaction between diverse areas of law, such as international environmental law, international investment law and international human rights law.

The UNCITRAL tribunal in *Methanex v. USA* advanced this view in the following statement:

> [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.[260]

C. Terminology

A variety of terms are used to refer to general principles. Article 38(1) of the ICJ Statute describes them as "the general principles of law recognized by civilized nations." Within public international law, the qualifier had been used for many years. Today it is widely accepted that the term "civilized" includes all members of the United Nations.[261] No State member of the United Nations can be considered "uncivilized." Recently, the Special Rapporteur of the ILC for the topic related to general principles suggested that the term "civilized nations" should be replaced in international instruments with the more appropriate term "community of nations" that was included in the International Covenant on Civil and Political Rights.[262]

In the field of investor-state relations, resort is also made to "principles." For example, the 1979 Athens Resolution released by the Institute of International Law on "The Proper Law of the Contract in

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[257] "[I]nternational standards […] apply uniformly and are not dependent on the peculiarities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions [rather than] a pragmatic and fair resolution in the individual case." *ICC Case No. 8385*, Collection of ICC Arbitral Awards 1996–2000, ¶ 474, comments of Yves Derains).

[258] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, 246, pp. 288-290, ¶ 79.

[259] "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78 (2018), pp. 1236-1237.

[260] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (August 03, 2005), Part IV - Chapter C, Article 1105 NAFTA, ¶ 24.

[261] "Reparation for injuries suffered", ICJ Reports 1949, at 219.

[262] International Covenant on Civil and Political Rights, signed on 16 December 1966, enter into force on 23 March 1976, Arts. 15, ¶ 2.

Agreements Between a State and a Foreign Private Person" alludes to "the principles common to […] (domestic) systems, or the general principles of law, or the principles applied in international economic relations."[263] The word "principles" also appears in other legal instruments, such as the 1954 Consortium Agreement with Iran. The word is also included in certain international contracts as well, such as those governing oil and gas investments in the Middle East (some of which have been the subject of landmark arbitrations in the past century). In those and other cases settled through arbitration, similar expressions have also been used by the tribunals.[264]

Recently, the Drafting Committee working on the PCA Rules considered replacing the archaic expression "the law of civilized nations" with more modern language. Nevertheless, the Drafting Committee ultimately decided against amending the expression due to concerns that such a change would lead to different interpretations of the traditional meaning of the provision. Therefore, no amendments were made in this regard to the PCA Rules approved in 2012.

D. Article 38 of the ICJ Statute and "*non liquet*"

The inclusion of "general principles" as a source of international law in Article 38(1) of the ICJ Statute had a clear objective: to avoid *non liquet* or the avoidance of a decision due to a gap in the law. The court can always apply general principles, notwithstanding a direct authorization of the parties. In contrast, Article 38(2) of the ICJ Statute requires consent for equity adjudication.

Divergences in these discussions derive from differing civil law and Anglo-Saxon approaches as to the power of the adjudicator. In common law jurisdictions, a decision creates law, whereas the prevailing civil law view is that the adjudicator does not make law, but merely applies it. For this reason, civil law systems make use of general principles of law to prevent a denial of justice. Article 38 of the ICJ Statute was designed specifically to avoid any issues that may arise regarding *non liquet*.

E. Principles and customary international law

State practice, national legislation, and domestic court decisions only become relevant as customary international law when accompanied by *opinio juris*, or the belief that the State is acting pursuant to a right or obligation within international law. A 2020 ILC report notes that the same is not necessarily true for general principles of law.[265]

Both general principles and customary rules must find some form of acceptance by the international community. Unlike customary international law, principles are not recognized from the existence of a general practice. However, principles can be extracted from existing norms of customary international law. In the *Frontier Dispute (Burkina Faso/Mali)* case,[266] a Chamber of the ICJ stated that at the time of the decision, the notion of *uti possidetis* (may you continue to possess such as you possess) was not yet

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[263] The Athens resolution is cited in J.F. Lalive, "Contrats entre Etats ou entreprises étatiques et personnes privées : Développements récents", *Recueil des cours*, Vol. 181,1983, pp. 51-52.

[264] "General principles of private international law" (in *Saudia Arabia v. Arabian American Oil Co. (ARAMCO)*, Ad Hoc Arbitration, 23 August 1958; "general principles of law" in *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Ad Hoc Arbitration, 12 April 1977; *The American Independent Oil Company v. The Government of the State of Kuwait,* Ad Hoc Arbitration, 24 March 1982; *Framatome v. Atomic Energy Organization of Iran*, (A.E. O.I.), ICC Case No. 3896, Award, 30 April 1982; "generally admitted principles" in ICC Case 2152/1972; "general principles of law and justice" in ICC Case 3380/1980; "general principles of law that govern international transactions" in ICC Case 2291/1975; "general principles adopted by international arbitral jurisprudence" in ICC Case 3344/1981; "amply admitted general principles that govern international commercial law" in ICC Case 3267/1979; "general principles of law applicable to international economic relationships" in *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1; "general principles of law comprised within" in ICC Case 3327/1981; "rules of law" in ICC Case 1641/1969.

[265] ILC, Second report on general principles of law, p. 35. Cf. Third report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez (73rd session of the ILC (2022)), A/CN.4/753, http://legal.un.org/docs/?symbol=A/CN.4/753 (last accessed 15 July 2022).

[266] *Frontier Dispute*, Judgment, ICJ Reports 1986, p. 554.

acknowledged as a customary international law rule, but could be recognized as a "general principle" as it had gained recognition by the community of nations.

General principles become relevant to address the emerging needs of the system in fast-evolving branches of public international law in which practice is not keeping pace. They may very well evolve into customary rules or even be incorporated into treaties.[267]

The role of the general principles may be particularly relevant when a customary rule is undergoing a process of change and its content is still controversial because there are a variety of approaches by States. If considered a general principle, it can be applied as a source.

F. Principles and policies

The distinction between principles and policies is a controversial topic. This issue has been particularly addressed in the context of investment arbitration. Preambles to investment treaties refer to policies as goals to be reached, such as the economic or social improvement of a community. Some writers argue that principles do not necessarily promote policies but are applied based on the requirements of justice and fairness. In that case, it is not the role of tribunals to decide a dispute on the basis of such policies, but on a matter of principles.

At a high level of abstraction, the distinction between principles and policies may not be so clear. When an issue arises concerning the desirability of a given policy goal, this question will ultimately be one of principles. As such, principles and policies are related terms and do not exclude the relevance of the other.

G. General principles of private law, public law or public international law?

Historically, there has been a debate about whether general principles of public international law should be extracted from private law, public law, or from public international law itself.

1. Domestic law principles?

There is a widespread understanding that – despite some uncertainties in both doctrine and jurisprudence – general principles of law are essentially "those principles that are applied in domestic legal systems around the world, such as the principle of *pacta sunt servanda.*"[268]

The origins of the use of domestic law principles can be traced to the emphasis in Roman law that international lawyers placed in their writings throughout the centuries. Roman legal maxims have undoubtedly played a significant role in the shaping of both general principles of law and public international law in its formative period.

Moreover, since law developed in the municipal sphere, it is natural to refer to domestic law when seeking universal principles. While adjudicating an international dispute, international courts and tribunals have historically applied those principles underlying domestic laws which previously proved useful in providing substantial justice between individuals in similar circumstances.

2. Public law principles?

Judge Tanaka wrote in the ICJ *South West Africa Case (Second Phase)* of 1966 that so long as the "general principles of law" are not qualified, the "law" must be understood to embrace all branches of law, including municipal law, public law, constitutional law, administrative law, private law, commercial law, substantive and procedural law, and others.[269]

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[267] An example is the principle of elementary considerations of humanity, which was mentioned in the *Corfu Channel Case* in 1949, and later on incorporated into the Montreal Protocol to the Chicago Convention on International Civil Aviation, signed at Montreal on 10 May 1984, Art. 3.

[268] *See, e.g.,* UNIDROIT/IFAD *Legal Guide on Agricultural Land Investment Contracts* (ALIC): https://www.unidroit.org/wp-content/uploads/2021/10/ALICGuidehy.pdf (last accessed 23 May 2022), p. 22.

[269] *South-West Africa, Second Phase*, Judgement, ICJ Reports 1966, 294.

Some principles such as those regarding State responsibility derive from private law. Others relating to adjudicatory proceedings are generally considered to originate in public, rather than private law. In addition to these divergences, public and private law also overlap in diverse manners.

An ILC report notes that practice and recent scholarship have revealed that all branches of national legal systems, including their private and public law, become potentially relevant when identifying a general principle of law. This appears to be the general understanding among scholars as well.[270]

Recourse to public international law is accelerating in the twenty-first century propelled by the emergence of more States and technological advances that are giving rise to new areas requiring regulation, among other developments. Recently, several ICSID tribunals have turned to public international law and specifically human rights law, in addition to domestic law, to resolve disputes.

Within international investment arbitration, some awards have addressed primary rules of public international law, such as the fair and equitable treatment standard of investment treaties or aspects of the law of expropriation.[271] Other decisions rely on general principles to expand upon primary obligations. The ICSID tribunal in *Total S.A. v. Argentina* performed "a comparative analysis of the protection of expectations in domestic jurisdictions," concluding that "[w]hile the scope and legal basis of the principle varies, it has been recognized lately both in civil law and common law jurisdictions within well-defined limits."[272]

Other awards dealt with the relationship of the law of treaties and secondary rules of State responsibility.[273]

Furthermore, other awards invoked private law principles that are solidly anchored in public international law, such as estoppel.[274]

In practice, investment arbitral tribunals tend to intertwine the nature and application of several general principles in domestic and international law. Consequently, it is rare for tribunals to decide the outcome by identifying the national legal system to which these principles belong.

3. Principles of public international law and not national law?

Particularly in the era prior to the fall of the Iron Curtain, writers in socialist States asserted that the expression "general principles of civilized nations" only referred to principles of public international law. Some Western writers also adopted the same stance. However, this position would strip Article 38 of the ICJ Statute of its meaning, since it is clear that principles of public international law could already be invoked within the framework of conventional or customary international law. In fact, some examples of general principles of law are already part of customary international law, such as *pacta sunt servanda*, the right to self-defense, and the duty to provide compensation for caused damage.

An ILC report on general principles of law formally acknowledges these concerns regarding principles in public international law. The report suggests that there is insufficient or inconclusive practice

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[270]ILC, Second report on general principles of law, p. 22. It cites, for instance, *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31October, 2011, ¶ 622 ("rules largely applied *in foro domestico*, in private or public, substantive or procedural matters").

[271] "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78 (2018), p. 1188.

[272] Ibid., *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 128-130. Other decisions relate to proportionality; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ii), ICSID Case No. ARB/06/11, Award, 05October, 2012, ¶¶ 402-403, and the Decision on Annulment, 02 November 2015, ¶ 350.

[273] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March, 2005, ¶ 23; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award of the ad hoc Committee, 19 August 2005, ¶ 177.

[274] Other examples include consent as a basis of international arbitration, *pacta sunt servanda*, and the principle according to which like cases should be decided alike. *See e.g., Daimler Financial Services A.G. v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 52, 146, and 174.

relating to them within public international law. Therefore, it remains extremely difficult to distinguish principles of public international law from customary international law. Finally, there is a risk that the criteria for identifying general principles of law may not be sufficiently stringent, potentially leading to facile invocation of rules of international law.[275]

According to the report, three forms of general principles within international law can be identified, which are not mutually exclusive.[276] First, general principles of international law may be widely accepted in treaties and other international instruments, such as United Nations General Assembly resolutions.[277] Second, a principle of international law may underlie general rules of customary international law, in which case the methodology will, essentially, be deductive.[278] Third, a principle may be inherent or fundamental within the international legal system.[279] An example of an inherent general principle within public international law is the principle of consent to jurisdiction. This principle is a necessary consequence of the equality of sovereign States, in accordance with which disputes may only be solved within an agreed-upon jurisdiction.[280]

H. Unanimity or principles recognized by the majority of judicial systems?

1. The discussion

As a legal concept, principles of law raise many questions. Is it necessary for such principles to be identical in every system to be considered "general", or is it sufficient for them to exist in most systems worldwide?

To insist that principles must be exactly similar throughout all systems of law would be impossible. It would amount to granting veto powers to legal systems that still use outdated or idiosyncratic legal rules. Furthermore, the wording of Article 38 of the ICJ Statute itself does not require recognition by all systems. Any such quest for unanimity is both utopian and impractical.

To identify general principles, an ILC report of 2020 has established the following criteria: "(a) the existence of a principle common to the principal legal systems of the world; and (b) its transposition to the international legal system."[281] This two-step analysis of general principles of law also appears in a 2020 report released by the ILA.[282]

2. Commonality or Representativeness

As a first step, the comparative analysis must be wide and representative, reflecting the "principal legal systems of the world."[283] This type of analysis is not an easy task, considering the uncertainties regarding comparative law and its method – or methods – as explained below.

a. Commonality and comparative law

Comparative law methodology is a useful tool for regulatory reforms, for interpretive purposes, and for better understanding domestic systems. In its report on general principles, the ILA referred to "functionalism" as "one of the primary comparative law methods."[284]

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[275] ILC, Second report on general principles of law, p. 36.
[276] ILC, Second report on general principles of law, Draft conclusion 7, p. 53.
[277] ILC, Second report on general principles of law, p. 39.
[278] ILC, Second report on general principles of law, p. 45.
[279] ILC, Second report on general principles of law, p. 38.
[280] ILC, Second report on general principles of law, p. 47.
[281] Draft Conclusion 4, ILC, Second report on general principles of law, p. 35.
Ibid., p. 5-6. Cf. Third report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez (73rd session of the ILC (2022)), A/CN.4/753, http://legal.un.org/docs/?symbol=A/CN.4/753 (last accessed 15 July 2022).
[283] Draft conclusion 5, ILC Second report on general principles of law, pp. 35-36.
[284] "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78 (2018), p. 1235.

Functionalism prevails in modern comparative law. The point of departure within the functional comparative law method is an analysis of the socio-economic problem presented and how it may be solved using the tools inherent within different legal systems. This strategy is known as "*tertium comparationis.*"

In his approach to functionalism as a comparative law method, René David popularized reference to legal families in the 1964 edition of his book on comparative law, one of the leading texts on the subject in France and abroad.[285] The underlying assumption within the functional method is that similar solutions to legal problems emerge from other comparable international systems. Of course, this method is not absolute, and the particular outcome will depend on the specific case. Indeed, each legal system is a sociological phenomenon of its own and belongs to its own legal family. In this regard, David referred to four legal families: common law, civil law, socialist systems, and a fourth residual classification. Other scholars expressly mention other systems, such as far-Eastern, Hindu, Islamic and Nordic (Scandinavian). The division of legal systems into legal families is one of the landmark breakthroughs in twentieth-century comparative law, making it easy to classify and organize the vast volume of extant legal materials.

The creation of the International Encyclopedia of Comparative Law in the 1970s marked an important attempt to simplify access to and comparison of legal materials, and several volumes have since been published. International arbitrators have been known to make use of this encyclopedia for this purpose. However, this and other comparative law materials must be used with great care.

Certain areas such as contracts and torts are more easily subject to the functional comparative law method that, in fact, is primarily used in private law. However, it has also been known to oversimplify issues and depart significantly from reality. Moreover, there are matters in which no *tertium comparationis* exists, or where the different legal systems compared are not equally evolved.

Many other issues arise with the functional comparative law method. To what extent should the context of the rules be considered? The same questions arise about procedural rules, the structure of courts, differences in legal history, and the cultural and socio-economic context in which the law developed. Confusion also emerges about the very term "functionalism," which is a misnomer: there is not one but several functional methods, not all methods are functional, and many times the functional methodology is difficult to identify.

The uncertainties of functionalism gave rise to other perspectives. For instance, a comparative law technique used to identify general principles employs the legal borrowing or transplantation method. This technique analyzes historical transplants of rules, principles, and legal structures. For reason of coercion (e.g., imposition of laws on colonies or conquered lands), prestige, or guaranteeing better economic performance, among others, some borrowings end up prevailing in different legal systems. Where legal borrowings prevail, they later become part of the general principles of the country's legal system.

The legal borrowing method has been the subject of several criticisms. It has been stated, for example, that alien notions are unfit to a new environment and become "legal irritants," such as the transplant of the civil law concept of good faith to the common law.

From a critical stance, some argue that there is no such thing as "comparative" law. The stages of analysis and synthesis of the rules of diverse systems that occur as part of the comparative legal analysis do not result in the formulation of any independent body of law. It would be preferable to use the term "comparative method" to "comparative law." Several methods and purposes exist within the "comparative method," however, and therefore this term remains fairly broad.

b. Geographical representation

Similar to the existence of a regional customary law, regional principles may emerge from the domestic laws that exist within a specific geographical zone. For example, the CJEU often refers to

[285] R. David, *Traité élémentaire de droit civile comparé : Introduction à l'étude des droits étrangers et à la méthode comparative*, Librairie Générale de Droit, 1950.

principles found in the domestic legal systems of its member States,[286] and European Union legislation refers to general principles common to the domestic laws of its member States.[287]

Referring to Article 9 of the ICJ Statute, Judge Christopher Weeramantry wrote that "the integrated values of any civilization are the source from which its legal concepts derive […] international law would require a worldwide recognition of those values."[288] Finding a principle that exists within all of the main legal systems is not sufficient, therefore, if it does not enjoy significant geographical representation worldwide. For instance, a general principle of European civil law systems should also be identified in civil law countries belonging to other cultural lineages.[289]

An International Law Commission Report on general principles states that different regions of the world should be represented in comparative legal analysis.[290]

c. Commonality in practice

One of the most frequent examples of the identification of general principles in practice is the *Barcelona Traction* case, in which the ICJ referred to "rules generally accepted by municipal legal systems"[291], but there are numerous other examples. In *Highlands Insurance v. Iran,*[292] for illustration, the tribunal cited a comparative study of various national laws in support of its holding regarding offer and acceptance.[293]

International tribunals have stated that a principle must emerge from national legal systems generally, from "all" legal systems, from the "main" or "major" legal systems, or from "many" or a "majority" of legal systems.[294]

Examples flow from ICSID cases. In *Amco v. Indonesia*, the tribunal considered *pacta sunt servanda* a general principle of law recognized in civil law (France), common law (United States), and Islamic law (Libya and Saudi Arabia) systems. In its calculation of damages, the tribunal referred to civil law systems (France and Indonesia) and common law systems (United Kingdom and United States)[295]. In turn, in *Total v. Argentina*, the arbitral tribunal referred to the protection of legitimate expectations as a general principle of law, "recognized lately both in civil law and in common law jurisdictions within well-defined limits."

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[286] See, e.g., Opinion of A.G. Lagrange in *Case C-14/61 Koninklijke Nederlandsche Hoogovens en Staalfabrieken v. ECSC High Authority* [1962] ECR 485 ECLI:EU:C: 1962:19, pp. 282-283. More recently, *Case C-550/07, Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission* [2010] ECLI:EU:C:2010:512, ¶¶ 69-76.

[287] For example, Article 340(2) of the Treaty on the Functioning of the EU (TFEU) states that "[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

[288] *Case Concerning the Gabčikovo-Nagymaros Project*, Order of 05 February 1997, ICJ Reports 1997, Separate Opinion of Judge Weeramantry, p. 245.

[289]"The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78, 2018, p. 1236.

[290]ILC, Second report on general principles of law, p. 16.

[291] *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 38, ¶ 50. See also *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections, Judgment, ICJ Reports 2007, p. 582, at p. 605, ¶¶ 60–62; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, at p. 675, ¶ 104. International Law Commission, Second report on general principles of law, p. 8.

[292] Award No. 491-435-3 (1990).

[293] In *Combustion Engineering v. Iran*, the tribunal made use of "principles of commercial and international law". It is widely accepted by municipal systems of law that enforceable contracts can be proven through evidence of performance. Award No. 506-308-2 (1991).

[294] International Law Commission, Second report on general principles of law, p. 9.

[295] *Amco Asia Corporation and Others v. Republic of Indonesia*, Award (November 20, 1984), ¶¶ 248, 266–267. International Law Commission, Second report on general principles of law, p. 13.

In support, the tribunal referred to legal systems of Argentina, England, and Germany.[296] Similarly, in *Gold Reserve v. Venezuela*, the tribunal held that "the concept of legitimate expectations is found in different legal traditions", in reference to Argentinian, English, French, German, and Venezuelan law.[297]

d. Discretion and pragmatism

A comprehensive survey of how different principles are interpreted within the world's varying domestic legal systems is beyond the capabilities of international courts and tribunals.

Similar to the application of customary law, international tribunals that identify "general principles of law" must necessarily exercise a considerable measure of discretion. In the end, resolving an international dispute with reference to general principles is a pragmatic attempt to find the greatest agreement between the world's major legal systems on the issues relevant to the case at hand.

It is, of course, impracticable in a comparative legal analysis conducted in the course of resolving an international dispute to review every legal system in the world. Thus, a pragmatic approach is suggested. The comparative law answer is not expected to emerge as a matter of mathematical calculation of which domestic laws endorse the solution the most.[298] Rather, tribunals are expected to carry out wide and representative comparative analyses, covering different legal families and regions of the world.[299] As noted in an ILC report on general principles, establishing the "commonality" between principles is an empirical assessment of comparison of national systems to find shared principles.[300]

e. Consequences of neglecting comparative law

The ICSID *Klöckner* case[301] illustrates the dangers of neglecting an appropriate comparative analysis. Rather than focusing on the Cameroonian governing law, the award based its decision on French law, upon which much of Cameroonian law is based. The arbitral tribunal adopted this approach based on the "basic principle" of "frankness and loyalty" emerging from French civil law. Moreover, the tribunal stated – without providing any citation – that this basic principle was also a "universal requirement" inherent in "other national codes which we know of" and both "English law and international law." The ICSID Annulment Committee found that this reasoning amounted to a failure to apply the proper law. The award was annulled on the basis that the tribunal had not based their reasoning on "the law of the Contracting State," but instead "more on a sort of general equity than on positive law […] or precise contractual provisions."[302]

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[296] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (December 27, 2010), ¶ 128. See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)11/2, Award, 04 April 2016, ¶ 546. International Law Commission, Second report on general principles of law, p. 13.

[297] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (September 22, 2014), ¶ 576. International Law Commission, Second report on general principles of law, p. 14.

[298] Statement of the ICJ Commission Member Mr. Wood (A/CN.4/SR.3490, p. 8). Similarly, Judge Tanaka was of the view that "the recognition of a principle by civilized nations […] does not mean recognition by all civilized nations" (South-West Africa, Second Phase, Judgment, International Court of Justice, ICJ Reports 1996, p. 6, Dissenting Opinion of Judge Tanaka, p. 299). International Law Commission, Second report on general principles of law, p. 9.

[299] International Law Commission, Second report on general principles of law, pp. 9-10.

[300] Ibid., p. 17.

[301] *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, 03 May 1985.

[302] See: "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78 (2018), p. 1235.

Well-known subsequent ICSID awards dispense with comparative law analogies and positively formulate a substantive rule of law. Thus, in *Letco v. Liberia* and *Amco v. Indonesia*, the tribunal ruled that in the event of non-performance by the State, compensation is the only appropriate remedy.[303]

I. Transposition to public international law

General principles must not only be recognized by the community of nations but must also be capable of being transposed within the broader framework of public international law.[304] Early arbitral cases already alluded to this requirement of transposition. For instance, in the *North Atlantic Coast Fisheries* case, the tribunal rejected the principle of "international servitude," noting that it would be incompatible with the principle of sovereignty.[305]

Therefore, general principles must be compatible with the fundamental principles of public international law in this context.[306] In his widely cited South West Africa Advisory Opinion, Judge McNair wrote the following:

International law has recruited and continues to recruit many of its rules and institutions from private systems of law […] The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law" […] the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions."[307]

The structure of the national legal systems must be considered (with particular attention paid to the procedural frameworks) to determine whether, at the international level, the principle can be applied appropriately.[308]

In a separate opinion concerning the private law principle *exceptio non adimpleti contractus* (that a party does not have to perform if the other fails to do so), Judge Simma stated that the transferability of general principles to the international legal arena requires amendment "in order for such a general principle to be able to play a constructive role also at the international level." In developed national systems, the functional *synallagma* (equivalence) operates within the control of the courts when a party affected by its application…

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[303] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March, 1986. *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Award, 20 November 1984.

[304] ILC, Second report on general principles of law, p. 23.

[305] *North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award, 07 September 1910), UNRIAA, Vol. XI, ¶¶. 167-226, at p. 182.

[306] ILC, Second report on general principles of law, p. 26.

[307] *International status of South-West Africa*, Advisory Opinion, International Court of Justice, ICJ Reports 1950, p. 128, Separate Opinion of Judge McNair, p. 146, at p. 148. International Law Commission, Second report on general principles of law, p. 19. See also in: "The Use of Domestic Law Principles in the Development of International Law", *International Law Association Reports of Conferences*, Vol. 78 (2018), p. 1237

[308] Ibid., p. 27. In a separate opinion in the *Barcelona Traction* case, Judge Fitzmaurice made the following statement: "[…] when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as it exists under the system or systems of their creation. But, although this is so, it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level. Neglect of this precaution may result in an opposite distortion, – namely that qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, – leading to a resulting situation of paradox, anomaly and injustice" (*Barcelona Traction,* Separate Opinion of Judge Fitzmaurice, p. 65 and p. 67, ¶ 5).

[…] does not accept the presence of the conditions required to have recourse to our principle. What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of these measures. Absent the leash of judicial control, our principle will thus become prone to abuse; the issue of legality will often remain contested.[309]

In certain circumstances, treaties or other international instruments can serve as evidence that a principle that exists in certain domestic settings may be transposed to the international legal system.[310] This is the case with some of the provisions in the UNIDROIT Principles (among others, the rule on modified acceptance (2.1.11) or the second paragraph of the provision on agreed payment for non-performance (7.4.13).

J. Proof of general principles

General principles of law do not merely reflect the arbitrators' own personal sense of justice. The principles must be proven and not presumed. There is a burden of proof for appealing to general principles of law, which has led them to be invoked less frequently in international dispute settlement due to the relative difficulty of proving their existence within many of the world's major legal systems.

Arbitrators tend to assume that the general principles that exist within their own legal system or systems with which they happen to be familiar are also accepted elsewhere, but this is not always the case.

In the famous ICSID case *Klöckner v. Cameroon* discussed above, the Annulment Committee pointed out that there had been a lack of authority to support the use of general principles in the annulled decision. The Committee ultimately concluded that the reasoning of the annulled award seemed more like a simple reference to equity, instead of referring to general principles.[311]

K. Principles in old international investment claims

Claims commissions and foreign offices throughout the eighteenth and nineteenth centuries referred to general principles to work out some minimum standards of international investment protection, which were applied frequently in disputes arising from relationships between States. Case law shows that general principles of law were used extensively even beyond the nineteenth century.[312]

Many of these general principles recognized by international tribunals remain relevant today. This is the case, for instance, with the principle that established that contractual breaches do not *per se* violate international law, held in the *Martini* award and *International Fisheries Company* claim,[313] and recently applied in the ICSID case *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan.*[314]

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[309] Application of the Interim Accord of 13 September 1995 (*the former Yugoslav Republic of Macedonia v. Greece*), Judgment, 05 December 2011, Separate Opinion of Judge Simma, 2011 (2) ICJ Rep. 695, p. 700; ILC, Second report on general principles of law, p. 31.

[310]ILC, Second report on general principles of law, p. 32.

[311] *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, 03 May, 1985, 1986(1) ICSID Rev. – FILJ 90, ¶ 137.

[312] *Eastern Extension, Australasia and China Telegraph Co., Ltd., Case* (1923), Nielsen's Report, p. 40, at pp. 75-76.

[313] *Martini Case (Italy v. Venezuela*, 1903) 10 RIAA 644; *International Fisheries Company Claim (USA v. United Mexican States,* 1931) 4 RIAA 691.

[314] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 06 August, 2003, ¶ 166. *Shufeldt Claim (Guatemala v. USA)*, 1930(2) RIAA 1081 (Only contractual breaches *iure imperii* are considered potential violations of international law). This principle was held in Judge Hersch Lauterpacht's separate opinion in the ICJ *Certain Norwegian Loans Case* (*Certain Norwegian Loans Case* (*France v. Norway*), (Separate Opinion of Judge Sir Hersch Lauterpacht, 6 July 1957). In *Bankswith Ghana Ltd. v. The Republic of Ghana Acting as the Government of Ghana* (UNCITRAL, Award Save as to Costs, 11 April 2014) the Tribunal credited the *Shufeldt* claim as sole authority for this principle (¶¶. 11-68-11-69).

L. Internationalization in the early natural resources' cases through the use of general principles

1. General considerations

In the *Serbian Loans* case, the PCIJ stated 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."[315] However, subjecting the entirety of a foreign investment contract to the national legal system of the State party would place the investor in an inferior position, subordinate to the free will of its co-contractor. States could escape liability by changing their domestic law for the matter. To avoid this imbalance of powers, "internationalization" emerged as a response.

This so-called "internationalization" refers to the equation of contractual obligations to international obligations. This way, a breach of an internationalized investment contract by a State will constitute a violation of public international law, which should deter public authorities from taking further actions outside of the conditions of said agreement.

Foreign investment contracts throughout the mid-twentieth century were "internationalized" under the logic that foreign investors' lack of international standing could be overcome where States were willing to treat them as their equals. In these situations, principles of international law could be applied to the agreement. Creative law firms, particularly throughout the 1950s and 1960s, included carefully crafted clauses in their investor clients' international State contracts – such as legal stabilization clauses, choice of law clauses, and arbitration clauses – to ensure that the "rules of the game" would not be unilaterally changed via State legislation.

The inclusion of stabilization clauses aimed to freeze the law and make the conditions of the investment immune to changes, insulating the contract from local courts and domestic law. This was a way of avoiding what French scholars called "*l'aléa de la souveraineté*", that is, the risk of legal changes made by the State to improve its contractual position or extricate itself from liability and thereby manipulate the contract balance to its advantage.

In the choice of law clause, the parties employed undefined and quite general language (general principles of law and the like), which they felt was – as was recognized by arbitral tribunals as – a lesser evil than subjecting their relationship to local rules that might have been unpredictable or anachronistic.

Furthermore, resolving foreign investment disputes through international arbitration was considered a way to ensure that rules of a transnational nature could apply, so that a sufficient degree of fairness would exist in the adjudication process.

2. Lena Goldfields

The idea of internationalization first surfaced in the 1930 *Lena Goldfields* award. This was the first international arbitration that applied a "general principle of law recognised by civilized nations" by reference to Article 38(l)(c) of the PCIJ, namely the principle of compensation for unjust enrichment.[316]

The decision was an English award made with London as the seat of arbitration. The parties' concession agreement was not a treaty, and the dispute was not a State-State arbitration subject to public international law. Despite these facts, the *Lena Goldfields* arbitration was never treated by the parties or its arbitrators as a purely English arbitration. Be that as it may, this decision paved the way for developments in favor of the notion of internationalization. Furthermore, over the years, legal commentators have treated the case as having a broader significance in both private and public international law.

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[315] *Serbian Loans case (France v. Serbia)*, Judgment, 12 July 1929, PCIJ Rep. Seria A. – No. 20/21, p. 41.

[316] In 1977, this award was relied upon by Arbitrator Dupuy to support his reasoning in the Texaco v. Libyan Arab Republic decision, which is referred to below in Subsection 8.b of this Part.

3. 1933 concession between the Persian government and the Anglo-Persian Oil Company

The *Lena Goldfields* arbitration influenced the drafting of Articles 21 and 22 of the 1933 concession convention between the Persian government and the Anglo-Persian Oil Company, which has inspired the drafting of concession agreements in the following years.

Article 22 of this concession agreement stated, "[…] F. The award shall be based on the juridical principles contained in Article 38 of the Statutes (sic) of the Permanent Court of International Justice. There shall be no appeal against the award." Evidently, the parties to these concession contracts were not satisfied with the national law governing the agreement, and felt it necessary to rely instead upon the general principles within which the agreements were intended to operate.

4. Petroleum Development Ltd. v. The Sheikh of Abu Dhabi[317]

This landmark case was critical to consolidate internationalization with regards to general principles of law. In the 1951 decision, the sole arbitrator Lord Herbert Asquith considered that even though the contract was:

> […] made in Abu Dhabi and wholly to be performed in that country, no reasonable municipal system of law could be said to exist […] The Sheikh administers 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.[318]

Lord Asquith applied instead the "principles rooted in the good sense and common practice of the generality of civilized nations – a sort of 'modern law of nature.'" From a critical stance, while English law was not applied in this case, the principles used in the award resemble the reasoning taken within specific English cases. Moreover, in a discretionary manner, Lord Asquith accepted certain principles of English law that represented a "modern law of nature" but rejected others. For instance, he considered that the English rules of evidence and the feudal inspired principle that sovereign grants are to be construed against the grantee were peculiarities of English legal history.

5. Ruler of Qatar v. International Marine Oil Co.[319]

In the 1953 award rendered in this case, Sir Alfred Bucknill was confronted with the question of whether in absence of choice the proper law Islamic law would be or "the principles of natural justice and equity." Sir Bucknill ruled that Islamic law "does not contain a body of legal principles applicable to a modern commercial contract of this kind," and applied general principles of law to the case, accompanied by the qualification that such principles reflected "natural justice and equity and good conscience."[320]

6. Saudi Arabia v. Arabian American Oil Co. (Aramco)[321]

In this 1958 decision, considering the lack of an express choice of law in the concession agreement, the arbitral tribunal took into account the *Serbian Loans* decision and its reference to the applicability of a national law in accordance with private international law rules. Consequently, the tribunal went on to declare the application, in principle, of the law of Saudi Arabia, given this country was party to the agreement that was in the jurisdiction where the performance of the agreement was to occur.[322]

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[317] *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi*, Award, 1 September 1951, 18 ILR 144.
[318] *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi*, Award, 1 September 1951, 18 ILR 144.
[319] *Ruler of Qatar v. International Marine Oil Co. Ltd.*, Award, 01 June 1953, 20 ILR 534.
[320] *Ruler of Qatar v. International Marine Oil Co. Ltd.*, Award, 01 June 1953, 20 ILR 534,20 ILR, 534 p. 544-545.
[321] *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, Award, 23 August 1958, 27 ILR 117, p. 168.
[322] In this regard, the award referred the Permanent Court of International Justice in its judgment in the *Serbian and Brazilian Loans Case*, (*Serbian Loans case (France v. Serbia)*, Judgment, 12 July 1929, PCIJ Rep. Seria A, No. 20/21, p. 42 and *Brazilian Loans case (France v. Brazil)*, Judgment, 19 July 1929, PCIJ Rep. Seria A, No. 20/21, p. 232. (The arbitrators reasoned that the Saudi Arabian law chosen by the parties must, where necessary, be interpreted and

However, the tribunal also held that the regime of mining and oil concessions had remained embryonic in Islamic law. After doing so, the tribunal stated: "[i]n so far doubts may remain on the content or on the meaning of the agreement of the Parties it is necessary to resort to the general principles of law and to apply them in order to interpret, and even to supplement, the respective rights and obligations of the parties." For this conclusion the tribunal relied, by analogy, on the precedent of the *Lena Goldfields* case.[323]

7. Sapphire Case award[324]

In this 1963 case, the tribunal also applied general principles of law, based upon reason and upon the common practice of civilized nations. In the absence of choice, sole arbitrator Pierre Cavin found no positive implication from the arbitral clause regarding the applicable law, but stated that "it is possible to find there a negative intention, namely to reject the exclusive application of Iranian law,"[325] which was the national law of the State company.

Drawing upon previous decisions in the *Lena Goldfields* arbitration and other early Middle East oil cases, the arbitrator expressed that "such a clause is scarcely compatible with the strict application of the internal law of a particular country. It much more often calls for the application of general principles of law" as enshrined in Article 38 of the ICJ Statute.[326]

This award has received significant criticism due to the fact that the arbitrator erroneously justified his decision by construing the *force majeure* provision of the contract as a choice of law clause.

8. Libyan 1970s´concession cases

In 1971, Libyan Colonel Muammar Khadafi nationalized several petroleum concessions. This had a tremendous impact upon the concession agreements that had been drafted previously. Specifically, the nationalization effort provoked numerous cases that – as will be seen below – yielded diverging decisions, even though the choice of law provisions within the concessions were identical.

Clause 28, paragraph 7 of all of the Libyan concession agreements stated the following:

The 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.

In turn, Clause 16 guaranteed the concession holders that their contractual rights would be protected, which could not be altered except by the mutual consent of the parties. Clauses 16 and 28 thus introduced a stabilization of rights, arbitration and choice of law provisions. Three well-known awards decided controversies in this regard with different arguments, as shown below.

***a. BP v. Libya* award**[327]

In the 1973 *BP v. Libya* award, sole arbitrator Judge Lagergren favored the application of "the principles common to Libyan law and to public international law." Only in the absence of such common principles would "the general principles of law" apply, which were considered to reflect the general principles of domestic laws as well.[328]

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supplemented by general principles of law). *See in* P. Bernardini, *ICC International Court of Arbitration Bulletin*, Vol. 15, No. 2 (2004), p. 3.

[323] *Lena Goldfields v. USSR*, The Times, 3 September 1930.

[324] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.,* Award, 15 March, 1963, 35 ILR 136, p. 169.

[325] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.,* Award, 15 March 1963, 35 ILR 136, p. 172-176.

[326] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.,* Award, 15 March 1963, 35 ILR 136, p. 172-176.

[327] *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 10 October 1973, 53 ILR 297 (1979).

[328] Ibid., p. 535.

This decision was criticized considering that previously the PCIJ had recognized and accepted that *restitutio in integrum* is an established principle of international law, and that since 1928 virtually all legal scholars have viewed the *Chorzów* statement on *restitutio in integrum* as a "declaration of principle." Moreover, the *BP v. Libya* award lacked a rigorous comparative law analysis between civil law and common law regarding remedies for non-performance.

b. The *Texaco v. Libya* case[329]

In his 1977 decision on this case, sole arbitrator René-Jean Dupuy listed three possible ways that internationalization can occur: the contract may refer to "general principles of law" as the applicable law,[330] it may contain an arbitration clause, or it may be an "economic development agreement."

Regarding the first two alternatives in which internationalization can take place (general principles and an arbitration clause), the award stated:

Even if one considers that the choice of international arbitration proceedings cannot by itself lead to the exclusive application of international law, it is one of the elements which makes it possible to detect a certain internationalization of the contract […] It is therefore unquestionable that the reference to international arbitration is sufficient to internationalize a contract, in other words, to situate it within a specific legal order – the order of the international law of contracts.[331]

However, arbitrator Dupuy did not offer a clear explanation of what was meant by the term "the international law of contracts" as governing law, and in what respect it differs from public international law or whether it is a manifestation of a distinct third category, the *lex mercatoria*.

Moreover, it is questioned whether recourse to arbitration may *per se* necessarily have a decisive impact on the issue of applicable law; especially considering that the primary purpose of arbitration is to avoid litigation before domestic courts.

Dupuy decided that the contract should be ruled by public international law, since the governing law clause referred primarily to "principles of international law" and to "general principles of law" on a subsidiary basis.[332]

Dupuy additionally determined that principles of Libyan law could govern only if they aligned with principles of international law "as applied between all nations belonging to the community of states." According to the arbitrator, clauses like these invoking general principles "tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to […] a system which is properly an international law system."[333] This reasoning was intentional:

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[329] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 1978 (17) ILM 1.

[330] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 17 ILM 1, ¶ 42. "International arbitration case law confirms that the reference to the general principles of law is always regarded to be a sufficient criterion for the internationalization of a contract",

[331] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award of the Merits, 19 January 1977, 17 ILM, 1, ¶ 44.

[332] The applicable substantive law Clause 28 of the Deeds of Concession read as follows: "This concession shall be governed by and interpreted in accordance with the principles of the 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".

[333] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 17 ILM 1, ¶ 45.

"The recourse to general principles […] is justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties."[334]

The award also held that "[a] third element of the internationalization of the contracts in dispute results from the fact that it takes on a dimension of a new category of agreements between States and private persons: economic development agreements […]."[335] These agreements tend to bring to developing countries investments and technical assistance, and consequently contribute to the development of the country where they are performed. Their long duration and magnitude of the investment imply a close cooperation between the investor and the State and require the assurance of a certain stability. In the words of Dupuy,

"Hence the insertion, as in the present case, of so-called stabilization clauses: these clauses tend to remove all or part of the agreement from the internal law and likewise to provide for its correlative submission to *sui generis* rules as stated in the *Aramco* award, or to a system which is properly an international law system."[336]

The reasoning used in the *Texaco v. Libya* case is significant, primarily due to the fact that Dupuy's elaborate decision extensively cited scholarly authorities. Moreover, the *Texaco v. Libya* case was the first major international arbitration to address the effect of the United Nations General Assembly's resolutions on the legal doctrine of permanent sovereignty over natural resources, discussed in Part 2, Section XII. Even though his reasoning tended to favor developing nations, Dupuy could not find any positive law source to support the binding legal effect of the Charter of Economic Rights and Duties of States. He determined that the very nature of the Charter, the circumstances surrounding it, the relevant statements made by States regarding the Charter, the States that voted on it, and the text of its provisions all indicated that the Charter itself did not create customary international law. On the contrary, it was a clear challenge to the traditional Western view of international law. By contrast, State practice alone could lead to the development of customary international law. Dupuy concluded that only Resolution 1803 (XVII) of 1962 reflected the state of existing customary international law.[337]

c. Liamco award

In this award, sole arbitrator Sobhi Mahmassani went in a different direction and interpreted the choice of law clause as implying that "[t]he proper law governing Liamco's Concession Agreement […] is in first place the law of Libya when consistent with international law, and subsidiarily the general principles of law."[338] The arbitrator noted that the stabilization clause included in the agreements emphasized the contractual basis of the concession.

All three Libyan nationalization cases explained above (*BP*, *Texaco*, and *Liamco*) were decided by arbitrators from different parts of the world: Sweden, France, and Iran. Since in these cases Islamic law has typically been considered inadequate with respect to foreign investment contracts, the tribunals opted instead for the application of equitable or general principles of the law.

In both the *Liamco* and the *BP* awards, the arbitrators engaged in a comparative approach in the understanding that general principles of law applied. However, in the *Texaco v. Libya* award, the arbitrator

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[334] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 17 ILM 1 ¶ 42

[335] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya,* Award on the Merits, 19 January 1977, 17 ILM, 1, ¶ 45(c.

[336] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 17 ILM 1, ¶ 45(c).

[337] *Texaco Overseas Petroleum Co./ California Asiatic Oil Co.) v. Government of Libya,* Award on the Merits*,* 19 January 1977, 17 ILM 1 ¶ 68. See J.W. Salacuse, *The Law of Investment Treaties* (3rd edn, 2021) p. 93-94.

[338] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 ILM 1, p.66.

held that international law or the "international law of contracts" rather than the general principles applied as the governing law.[339]

These three conclusions are problematic. On the one hand, what the content of international law of contracts entails remains unclear. This explains why, contrary to *Texaco v. Libya*, the *Aminoil* award rejected the application of transnational law or of a third legal order between national and international law. The *Aminoil* decision further referred to below repudiates the *lex mercatoria*. By incorporating international law into the law of Kuwait and blending them into a single legal framework, the award obscured the role of international law as the ultimate controlling standard. In this way, the tribunal found it necessary to test domestic rules against some external international norms that were capable of supplying a troubling "international public policy" that might justify the non-application of domestic law. On the other hand, a comparative analysis has its own perils. *Liamco* follows the *BP v. Libya* approach in this regard, and the latter has been criticized for lack of rigor in its civil and common law comparison.

9. Aminoil case

The 1982 *Aminoil* decision,[340] among others, adopted a different position than *Texaco v. Libya.* So far, no attempt has been made to duplicate the *Texaco* ruling that submission to international arbitration might constitute an implicit choice of international law applicable to the substance of the dispute. In the *Aminoil case*, this was more evident since there was an express applicable law clause governing the substance of the dispute.

The applicable law clause stated the following: "[t]he law governing the substantive issue 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."[341] The tribunal applied Kuwaiti law to many of the contractual issues, as it was "the law most directly involved."[342] It also applied international law alongside Kuwaiti law, stating that the two were not in conflict with one another. The tribunal thus recognized the possibility of applying both the law of the host State and international law as part of national law. However, the award fell short of directly addressing an important issue, namely the hierarchy between domestic and international law.

M. Recent evolution of general principles within investment arbitration

Since the 1970s, numerous changes have occurred within the field of international investment arbitration. Rather than States themselves, State-owned entities have increasingly been entering into investment contracts with private parties. Furthermore, investors – who had previously occupied a dominant position in international trade – had to adapt to new patterns of conducting business. Concomitantly, a new generation of negotiators in third-world countries became steadily more familiar with the complexities of international investment contracts and, as a consequence, negotiation and implementation of State contracts have increasingly been conducted in a business-like manner. Also, traditional concession agreements subject to general principles of international law have been replaced by new types of arrangements mostly

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[339] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 ILM 1, p. 67; *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 10 October 1973, 53 ILR 297, p. 329. *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 1978(17) ILM 1, ¶ 41.

[340] *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award, 24 May 1982, 21 ILM 976, (1984) IX Y.B. Comm. Arb. 71; *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award (extracts), 24 May 1981, 9 Y.B. Comm. Arb. 71.

[341] *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award, 24 May 1982, 21 ILM 976, *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award (extracts), 24 May 1981, 9 Y.B. Comm. Arb. 71, p. 980.

[342] *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award, 24 May 1982, 21 ILM 976, *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award (extracts), 24 May 1981, 9 Y.B. Comm. Arb. 71, p. 1000.

subject to private domestic laws, such as service contracts, technical assistance contracts, and build-operate-transfer agreements.

However, international arbitrators have shown a tendency to attenuate the application of domestic law by concurrently referring to other principles with a varying nomenclature, even where domestic law has been chosen by the parties. Arbitration laws and rules such as the ICC Rules of Arbitration (Article 28(4)) require arbitrators to take trade usages into account in all cases. The question nonetheless remains whether general principles fall within these categories.[343]

Further, although infrequent, application of the general principles of commercial law to the substance of an investment dispute may be relevant in situations in which, for example, the arbitral tribunal is faced with contractual claims and the broad language used in the relevant treaty covers disputes or investments. Situations may occur in which ascertaining a breach of the treaty requires analysis of a contractual relationship and of the parties' conduct in the context thereof. Even though here the relevant standards are those of public international law, ascertaining their breach may require an assessment of the conduct of the parties within the contractual relationship, for which purpose the general principles of commercial law could become relevant.

Several ICSID arbitration cases made use of general principles. In the ICSID case *Inceysa v. El Salvador*, the tribunal cited Article 38 of the ICJ Statute and proposed that general principles of law be described in the following terms:

> […T]he general principles of law are an autonomous or direct source of International Law, along with international conventions and custom. Without attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based.[344]

ICSID tribunals have invoked general principles such as, among others, good faith,[345] *exceptio non adimpleti contractus,*[346] estoppel,[347] unjust enrichment,[348] and the valuation of damages.[349] The United States-Iran tribunals have also applied general principles of law, in accordance with the open-ended provision of Article V of the Claims Settlement Declaration of 1981. As stated in the *Amoco v. Iran* case, this provision "contributed, to a greater extent than any other international compact, to the consolidation of

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[343] For instance, ICC Case No. 3896, (1983) 110 JDI 914, *Construction Company (France) v. Government Organization (Iran)*, ICC Case No. 3896, Partial Award (extracts), 23 December 1982, 10 Y.B. Comm. Arb. 47, S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985*, (1990), p. 161; B. Oppetit, *Arbitrage et contrats d'Etats: L'arbitrage Framatome et autres c. Atomic Energy Organization of Iran*, 1984 111 JDI 37. (This award was commented by B. Oppetit).

[344] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 02 August, 2006, ¶¶ 226-227.

[345] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 02 August, 2006, ¶¶ 230, 239.

[346] *Autopista Concesionada de Venezuela*, *C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September, 2006, ¶ 316.

[347] *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic*, Decision on Jurisdiction. 27 July, 2006, ¶¶ 154-161.

[348] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 02 August, 2006), ¶¶ 253, 257

[349] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 22 November, 1984), ¶ 267; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, 09 March, 1998), ¶ 30; *Enron Corporation & Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3,, Award, 22 May, 2007), ¶ 360.

the rule of international law that a State has the duty to respect contracts freely entered into with a foreign party."[350]

IV. National legislation as source of law for international investment claims

After World War II, the legislation of several host States started providing protection for foreign investments. These national laws established numerous guarantees for these investments, such as free profit repatriation and safeguards against discrimination, among others that are typically contemplated within investment treaties.

National legislation also became relevant to international investments. In the past, for States to offer diplomatic protection for damages to investments made by their nationals, the prior exhaustion of local remedies was required. As such, domestic courts had to intervene first in dealing with issues related to national law. Where domestic courts were unable to provide an appropriate remedy, damaged nationals would recur to an international tribunal for protection, which would apply international law to the dispute. In this scenario, national law became a pure question of fact.

By contrast, international investment arbitration was developed in line with a different set of rules. First, there is no requirement to exhaust local remedies prior to commencing an investment claim unless expressly agreed to in the contract or provided in the applicable investment treaty. Nonetheless, the law applicable to the investment contract is usually that of the host State alongside public international law.

When an investment dispute arises, the law of the host State does not necessarily apply by default. While international tribunals will inform themselves of the content of local laws through expert submissions and other sources, determining the law applicable to an international investment dispute is a conflict of laws matter. In the case of inconsistency between national and international law, international law will prevail. In the majority of cases, however, there is no inconsistency, and both apply in parallel.

As to the relevance of national law within international investment claims, the PCIJ considered matters related to national law as merely factual.[351] However, the principle that national laws are to be treated as facts before an international court or tribunal is debatable. Some situations do not generate controversy, such as when an international court decides a maritime boundary dispute and takes into account municipal laws asserting legal rights over the disputed area to determine whether the doctrine of acquiescence in international law can be invoked by one of the State litigants. It is able to do so in this context because the matter is governed exclusively by international law.

Moreover, the violation of domestic law may not necessarily entail a breach of international law, as decided by the ICJ in the *ELSI* case.[352] However, when violating its domestic law, the State may also have breached public international law. In such a situation, interpretation of domestic law becomes a preliminary step. When evaluating the lawfulness or unlawfulness of the State's conduct, domestic law must be considered as a fact from the point of view of public international law. National law is, of course, also relevant to questions such as whether an investment is valid, whether a representative was empowered to act on behalf of the State, or in determining the nature of a private entity. Further examples include environmental impact assessments, zoning changes, taxation, immigration, and identifying the appropriate currency to be used in calculating and adjusting tariffs.

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[350] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56 (310-56-3), Award, 14 July, 1987, 15 Iran-United States Claims Tribunal Reports 189, ¶ 177.

[351] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland),* (Merits)*,* Judgment, 25 May 1926, PCIJ Rep. Series A No. 7, p.19. *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. et al. v. Jordan*, ICSID Case No. ARB/13/38, Award 14 December 2017, ¶ 345.

[352] *ELSI* Judgment of 20 July 1989, ¶ 124. *See also*, *Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia S.L. v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, 12 March, 2021.

Unlike treaties, international investment contracts are, in principle governed by national law, or – if chosen or applicable in absence of selection – uniform law such as the UNIDROIT Principles. Depending on the circumstances, however, States will incur international legal responsibility upon a breach of their obligations under the investment contract. Some key aspects of the investment agreement will also be subject to public international law, either because they have been designed to this effect or since its general safeguards will always be available. Some writings question whether this means that State contracts are, in fact, treaties, at least from the point of view of their legal effects. However, it is one thing to strengthen State contractual compliance with investment contracts by building upon the role of international law, and quite another to transmute State contracts into treaties.

V. Teachings of the most highly qualified publicists

At its inception, the doctrinal writings of leading publicists shaped - from the sixteenth to eighteenth centuries - the scope, form and content of public international law. In the modern era, these writings also constitute a source of authority in the discipline. In this regard, Article 38(1)(d) of the ICJ Statute refers to "[…] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law […]." Article 35 1(a)iv of the PCA Arbitration Rules likewise include a provision along similar lines. Further, an ILC Report came to a similar conclusion, stating that there are certain scholarly works or "teachings" that demonstrate that a principle is common in different legal systems.[353]

With the exception of the 1992 chambers judgment in *Land, Island and Maritime Frontier Dispute* that mentioned "the successive editors of *Oppenheim's International Law,"*[354] the ICJ does not cite specific writers but refers in general to scholarly writings in certain matters that have reached general consensus as, for instance, an "almost universal opinion" or a view emanating from "all or nearly all writers."

Other tribunals, and investment arbitration tribunals in particular, regularly cite doctrinal writings in their awards.[355] The use of secondary sources in this way stems from the historic unavailability of primary sources and difficulties in their interpretation, especially during times when the state of public international law was alarmingly uncertain. When no positive rules could be established, tribunals made use of natural law and Roman law as sources to support the reasoning in their awards, particularly as referenced in the works of the publicists.

That practice still holds today. In ICSID arbitrations, for instance, the tribunals frequently cite scholarly writers and in particular, Christoph H. Schreuer's commentary on the ICSID Convention.[356] Many

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[353] ILC, Second report on general principles of law, pp. 55-56.

[354] *Land, Island and Maritime Frontier Case (El Salvador v. Honduras)*, Judgment, 11 September 1992, ICJ Rep. 351, ¶ 394; *Lotus Case (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Rep. Series A. - No. 10, p. 26. (In the *Lotus* case, the Permanent Court referred to the "teachings of publicists" leaving expressly apart "the question as to what their value may be from the point of view of establishing the existence of a rule of customary law").

[355] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, (the tribunal cited several academics by name that affirmed its opinion). In *America Móvil S.A.B. de C.V. v. Republic of Colombia* ICSID Case No. ARB(AF)/16/5, Award, 07 May 2021. (The tribunal affirmed as a principle one that had been reiterated many times in international jurisprudence and doctrine); Eco *Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September, 2021, (the tribunal mentioned the position of numerous commentators in relation to exclusions from the scope of the minimum level of treatment).

[356] S. Schill (Ed.) *Schreuer's Commentary on the ICSID Convention* (3rd edn. 2022); 1. *Alberto Carrizosa Gelzis, 2. Felipe Carrizosa Gelzis, 3. Enrique Carrizosa Gelzis v. The Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, ¶ 131 (In this case the Commentary was cited by the tribunal on predominant nationality) [FN 24]; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 (In this case the Commentary was cited by the Ad Hoc Committee in relation to the annulment of the award, the appeal and the manifest nature of excess).

well-established legal theories applicable to international investments can be sourced to the writings of publicists.

A few caveats: writers and publicists not only record the state of the law as it is (*lex lata*) but also advocate for its development (*lex ferenda*). On the other hand, many writings merely reflect the national or individual viewpoints of their authors. Further, the quality of scholarly writing varies immensely. As such, the impact of each work should be assessed independently on its own merits. Therefore, it is advisable to make use of the works of highly qualified publicists as public international law sources with prudence and caution.

VI. The "precedential" role of decisions in international investment claims

A. In general

Article 38 of the ICJ Statute treats both writings and judicial decisions as parallel "subsidiary means." In practice, however, judicial decisions can be "of immense importance," perhaps more so than scholarly writings and the work of publicists.

The ILC concluded in a report that "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles."[357] The report also mentions that decisions of national courts can likewise be used as aids to determine the existence of general principles of law.[358] Moreover, precedents of domestic courts may provide evidence of the existence of a customary rule or may serve as examples of how States actually behave, which can lead to the recognition of a new rule of international customary law.[359]

The role of judicial precedents within arbitration proceedings is rather distinct from that in litigation. Arbitrators must treat judicial decisions with great care and are not bound by such judgments in principle. While adjudication by tribunals in commercial arbitration between private parties are usually not public, publication of arbitral decisions is a welcome trend that aids in the establishment of a body of "arbitral jurisprudence" and the possibility to reference such decisions, even if not as "precedent" *per se*.

Although Article 38(1) of the ICJ Statute does not mention arbitral awards, it is generally accepted that they have the same authority as judicial decisions in the hierarchy of legal sources. Many diverse international tribunals also make use of prior decisions in their issuance of awards, as is evident in the decisions of the PCIJ, the ICJ, the European Court of Human Rights, and the Iran-United States Claims Tribunal, among others. In addition, rulings on foreign direct investments released by the World Trade Organization are or may also be relied upon.

B. Precedents in international investment claims

The significant role played by precedents within investment disputes originates, to a large extent, in the practice of mixed claims commissions and, later, in international arbitral practice. This prominent role of arbitral awards in investment claims can be understood if one considers the few alternative places for guidance with respect to what the law is in this field. In a highly unregulated area such as investment contracts, not only were arbitral awards the first to offer guidance, but also generated important legal content.

In the resolution of investment-related disputes through arbitration, recourse to well-reasoned awards that have been issued on similar grounds is an invaluable analytical tool that can provide guidance to both States and investors, offering some clarity in a field marred by uncertainty. In contrast to the precedential

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[357] ILC, *Second report on general principles of law*, p. 56.
[358] ILC, *Second report on general principles of law*, p. 56.
[359] *See e.g., Thirty Hogsheads of Sugar, Bentzon v. Boyle*, 9 Cranch 191 (1815); The *Paquete Habana* 175 US 677 (1900); The Scotia, 81 U.S. 170 (1871).

value of arbitral awards, traditional customary international law has often proven unsuitable or has lost importance due to the growth of other kinds of precedents and legal sources.

Any discussion of precedents within international investment arbitration must be accompanied by the caveat that they be used with care. In addition to the variations that can be observed in how different tribunals use the precedents of other adjudicatory bodies, under certain rules they may not always have precedential effect. This was the case, for instance, under Article 1136(1) of NAFTA, whereby a decision from one panel has no precedent effect on any other panel; Article 14.D.13(7) of USMCA states likewise.[360]

Specifically in the context of ICSID arbitration, according to the first part of Article 53(1) of the ICSID Convention, "the award shall be binding on the parties […]." This may be read as excluding the applicability of the binding precedent principle to successive ICSID cases. Nothing in the *travaux préparatoires* of the ICSID Convention suggests that the doctrine of *stare decisis* should be applied under this mechanism.[361] However, reference to ICSID's prior jurisprudence "has become a standard feature" in most rulings.

Jurisprudence constante is a legal term of art that has extended into investment arbitration. It refers to an accumulation of judicial decisions that have decided similarly on a point of law. The main difference between the English notion of legal precedents and *jurisprudence constante* is the following: that precedents, as binding rules, derive from single decisions of hierarchically superior authority, while *jurisprudence constante* derives from a series of consistent decisions made by adjudicatory authorities of equal importance. Resorting to this broader concept of *jurisprudence constante*, tribunals will tend to only deviate from earlier "case law" if there are cogent reasons. Tribunals thus adhere to a "softer *de facto* system of precedent" which nonetheless helps build a coherent and predictable body of international investment law.

The notion of a "common legal opinion" or "*jurisprudence constante*" was first used by the tribunal in *SGS v. Philippines.*[362] The tribunal in *AES v. Argentina*[363] dealt in depth with the application of precedents to foreign investment disputes and is frequently cited in this regard. The arbitrators analyzed whether tribunals were permitted to use earlier decisions dealing with similar issues as a source of "comparison and […] of inspiration." They observed that a tribunal may find an issue of law "…which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the tribunal, of inspiration."[364] The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case.[365]

When dealing with international investment disputes, it is unsurprising that ICSID tribunals, among others, routinely refer to prior decisions and awards. These tribunals also make use of decisions and awards

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[360]USMCA, Art. 14.D.13(7) ("An award made by a tribunal has no binding force except between the disputing parties and in respect of the particular case".

[361] History of the ICSID Convention. ICSID Secretariat, 1970. Volumes I through IV.

[362] *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 97. See also: *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, ¶ 704.

[363] *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction 26 April, 2005, pp. 6, 12.

[364] *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 31

[365] *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April, 2005, ¶¶ 31-32; *Astrida Benita Carrizosa v. Republic of Colombia (II),* ICSID Case No. ARB/18/5, Award, 19 April 2021. In this decision, tribunal invoked what it considered as a consistent line of jurisprudence regarding the MFN clause for the basis of its own interpretation of the term).

issued by other adjudicatory bodies on investment-related matters, such as the jurisprudence of the Iran-United States Claims Tribunal. As a caveat in this regard, while the Iran-United States Claims Tribunal has issued more decisions than any other international claims tribunal, the precedential value of its awards should be assessed with caution. Its awards have been criticized due to their inconsistency, and its decisions are mostly rendered on direct and indirect expropriations issues. By contrast, other investment tribunals usually also deal with several other investment-related matters.

In the context of an ICSID annulment proceeding, the *Continental Casualty v. Argentina* Committee remarked that "[…a]lthough there is no doctrine of binding precedent in the ICSID arbitration system […] in the longer term the emergence of a *jurisprudence constante* in relation to annulment proceedings may be a desirable goal."[366] However, another *ad hoc* committee concluded that "the mere fact that a tribunal does not follow the prevailing jurisprudence on a given issue is not an error of law *per se*."[367] In *MCI v. Ecuador*, the *ad hoc* committee decided that "the annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law."[368]

In absence of an appeal mechanism in ICSID, the purpose of a *jurisprudence constante* is largely one of self-restraint of arbitrators based on a common understanding on legal issues and respect for other tribunals. However, nothing impedes newfound approaches from being more appropriate for a given case.

Despite these safeguards, the embryonic institutionalization of investor-State dispute settlement, the lack of a rule of *stare decisis*, and the absence of an appeals mechanism sometimes lead to notably inconsistent decisions. For instance, in *SGS v. Pakistan* and *SGS v. Philippines,* the tribunals interpreted similar umbrella clauses in two different investment treaties in a dissimilar manner.[369] Notwithstanding these divergences, by and large investment tribunals actively recognize consistency as a value in investment treaty arbitration.

The PCA Arbitration Rules include an express provision dealing with the use of precedents. Their Article 35(1)(a)(iv) was intended to increase the consistency and predictability of awards issued pursuant to them. An example of how precedents are employed in the PCA context can be seen in the *Yukos v. Russia* case. The arbitral tribunal discarded the "clean hands" doctrine invoked by Russia since it did not refer to any "majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' in an inter-State or investor-State dispute."[370]

VII. Other sources

Article 38 of the ICJ Statute cannot be regarded as a necessarily exhaustive statement of the sources of international law for all time.

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[366] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment, and the Application for Partial Annulment 16September 2011, ¶ 84; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award, 24 February 2022 ¶ 171 (The tribunal referred to the set of interpretations and guidelines in the Trans-Global case in relation to the application of Rule 41(5) of the ICSID Arbitration Rules "whose validity remains unquestioned").

[367] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the ad hoc Committee on the Application for Annulment, 29 June, 2012, ¶ 99.

[368] *MCI Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October, 2009, ¶ 24.

[369] The tribunals in *CME v. Czech Republic* and *Lauder* v. *Czech Republic* also reached contrary results in two proceedings that related to the same fact pattern but were brought by different claimants under two different BITs. *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL Final Award, 14 March 2003, 9 ICSID Reports 264, 348 (2006); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award 03 September 2001.

[370] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award 18 July 2014, ¶ 1362.

A. A legal "sub-system" of the law of international institutions

Multiple actors are active within the field of foreign investments, all contributing in different ways to the development of the legal governance of international investment. Notable actors include States, investors, multinational enterprises, non-governmental organizations, and inter-governmental organizations. Their proliferation constitutes perhaps one of the most significant changes in public international law in recent decades, and their impact upon the available sources of law has been considerable.

Inter-governmental organizations have formed a legal sub-system based on their constituent instruments, which, in turn, will also be governed by a sub-system of public international law (the law of international institutions). An inter-governmental organization, such as the OECD or the World Bank, may have a quasi-legislative power to develop substantive international rules and procedures governing its main field of activity. Inter-governmental organizations have, therefore, the power to develop rules applicable to international investments. For example, MIGA, as a member of the World Bank Group, contributed to the creation of investment opportunities in developing countries by offering a specific, development-oriented investment insurance system that complements existing national investment insurance schemes.

The works of the ILA, founded in Brussels in 1873 for "the study, clarification and development of international law…"[371] and of the ILC, established by the UN General Assembly in 1947 with the purpose of promoting the progressive development of international law and its codification, are of noteworthy relevance. The Articles on State Responsibility adopted by the ILC constitute perhaps the most often-cited document in investment arbitral decisions and have assisted in the development of consistent case law.[372]

The ICJ observed that resolutions emanating from bodies like the ILA and the ILC "even if they are not binding […] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.*"[373] This statement holds particularly true when a resolution purports to declare the existence of a certain customary international law rule, in which case the resolution serves as evidence of its acceptance.[374] According to the 2018 ILC report, "[c]onversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law."[375]

In addition to ILA and ILC resolutions, UNCTAD and OECD regularly generate reports describing and analyzing different developments within international law. While not emanating from publicists per se,

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[371] The ILA has consultative status, as an international non-governmental organization, with a number of the United Nations specialized agencies. https://www.ila-hq.org> (last accessed 05 April 2022).

[372] *Naturgy Electricidad Colombia S.L. v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, 12 March 2021, ¶ 423 (The tribunal rejected the claimant's argument that debts for public services of public entities must be attributed to the national government based on Article 4 of the Draft Articles); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021. By comparison, in *Eco Oro v. Colombia*, the tribunal reproached the host State, also considering Article 4, for the lack of coordination of its public entities whose inaction caused damage to the investor. In this case, the tribunal also considered certain treaty provisions and the Draft Articles and found that the absence of non-compliance with the treaty does not exclude the obligation of States to compensate investors for damages. It found that the appropriate standard is that of full reparation, in other words, restitution and, eventually, compensation); *Astrida Benita Carrizosa v. Republic of Colombia (II),* ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 126 (The tribunal restricted its jurisdiction to acts that occurred after the entry into force of the Trade Promotion Agreement on the basis of Article 13 of the Draft Articles.

[373] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ¶ 8 July 1996, ICJ Rep. 226, ¶70 (referring to General Assembly resolutions).

[374] *The American Independent Oil Company (Aminoil) v. The Govt. of the State of Kuwait*, Award, 24 March 1982, 21 ILM 976, ¶ 143.

[375] ILC, Report on the work of the seventieth session, p. 148.

these reports may be regarded as equally authoritative as the teachings of the most highly qualified publicists.

While resolutions originating from international organizations and intergovernmental conferences cannot create customary international law rules in themselves, an ILC report concludes that they can provide evidence of the existence of certain customary international law rules or contribute to their development. International reports and resolutions may also establish that a determined rule of customary international law is accepted as such by *opinio juris*.[376] Resolutions like these reflect a general consensus – either unanimously or by some majority of the international community – on a particular matter, providing evidence of and contributing to the development of custom. By reducing customary law to written form, these resolutions share some of the characteristics of a codifying treaty. However, even though they contribute to developing customary law, clearly the process is not one of treaty making.

B. Rules of law, soft law and other terminologies used in international investment claims

1. Rules of law

The plural expression "rules of law" is understood to be wider than the term "law," encompassing both hard and soft law norms that have emerged on the international plane. Arbitral awards show references to a wide inventory of rules of law, such as public international law, general principles, drafts of international treaties not yet in force, the UNIDROIT Principles, among others.

However, not all of the sources on this list strictly qualify as "applicable law," although many of these rules may serve for interpretive or gap-filling purposes or be incorporated by reference by the parties.

Early uses of the expression "rules of law" in reference to non-State law can be found in the 1960s in the drafting of the ICSID Convention, and the arbitral laws of France and Djibouti.[377] Subsequently, the language "rules of law" was extended to arbitration laws and rules worldwide, appearing in numerous international and domestic instruments.

2. Soft Law

The emergence of the term "soft law" is credited to Lord Arnold McNair, one of the most renowned jurists of his time, President of the ICJ (1952-1955), and the first President of the European Court of Human Rights (1959-1965). The expression, however, was popularized in arbitration much later.

Many different instruments, texts, and practices are regarded or labelled as "soft law." What these sources all share in common is that they are not State law. Aside from this commonality, there is little consensus on the exact definition of the term. Be that as it may, these instruments in principle have no legally binding force, but may have a highly persuasive value and may be applied through voluntary acceptance.

3. Transnational Law

According to some writings, the supranational systems emerging out of case law and scholarly writings can be grouped into general principles of law, transnational law, and *lex mercatoria*. Under this nomenclature, general principles emerge through a process of comparing different legal sources. Consecutively, transnational law exists as an intermediate system to govern State contracts, standing between public international law and national law. In turn, *lex mercatoria* applies to State contracts involving foreign parties as well and was developed to apply to private international commercial transactions.

The expressions "general principles of law" and "*lex mercatoria*" have been used for centuries. However, it is usually recognized that Judge Philip Jessup only coined the expression "transnational law"

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[376] ILC Draft conclusions on identification of customary international law, Conclusion 12 [FN 106].

[377] Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, UNCITRAL, 20 July 2006, p. 10.

in 1956 to reflect the general interpenetration of legal rules and systems across the world, in contrast to the dualistic picture put forward by legal positivism, which created a sharp separation between international and domestic law.[378]

The notion of transnational law developed largely from public international law, whereas *lex mercatoria* emerged from private law. To a large extent, both transnational law and *lex mercatoria* came about independently, but with numerous common features. Both developed thanks to the policy goal of promoting international commerce and investment through the creation of norms that provide security of businesses and commitments. Both were also invoked by arbitral tribunals and scholars using general principles of law as the primary source from which the principles of the two systems are selected. However, the early Middle Eastern arbitral awards that mentioned transnational law failed to distinguish between transnational law and general principles of law, generally using them as synonyms. These awards were mentioned above in Part 3, Section III, Subsection L.

REC. 3.1 Legislators considering reform of the domestic legal regime related to international investment arbitration and negotiators of investment treaties are encouraged to consider the various sources of law and to include, where possible, references to relevant international standards and uniform law.

REC. 3.2 Adjudicatory bodies, including arbitral tribunals and domestic courts, are encouraged to consider the role of customary international law, particularly in the absence of applicable treaty provisions or when appropriate for interpretative purposes, and also to consider general principles of international law, *jurisprudence constante,* and scholarly writings with care and with a view towards building a coherent and predictable body of jurisprudence on the law applicable to international investment arbitration.

PART 4: PARTICULARITIES OF INTERNATIONAL INVESTMENT CONTRACTS

I. Differences between international investment contracts and domestic or commercial contracts

Unlike domestic contracts, international investment contracts may be governed by public international law or other rules that exist outside the law of the host State. In the 1922 *Electricity Company of Warsaw* case,[379] the sole arbitrator held that international investment contracts such as concessions "are not pure institutions of private law but present a mixture of private and public legal characters." In the *Lighthouse* case between France and Greece, the PCIJ stated that "a contract granting a public utility concession does not fall within the category of ordinary instruments of private law."[380]

Unlike ordinary commercial contracts concluded with a State party, public law elements pervade the negotiation, conclusion, operation, and termination of international investment agreements. In domestic systems of several civil law countries, international investment contracts are considered "administrative contracts" (*contrats administratifs*). These undertakings are subject to special rules, for instance regarding State capacity to enter the contract, the areas that can be regulated, and other intricacies involving their review and scrutiny. Usually, international investment contracts affect State interests and may potentially involve a State's financial and other resources.[381]

Administrative contracts can be distinguished from ordinary contracts in that they recognize the administration's unilateral powers of control in the public interest. The administration may suspend, vary, or rescind the contract, transfer it to another party, or take over the project itself. The contract is always

[378] S P. Jessup, *Transnational Law*, 1956.
[379] *Electricity Company of Warsaw Case (France v. Poland)*, 1932(3) RIAA 1679, p. 1687.
[380] *Lighthouses Case (France v. Greece)*, Judgment, 17 March 1934, PCIJ Rep. Series 51 P.C.I.J., Ser. A/B, No. 62, p. 20.
[381] UNCTAD, State Contracts, November 2004, https://unctad.org/system/files/official-document/iteiit200411_en.pdf (last accessed 12 November 2023), p.4.

subject to the changing needs of the public service. Even though no exact equivalent exists in common law systems, similar developments have unfolded through using standard forms and terms in government contracts that grant authorities certain powers of termination or modification balanced by an obligation to indemnify the private party.

The blend of public and private law in State contracts is clearly reflected in the arbitral award issued by the President of the Swiss Federal Tribunal in the *Alsing* case.[382] In its decision, the adjudicator analyzed both public and private law elements in a supply agreement and decided to interpret aspects of this administrative contract "according to the norms of private law and by the application of the principles of good faith."[383] A growing number of international economic transactions also apply a blend of public and private concepts, especially where both parties are public authorities or where one is a public authority and the other a private subject.

International investment contracts provide mutual benefits and obligations for the State on the one hand and the private party on the other. These undertakings are usually made in accordance with relevant laws and regulations (such as those related to mining or petroleum extracting) and a concession or license is issued thereunder. As more State agreements become assimilated into the concept of "administrative contracts" or its analogues, governments will become more inclined to claim a power to unilaterally rectify and amend the arrangements they enter.

Special rules apply to international investment contracts that extend beyond private law, for instance, in cases where external circumstances require State contracts to be terminated due to public considerations. In these cases, the rules regarding damages may differ from those that apply to ordinary commercial contracts. For example, the French *Conseil d'État* (the country's administrative law tribunal) limits compensation to the *damnum emergens*, that is, to actual losses suffered by expenses and commitments incurred in the execution of the contract, as distinct from the expectation of profits that can be awarded in private law agreements. A similar approach is followed in the common law.

Moreover, the means of contract termination may be different. Ordinary commercial contracts with States may be terminated due to breach, but investor-State contracts are typically ended in cases where performance has been made wholly or partially impossible due to State action. The public policy-based control and discretion may tip the balance in favor of the State and may subject the other party to the risk of interference in its commercial expectations for entering the contract. As such, public international law has developed rules to protect investors in these situations, due to concerns for the "in-built superiority of host country institutions" and for the partiality of local courts.[384]

If, after a time, a State receiving an investment wishes to be free of the contract, alter its terms, or cancel it, these circumstances may be contemplated in the contract. Where an investor-State contract provides for its own modification and termination, the question arises as to whether the State is entitled to alter or terminate the contract for reasons not contemplated therein. Even though the contract is subject to local law, according to the public international law doctrine of acquired rights, once a right has come into existence under local law, it cannot be deprived of its international significance by any State action that runs contrary to the law of nations.

Therefore, in accordance with these international developments, the obligations arising from foreign investment contracts may be rooted in an external system other than domestic law, at least for matters related to termination and dispute resolution.[385] Proposals have been advanced in this regard under

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[382] S. Schwebel, The Alsing Case, 8 (2) ICLQ p. 320.
[383] S. Schwebel, *The Alsing Case*, 8(2) ICLQ 320, p. 333.
[384]UNCTAD, *State Contracts*, November 2004, https://unctad.org/system/files/official-document/iteiit200411_en.pdf (last accessed 12 November 2023) p. 5.
[385]UNCTAD, *State Contracts*, ,November, 2004 https://unctad.org/system/files/official-document/iteiit200411_en.pdf (last accessed 12 November 2023), p. 6.

customary international law,[386] and, although several matters have been left unresolved, investment treaties also address these issues.

In reference to the field of foreign investment contracts, some scholarly writings refer to a "public international law contract" and others to "quasi-international agreements" or "partly international agreements", etc. Some writers have argued that as soon as international law applies to contracts, an "international law of contracts" is created "even if only partial, thin, and rudimentary."

II. Absence of a public international law corpus applicable to international investment contracts

Public international law lacks an appropriate corpus of rules applicable to the regulation of complex foreign investment contractual relationships regarding formation, invalidity, and breach. In 1970, the ILC expunged the topic of contractual breaches from its codification project on State responsibility. In the words of the Special Rapporteur Roberto Ago:

"[t]he breach by the State of an obligation it has entered into under a contract of this kind does not therefore constitute, as such, the objective element of an internationally wrongful act and is scarcely likely to tneail international responsibility on the part of that Satete; it is governed by a different legal order, and whether that order is national or of another kind is largely immaterial."[387]

Since then, no international organization has undertaken detailed studies on the law of State responsibility for contractual breach. While there have been substantial efforts to codify rules regarding international transactions such as the sale of goods, documentary credits and bills of exchange, among others, little attention has been paid to the development of public international law rules addressing the diverse aspects of foreign investment contracts.

Nonetheless, various international organizations have embarked on partial soft law codification efforts. For example, the United Nations released the Draft Code of Conduct on Transnational Corporations and the World Bank released the Guidelines on the Treatment of Direct Foreign Investment.[388] However, these guidelines leave many issues unaddressed and it remains to be seen what their impact will be in practice.

The ICJ has done little to advance the law in the field of foreign investment, having missed the opportunity to contribute to the field in two important cases: the 1952 *Anglo-Iranian Oil Company* case[389] and the 1970 *Barcelona Traction* case.[390] Moreover, arbitral decisions by ICSID and other tribunal decisions concerning State responsibility for contractual breach have been contradictory. A famous article

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[386] Claim by the British Government before the International Court of Justice in 1951 (*U.K. v. Iran*), 1952 ICJ Pleadings 124 and Oral arguments and Documents 84 (July 2). Also, claim by the Greek Government in the "Ambatielos" Case (*Greece v. U.K.*), 1953 ICJ Pleadings 71 (May 1953. Similarly, argument advanced by Switzerland in the Norwegian Loans Case (*France v. Norway*), 1957 ICJ Pleadings 61 (July 1957). *Fourth Report on International Responsibility*, 1959(2) ILC Y.B. 1 (None of the cases, in which these arguments were made, ended up in judgment on the issue. *Sixth Report* on International Responsibility, 1961 (2) ILC Y.B. 1.

[387] *Fifth Report on State Responsibility*, 1976(2) ILC Y.B. 3, p. 7.

[388] Commission on Transnational Corporation, *Proposed text of The Draft UN Code of Conduct on Transnational Corporations*, 12 June 1990 https://digitallibrary.un.org/record/95333/files/E_1990_94-EN.pdf, (last accessed 12 November 2023; *The World Bank Guidelines on the Treatment of Foreign Direct Investment*, 21 September 1992, 31 ILM 1363.

[389] *Anglo-Iranian Oil Co. case (United Kingdom v. Iran),* Judgement, 22 July, 1952: ICJ Rep., p. 93.

[390] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement, 5 February, 1970: ICJ Rep. p. 3. (In this case, the Court found that it had no jurisdiction. However, in the ELSI case, the ICJ dealt with certain important issues, such as: the requisition of a US company in Italy in violation of the bilateral FCN treaty between the USA and Italy, the interpretation and status of the treaty, the exhaustion of local remedies, and compensation for damages).

written by Brigitte Stern discusses three important cases (*Texaco v. Libya*, *BP v. Libya*, and *Liamco v. Libya*) that originated in similar factual scenarios but were resolved differently.[391]

The conundrum of State accountability regarding foreign investment contracts is exacerbated by the lack of an appropriate corpus to regulate the matter comprehensively. Indeed, any search for appropriate wide-ranging contractual rules applicable to State contracts within public international law will be in vain. In the absence of any over-arching corpus, decades ago tribunals started to make use of general principles of law in accordance with Article 38 of the ICJ Statute. In doing so, tribunals embarked upon the process of "internationalizing" foreign investment contracts.

III. The "internationalization" of contractual obligations via umbrella clauses?

In principle, a State's breach of contract with an investor may simply be treated as a matter of domestic law. In such circumstances, investors are forced to resolve a contractual dispute in the State's courts, under its domestic laws and vulnerable to unilateral variation. It was in this context that the umbrella clause first emerged.

Umbrella clauses are provisions in investment treaties by which States agree to comply with all their contractual obligations to investors. The typical language provides that the host State "shall observe any obligation it may have entered into with regard to investments." A breach of contract thus becomes a breach of the umbrella clause. As such, the legal effect of umbrella clauses is to transform contractual claims into treaty claims.[392] If umbrella clauses are meant to stabilize contractual rights in the same way as stabilization clauses, then they can be understood to continue the work of engineering inviolable contractual rights, thus reintroducing internationalization into investment protection.

Umbrella clause claims are unusual because at times they evidence an overlap between contractual claims and treaty claims, which have traditionally been considered as distinct. If the host State breaches an umbrella clause within an investment treaty, its international responsibility will be engaged due to its violation of a treaty obligation. What is less clear is whether a host State's breach of a separate contractual obligation is sufficient to violate the umbrella clause.

This confusion arose in the aftermath of the *SGS v. Pakistan* case[393] and umbrella clauses have been the subject of intense debate ever since. Article 11 of the Switzerland-Pakistan investment treaty provided the following: "Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party." According to the decision in the *SGS v. Pakistan* case, the umbrella clause cannot have the effect of automatically elevating breaches of contract under domestic law to breaches of the treaty.[394] In rejecting SGS's interpretation of Article 11 without proposing an alternative, the award has been criticized for appearing to strip Article 11 of any legal effect.

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[391] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 1978(17) ILM 1.; *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 10 October 1973, 53 ILR 297; Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, Award, 12 April 1977, 20 ILM 1.

[392] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 992 (the tribunal held that the "…Umbrella Clause imposes on the State, as a matter of Treaty law, the observance of obligations stemming from a written agreement concluded between its government or agencies and the investor").

[393] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 06 August, 2003.

[394] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶ 172; *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶¶ 1011-1013.

The divergences that exist between the different theories of umbrella clauses are reflected in contemporary cases. In two claims launched against Paraguay (one by BIVAC, the other by SGS), the arbitral tribunals arrived at exactly opposite conclusions regarding the jurisdiction of national courts and tribunals as provided for in the umbrella clause in the investment treaty.[395] Such decisions have highlighted the question of whether umbrella clauses apply to obligations arising from separate investment contracts between the investor and the host State. The importance of determining the effectiveness of an umbrella clause is that an investment tribunal constituted under an investment treaty would have jurisdiction over breach of contract claims since it is also a breach of the umbrella clause. When viewed critically, this could mean that the investor may seek redress for a breach of any investment contract through the arbitration mechanism provided in the investment treaty.

It should be borne in mind that each case is unique; both the particular language of the clause and structure of the treaty are relevant and must be considered. The diversity in the wording of these types of clauses is perhaps one of the reasons for the disparity in their interpretation by tribunals. Controversies and the lack of conclusive answers to issues raised by umbrella clauses make them less attractive to States. Even though reliance on such clauses has a relatively low rate of success, the trend to exclude umbrella clauses is gaining momentum.

IV. The difference between contractual and treaty claims

An international investment contract is not a treaty, nor is it even analogous to a treaty. Hence, the application of treaty rules to investment agreements by analogy should not be accepted. In this regard, the Iran-United States Claims Tribunal held in the *Amoco v. Iran* case[396] that while "a State has the duty to respect contracts freely entered into with a foreign party," this rule must not be equated with the *pacta sunt servanda* principle. States are not bound by their contracts with private parties in the same way that they are committed by treaties entered into with other sovereign States.

In the landmark *Vivendi v. Argentina* decision, the ICSID arbitral tribunal held that…

> […] whether there has been a breach of the BIT and whether there has been a breach of the 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 […].[397]

Vivendi v. Argentina is considered the leading case in shining light on the contract-treaty distinction. According to its award, the breach of an investment contract must be assessed under the proper contract law, while the breach of an investment treaty is a question for international law. This ruling was endorsed in many subsequent ICSID decisions. For instance, in *Impregilo v. Pakistan,*[398] the tribunal held that "[e]ven

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[395] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, 29 May 2009, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 141–142 (The BIVAC tribunal declared the claim inadmissible since the parties had agreed to the exclusive jurisdiction of national courts); SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, 12 February 2010, Decision on Jurisdiction, ¶¶ 162–171 (On the contrary, the SGS tribunal decided that the forum selection clause did not bar its jurisdiction.)

[396] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, *National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56 (310-56-3), Award, 14 July 1987, ¶¶ 177-178.

[397] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 03 July 2002), ¶ 96.

[398] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Award, 22 April 205, ¶¶ 275-278 (In this case, the ICSID tribunal held that the taking of contractual rights could, potentially, constitute expropriation (or a measure having an equivalent effect). The tribunal noted that the case at hand did not involve nationalisation or expropriation in the traditional sense of those terms, but behavior that could, at least in theory, constitute an indirect expropriation (or a measure having an effect equivalent to expropriation). *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 119-123.

if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries."[399]

However, overlapping may occur. When a State commits, through the signing of a treaty, to comply with a contract, any breach of the contract will also constitute a breach of an international obligation – except when a State commits the breach to avoid committing another wrongful act. Even though they are conceptually different, the breach of a contract may, in certain contexts, also entail or imply the breach of a treaty.[400]

V. Law applicable to contractual claims

International investment contracts also often regulate the exploitation of natural resources. These contracts are referred to as "concession agreements," but this is not a strict term of art. This terminology conceals the bilateral character of the transaction and is often used in reference of the area in respect of which the agreement is made. This is why some prefer to call them "economic development agreements"[401] or "*convention d'établissement.*" These agreements, usually of long duration, involve a variety of obligations mostly performed in the territory of the host State and within the framework of its administrative system. Even though these contracts are usually governed by the law of the host country, they also give rise to international legal obligations related to the treatment of the investor.

Unlike ordinary commercial arrangements, international investment contracts raise significant public policy considerations. Elements of public law are relevant during their negotiation, conclusion, operation, and termination. Since terminating foreign investment contracts may have implications for public goods or necessities, the rules regarding damages may differ from those typically found within ordinary commercial agreements. Termination rights may also be different: while commercial contracts and foreign investment contracts may be terminated due to contractual breaches, international investment contracts may also be terminated where performance of the contractual obligations is made wholly or partially impossible due to State action.[402]

The elements of public policy-based control and discretion that are common to international investment contracts may favor the State over the investor and may subject the other party to the risk of interference in its commercial expectations for entering into the agreement. It is at this juncture that public international law may become important.

In the *Ambatielos* case, the ICJ[403] stated that it "[…] cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character [of a contract and an international agreement]. It is nothing more than a concessionary contract between a government and a foreign corporation."

In fact, not every breach of contract generates State responsibility under public international law. State responsibility is relevant, for instance, when it comes to determining remedies. However, contractual remedies in domestic laws, such as punitive damages, liquidated damages, or contractual penalties are not available and cannot be awarded under public international law.

State responsibility cannot be invoked under public international law for several reasons. First, foreign investors are not considered full subjects within international law, and State contracts do not, in

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[399] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Award, 22 April 2005, ¶ 258.
[400] (In MTD, the tribunal held that it "…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 undertaken by the Respondent and the Claimants and what their scope was under Chilean law).
[401] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya*, Award on the Merits, 19 January 1977, 1978 (17) ILM, 1, ¶¶ 36, 40-45(c).
[402] UNCTAD, *State Contracts*, November 2004 https://unctad.org/system/files/official-document/iteiit200411en.pdf (last accessed 12 November 2023), p. 5.
[403] The *Ambatielos* Case (*Greece v. U.K.*) 1953 ICJ Pleadings 71 (May 1993). 11 (*U.K. v. Iran*), 1952 ICJ 111 *et seq.* (July 1952). 12 Id. at 112. ICC Case 3327, Award. 1981, I Collection of ICC Awards 433.

principle, create public international law obligations for either of the contracting parties. Moreover, it would be unfair if a private alien could invoke State responsibility for breach of contract under public international law because the investor has different concerns by comparison to those of the State, such as the welfare of the country or equivalent obligations to the public. As such, foreign investors should not be entitled to take advantage of the State party's superior position as a subject within public international law by acting as an international subject without the corresponding duties or obligations.

In contract-based disputes subject to arbitration, parties can subject their contract to the law of the host State, or some other law. If the contract is silent, tribunals recur to private international law techniques. In the 1929 case of *Payment of Various Serbian Loans Issued in France*, the PCIJ decided that agreements that are not concluded between international law subjects will be governed by national law.[404] As a result, an agreement that is not a treaty will be subject to domestic law or non-State law when applicable.

When it comes to ICSID arbitration, in the *travaux préparatoires* of the ICSID Convention, the Austrian delegate expressed that "in cases where an investor complained of action which affected the performance of the contract", the tribunals were "merely a substitute for the domestic courts and would apply municipal law."[405]

Several cases illustrate this conclusion. In *(SOABI) v. Senegal*, an ICSID tribunal ruled 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." The tribunal referred to the agreements under discussion as "government contracts", subject primarily to the Senegalese Code of Governmental Obligations.[406] In turn, the tribunal in *Aucoven v. Venezuela* applied national law to the merits of the contractual claims.[407] Similarly, in *Noble Ventures v. Romania*, the tribunal recalled the "[…] 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."[408] Similarly, the Iran-United States Claims Tribunal applied national law to questions relating to the relationship within the investment contract, as was the case in *Sea-Land Service, Inc. v. Government of the Islamic Republic of Iran*, *Ports and Shipping Organizations (PSO)*[409] and in *Dic of Delaware, et al. v. Tehran Redevelopment Corp. (TRC), et al.*, which dealt with the enforceability of an alleged verbal agreement for the third phase of a project.[410] Following the same logic, the tribunal in the NAFTA case, *Waste Management v. Mexico*, did not apply public international law to a mere breach of contract.[411]

VI. Breach of contract in violation of public international law

For a State to incur responsibility under public international law for breach of contract, the State's actions must have been arbitrary, violating an agreement in a clear and discriminatory departure from the governing law or from the principles generally recognized internationally. State arbitrariness can also result

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[404] *Serbian Loans* case in (*France v. Serbia*), Judgment, 12 July 1929, PCIJ Rep. Seria A No. 20/21 p. 41.4.
[405] History of the ICSID Convention, ICSID Secretariat, 1970, vol. II-1, p. 400.
[406] *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 25 1988, ¶ 5.02.
[407] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, ¶¶ 222–227.
[408] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award 12 October 2005, ¶ 53; *SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 05 August 2003, ¶ 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').
[409] *Sea-Land Service, Inc. v. Government of the Islamic Republic of Iran*, *Ports and Shipping Organizations (PSO)*, JUSCT Case No. 33, Award, 22 June 1984, Section II(A)(i).
[410] *Dic of Delaware, Inc. et al. v. Tehran Redevelopment Corp., et al.*, IUSCT Case No. 255 (176-255-3), Award, 26 April 1985, Section IVB(1). (Regarding enforceability, the tribunal applied Iranian law to hold that the agreement was unenforceable due to insufficient evidence of the definiteness of the agreement).
[411] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April, 2004.

from a denial of justice, such as limiting access to its courts, refusing to arbitrate after clearly committing to do so, or failing to comply with a judicial or arbitral award.[412] In this sense, denial of justice is an international delict that gives rise to causes of action under public international law.[413]

The Commentary to Article 4 of the ILC's Draft Articles on State Responsibility states that a contractual breach by a State does not automatically entail a breach of international law. Instead, it suggests that "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."[414]

Following the same logic, Section 712 of the Restatement of the Foreign Relations Law of the United States (revised in 1986) rejects the principle that governmental acts to alter or abrogate the terms of a State contract constitute violations of public international law. Actions of a more egregious nature are required, such as a discriminatory breach or a breach of contract for governmental (rather than commercial) reasons.[415]

It is widely accepted in arbitral precedents that a contract cannot, in itself, create legitimate expectations under public international law. For instance, in *Parkerings v. Lithuania*,[416] *Duke v. Ecuador,*[417] and *Hamester v. Ghana,*[418] the existence of legitimate expectations and of contractual rights were considered to be two entirely separate issues. As decided in the latter case, "[…] it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed" to advance a claim for a violation of the fair and equitable treatment standard.[419] The tribunal in *Impregilo v. Argentina* came to a similar conclusion.[420]

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[412] *Barcelona Traction, Light and Power Company., Limited. (Belgium v. Spain)*, Separate Opinion of Judge Tanaka, 5 February 1970 ICJ Rep. 114 p. 144 [FN 1] (In his Separate Opinion, Judge Tanaka stated that "denial of justice occurs in the case of such acts as- 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it…But no merely erroneous or even unjust judgment of a court will constitute a denial of justice. .")

[413] *Robert R. Brown* (*United States v. Great Britain,*1923-(4) RIAA 120, pp. 128-129. (In this case it was held that the cancellation of a public tender for mining licenses by the Transvall government after the bids were submitted deprived the claimant of his right to a mining license. This deprivation was the result of all three branches of the Government conspiring to ruin the enterprise, which was "a denial of justice within the settled principles of international law").

[414] Intl. Law Commission, Arts. on Responsibility of States for International Wrongful Acts with commentaries, Article 4, Comment 6.

[415] The commentary on Section 712 of the Restatement of the Foreign Relations Law of the United States provides, "[u]nder Subsection (2) a State is responsible under international law for such a repudiation or breach only if it is discriminatory […] or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons and the State is not prepared to pay damages".

[416] *Parkerings-Compagniet A.S. v. Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 344.

[417] *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador,* ICSID Case No. ARB/04/19, Award, 12 August 2008, ¶ 358. (The tribunal established that in its dealings with Electroquil, INECEL did not behave in a manner different from that of a "normal" contracting party. The establishment of the Payment Trust did not imply the exercise of sovereign power. According to the tribunal, any private contractor may undertake to establish a payment trust. As such, Electroquil's expectations under the PPA 95 must be regarded as "mere" contractual expectations that are not protected under the BIT.

Gustav F W Hamester GmbH & Co. KG v. Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2008, ¶ 335.

[419] *Gustav F W Hamester GmbH & Co. KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2008, ¶ 337. (Thus, even if the impugned actions were "sovereign" in nature and attributed to Ghana, the alleged contract violations could not have amounted to a violation of the FET standard based on the theory of "legitimate expectations.")

[420] *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award 21 June 2011, ¶¶ 292, 294. (The tribunal considered the existence of legitimate expectations and the existence of contractual rights as two separate issues. Contractual acts "[…] cannot amount to a violation of the fair and equitable treatment standard based on a theory of legitimate expectations."

Long before then, in the *Neer* case decided in 1926, the tribunal had already held on the issue of denial of justice that the "minimum standard of treatment" for aliens under customary international law entails "an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency."[421]

The *Neer* case did not deal with contractual protection, as did the 1927 decision in the *Chattin* case[422] regarding contractual non-performance. The tribunal did not consider mistreatment a breach of contract that was sufficient, in and of itself, to engage State responsibility. As such, the tribunal preserved denial of justice as the minimum standard of treatment recognized within the *Neer* case.

Case law emerging after the *Neer* case dealing with customary international law determined that aggravating circumstances turn a breach of contract into a breach of public international law, such as arbitrariness[423] and State exercise of its sovereign power[424] to unduly interfere with contract performance.

The legal basis for finding breaches of contract changed when States gradually stopped practicing diplomatic intervention to protect the interests of their nationals that had entered into international investment treaties. Today, injured investors can directly pursue claims against the host State.

Previously, within international investments it was thought that any denial of justice violated the international minimum standard within customary international law. Now, the "fair and equitable treatment protection" standard is included in virtually all investment treaties, allowing investors to pursue States internationally for breaches of contract that amount to its violation. In this regard, the approach for interpreting fair and equitable treatment in the context of contractual breaches approximates it to the denial of justice under the minimum standard within customary international law.

The doctrines of non-arbitrariness and respect for due process have emerged from arbitral precedents as the key components within the fair and equitable treatment protection standard. For instance, while bad faith conduct undoubtedly violates the standard, it is often not identified as its component in international jurisprudence. Other components of the fair and equitable treatment standard identified by tribunals include the safeguarding of investor expectations, freedom from State coercion for renegotiations and cancellations, and harassment.

The following question arises: what additional factor is required for a breach of contract by a State to become a breach of public international law?

VII. Additional factors for considering breach of contract a breach of international law

Arbitral precedents have failed to determine in a consistent manner when breaches of contract by a State constitute breaches of public international law. As discussed below, various responses to this question have been advanced.

A. Exercise of power (*iure imperii*)

The *iure imperii* exercise of power is the dominant approach to determining breaches of public international law by States. In this regard, a distinction must be made between State actions performed *iure*

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[421] *Neer case (United States v. United Mexican States),* 1926 (4) RIAA 60, p. 61-62.
[422] B. E. Chattin (United States v. United Mexican States), 1927 (4) RIAA 282.
[423] *El Triunfo Company Case (United States v. El Salvador), 1902* (5) RIAA 467. *Dickson Car Wheel Company (United States v. United Mexican States),* 1931 (4) RIAA669; *Mexican Union Railway*(*Great Britain v. United Mexican States),* 1930 (5) RIAA 115.
[424] *Delagoa Bay Railway Arbitration (USA v. Portugal)*, in US Department of State, Papers Relating to the Foreign Relations of the United States (Washington, DC: Government Printing Office, 1900). *Cheek Claim (USA v. Siam)*, Award, 21 March 1898. *Robert R. Brown (United States v. Great Britain), 1923(*4) RIAA 120.

gestionis (for commercial or private matters) and State actions performed *iure imperii* (in the exercise of sovereign authority or *puissance publique*).[425]

State breaches that could also have been committed by a private party are not considered acts *iure imperii*, and do not violate public international law. This was the case in the *Bayindir v. Pakistan*[426] and *Impregilo v. Pakistan* decisions.[427] In the latter award, the tribunal held that "[o]nly the State in the exercise of its sovereign authority ('*puissance publique*'), and not as a contracting party, may breach the obligations assumed under the BIT."[428] Similarly, in *Azurix v. Argentina*,[429] the tribunal held that although a State or its agencies may deficiently perform a contract, this will not result in a breach of the provisions of the treaty unless the State or an agency thereof has gone beyond its function as a mere party to the contract and has exercised the specific functions of a sovereign.

In *Bureau Veritas v. Paraguay*, the tribunal stated that Paraguay did not exercise its sovereign powers via the adoption of legislation or regulatory acts, did not exercise police powers, nor did it ignore any court judgment. Further, it noted that "[a]ttempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons."[430] Something more is required.[431]

Criticisms can be directed to this approach of distinguishing between acts *iure imperii* and *iure gestionis*. Nowhere in Articles 4 and 12 of the ILC Draft on State Responsibility is there a requirement to prove any particular motive, whether financial or "governmental" in this regard.[432]

B. Other elements beyond acts *iure imperii*

In *Waste Management v. Mexico,*[433] the tribunal decided that if a violation of a contract amounted to "an outright and unjustified repudiation of the transaction," a breach of public international law may be found in cases where the aggrieved party was left with no remedy to address the problem. The tribunal in this case both alluded to the repudiation of the transaction and to the lack of capacity to address courts or an arbitral tribunal.

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[425] *Saudi Arabia v. Nelson*, 507 U.S. 349, pp. 359–360 (1993) In *this case*, the United States Supreme Court Justice Souter, stated that: "Under the restrictive, as opposed to the absolute, theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*) […] a state engages in commercial activity under the restrictive theory where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market."

[426] *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 377.

[427] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

[428] *Impregilo S.p.A.v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 260; *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 299. (In this case, the arbitral tribunal stated: "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 a significant interference by governments or public agencies with the rights of the investor").

[429] *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12 Award, 14 July 2006, ¶ 315.

[430] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay,* ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 09 October 2012, ¶ 241.

[431] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay,* ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, ¶ 227.

[432] *Report of the ILC on the work of its fiftieth session*, 1998(2) ILC Y.B. 1, ¶ 35. (All those members of the Sixth Committee who responded to the specific question on this issue confirmed that classifying the acts of State organs as *iure imperii* or *iure gestionis* was an irrelevant consideration.

[433] *Waste Management Inc. v. United Mexican States,* ICSID Case. No. ARB/00/3, Award, 30 April 2004, ¶ 115.

Action taken by States according to general unquestionable legislation not specifically directed against the contracting party would probably not be considered arbitrary.

The following actions may violate the fair and equitable treatment standard: cumulative acts and omissions, coerced renegotiations, bad faith, and arbitrariness.[434] In this regard, the 2017 Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) provides in its Article 8.10(2) that breaches of fair and equitable treatment may occur…

[…] if a measure or a series of measures constitutes: (a) denial of justice, in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment […].

Confiscatory breach, in which the investor's rights are taken away without adequate compensation, is internationally wrongful.

Some decisions are erroneously cited as establishing that a breach of contract amounts to a treaty violation. For instance, in *Mondev v. USA*[435] the tribunal rejected the claim that the local court's decision amounted to denial of justice. This ruling in no way states that a breach of contract amounts to a breach of treaty. The *SGS v. Paraguay* decision has also been erroneously cited as establishing that a violation of contract leads to a breach of public international law. This interpretation is wrong.[436] At most, the *SGS v. Paraguay* decision recognizes that non-payment violates the fair and equitable treatment if proof of bad faith or arbitrariness can be found.

VIII. Private law and foreign investment contracts

Investment treaties do not properly assimilate contracts to property, but they have assimilated contracts to investments. When treaties list contractual rights as protected within the agreement, such rights will become subject to expropriation. Several investment treaties[437] have included contracts in the definition of "investment", which has led arbitral precedents to develop inconsistently on this issue. A problem arises here because tribunals often confuse the logics of contract and property.

The argument in favor of assimilating contract law and foreign investment legal protection holds that intrusion in contractual rights is a form of deprivation of property rights, and public international law prohibits such interference unless done for a public purpose, on a non-discriminatory basis, and appropriate

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[434] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 354 (In this case, the tribunal agreed with the Respondent that in this context the State had not used its *jure imperii* and consequently, the contractual breach had not reached the level of a violation of the principle of fair and equitable treatment.

[435] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)99/2, Award, 11 October 2002. (The decision has been misinterpreted to have concluded that a breach of contract is also constitutes a breach of international law. A closer reading of the award reveals that this may be an erroneous interpretation).

[436] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, 12 February 2010, Decision on Jurisdiction, ¶ 146 The decision turned on issues of jurisdiction. The tribunal stated the following: "[a] State's non-payment under a contract is, in the view of the Tribunal, capable of giving rise to a breach of a fair and equitable treatment requirement, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value. Whether anything more than a wrongful refusal to pay, and, if so, what more, is required to prevail on a claim of breach of a fair and equitable treatment standard are questions for the merits."

[437] Also § 712 of the United States Restatement on Foreign Relations Law (1987) makes applicable the rules on expropriation of property to contractual interference.

or fair compensation is offered.[438] Thus, the breach of contractual rights is considered as an act of expropriation or deprivation of property rights.

However, property claims are different from contract disputes. Contracts involve the parties' individual choices. As such, the underlying logic of contract law is one of customization, which can be contrasted with the underlying logic of property law that focuses on standardization. Arbitral investment tribunals implicitly, but routinely, interpret investment instruments as generating a wide set of rigid implied terms that are applicable to investment contracts.

The drafting of rigid and stable protections within treaties make sense when property is involved. For instance, clear property law provisions allow investors to properly plan and execute a land development project. In these cases, mandatory property law rules offer little room for agreeing parties to choose how the law will apply to their holdings. For example, *numerus clausus* is one of the fundamental principles of property law and refers to the idea that both the number and content of property rights is limited. By contrast, party autonomy is the dominant principle within contract law. As such, contract law can be understood to follow the logic of choice.

In their contracts parties make plans. The drafting of robust and specific contracts prevents opportunistic behavior that might otherwise occur over the course of the relationship and hinder the fulfilment of the contractual obligations. Moreover, assurances given by one party encourages the other party's reliance, thus increasing the value of the transaction. For instance, a factory owner may be unwilling to spend money to customize machinery for a particular transaction unless he has full assurance that the other party will not breach the contract.

Treaties typically do not specify how they relate to contracts. They do not detail how exactly they apply, for instance, with respect to contractual breach, defenses, forum selection, damages, and the rights and obligations that generally emerge from the contractual relationship. Rather, treaties generally apply to agreements either explicitly or implicitly, and sometimes even equate the breach of the State contract with the violation of the treaty due to the presence of the umbrella clause. Therefore, where treaties do not include specific provisions relating to their interaction with contract law, contract rules must be applied.

In sum, investment treaties do not clarify the scope and content of the rules contained in the treaty as these apply to contracts. Moreover, investment treaties do not address the ways in which the rules contained therein interact with contracts and mandatory rules. Arbitral decisions on this topic have generated contradictions: most tribunals assume that treaty rules are mandatory and that only rarely can these rules be discarded by agreement of the parties.

This confusion stems from equating treaty rights to property-style rules, which prevents parties from including specific contractual provisions relating to substantive duties, forum selection, and damages. Tribunals tend to apply the treaty over agreed-upon contractual terms. By doing so, the contractual bargain may be rewritten, which hampers the parties' capacity to negotiate risk and price at the outset. In that case, parties are less incentivized to contract in the first place, which does not benefit States pursuing foreign investments nor investors.

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[438] Contract as property was recognized in the Permanent Court of Arbitration case N*orwegian Shipowners' Claim (Norway v. United States)*, 1922 (1) RIAA 307; *Shufeldt Claim (Guatemala v. United States),* 1930 (2) RIAA 1081. The PCIJ assimilated contractual to property rights in: *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (Merits, Judgement, 25 May 1926, PCIJ, Rep. Seria A, No. 7, p. 12; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶ 165. (Following similar logic, the tribunal in *SPP v. Egypt* held that "it has long been recognized that contractual rights may be indirectly expropriated."); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, 41 ILM 897 (*SPP v. Egypt was cited in Wena Hotels v. Egypt)*; *Bayindir Insaat Turzim Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction (November 14, 2005), ¶ 255(Furthermore, in *Bayindir v.Islamic Republic of Pakistan* the tribunal decided that contractual rights could be subject to expropriation.)

Cases are contradictory in this regard. Some decisions consider investment treaties as default rules to be applied unless the parties use language that clearly and specifically precludes their application, as decided in the *Kardassopoulos* and *Crystallex* cases.[439]

Other tribunals consider treaty provisions as simple default rules that can be left aside by the parties.[440] This was the case, for instance, in *SGS v. Philippines* and *Oxus Gold v. Uzbekistan.* Further, when considering the relationship between contract arrangements and the standard of fair and equitable treatment, the ad hoc Committee in *MTD v. Chile* reasoned that:

The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[441]

In extreme cases, it is possible that the contract completely prevails over the treaty. In these cases, domestic law provides background rules. This hypothesis, however, runs contrary to the text of most treaties when considering contracts as covered investments. Another position holds that treaties do not prevail over the parties' express agreement but provide rules that supplant any conflicting domestic law rule. This, for instance, is the approach of the Vienna Convention on the International Sale of Goods (CISG). Parties may exclude the application of the CISG, derogate from it, or vary the effect of any of its provisions (Article 6).

The *Parkerings v. Lithuania* decision follows this logic, implicitly considering the fair and equitable treatment principle as a default rule. The decision also held that parties are free to "ratchet up" the level of protection that fair and equitable treatment would entail by negotiating for a stabilization clause in the contract.[442] In other words, treaty and contract law cannot be neatly separated from one another, but the parties can control the scope of fair and equitable treatment. The *Parkerings* case and subsequent similar decisions differ markedly from the *Argentine Gas* cases in treating the fair and equitable treatment principle as a default rule, the scope of which can be altered by contract.[443]

On the opposite end, certain tribunals hold that treaty terms that impose mandatory rules cannot be waived. The *Argentine Gas* cases provide the archetypal example of this.[444] Once triggered, the fair and equitable treatment principle applies equally to property and to contracts and remains unaffected by anything the contract says about the scope of stabilization, or even the waiver of treaty rights. In this sense, the treaty effectively displaces any contractually agreed-upon rule. As such, the fair and equitable treatment

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[439] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/l1/2, Award, 04 April 2016, ¶ 482; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18; and ICSID Case No. ARB/07/15, Award, 03 March 2010.

[440] *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction 29 January 2004, ¶ 134; *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award 17 December, 2015), ¶ 958; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, 29 May 2009, Decision of the Tribunal on Objections to Jurisdiction. ¶ 148.

[441] *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment 21 March 2007), ¶ 67.

[442] *Parkerings-Compagniet A.S. v. Lithuania*, ICSID Case No. ARB/05/8, Award 11 September 2007, ¶ 332. In similar lines, see also *EDF Servs. Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 08 October 2009, ¶ 217; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 , Award, 8 July 2016.

[443] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 2007*; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award 22 May 2007; *CMS Gas v. The Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005.

[444] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *CMS Gas v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

principle leaves States and investors stuck with an implied stabilization clause, notwithstanding any agreement on the contrary.[445]

Mandatory rules are justified when values should be protected, such as the intrinsic logic of contract, the equality of information, the protection of unsophisticated parties, and extrinsic public goods such as anti-corruption initiatives.

The optimal approach seems, at least in principle, to privilege contractual arrangements over background treaty rules. If background treaty rules are given precedence, there must be a justification in terms of values, incentives and risks, and this justification may not be based on broad formalisms regarding the relationships between treaty and contract, or international law and domestic law. In this way, States secure their future regulatory autonomy by including risk-control mechanisms in their contracts such as limitations on damages and *force majeure* clauses. If treaties call for the respect of investment contracts, treaty-contract matters should be drawn from the private law logic of the contract.

Neither rigidity nor flexibility clearly favors one party or the other. Rigidity affects the State's future regulatory autonomy. If foreign investors may flexibly negotiate secure contractual obligations in their contracts with States, in the end, the investment is protected when the terms of the bargain are followed, rather than when a treaty is invoked to re-write the agreement.

Treaties should be drafted with these intricacies in mind. Treaties may expressly declare some norms as mandatory, or even as default rules with specific opt-out provisions. Treaties that are drafted in this way will ensure predictability and efficiency for both States and investors.

REC. 4.1 In order to foster greater predictability and efficiency for both States and investors, the absence of an international corpus of substantive law applicable to international investment contracts should be borne in mind:

- by legislators considering reform of the domestic legal regime related to international investment arbitration;
- by negotiators of investment treaties, who should be encouraged to include clear provisions:

iii. on the scope and content of the rules contained and their application to investment contracts and,

iv. to enable contracting parties to exclude the application of the treaty, derogate from it or vary its effect, expressly declare some norms as mandatory, or as default rules, with specific opt-out provisions; and

- by parties to international investment contracts and their counsel in the drafting of such contracts.

PART 5: EVOLUTION AND RECENT RELEVANT DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW

I. Introduction

Marginal or not, private international law has its role to play in investment arbitration. Over the past few decades, this discipline has evolved significantly, but its development has not generally received sufficient attention from other legal fields. Study of these developments can bring clarity to several issues related to the applicable substantive law in investment arbitration.

Throughout the nineteenth century as nation-States were consolidated, private international law emerged as an independent discipline. The "international" issues within private law proliferated, in matters such as the law that should apply to a contract that was entered into in one State and performed in another. Similarly, conflict of laws problems also arose in federal systems such as the United States.

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[445] *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶ 225 (In *Venezuela Holdings v. Venezuela*, the tribunal held that it could not give effect to potentially limiting compensation provisions in the underlying concession contract.)

In the common law system, until rather recently, private international law has been considered primarily as synonymous with "conflict of laws." Within civil law systems, the term "private international law," first employed by French jurist Jean-Jacques Foelix in 1843, became commonplace to describe an independent discipline in the civil law world. Most of the theoretical debates that have occurred historically within private international law relate to the question of determining the applicable law. (This issue is dealt with in more detail below.) Nevertheless, private international law is also concerned with international jurisdiction and the recognition and enforcement of foreign judgments. Under its traditional interpretation, in both the common law and civil law systems, private international law was limited to this trilogy of issues. In more recent years, the term has been vastly expanded to include substantive rules in private law that govern the relationships between parties in different states.

Conflict of laws and choice of law rules are not applied directly to address substantive issues within a case; but rather, constitute a set of rules to help the adjudicator determine which system of law is to be applied to decide the substantive issue. In the case of arbitration, for example, this might be either the law of the host State, the investor's State, or that of a third State. The "point of connection" or "connecting factor" is the technical means by which the adjudicator will determine the applicable law that will be used to resolve the dispute. *Lex causae* is the expression that is generally used in this regard.

Connecting factors such as territoriality (*lex fori*), nationality (*lex patriae*), and domicile (*lex domicilii*) relate to the capacity of the parties to contract. Connecting factors may also refer to elements of the parties' substantive relationship, such as the place of performance (*lex loci executionis*), place of contracting (*lex loci contractus*), or the law selected by the parties (*lex voluntatis*) to govern their international contract. Other examples of connecting factors include the place of the wrongdoing (*lex loci delicti*) in tort law and the location of the property (*lex rei sitae*) in property law.

Bilateral or multilateral investment treaties typically do not include choice of law rules. As such, arbitral tribunals resort to the choice of law rules that are provided within the claims mechanism chosen. Detailed choice of law rules are, however, relatively rare within international dispute resolution instruments, and tribunals therefore typically make use of private international law and its principles to fill any gaps. Some choice of law rules, such as the *lex rei sitae* regarding immovables, have attained such universal recognition that their application in foreign investment as a general principle of private international law is not controversial.

Private international law also deals with the problem of "characterization", which is particularly relevant in investment-related matters. Some legal systems consider the transfer of tangible property a "property" issue, applying the *lex rei sitae* rule. On the other hand, other systems consider it a "contracts" issue, in which the choice of law rule will likely be different (related to the place of performance, closest connection, etc.). Matters connected to expropriation, for instance, will often require an inquiry into whether the property has been transferred and therefore acquired by the investor. In these circumstances, legal rules of universal application should govern, rather than parochial rules that come from particular domestic legal systems.[446] These universal principles and rules are often enshrined in international instruments, such as the Rome I Regulation on Contractual Obligations, referred to below.[447]

II. Brief historical note

At times, substantive rules of purported universal application have prevailed within private international law. At other times, conflict of laws rules have triumphed.

A. Roman law

Roman law did not develop a conflict of laws system. The *ius gentium* applied among foreigners or between them and Roman citizens, and the *ius civile* governed the relationships between Roman citizens.

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[446] *Macmillan Inc. v. Bishopsgate Investment Trust P.L.C.,* (No. 3) (1996) 1 WLR 387.
[447] See Part 5, Section IV, Subsection A.

In this personality-based system, citizenship therefore determined which law would be applied to a particular dispute between individuals.

The *ius gentium,* which was also Roman substantive law, contained several international elements – many of them rules derived from Greek law – that were to be applied to "transnational" relationships at the time. Some scholars proposed the application of this transnational or universal substantive law (the *ius gentium*) in the Middle Ages. Had this system maintained its relevance, what we now understand as private international law would have been identified with the *ius gentium.* However, private international law ultimately developed primarily into a conflict of laws endeavor.

B. Statutists

The true origins of the conflict of laws mechanism can be traced to continental Europe during the Middle Ages. With the consolidation of Italian cities such as Florence, Bologna, Milan, Pisa and Padova, the linkages between people no longer arose as a result of their allegiances to the same feudal lords, but due to their residence in the same city. As a result, conflict of laws issues arose due to the diversity of applicable municipal laws and the increase in commerce between cities. Formulas developed to deal with these conflict of laws issues, many of which still exist today. For instance, the *lex rei sitae*, *lex domicilii* and the *lex loci contractus* all trace their roots to the Middle Ages.

However, the *ius commune* has always operated as the general legal framework for resolving legal disputes. Therefore, the central question that emerged at the time was to what extent this "common law" could be excluded by statute.

Bartolus of Sassoferrato (1314-57) is considered the father of private international law. His work introduced notable doctrinal refinements to the state of law at the time. Prior to his scholarly writings, a unilateral legal perspective had prevailed that concentrated on the solutions to conflict of laws problems that were offered by the local law.

One of Bartolus' primary contributions to the development of private international law was the introduction of a multilateral perspective for contractual matters. According to this approach, instead of determining the reach of the law of the forum, one must first consider the particularities of the legal relationship that exists between the parties, and from there determine the applicable law. For this reason, Bartolus proposed that the validity of the contract must be determined according to the place of its conclusion, irrespective of the place of dispute resolution, whereas the consequences of the breach of the agreement (for instance, non-performance, notice of default, prescription) must be analyzed according to the law of the place of performance. Only if the place of performance is not specified in the contract or cannot be easily determined, should the contract be governed by the law of the forum. Within torts law (the law of delicts), the statutes of the city where the foreigner was being sued were to apply.

C. Territorialism

From the sixteenth to the eighteenth centuries in France, the law of the involved territory was applied to legal disputes. Territorialism therefore has a feudal legacy that also developed at the time of the emergence of modern nation-states.

As a result of the political independence initiatives that existed at the time, the Netherlands adopted the theory of territorialism due to their independence struggle with the Spanish Crown. However, the necessities of commerce in the region and the cosmopolitan spirit at the time tempered territorialism, using the notion of *comitas* or comity.

Ulrik Huber (1636-1694) was the most influential jurist within the Dutch School. Huber advanced the ideas of sovereignty and *comitas* as a midway point between mere courtesy and a legal obligation to apply a foreign law, derived from the tacit consent of nations, and based on mutual tolerance and ultimately, self-interest. For Huber, nothing could be more destructive to international commerce than neutralizing rights that had been validly acquired in another jurisdiction. Even though each State is sovereign, he

advocated that they should not act in an arbitrary manner. Rather, States must take *comitas* into account and respect the requirements of international commerce.

In England, the work of Huber greatly influenced Lord Mansfield and Sir William Blackstone, and also had a particularly strong influence upon A.V. Dicey and his theory of "vested rights" or acquired rights, and who came to similar conclusions. However, *comitas* or the theory known as "vested rights" has also led to many doctrinal and practical uncertainties.

D. XIXth-century doctrinal developments

Joseph Story (1779-1845) is considered the father of the modern conflict of laws system. His contributions to international law were influenced by the ideas generated by Bartolus and his followers, as well as by Huber and his theory of *comitas*. In his 1834 Commentaries, Story adopted a multilateral stance, holding that any nation that refused to recognize common principles in private international law would soon find itself in a "barbarous" state.

In Story's view of private international law, connecting factors were almost always territorial: the place of the tort, the place of the contract, and so on. To solve contractual disputes, Story argued that decision makers should not only consider the application of the local law (*lex fori*), but also the law of the place of execution of the contract (the *lex loci celebrationis*, within Dutch doctrinal writings). This approach, however, was not intended to exclude alternative methods. In his *Swift v. Tyson* decision, Story cited Cicero and imagined an American federal system, analogous to the Roman *ius gentium*, "which would control interstate and international cases […]" and that contracts would be governed by "a general commercial law rather than conflicting State laws."[448]

The German professor Friedrich Carl von Savigny (1779-1861), was also a multilateralist and took inspiration from Story's writings. By focusing on the "seat" of the legal relationship, Savigny made the applicable law independent from its result – that is, it could lead to the application of either national or foreign law.

Upon creating a neutral mechanism for the determination of the applicable law, Savigny moved away from the theories of territorialism and *comitas*, which centered on national law and the limits of its application. Rather than classifying laws according to their subject matter, Savigny's neutral mechanism focused on determining the seat within every legal relationship. For specific relationships, the following concepts were fundamental: the theory of domicile regarding personal capacity, *lex rei situs* in relation to property, and the place the contract was formed and where it would be performed with regards to contracts. Because torts law and criminal law are so closely related, Savigny argued that the *lex fori* should apply, rather than the law of the place of the tort.

While the Savignean method has diminished in use, it still remains an important starting point for private international law and as a basis for modern thought. For example, certain European regulations (such as Rome III Art. 8 and IV Art. 21) and conventions proposed by international organizations, such as the OAS, the Hague Conference on Private International Law (HCCH) and UNIDROIT, include rules derived from that method.

Savigny's writings have been translated into several languages and he has been cited as an authority in common law and civil law countries alike. His seat-centered approach inspired Otto von Gierke's "center of gravity test" in the civil law world. Savigny's theories have shaped the development of the common law as well, notably Westlake's "proper law" theory in England, which led to the development of the "closest or most significative connection" test. The 1971 Restatement (Second) of "Conflict of Laws" (Sections 145, 188) refers to the closest connection or the "most significant relationship."

Following Savigny's proposal in this regard, the Italian professor, Pasquale Stanislao Mancini (1817-1888), was perhaps the most vehement and well-known proponent at his time of the unification of the discipline through the use of treaties. Mancini's unification theories as a universal aspiration were put into

[448] *Swift v. Tyson*, 41 U.S. 1, 19 (1842).

practice by Dutch professor Tobías Asser (1838-1913), who in 1892 influenced the Dutch government into inviting several European countries to codify private international law in. The following year, the Hague Conference on Private International Law came into being and, since 1955, it has served as an intergovernmental organization.

III. The first private international law treaties

As early as 1877, the Americas took the lead in the development of private international law, , influenced by contemporary European thinkers.[449] In Montevideo in 1889, nine private international law treaties were signed in Montevideo, each of them dealing with specific topics in civil, commercial, and procedural law, as well as other matters. However, the Montevideo Treaties were not incorporated into national legislation in many American states. Instead, they ratified the Bustamante Code of 1928, which was enacted as a result of the sixth Pan-American Conference in Havana, Cuba. The OAS Contracts Guide discusses these instruments (see Part Two, III. Historical Efforts to Codify Conflict of Laws in International Commercial Contracts).

IV. Modern international instruments in contractual matters

A. The Rome Convention and the Rome I Regulation

In 1980, nearly a century after the Montevideo Treaties, a new treaty was signed in Europe to address law issues in international contracts. This was the "Rome Convention", which took effect in 1991. In 2008, following the transfer of certain legislative powers to the European Union, the Rome Convention was replaced, with some amendments and additions, by the European Union's Regulation on the Law Applicable to Contractual Obligations, also known as "Rome I."[450] This instrument is also discussed in the OAS Contracts Guide (see Part Two, III).

The Mexico Convention, which will be examined further below, raised several concerns regarding the interpretation of these initial international private law instruments. Consequently, Rome I emerged as an alternative expression of general principles on the law applicable to international contracts, as explained below.

B. Mexico Convention

By the mid-twentieth century, there was a widespread belief in the Americas that the early private international law instruments outlined above were highly unsatisfactory. Firstly, because they contained dubious solutions to legal issues; and secondly, because there were major inconsistencies among them. In addition, several States on the continent, particularly those of the common law tradition, had not ratified any of the American instruments, which added complexity to the matter.

The establishment of the Organization of the American States (OAS) in 1948 brought with it new hope that these complexities in the conflict of laws system within the region would finally be resolved. After careful consideration, the OAS opted against drafting a broad code like the Bustamante Code and instead focused its efforts on working towards the gradual codification of specific topics within the field of private international law.

Through of the Inter-American Specialized Conferences on Private International Law (CIDIP in Spanish), it started to achieve this. The CIDIPs are diplomatic conferences convened in accordance with Article 122 of the OAS Charter. To date, seven CIDIPs have been held, which resulted in the adoption of

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[449] OAS Peace Fund, *The Juridical Congress of Lima*, November 2023, https://www.oas.org/sap/peacefund/VirtualLibrary/virtualLibrary.html#8 (last accessed 17 September 2023), p. 1. (The creation of norms to govern private international law can be traced back to the conversations between diplomatic representatives of Bolivia, Chile, Ecuador, and Peru that culminated in the Juridical Congress of Lima (1877 – 1880). The meeting resulted in two treaties, one on private international law and the other on extradition).

[450] Regulation (EC) No 593/2008 of the European Parliament and Of The Council On The Law Applicable To Contractual Obligations (Rome I) [2008] OJ L177/6. (Rome I is binding on all European Union Member States other than Denmark, where the Rome Convention remains applicable).

26 international instruments on diverse issues (including conventions, protocols, uniform law documents, and one model law).

However, it was only at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V, which took place in Mexico City in 1994) that the issue of choice of law in international contracts was addressed. The result was the adoption of the Inter-American Convention on the Law Applicable to International Contracts, commonly known as the "Mexico Convention". The issues regulated by the Mexico Convention are discussed throughout the OAS Contracts Guide (see Part Three, IV, on the specific challenges that had to be overcome).

Even though the Mexico Convention was generally welcomed by the international community, so far it has been ratified only by Mexico and Venezuela. There is much speculation as to why the Convention was not more widely ratified. Perhaps the domestic legal regimes of the Member States were not sufficiently prepared to integrate the solutions proposed by the Mexico Convention or perhaps States did not know of a way to bring the Mexico Convention into effect without ratification by transfer of its provisions into a national law on the matter, as was done by Venezuela in 1998, for instance.

C. The HCCH Principles

The HCCH is undoubtedly the most prestigious organization in the world when it comes to codifying conflict or choice of law rules. This organization advanced the initiative of drafting Principles on Choice of Law in International Contracts, now commonly referred to as "the HCCH Principles," which are already very influential and likely to become even more so in the years ahead.

The success of the Rome Convention led the HCCH to undertake studies throughout the early 1980s regarding the possibility of adopting a similar instrument with global reach. Given the difficulties in obtaining mass ratification of such a convention, this initiative was ultimately discarded since insufficient ratification would have led to its failure. In subsequent years, however, the matter was taken up again with a view towards developing a "soft law" rather than a "hard law" instrument, inspired by the drafting technique of the UNIDROIT Principles. The HCCH Principles were finally approved in 2015.

While the UNIDROIT Principles address substantive law issues, the HCCH Principles are limited to choice of law issues, specifically in relation to party autonomy.[451] For its part, the absence of choice is not addressed by the HCCH Principles, as perhaps this would have made the project too ambitious and because it makes little sense to regulate these issues in a soft law instrument.

The HCCH Principles are not a formally binding instrument, such as a convention that States are obliged to apply or incorporate into their domestic law directly. Instead, they are a non-binding set of principles intended to guide the reform of domestic legislation related to choice of law. Of course, there are many uses for the HCCH Principles, for example, to serve as a model for legislators and as an interpretive tool for parties, judges, and arbitrators. As of the date of this publication, eighteen OAS Member States are also members of the HCCH, and representatives from this region served on the working group that drafted the HCCH Principles.[452] As such, the HCCH Principles can be said to reflect the positions of many States in the Americas.

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[451] UNIDROIT, *Tripartite Legal Guide*, May 2020, https://www.unidroit.org/instruments/commercial-contracts/tripartite-legal-guide (last accessed 15 September 2022). (Regarding the relation between the HCCH Principles and the UNIDROIT Principles (as well as the CISG), see the joint work of the HCCH, UNCITRAL and UNIDROIT on the Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts).

[452] Hague Conference on Private International Law, *Rapport De La Réunion De La Commission Spéciale De Novembre 2012 Sur Le Choix De La Loi Applicable En Matière De Contrats Internationaux Établi Par Le Bureau Permanent*, February 2013, https://assets.hcch.net/docs/191f7762-7cff-473b-9060-d35dc46d6980.pdf (last accessed 19 November 2023). (At the diplomatic session, many of the OAS Member States recommended that the document should be approved. The meeting of the Special Commission on the Choice of Law in International Contracts took place on November 16, 2012)

For example, Paraguay has reproduced the HCCH Principles almost verbatim in its law on international contracts, which came into effect on January 2015.[453] Similarly, the HCCH Principles have played a role in the development of legislation in the European Union and several States, including Australia, the Democratic Republic of the Congo, Indonesia, Mexico, Russia and Uruguay. While in existence for only a short time, the HCCH Principles have been used as persuasive authority in the interpretation, supplementation, and development of applicable private international law rules and principles by courts in many jurisdictions including Argentina, Brazil, Canada, Colombia, the European Union, Hong Kong, India, Israel, Japan, Mexico, Singapore, the United States and many others.[454]

The HCCH Principles may have far more influence in jurisdictions that have no codified regime of choice of law in international contracts and in which the courts have no – or only very limited – experience dealing with transborder commercial transactions.

D. OAS Contracts Guide

After approval of the HCCH Principles and on the 20th anniversary of the Mexico Convention, the Inter-American Juridical Committee (CJI) of the Organization of American States (OAS) decided to revisit the topic of the law applicable to international contracts. Ultimately, in 2019, the CJI adopted the Guide on the Law Applicable to International Commercial Contracts in the Americas (the OAS Contracts Guide).[455]

Several circumstances led to that outcome. Over twenty years had passed since the adoption of the Mexico Convention which, as discussed above, had been ratified by only two States. Additionally, the HCCH Principles had incorporated subsequent developments that created greater clarity for conflict of laws problems and had introduced innovative solutions. Accordingly, the CJI reviewed several options. It decided against revising the Mexico Convention because negotiating and implementing a convention is a highly complicated and costly process that requires political will and considerable resources. Furthermore, other instruments, such as model laws and legislative guidelines can be established in a much simpler manner and are just as effective in achieving harmonization in private international law. Finally, the CJI concluded that, at this stage in the development of applicable law issues, it would be much more effective for OAS Member States to adopt or revise their domestic laws to establish some consistency with the guidelines endorsed by the OAS based on international rules and best practices recognized by the HCCH and other relevant international bodies.

The OAS Contracts Guide has several objectives, one of which is to support efforts by OAS Member States in modernizing their domestic laws on international commercial contracts in conformity with international standards. It also provides assistance to contracting parties and their counsel in the drafting and interpretation of international commercial contracts and provides guidance to judges and arbitrators in the interpretation and supplementation of domestic laws, particularly on international commercial contract matters that are not dealt with under domestic law.[456]

The OAS Contracts Guide begins with a compilation of its eighteen specific recommendations aimed at legislators, judges, contracting parties and their advisors. Each one of these recommendations is expanded upon by a specific chapter (eighteen in total) that address the issues of party autonomy, absence of choice, and public policy, among others. Annexes to the text include a table that compares the Mexico Convention and the HCCH Principles, a table of legislation, a table of cases, and a list of databases and other electronic sources.

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[453] Hague Conference on Private International Law, *Implementation Legislation*, January 2015, https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41, (last accessed 13 November 2023).
[454] *D.G. Belgrano S.A. v/ Procter & Gamble Argentina S.R.L.*, [2013], CNCom, Sala A, LL 2013. (An Argentine Appeals Court also used the HCCH Principles as an interpretive tool even before their final adoption). .
[455] OAS, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, March 2019, https://www.oas.org/en/sla/dil/docs/publications_Guide_Law_Applicable_International_Commercial_Contracts_Americas_2019.pdf (last accessed 13 November 2023).
[456] OAS, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, p. 21-22.

When dealing with the applicable law in arbitration, the OAS Contracts Guide focuses in particular on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), which has been ratified or acceded to by nearly all States in the Americas,[457] and on the UNCITRAL Model Law on Commercial Arbitration, which has promoted harmonization by inspiring legal reforms throughout the Americas.[458] These reforms greatly contributed to increasing acceptance of the principle of party autonomy and recognition of the utility of uniform law instruments within the realm of international commercial contracts throughout the region.

V. Private international law in investment claims related to contracts

Only on some occasions are the parties to a contract and the parties to a treaty-based dispute identical. In many other instances, the parties to a treaty-based dispute have merely a certain proximity to the parties to a contract. Sometimes, the foreign investor acting as a claimant concludes agreements with a broad range of State-related entities, such as a ministry or a State-owned enterprise, that are not formally respondents in investment treaty arbitration. At other times, discussions in an investment claim relate to contracts concluded between a claimant and a third party. Every so often, issues arise in relation to contracts concluded between the State and companies connected with a foreign investor. Furthermore, contracts of parties that do not intervene as a party in an investment dispute may also appear in the claim. All these agreements may raise private international law issues.

Some investment contracts, such as concession and license agreements, have a strong public law element and, consequently, a reduced scope of exercise for party autonomy.[459] Arbitral decisions have dealt with a variety of these contracts, such as concession agreements for the operation of a national vehicle registry,[460] provision of services,[461] energy distribution and commercialization,[462] clean water and

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[457] The exceptions are Belize, Grenada, Saint Kitts and Nevis, Saint Lucia and Suriname.

[458] United Nations, *United Nations Commission On International Trade Law*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed 13 November 2023) (According to the website, legislation based on the Model has been adopted in the following OAS Member States: Canada (federally and all provinces and territories), Chile, Costa Rica, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Peru, United States (certain states only), and Venezuela. Argentina has also advanced new legislation (Arbitration Law, enacted 26 July 2018). Uruguay has also approved legislation to adopt the Model Law.) CIAR Global, *Uruguay: Aprobado Por El Senado El Proyecto De Ley De Arbitraje Comercial Internacional,* May 2018, http://ciarglobal.com/uruguay-aprobado-por-el-senado-el-proyecto-de-ley-de-arbitraje-comercial-internacional/ (last accessed 6 May 2022).

[459] Discussions in this regard were addressed in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 220; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 54, 62, 290.

[460] *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award, 16June 2010, ¶¶ 4–44.

[461] *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, 22 December 2003, ¶¶ 54– 63.

[462] *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia S.L. v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, 12 March 2021, ¶ 1.

sewage/water distribution services,[463] exploration of natural resources,[464] mine operation contracts,[465] mobile cellular telephone services and license agreements.[466]

In addition, typical commercial agreements have also been recognized as investment contracts, such as the financial risk management (hedging) agreement discussed in *Deutsche Bank v. Sri Lanka.*[467] Other cases have dealt with discussions related to leases,[468] loans,[469] and other credit agreements,[470] pledge agreements,[471] electricity purchase agreements,[472] farmout agreements,[473] privatization agreements,[474] settlement agreements,[475] joint venture agreements and partnerships,[476] share purchase agreements,[477] trust contracts,[478] and many others.[479] Standard contract forms, such as those provided by FIDIC in relation to

[463] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 41, 114–119; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶¶ 14–15, 322–323.

[464] *Chevron Corporation) and Texaco Petroleum Company v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits 30 March 2010, ¶¶ 33, 448–451; *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (II)*, PCA Case No. 2009- 23, Third Interim Award on Jurisdiction and Admissibility 27 February, 2012, ¶¶ 3.7–3.12; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 140-151; *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 5; *Eco Oro Minerals Co. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum 9 September 2021, ¶ 5; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation 03 August 2020), ¶¶ 48-51.

[465] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 04 April 2016, ¶¶ 18–20, 205, 481–483, 698–700.

[466] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 02 August 2004, ¶¶ 23, 47–52, Award, 22 May 2007, ¶¶ 43, 151–155; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010, ¶¶ 67–72, 149–163.

[467] *Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶¶ 12–14.

[468] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶¶ 81, 648.

[469] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, ¶¶ 30–31, 239–257, 272–278, 303–313.

[470] *Waste Management, Inc. v. United Mexican States ("Number 2"),* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 50–51, 102–103, 118–129.

[471] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 02 March 2015, ¶¶ 58–60, 220–221, 368–383.

[472] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 06 March 2018, ¶¶ 3.82–3.85.

[473] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 05 October 2012, ¶¶ 92, 127–134, 331, 386.

[474] *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ¶ 87.

[475] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶¶ 198–202.

[476] *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction 19 September 2008, ¶¶ 46–47.

[477] *Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 06 July, 2012, ¶¶ 180–181.

[478] *Empresa Electrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 02 June 2009, ¶¶ 53, 86.

[479] Such as an usufruct contract (in *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June, 2012, ¶¶ 82–84); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶¶ 75–76, 170, 185–191, 250 (A so-called 'road map agreement' as a specific agreement evidencing undertakings on the part of the State to enable an investment project; *Reinhard Unglaube v.*

international construction contracts,[480] have also been addressed in international investment disputes.[481]Moreover, investment claims may raise discussions in relation to agreements that are not investment contracts *per se.*[482]

Contractual matters addressed in investment claims typically involve choice of law and dispute resolution clauses, provisions on currency adjustment, exclusivity, *force majeure*, limitation of liability or waiver of liability clauses, linguistic discrepancy, notification, penalty, price, renegotiations, stabilization clauses and economic equilibrium, termination clauses, and other interpretive matters.

The private international law instruments discussed pages above, such as Rome I and the Mexico Convention, can be of great assistance in addressing these and other contractual issues raised in foreign investment claims. The same holds true with uniform law, which will be discussed in the following chapter.

Interesting problems also arise regarding the "incidental or preliminary question" issue. In private international law the "incidental or preliminary question" discussion arises when a rule of law attaches specific effects to an existing legal status or relationship. When adjudicators must decide on a legal issue, they may be required to first rule on the presupposed status or relationship if its existence or validity is disputed.[483] For example, a claim on the registration of shares (principal issue) may require a prior decision on the validity of the contract on their transfer (preliminary or incidental issue).

The matter, first raised in the 1930s, is controversial in national courts, since no clear preference can be formulated *in abstracto* regarding the application of the *lex fori* or *lex causae*. It is clear, however, that as stated in Article 8 of the Inter-American Convention on General Rules of Private International Law, "[p]revious, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue."

In investment treaty claims, controversies can arise regarding the jurisdiction over a claim for a breach of an international investment contract. The tribunal must then interpret the agreement, which may also involve, for instance, assessing an environmental regulation that modifies contractual rights. The investor may believe that the regulation is incompatible with the protection afforded by the investment treaty. In this scenario, public international law may apply to an incidental question raised in the context of a commercial contractual claim. If it is not considered a violation of public international law, the law governing the contract in accordance with private international law will apply.[484]

Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶¶ 75–76, 170; 185–191, 250 [FN 187, FN 193]; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 03 August 2004, ¶¶ 23–25, 174–180 (A contract on immigration control, personal identification, and electoral information); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06 February 2007, ¶¶ 128–150; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶¶ 49–59, 170–197 (Donation of land plots agreement) [FN 187]; *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶¶ 49–59, 170–197; a funding agreement (third-party funding) in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1; Decision on Jurisdiction, 21 December 2012, ¶¶ 239–259; and in *S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶¶ 224–233.

[480] FIDIC, *Why Use FIDIC Contracts?* November 2023, https://fidic.org/node/7089, (last accessed November 2023).

[481] *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, ¶¶ 14–15.

[482] *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 146–153; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 04 May 2016, ¶¶ 158–159, 164.

[483] *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, 07 May, 2021, ¶¶ 413-415.

[484] *AGIP S.p.A. v. Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/1*,* Award*,* 30 November 1979, 1 ICSID Rep 306.

In this regard, the private international law notion of an incidental or preliminary question can provide a working theoretical framework that helps in the application of the proper law. Moreover, the conceptualization of the matter as an incidental issue may enable justice to be done without blocking a procedure in investment treaty arbitration. The arbitral tribunal can decide on its jurisdiction without waiting for the issue to be resolved by another adjudicatory body.

VI. Capacity

Capacity within international contracts is not regulated in the HCCH Principles, and no universal principle exists in this regard. Divergent perspectives emerge from private international law rules. Many jurisdictions consider capacity a matter of personal status, whereas the Restatement (Second) of Conflict of Laws considers it a question of *lex contractus*.

Moreover, different approaches exist in national laws for determining the law applicable to individuals and legal entities (the *lex societatis,* in particular). Some international instruments also address the matter.

In Latin America, the 1940 Montevideo Treaty adopted as its criteria the law of the country within which the company was recognized as a legal entity. The 1989 Montevideo Treaty changed this approach and adopted a new criterion in favor of the law of the country in which the company is domiciled. Under the Bustamante Code, the applicable law is that of the place in which the company was constituted.

In turn, in 1979 the OAS produced the Inter-American Convention on Conflicts of Laws Concerning Commercial Companies, which sets the place of incorporation as the connecting factor (Article 2). An identical rule emerged from the 1984 Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, which refers to the "law of the place of its organization" (Article 2).

At a global level, the HCCH Convention on the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions includes identical criteria in its Article I, although it did not receive sufficient ratification to enter into force.[485]

Similarly, the *Institut de Droit International* issued the recommendation that:

"A company which is recognized in accordance with the preceding provisions enjoys all rights which are conferred upon it by the law by which it is governed, except rights which the State by which it is recognized refuses to grant either to foreign nationals in general or to companies of a corresponding type governed by its own law."[486]

The matter was addressed by the ICJ in the *Barcelona Traction* case of 1970. The Court stated:

"[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."[487]

Issues of capacity may technically arise in investment arbitration, although they rarely do in practice. In the first of the *Amco v. Indonesia* cases, the tribunal held that "[o]ne should apply the law of the state of incorporation to determine whether such a company, though dissolved, is still an existing legal entity for

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[485] Hague Conference on Private International Law, *07:* Convention Of 1 June 1956 *Concerning The Recognition Of The Legal Personality Of Foreign Companies, Associations And Institutions,* June 1956, https://www.hcch.net/en/instruments/conventions/full-text/?cid=36 (last accessed 9 May 2022).

[486] Warsaw Session, 1965. Limited Companies in Private International Law, art. 6, available at: Justitia Et Pace Institut De Droit International, *Les Sociétés Anonymes En Droit International Privé*, September 1965, https://www.idi-iil.org/app/uploads/2017/06/1965_var_02_fr.pdf (last accessed 17 September, 2023), Art. 6

[487] *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment, February 5, 1970, ICJ Rep. 3, ¶ 33-34.

any specified legal purpose."[488] In this case, the tribunal chose the place of incorporation as a connecting factor.

The *lex societatis* governs the capacity of a legal entity to present a claim before an investment treaty tribunal.[489] However, the connecting factor can vary in domestic laws between the place of incorporation and the seat of the legal entity.[490]

Despite the differences that exist in diverse national laws and international instruments, they all share a common goal: to determine the law that has the closest connection to the case, without having to resort to the *lex fori.* This matter must be distinguished from the discussion regarding whether a claimant company fulfills nationality requirements under the applicable international investment agreement for jurisdictional purposes.

VII. Torts and other international conflict of laws instruments

A. Torts

In the Americas, the Montevideo Treaties follow the traditional *lex loci delicti* rule (Article 38 of the 1889 Treaty, and Article 43 of the 1940 Treaty).[491] Article 167 of the Bustamante Code, in turn, rules that obligations generated by torts follow the law of the jurisdiction where they were committed. In the United States, the classic *lex loci delicti* rule, included in Section 377 of Beale's first 1934 *Restatement of Conflict of Laws* was discarded in case law and legal practice. Instead, one should determine the proper law of the tort considering its center of gravity or more significant contacts.

At a global level, the HCCH addressed the issue of the law applicable to torts in two conventions: the HCCH Convention of 4 May 1971 on the Law Applicable to Traffic Accidents,[492] and the HCCH Convention of 2 October 1973 on the Law Applicable to Products Liability.[493]

The Rome II Regulation followed, establishing for the first time in modern history non-contractual rules applicable to all EU member States except Denmark. Article 28 of the Rome II Regulation establishes that the two Hague Conventions prevail over the laws of the respective contracting States.

The general *lex loci delicti* rule has remained constant throughout these developments, with certain exceptions to party autonomy, both by an *ex post* and *ex ante* (under certain circumstances) choice of

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[488] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 10 May 1988, 3(1) ICSID Rev. – FILJ 166, ¶ 104.

[489] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3*,* Decision on Jurisdiction, 22 April 2005, ¶¶115 - 124; *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1*,* Decision on Jurisdiction, 10 May 1988, 3(1) ICSID Rev. – FILJ 166, ¶ 104.; *Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/03/8*,* Award, 10 January 2005, ¶ 39*: Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22*,* Award, 24 July 2008, ¶ 323.

[490] For instance, in the Netherlands, the law of incorporation determines the power of the legal entity "to perform acts and to act at law", and in Switzerland it governs the "capacity to have and exercise rights and obligations". In Germany, the "real seat" doctrine determines the company's legal status and standing to sue. European Court of Justice, *Überseering B.V. and Nordic Construction Company Baumanagement GmbH (NCC*), Judgment of 5 November 2002, Case C-I-09919. EU:C: 2002:632, 200. (The European Court of Justice held that this choice of law rule is incompatible with the freedom of establishment guaranteed in the EC Treaty. In that case, the German courts failed to recognize the standing a company that had been incorporated in the Netherlands but had its seat determined to be in Germany.).

[491] *Lex loci delictus*, also known as *lex loci delicti,* is the Latin term for "law of the place where the delict [tort] was committed". It holds that the substantive law of the place where the tort occurs applies.

[492] In force since 1975. On its adoption status, see at: Hague Conference on Private International Law, *19: Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, June 2014, https://www.hcch.net/en/instruments/conventions/status-table/?cid=81 (last accessed o9 June 2022).

[493] In force since 1977. On its adoption status, see at Hague Conference on Private International Law, *22: Convention of 2 October 1973 on the Law Applicable to Products Liability*, December 2012,: https://www.hcch.net/en/instruments/conventions/status-table/?cid=84 (last accessed 20 May 2022).

applicable law. In tort-related disputes, investment tribunals have applied the law of the tort, in accordance with generally accepted principles of private international law.[494]

B. Property

Regarding property, both of the Montevideo Treaties on International Commercial Law (Article 26 of the 1889 Treaty, and Article 32 of the 1940 Treaty) and the Bustamante Code (Article 105) apply the *lex loci rei sitae.*

Property-related matters within contracts are not addressed in the relevant international aforementioned instruments, such as the Mexico Convention and the Hague Convention. Commentary 1.31 of the HCCH Principles provides that the HCCH Principles "only determine the law governing the mutual rights and obligations of the parties, but not the law governing rights in rem" i.e., they do not address matters such as whether the transfer of goods actually conveys property rights without the need for further formalities, or whether the purchaser acquires ownership free of the rights and claims of third parties. Such questions are typically governed by domestic laws specific to conveyances.[495]

In investment arbitration, the law of the host State's legislation, including its private international law norms, governs the existence or scope of property rights. This solution originating from private international law has been applied in several cases,[496] since public international law does not provide substantive property law rules.[497]

For matters concerning tangible property, the *lex situs* rule applies. For example, the domestic law would apply to define the scope of a mortgagee's interest over tangible property that comprises the investment. Different private international law regimes regard intangible property differently. In some cases, the law of the debtor's domicile applies, in others, the domicile of the creditor applies. Investment protection regimes may become available where debtor law applies and the debtor is domiciled in the host State.[498]

If the investment is in shares, investment protection may also arise when these have been acquired in accordance with the law of the jurisdiction where the company was incorporated. In the United Kingdom, legal ownership commences once the investment is entered onto the share register. For registration to occur, however, it is not sufficient to accept the delivery of share certificates, as would be the case in other jurisdictions such as New York.

C. Bonds and loans

International regulation is scarce on issues related to bonds and loans. After the HCCH failed to regulate the matter in 1910 and 1912, the League of Nations promoted the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva 1930). However, the instrument was ratified by

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[494] *Lex loci rei sitae* (Latin for "law of the place where the property is situated"), also known as *lex situs*, is the doctrine that the law governing the transfer of title to property is dependent upon and varies with the location of the property. See at: *Isiah v. Bank Mellatt*, IUSCT Case No. 219 (35-219-2) Award, 30 March 1983; *Sea-Land Service, Inc. v. Iran*, IUSCT Case No.33 (135-33-1), Award 22 June 1984.

[495] *Guide on the Law Applicable to International Commercial Contracts in the Americas*, p. 91.

[496] *EnCana Corporation v. Republic of Ecuador,* LCIA Case No. UN3481*,* Award, 3 February 2006, ¶¶ 476–7/184–8; *BG Group Plc v. The Republic of Argentina,* UNCITRAL Award, 24 December 2007, ¶¶ 102, 117; *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2*,* Award, 08 May 2008), ¶¶ 179–230.

[497] Treaties do not either. An exception of an international treaty that does create and regulate rights in rem is the UNIDROIT Convention on International Interests in Mobile Equipment, UNIDROIT, *Convention on International Interests In Mobile Equipment Signed at Cape Town on 16 November 2001,* November 2001, https://www.unidroit.org/wp-content/uploads/2021/07/Cape-Town-Convention_English.pdf > (last accessed 20 May 2022).

[498] *EnCana Corporation v. Ecuador*, Merits, 12 ICSID 427.

27 countries, which were mostly from Europe – none from Africa, Oceania, and only a few from Asia.[499] Brazil was the only country in the Americas that adopted the Convention, which was ratified 22 years after the instrument was brought before the Secretary-General of the League of Nations.[500]

In turn, the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) did not receive the necessary ratifications to enter into force.[501]

Regionally, the Montevideo Treaties contained provisions on bills of exchanges and promissory notes (Articles 26 and 34 of 1889 Treaty and Articles 32 and 33 of 1940 Treaty). The Bustamante Code also addresses bills of exchange in Articles 263-273.

The Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, adopted at CIDIP-I in 1975, substituted with its regulation the Montevideo and Bustamante rules for the States that ratified the OAS instrument.

For its own part, Article 5, paragraphs (c) and (d) of the Mexico Convention exclude obligations deriving from securities and from secured transactions. The HCCH Principles do not contain a similar provision. Rome I deals with securities and pledges or other security rights over claims in Article 14.

A 2016 ICC Commission Report notes that localizing an investment in an infrastructure project for the purpose of determining whether an investment treaty applies is different from localizing financial instruments, such as bonds and loans. In the latter case, specific connecting factors need to be considered.[502] Transnational finance instruments can be designed to avoid conflicts of laws problems by containing choice of law and choice of forum clauses. Loans that do not include a choice of law clause would be subject to the *lex contractus*. Bonds that do not contain a choice of law clause can be reasonably presumed to be subject to the law of the market where the bond was issued, as it has the closest connection to the bond.

D. Secured transactions

The Montevideo Treaties and the Bustamante Code are generally considered to be the first private international law regulations dealing with security rights over movable assets.

At a global level, there were several early attempts to develop a system of international recognition of security rights, including the International Convention of 10 April 1926 for the Unification of certain Rules relating to Maritime Liens and Mortgages,[503] the International Convention of 6 May 1993 on Maritime Liens and Mortgages,[504] and the Geneva Aircraft Convention of 1948.[505]

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[499] Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, 7 June 1930.

[500] Legislative approval was granted in 1964, through the Legislative-Decree No. 54 of 1964, and finally entered into force through the Decree No. 57.663 of January 24, 1966.

[501] UNCITRAL, *Status: United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988),* November 2023, https://uncitral.un.org/en/texts/payments/conventions/bills_of_exchange/status (last accessed 09 May 2022).

[502] ICC Commission Report, Financial Institutions and International Arbitration, International Chamber of Commerce (ICC) 2016, <https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf> (accessed 9 May 2022), p. 6.

[503] International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, 1926.

[504] International Convention on Maritime Liens and Mortgages, signed 6 May 1993.

[505] Convention on the International Recognition of Rights in Aircraft, signed 19 June 1948.

More recently, UNIDROIT, the HCCH, and UNCITRAL have actively promoted a series of instruments addressing secured transactions.[506] Similarly, the OAS has also developed a regional instrument that it continues to promote across the Americas.[507]

Both conflict of laws rules and "uniform law" (i.e., proposed direct substantive rights solutions) emerge from these instruments. For instance, the Cape Town Convention (Convention of 16 November 2001 on International Interests in Mobile Equipment) sought to create internationally registered uniform security rights in mobile equipment, which by means of its protocols extend to aircraft equipment, railway rolling stock, space assets and mining agricultural and construction equipment.[508] The Cape Town Convention is a major success and has been ratified by 85 States.[509]

VIII. The problems with "orthodox" private international law

Private international law has been criticized for being unduly technical, process-driven, and, above all, a matter of domestic law. Private international law experts have often been referred to as "conflictualists" rather than "internationalists," obsessed with domestication of international relationships.

The difficulties of conflictualism are patent. Conflict of law national rules diverge alarmingly, and the idea of a universal treaty on the matter has been a chimera. Therefore, notorious uncertainty exists regarding the applicable law.

Moreover, in many parts of the world, such as in Russia, Indonesia, China, or Latin America, it is often impossible to render an opinion on domestic law or predict a court decision. Some codes or laws may be so old or so heavily amended that it is impossible to know if the text at hand is the appropriate one. In some parts of the world this is compounded by the problem of corruption, which makes case law unreliable and adjudication unpredictable.

Local peculiarities, legislation, case law, and doctrinal developments can frequently be handled appropriately only by adjudicators and parties practicing in that national jurisdiction, and the situation is even more complicated when one of the parties does not come from the same legal tradition.[510] A well-known study conducted by Max Rheinstein, included in a leading casebook on private international law, found that adjudicators erred in the application of the law in 36 of the 40 cases. In the other four cases, the

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[506] UNCITRAL, *UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests, Comparison And Analysis Of Major Features of International Instruments Relating To Secured Transactions,* May 2012*,* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-hcch-unidroit-e.pdf, (last accessed 09 May 2022). (These include the UNIDROIT Convention on International Factoring (Ottawa, 1988), the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988), the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001), the UNCITRAL Legislative Guide on Secured Transactions (2007) and Supplement on Security Rights in Intellectual Property (2010), the UNIDROIT Model Law on Leasing (2008), the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (The Hague, 2006), UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 2009), the UNIDROIT Model Law on Factoring (2023), the "Cape Town" Convention and its Protocols, referred to in the following footnote).

[507] OAS, *Model Inter-American Law on Secured Transactions and Model Registry Regulations*, 2013. https://www.oas.org/en/sla/dil/docs/secured_transactions_book_model_law.pdf (last accessed 13 November 2023)

[508] UNIDROIT, *Access To Credit UNIDROIT Work And Instruments In The Area Of Access To Credit,* https://www.unidroit.org/secured-transactions, (last accessed 13 November 2023).Town Convention on International Interests on Mobile Equipment, signed November 2001; Aircraft Protocol, entered into force 2006. Additional Protocols that are not yet in effect deal with other matters such as the financing of railway rolling stock (Luxembourg Rail Protocol), space assets (Space Protocol), and agricultural, mining and construction equipment (Pretoria MAC Protocol).

[509] UNIDROIT, *Convention On International Interests In Mobile Equipment (Cape Town, 2001) - States Parties,* November 2023, https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/ (last accessed 13 November 2023).

[510] Regarding, for instance, the terms "consideration", "implied terms", "misrepresentation" or "frustration".

outcome was accurate, but the reasoning was flawed. Evidently, an adjudicator inexperienced with a certain national legal system is prone to error when applying a law that they simply do not understand.

In several settings, the application of national law is highly inappropriate, such as when a transaction has so many international components that a domestic legal system cannot govern it.

The new reality of cyberspace also leaves the territorial conceptions that are fundamental to the application of most domestic laws without a foundation.

Moreover, conflict of law rules reward "forum shoppers" that, when feasible, pursue litigation in places with rules that benefit their claims, which frustrates the search for certainty and predictability in transactions. Besides, not infrequently, when faced with a dilemma between "conflictual justice" and "material justice", adjudicators seek to dodge the matter entirely by escaping into concepts such as characterization, international public policy, and *fraude à la loi*. Even human rights have been invoked to "limit" what States can do in private international law matters. A landmark decision in this sense was rendered by the German Constitutional Court in 1971,[511] followed by others such as the Italian *Corte di Cassazione* in 1987,[512] and the Court of Justice of the European Union.[513]

Failures such as thosedetailed in the preceding paragraphs above led defenders of orthodox private international law to a methodological pluralism, as displayed below.

IX. Recent developments

Domestic nationalization movements and the consolidation of modern States throughout the nineteenth century fueled a boom within the field of private international law, understood as a discipline intended to solve "conflicts of national laws." On a theoretical level, the basis of orthodox "conflictualism" has been repeatedly criticized, and the system has proven inefficient in adapting to the needs of transnational commercial activity. However, in today's world, things are changing. Private international law is capable of meeting the needs of a multijurisdictional world, etched by the permeability of national borders, growing interconnectivity of societies and economies, and the internationalization of individual lives.

Modern advances in private international law are profound and have far-reaching consequences. Party autonomy has become a firmly established principle in international contracts. As a result, by inserting straightforward choice of law provisions in their agreements, parties can effectively avoid the unforeseen "conflictualism" that can occur in international transactions.

In addition, the field of arbitration has developed into a widespread means for solving commercial disputes, providing arbitrators with powerful tools to arrive at appropriate decisions beyond the automatic application of national laws in accordance with conflict of laws mechanisms.

International organizations have responded to the necessity to harmonize norms governing trans-border commercial activities and thus, to leave behind the outdated "conflictualism" that exists in this field. Remarkable efforts to propose norms governing international commercial transactions include those of UNIDROIT, created in 1926 under the auspices of the then League of Nations; UNCITRAL, established by the United Nations in 1966; and private organizations such as the International Chamber of Commerce (ICC).[514]

This development goes in hand with the increasing "flexibilization" of conflict of laws rules to better cater the legal analysis to the particular needs of the case. For instance, Article 15.1 of Switzerland's 1987 Code on Private International Law (CPIL) states the following: "The law designated by this Code shall not

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[511] BverfGE, Decision, 04 May 1971, ¶¶ 31, 58 "Spanierenentscheidung".
[512] Decision of 26 February 1897, No. 71/1987.
[513] Judgment of 09 March 1999, *Centros v. Erhvervs-og Selskabsstyrelsen*, Case C-212/97, 1999, EU:C:1999:126 (For instance, it referred to the four liberties (of movement, persons, services and capital) and the principle of non-discrimination to guarantee recognition of a corporation in member States).
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ICC, *International Chamber of Commerce*, May 2002, http://www.iccwbo.org, (last accessed 9 May 2022).

be applied in those exceptional situations where, in light of all circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law."

In addition to increasing "differentiation" and "flexibilization" within public international law, recent years have seen an increasing "materialization" in the field, reflected in the use of public policy (*ordre public*) or alternative connecting factors to achieve substantive results. Uniform law rules adopted in international instruments have progressively gained momentum, many of them have been formally incorporated by States.

Uniform law and comparative law have become increasingly relevant in this new era of private international law, marked by a strong eclecticism in the search for predictability within private trans-border transactions.

Many States have modified their domestic legislation to reflect these international changes to unify domestic laws pertaining to private international law and uniform law.

States no longer have a monopoly on enacting conflict of law rules. In many jurisdictions, private international law is decentralized from within. For instance, in the European Union the States have largely relinquished their legislative power with respect to private international law in favor of developing uniform solutions applicable to all European States. Much of what we describe as domestic private international law now originates outside the domestic sphere of States. Indeed, private international law, like public international law, may now play a regulatory function.

Furthermore, the European Court of Human Rights has repeatedly dealt with the compatibility of private international law with human rights. In various contexts, individual private international law provisions have been held to infringe human rights.

Modern private international law can thus be characterized as working towards the goals of coordination, unification, and harmonization. Different instruments are employed in this regard, such as formally binding conventions and protocols, non-binding (soft law) instruments and rules, exhortatory principles, legislative guidance, and best practices.

However, the conflict of laws methodology did not and will not disappear, however. In matters related to foreign investments specifically, tribunals will continue to make use of conflict of laws rules when necessary or pertinent. Since private international law has evolved significantly, stakeholders in investment claims must be aware of its developments.

REC. 5.1 OAS Member States are encouraged to review and clarify their private international law rules as relevant to the law applicable in the international investment context. In this regard, solutions offered by OAS instruments on private international law, including the *Inter-American Convention on the Law Applicable to International Contracts* (Mexico Convention) as elucidated by the OAS Contracts Guide, should be considered and may be incorporated into domestic law.

REC. 5.2 OAS Member States and their negotiators of international investment treaties and investor-State contracts are encouraged to consider and to include clear choice of law provisions into the text of such treaties and agreements.

PART 6: UNIFORM LAW AND THE UNIDROIT PRINCIPLES

I. General Considerations

Regarding international contracts, the "conflicts method" exists alongside the "uniform" or "uniform law method", which is also referred to as the "material," "privatist" or "universalist" technique. The conflicts method seeks localization of the relationship in a national law, whereas the uniform method advocates in favor of substantive transnational solutions in international matters.

In transborder transactions, parties should be aware of the law governing their relationship. Surprising foreign legal rules may conflict with this goal. Even when parties choose the law of a third State to govern their relationship, they often do so mainly for the sake of neutrality. However, parties using a third State's law rarely have an in-depth knowledge of its content or the subtleties of its rules as developed and applied in practice, which may be unexpected.

Furthermore, parties often expressly or impliedly desire their transaction to be governed by a neutral law. This situation may occur, for instance, if a contracting party is a State or a State entity. In such a case, by selecting transnational or uniform law, the private party avoids exposure to potential changes in the legal system of the State party and the State does not submit to the law of a foreign country.

In other instances, national laws do not provide answers to questions that may arise in a particular case.[515] In fact, many national systems are ill-equipped to handle international transactions. For example, a buyer's rejection of goods presents significant issues in an international sale that requires consideration of certain obligations that may not be contemplated under domestic law, such as resale or conservation of the goods. Moreover, several factors are unique to international transactions, such as the distance between importers and exporters, and other requirements, such as import and export licenses, depend upon local authorities or other factors.

The language used in foreign laws and the absence of uniform legal terminology worldwide may also be a problem. On occasion, selecting domestic law to govern an international contract is not an option due to the national pride of one of the parties or for other political reasons. The problem is even more significant when the foreign law is completely unknown to the parties or not wanted at all. Obtaining information on the foreign law may also be extremely time-consuming and costly, posing further complications.

Another consideration is that contemporary multipartite arrangements for large economic development projects that involve a State party usually encompass the implementation of industrial, engineering, or mining ventures and normally require the combined contributions of suppliers of machinery and equipment, contractors, consulting engineers, and suppliers of technology. In these situations, avoiding potential conflicts between all parties can be a huge challenge. The complexity of these contractual frameworks is such that one may not find appropriate solutions in traditional notions of contract law and conflict of law mechanisms within the domestic legal regime.

Therefore, a uniform law should ideally govern international transactions, unless the application of a particular national law is desirable to achieve a specific purpose, for instance, where the parties chose Californian law due to its advanced state of development regarding high-tech regulation.[516] Of course, there are matters for which national law is most suited, for instance, regarding the override of mandatory rules.

II. Instruments of uniform law

There are different types of instruments that allow for the creation of uniform law, such as international conventions, model laws, and "principles," as discussed in the OAS Contracts Guide (see Part Three, Advances in the Uniform Law Method in Recent Decades).

Two are particularly relevant as they address choice of law issues related to international contracts and investment arbitration: the UN Convention on Contracts for the International Sale of Goods (CISG),[517] and the UNIDROIT Principles of International Commercial Contracts.[518] Additionally, there are also some important ongoing regional efforts dedicated to developing uniform laws on contracts as well as private sector initiatives that have been influenced by other arbitral instruments. These have been discussed in the

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[515] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992 (Such as interests not contemplated in Islamic Law.)

[516] If a party chose a national law because it desired a rigid solution for a specific case, it can state so and thus exclude the possibility of considering other laws or transnational law.

[517] *United Nations Convention on Contracts for the International Sale of Goods.*, signed 11 April 1980.

[518] 2016 UNIDROIT Principles.

OAS Contracts Guide (see Part Three, III, C and D). Part Six of the OAS Contracts Guide considers diverse manifestations of uniform law, such as uses, customs and practices, principles and the *lex mercatoria*.

Likewise, the OAS Contracts Guide advocates for uniform interpretation, encouraging judges, arbitrators, contracting parties, and lawyers to consider the ultimate goal of unification and harmonization of law and to remain informed on the developments on the interpretation of instruments which may influence the specific transaction at hand.[519]

III. The UNIDROIT Principles and Investment Arbitration

The UNIDROIT Principles (also referred to as "UPICC") were initially designed as a tool for international commercial transactions. It is, therefore, understandable that they have had a limited role in international investment arbitration.

However, the UNIDROIT Principles have enormous potential in the legal field of foreign investments. They may apply not only to international investment contracts, but also to public international law issues, if tribunals consider that UNIDROIT Principles reflect the general principles of this field. This may invite discussion regarding the legitimacy the tribunal has to apply them.

While the available information suggests that these UNIDROIT Principles have been used in a few investment cases, this is difficult to ascertain. Although many published works focus on ICSID arbitrations, a significant number of investment cases are heard before other forums such as the ICC,[520] or other arbitral mechanisms including ad hoc arbitrations. The resulting awards are rarely published and even when they are, the parties' pleadings are rarely made public.

Furthermore, UNIDROIT's most recent 2016 edition, which better addresses matters related to long-term contracts, is envisaged by its drafters to be relevant to both international commercial agreements and foreign investment contracts.[521]

As another example, UNIDROIT has also developed in partnership with the International Fund for Agricultural Development (IFAD), a Legal Guide on Agricultural Land Investment Contracts (ALIC). The Guide contains references to both public and private international principles and standards, as well as good contractual practices applicable to agricultural land investment contracts. Guidance contained in the ALIC is consistent with, and reaffirms, the applicability of the UNIDROIT Principles in this context.[522]

The new project on the UNIDROIT Principles and international investment contracts mentioned in Part One, Section I, builds upon UNIDROIT's partnership with the ICC Institute of World Business Law to provide parties with guidance on how they might adapt or supplement the UNIDROIT Principles to meet the special needs of investment contracts and properly combine the UNIDROIT Principles with existing principles of international investment law and contracts. The aim is to establish both a background and special body of principles and rules, of transnational character, as applicable law for investment contracts. The project outcome would be a legal guide or, as an alternative, a self-standing instrument in the form of a list of principles with commentary, providing a set of model clauses reflecting the provisions most used in practice. The instrument would provide investors with guidance on how to specify vague treaty concepts and standardise traditional contract clauses of international investment law considering arbitral case law,

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[519] OAS Contracts Guide, Recommendations 4.1 to 4.4.

[520] *State party (State X) v. Private contractor (United Kingdom),* ICC Case No. 7110, Partial Awards (extracts), 1999, 10(2) ICC Bull. 1049.

[521] 2016 UNIDROIT Principles, Article 1.11. (It states that, "Depending on the context, examples of long-term contracts may include… investment or concession agreements…").

[522] UNIDROIT/IFAD *Legal Guide on Agricultural Land Investment Contracts* (ALIC), September 2021, https://www.unidroit.org/instruments/agriculture/alic/ (last accessed 09 May 2022).

contributing towards achieving more uniform legal solutions and a safer legal environment for States and investors.[523]

A. The UNIDROIT Principles and public international law

Not all the provisions included in the UNIDROIT Principles reflect norms recognized in most legal systems. According to its drafters, however, many of the answers presented therein are "better solutions" than those found in other systems worldwide.

In accordance with Article 38 of the ICJ Statute, so long as they may be applied on a public level, only the UNIDROIT Principles that reflect principles generally accepted worldwide qualify as "general principles of law". The United Nations Compensation Commission,[524] for example, referred to the UNIDROIT Principles as an expression of general principles, particularly those concerning *force majeure,*[525] and the duty to mitigate the losses of the opposing party.[526]

Most investment arbitration cases deal with treaty claims rather than contractual claims. However, even in treaty-related claims, investment tribunals rely on concepts codified by the UNIDROIT Principles as an expression of general principles. Some commercial contractual principles contained therein are general enough that they may be relied upon both in contractual and treaty-related relationships between investors and host States.

In *El Paso v. Argentina*, the tribunal was faced with the issue of the preclusion of wrongfulness in certain situations. In its reasoning, the tribunal inquired whether the UNIDROIT Principles existed as a "general principle of law recognized by civilized nations" in the sense of Article 38(1)(c) of the Statute of the International Court of Justice. The tribunal concluded that the UNIDROIT Principles indeed were a sort of international restatement of the law of contracts, reflecting rules and principles applied by most national legal systems.[527]

The *Gemplus v. Mexico* case offers another example, wherein the tribunal applied the UNIDROIT Principles to corroborate a general principle clearly forming part of public international law, such as the certainty of harm principle.[528] Likewise, in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.,* the arbitral tribunal and the court that decided in favor of the recognition of the arbitral award (US District Court for the Southern District of California) applied the UNIDROIT Principles as an expression of "general principles of international law."[529] Many

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[523] UNIDROIT, *Item No. 4 on the agenda: Proposals for the New Work Programme for the triennial period 2023-2025,* June 2022, https://www.unidroit.org/wp-content/uploads/2022/06/C.D.-101-4-rev.-Proposals-for-the-New-Work-Programme-for-the-triennial-period-2023-2025-2.pdf (last accessed 09 May 2022), ¶¶ 70-79.

[524] The UNCC is a subsidiary organ of the UN Security Council established by its Resolution 692. The UNCC was active primarily between 1991 and 2005 in claims for compensation losses resulting from Iraq's unlawful invasion and occupation of Kuwait in 1990-1991. The UNCC is not technically an international tribunal, but is rather an administrative mass claims processing program. Nonetheless, its panels applied international law principles as well as internal UNCC rules to claims brought before it.

[525] United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners concerning Part One of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims),* 18 December 1997, UN-Doc S/AC.26/1997/6 p.19.

[526] UNCC, *Report and Recommendations Made by the Panel of Commissioners concerning Part One of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims)*, 18 December 1997, ¶ 79, UN-Doc S/AC.26/1997/6, p. 21.

[527] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

[528] *Gemplus, S.A., SLP, S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB/(AF)/04/4, Award, June 16 2010, ¶¶ 13-88.

[529] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc,* ICC Case No. 7365/FMS, Award, 05 May 1997.

other decisions have also relied on the UNIDROIT Principles as "general principles of law," recognized as applicable within international trade law.[530]

B. UNIDROIT Principles and private international law

1. The UNIDROIT Principles as a "general part" of investment contracts

There is no comprehensive corpus of substantive law matters related to international investments. Few provisions are found within investment treaties and those that exist are rather general and broad, while investment contracts usually focus on matters related to the specific venture and do not deal with issues of contract law.

The UNIDROIT Principles may therefore be of use as general principles of law applicable to international (investment) contracts. The chapters on formation, validity, performance and non-performance are particularly relevant, because they contain several provisions particularly suited to the special needs of long-term contracts in general and investment contracts in particular. They may also be useful in determining jurisdiction.[531]

2. The UNIDROIT Principles as a neutral law chosen by the parties or the tribunal

A fear of the so-called "*alea de la souveraineté*" (risk of sovereignty) may lead investors to seek to apply the UNIDROIT Principles instead of the law of the home State. In doing so, investors may avoid potential future amendments to local laws that may place them at a disadvantage.

Parties may choose the UNIDROIT Principles either directly or indirectly. When chosen directly, they must be considered as the applicable law, regardless of whether they have been selected before or after a dispute arises – they must be applied directly in accordance with the parties' choice.

In the second case, tribunals may apply the UNIDROIT Principles in a neutral fashion when the parties generically refer to "principles of the [host country's domestic law] common to the principles of international law," "generally accepted principles of international commercial law," "usages and customs of international trade," or the like.[532] The same occurs when the UNIDROIT Principles are considered by tribunals as a manifestation of the *lex mercatoria*, as was recognized in the second of the *Lemire* cases.[533]

Even when domestic laws show a reluctance to accept the choice of non-State rules as the law governing the contract, the situation is very different in the field of arbitration. For instance, Article 28 of the UNCITRAL Model Law expressly accepts a choice of law provision. Thus, in disputes that fall under Model Law rules, the UNIDROIT Principles might be applicable as the law governing the contract, even to exclude the applicability of any domestic law.[534] The same occurs in arbitrations that are conducted under Article 42(1) of the 1965 ICSID Convention.

3. The UNIDROIT Principles in the absence of choice

It is rare for parties to have clearly chosen the UNIDROIT Principles as the law applicable to their contract in investment-related matters.

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[530] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc,* ICC Case 7365/FMS, Award, 5 May 1997.

[531] *Cayman Power Barge I, Ltd. v. 1. The State of the Dominican Republic, 2. Corporación Dominicana de Electricidad,* ICC Case No. 11772/KGA/CCO, Preliminary Arbitration Decision on the Jurisdiction of the Arbitral Tribunal, 19 September 2003.

[532]: *The East Cement for Investment Company v. The Republic of Poland*, ICC Case No. 16509/JHN, Award, 26 August 2011, ¶ 125-126. (In this case the tribunal turned to Article 7.4.9 (2) of the UPICC in relation to the interest rate).

[533] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010), ¶ 110.

[534] For the binding force of the parties' choice in arbitration and State courts, see L. Gama, pp. 128 *et seq.*

In the second of the two *Lemire* cases,[535] the tribunal applied the UNIDROIT Principles because the parties could not agree on a specific national law to govern their contract or apply to their dispute. However, the reasoning of the tribunal in this case is unclear and does not shed much light on the matter.

Where the parties have not chosen an applicable law, the tribunal should not necessarily automatically opt for the application of non-State law. In ICC Case No. 7319 of 1991,[536] the tribunal applied the Irish substantive law in accordance with the provisions in the Rome Convention on absence of choice, having determined that this instrument governed the relationship for both parties. In situations like this, it is safer to apply an instrument that is common to both parties (the Rome Convention in this case) to avoid the risk of the award being challenged.

In any event, in the absence of choice, the arbitrators must first hear the parties on the law that they consider most appropriate to govern the substance of the dispute if they did not discuss this issue in their submissions.[537]

C. The UNIDROIT Principles as an interpretive aid

In addition to the primary application as the law governing the contract, the UNIDROIT Principles may also be used to interpret or supplement the international conventions and national laws that might be applicable to the investment relationship.[538]

International tribunals have relied on the UNIDROIT Principles in this way to resolve investment disputes. For instance, in the *Al-Kharafi v. Libya* case, the tribunal referred to the UNIDROIT Principles to support its reasoning for the amount of damages awarded.[539] The *Petrobart v. Kyrgyzstan* case conducted under the Stockholm Chamber of Commerce arbitration rules offers another example where the tribunal referred to the UNIDROIT Principles to justify its award on interest.[540] Further, in the ICSID case *AIG v. Kazakhstan*, the arbitrators referred to Article 7.4.8 of the UNIDROIT Principles in relation to the broad acceptance of the "duty to mitigate damages."[541] Lastly, the defense of non-performance (*exceptio non adimpleti contractus*) was addressed in 2005 by the ad hoc tribunal in *Eureko v. Poland.*[542] In its decision, the tribunal referred to the exception as contemplated in Article 7.1.3 of the UNIDROIT Principles.

D. The UNIDROIT Principles as corroboration of national law

The UNIDROIT Principles may serve to legitimize the conclusions reached by tribunals in their interpretation of national laws. For instance, in *African Holding v. Congo*, the tribunal stated that under Congolese law and in accordance with the UNIDROIT Principles, it was not necessary for the contract to

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[535] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010), ¶ 109.

[536] J-J Arnaldez et al., *Collection of ICC Arbitral Awards*,1996-2000 (2003), pp. 300 *et seq*.

[537] In the context of an *iura novit arbiter* (the UPICC was not considered in the case), a similar statement (with citations) regarding discussion by the parties was made in *Carlos Rios y Francisco Javier Rios c. República de Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021.

[538] No. 1 of The Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts states that parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract may (i) choose the UNIDROIT Principles without any reference to other legal sources; (ii) choose the UNIDROIT Principles supplemented by a particular domestic law; or (iii) choose the UNIDROIT Principles supplemented by "generally accepted principles of international commercial law". UNIDROIT, *UPICC Model Clauses Model Clauses for The Use Of The UNIDROIT Principles Of International Commercial Contracts,* May 2022, https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses (last accessed 9 May 2022)

[539] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of Libya and others*, Final Arbitral Award (March 22, 2013).

[540] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005.

[541] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 07 October 2003, ¶ 10.6.4.

[542] *Eureko v. Poland*, UNCITRAL, Partial Award 19 August 2005, ¶ 167.

be in writing. Moreover, the conduct of the parties proved the existence of a construction contract.[543] Other examples may be found in *AIG v. Kazakhstan*, *Sax v. City of Saint Petersburg*, *Al-Kharafi v. Libya,*[544] and *Suez v. Argentina.*[545]

E. The supplementary or corrective function of the UNIDROIT Principles

An arbitral tribunal found that a former Soviet country had not yet fully developed its legal framework to support the market economy, which contained several gaps and ambiguities pertinent to the dispute. Accordingly, the tribunal supplemented the national law by applying the UNIDROIT Principles in its place.[546]

This is another important function of the UNIDROIT Principles: it may supplement anachronistic or unsophisticated legal systems that cannot appropriately deal with certain issues regarding, for instance, formation, validity, performance, and non-performance of an investment contract.

A more contentious issue concerns the potential *corrective* function of the UNIDROIT Principles in the arbitration context. As will be seen further in Part 13, Section III, international and uniform law may play a corrective role in relation to national law. Moreover, the UNIDROIT Principles have been used in treaty arbitration cases as a confirmation of a rule that is already part of customary international law.[547]

F. The UNIDROIT Principles as invoked by the parties

In several investment arbitration cases the parties have invoked the UNIDROIT Principles in their submissions. This was the case, for instance, in *PSEG v. Turkey,*[548] *Limited Liability Company AMTO v.*

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[543] *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award, 29 July 2008.

[544] *Mohamed Abdulmohsen Al-Kharafi & Sons Co v. The Government of Libya and others*, Ad Hoc Arbitration, Award, 22 March 2013.

[545] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Dissenting Opinion of arbitrator Pedro Nikken, 30 July 2010, ¶ 48 (In corroboration of its conclusions in favor of the obligation to negotiate in cases of hardship, the tribunal cited the UNIDROIT Principles and the Principles of European Contract Law).

[546] The energy supply system in the State in question was fundamentally changed by law, making it possible for the power station constructed by the US company to supply energy at profitable prices. Given this, the tribunal found that the application of the national law of that State should be supplemented by taking the UPICC into consideration, particularly Articles 1.4, 6.2.2/6.2.3 and 7.1.7.

[547] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems Inc*, ICC Case No.7365/FMS, Award 05 May 1997; Petrobart *Limited* v. *The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005; *Eureko B.V. v. Poland*, UNCITRAL, Partial Award, 19 August 2005, [FN 270, FN 537]; ICC Case No. 14581 Award (extract), 2007, Procedural Decisions in ICC Arbitration (Special Supplement); *Gemplus Industrial S.A. de C.V. and Talsud, S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011; *William Ralph Clayton and others and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award, 10 January 2019.

[548] *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 04 June 2004.

Ukraine,[549] *Meerapfel v. Central African Republic,*[550] *Azurix v. Argentina*, *Kardassopoulos & Fuchs v. Georgia,*[551] *SGS v. Paraguay,*[552] *Chevron v. Ecuador,*[553] and *Micula v. Romania,*[554]among others.[555]

Even though the tribunals in these cases did not cite the UNIDROIT Principles in their decisions, they may very well have relied upon the substantive provisions in their reasoning. As such, determining the specific influence of the UNIDROIT Principles in these cases remains difficult.

As an example, in *PSEG v. Turkey*, the arbitral tribunal addressed the issue of good or bad faith in negotiations. It used words such as "reasonable" (paragraph 127), "lack of diligence" or "silence" (paragraph 157), and addressed the question of "Were the Parties Engaged in Subsequent Negotiations in Bad Faith?" (paragraphs 159 to 178). Many of the arguments therein could also have cited, in support, the UNIDROIT Principles and accompanying comments on good and bad faith.

G. Aspects of investment contracts in which the UNIDROIT Principles may be useful

Many long term-contracts and investment contracts involve lengthy negotiations. The UNIDROIT Principles contain provisions to determine when a binding agreement has been reached (Article 2.1.1),[556] and the precise time of the conclusion of the contract (Official Comments to Article 5.3.1).

Investment contracts are usually arrived at after extensive negotiations. Article 2.1.15 of the UNIDROIT Principles deals with negotiations that have been made in bad faith and can be useful to determine the offending party's liability.

In addition, when parties put their agreement in writing and declare that their document constitutes the final agreement, Article 2.1.17 related to merger clauses may be helpful.[557] In these situations, even though prior statements cannot be used to contradict or supplement the final contract, they may still serve an interpretive purpose. On this issue, the Iran-United States Claims Tribunal invoked Article 7.4.9(2) of the UNIDROIT Principles, which provides "[that] the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment […]."[558]

The tribunal in the second of the *Lemire* cases relied on the estoppel/*venire contra factum proprium* principle enshrined in Article 1.8 of the 2004 version of the UNIDROIT Principles when it determined that a party cannot invoke a specific contractual breach that it had previously condoned. The same tribunal also invoked the duty of best efforts located in Article 5.1.4 of the 2004 version of the UNIDROIT Principles to find that a mere delay in procuring licenses did not violate this obligation.[559]

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[549] *Limited Liability Company Amto v. Ukraine*, SCC, Case No. 80/2005, Final Award, 26 March 2008, ¶ 34. (The claimant invoked Article 7.4.9 of the PICC to support its claim for interest).
[550] *M. Meerapfel Söhne A.G. v. Central African Republic*, ICSID Case No. ARB/07/10, Award, 12 May 2011, ¶ 149.
[551] *Ioannis Kardassopoulos & Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18 and ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 03 March 2010, ¶ 288.
[552] *SGS Société Générale de Surveillance v. ¶guay*, ICSID Case No. ARB/07/29), Award, 10 February 2012. ¶ 171.
[553] *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Partial Award, 20 March 2010, ¶ 382.
[554] *Ioan Micula, Viorel Micula, SC European Food S.A., SC Starmill S.R.L. and SC Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11December 2013, ¶ 1282.)
[555] *Balkan Energy Limited v. Republic of Ghana*, PCA Case No. 2010-07, Interim Award, 22 December 2010; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012 ¶ 422.
[556] See the ICSID Award of July 23, 2008. See also ICSID Award of June 4, 2004.
[557] Referred to in the ICSID Award of January 14, 2010.
[558] Decision of July 2, 2014, Iranian-U.S. Arbitral Tribunal. Case 602-A15(IV)/A24-FT. *The Islamic Republic of Iran v. The United States of America*. Available at: <http://www.unilex.info/principles/case/1856> (accessed 10 May 2022).
[559] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 134, 154, 199.

The provisions of the UNIDROIT Principles related to damages have also been applied in investment arbitrations. In *Gemplus v. Mexico*, the tribunal referred to Article 7.4.2 in relation to lost profits.[560] In *El Paso v. Argentina*, the arbitrators mentioned Articles 7.1.6 and 7.1.7 of the 2004 version of the UNIDROIT Principles to find exemptions from liability for non-performance. The tribunal interpreted the investment according to these provisions and decided that the exemption did not apply to Argentina.[561]

In *Sax v. City of Saint Petersburg,*[562] the arbitral tribunal quoted Article 7.4.9 in its determination of the interest rate. However, the tribunal did not rely solely on the UNIDROIT Principles but reasoned that the "average bank short-term lending rate to prime borrowers of the currency in question at the place for payment" was a "frequently used formula in international arbitration."

There is convincing evidence that the duty to mitigate the other party's loss has been generally accepted in international practice. This principle is reflected in Article 7.4.8 of the UNIDROIT Principles relating to the mitigation of harm.[563] A United Nations Compensation Commission panel decided that Article 7.4.8 reflects a general principle of law,[564] a principle that can be considered as recognized in both public and private law.

The UNIDROIT Principles may be useful also in situations of gross disparity (Article 3.2.7), "penalty" or "liquidated damages" (Article 7.4.13), mandatory rules (Article 3.3.1), illegality where corruption has occurred (Article 3.3.2), duty of cooperation (Article 5.1.3), termination (Articles 7.3.1 to 7.37), hardship and *force majeure*.

Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles address hardship or supervening circumstances that lead to a fundamental alteration of the equilibrium of the contract, as well as the appropriate remedies for each.

By contrast, Article 7.1.7 relates to *force majeure*. Termination, adaptation, or renegotiation are all remedies contemplated for hardship. In situations of *force majeure*, the only remedy provided by the UNIDROIT Principles is an excuse for non-performance: there is no possibility of the adjudicator adapting the contract, nor a duty of the parties to renegotiate (unlike what is provided by the UNIDROIT Principles in the case of hardship).

Furthermore, the dissenting opinion of arbitrator Pedro Nikken in the *Suez v. Argentina* investment case stresses the potential of the UNIDROIT Principles to evaluate whether a contractual renegotiation due to hardship constitutes a breach of the fair and equitable treatment standard.[565]

The COVID-19 pandemic significantly affected the business operations of many sectors. The UNIDROIT Principles may offer guidance in this context for many issues relating to foreign investments, particularly concerning State contracts. The open nature of the UNIDROIT Principles furnishes the parties

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[560] *Gemplus, S.A., SLP, S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB/(AF)/04/4, Award, 16 June 2010.

[561] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October, 2011, ¶ 623.

[562] *Sax v. City of Saint Petersburg (Sax)*, Ad hoc UNCITRAL Arbitration, Award, 30 March 2012.

[563]UNIDROIT, *UNIDROIT Principles 2010*, November 2010, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-7-section-4/, (last accessed 28 September 2022) "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps".
(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm. This duty is also contemplated in Article 77 of the CISG and in other instruments as well).

[564] UNCC, Report and Recommendations Made by the Panel of Commissioners concerning Part One of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims), 18 December 1997,UN doc. S/AC.26/1997/6, ¶ 79.

[565] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Dissenting Opinion of arbitrator Pedro Nikken, 30 July 2010, ¶ 48.

and interpreters with a much-needed flexibility in such an extreme context, constituting an efficient tool to offer a nuanced solution that can help preserve valuable contracts.

In mid-to-long-term contracts especially, and in view of the temporary nature of the impediment, mechanisms that allow for an adequate renegotiation and proportionate allocation of losses ultimately help preserve contracts and maximize value for the jurisdiction involved.

In this regard, the UNIDROIT Secretariat prepared a document purporting to help parties use the UNIDROIT Principles "(i)[…] "when implementing and interpreting their existing contracts or when drafting new ones in the times of the pandemic and its aftermath"; as well as to "(ii) assist courts and arbitral tribunals or other adjudicating bodies in deciding disputes arising out of such contracts; and (iii) provide legislators with a tool to modernise their contract law regulations, wherever necessary, or possibly even to adopt special rules for the present emergency situation."[566] The first known court decision relying on the UNIDROIT Principles on matters related to the pandemic was rendered on April 30, 2020, by the Rechtbank of Amsterdam.[567]

IX. The UNIDROIT Principles and ex aequo et bono arbitrations

In these types of proceedings, even though the arbitrators are not tied to a specific legal system, they must become familiar with the stipulations of the contract, look at the intention of the parties and interpret and supplement ambiguous texts. In completing this mission, the arbitrators will likely find the UNIDROIT Principles a useful tool and it may provide the adjudicators with a reliable guide on how to act. This is discussed in greater depth in Part 12.

REC. 6.1 OAS Member States are encouraged to review their domestic legal regimes on the law applicable to international investment contracts and to recognize and clarify choice of non-State (or uniform) law.

REC. 6.2 Adjudicators, specifically arbitrators, parties to international investment contracts and their counsel are encouraged, in relation to non-State (or uniform) law, to consider the UNIDROIT Principles and to recognize the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

PART 7: INTERNATIONAL ARBITRATION

I. Origins and evolution of private law and commercial arbitration

In Roman private law, the public authority (the Praetor-Consul) delegated its adjudicating functions to citizens known as *arbiters* or *iudex.* These adjudicators were typically laymen exercising common sense and did not require a thorough knowledge of the law, since they acted in close contact with jurists and often requested their opinions.[568]

Similarly, rather than relying on public adjudicators, in the Middle Ages merchants frequently referred their disputes to peers, trustworthy third parties, and honorable citizens who acted as arbitrators. The merchants organized themselves into fairs and corporations and developed their own statutes. Kings, feudal lords, and other authorities allowed the merchants to organize their own system of justice. As a

[566] UNIDROIT, *Note of the UNIDROIT Secretariat on the UNIDROIT Principles on International Commercial Contracts and The COVID-19 Health Crisis*, July 2020, https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf, (last accessed 30 November 2023), p. 3.

[567] J. Bonell and E. Finazzi, *First Court Decision Referring to the UNIDROIT Principles in Relation to the Current Pandemic Situation*, https://www.unidroit.org/english/principles/contracts/covid19/200430-case-law.pdf (last accessed 30 November 2023). UNIDROIT, *UNIDROIT & COVID-19*, https://www.unidroit.org/unidroit-covid-19/#1456405893720-a55ec26a-b30a (last accessed 30 November 2023).

[568] This system was even institutionalized in Imperial Rome, after the Emperor granted a determined group of experts the *ius respondendi ex auctoritate principis*. Among these jurists, historic names such as Papinian, Ulpianus, Modestinus, and others can be found.

result, numerous tribunals were successively created. These fora have frequently been considered arbitral tribunals due to the freedom granted to the parties to choose their adjudicators and due to the application of rules beyond those provided for in local customs.

The subsequent consolidation of nation-States and the proliferation of the doctrine of State sovereignty over the centuries, among other factors, contributed to the retreat of arbitration. In 1790, the French Constituent Assembly had considered arbitration as "the more reasonable method for terminating disputes among citizens."[569] However, some decades later, in 1843 a landmark decision rendered in France ruled arbitration clauses invalid, except in exceptional circumstances. The French court went on to state that if these clauses were considered valid, arbitration may be chosen too often over other dispute resolution methods and individuals would be deprived of the basic guarantees recognized by State tribunals. This position remained unchanged until 1925, when France reformed their Code of Commerce and the possibility of referring court cases to arbitration arose once more.

The same fear that arbitration would become the dominant dispute resolution mechanism also existed in common law systems. The financial compensation of English judges was based almost exclusively on fees they charged the litigants for the cases in which they intervened. Fixed salaries were non-existent. Such a situation clearly contributed to the hostility towards arbitration in England.

In the United States, the popularity of arbitration began with the Arbitration Act of 1925. Support for the arbitral mechanism started consolidating in 1932 when the Supreme Court decided that, considering the clear intention of Congress, the traditional judicial hostility towards arbitration must be reversed.[570] France also modified its legislation in the 1960s by adding provisions that helped to consolidate arbitration as a viable domestic dispute resolution mechanism. Today the French Code of Civil Procedure – as adopted in decrees promulgated on 14 May 1980, 12 May 1981, and 13 January 2011 – applies to international arbitration as codified in Articles 1504 to 1527. In England, the Arbitration Act of 1996 modernized the matter in a similar manner.

Following the same logic, States that are active in international commerce have become signatories to essential international conventions and have reformed their domestic laws to favor arbitration. As a result, arbitration has now been consolidated as an influential dispute resolution mechanism in many regions of the world.

The enactment of pivotal international instruments strongly contributed to the flourishing of commercial arbitration in recent times. The New York Convention was concluded within the United Nations framework and now has more than 160 State parties from across all continents.[571]

Several relevant regional arbitration instruments exist as well, such as the 1964 European Convention on International Commercial Arbitration (comprising 31 State parties)[572] and the Inter-American

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[569] French Constituent Assembly, Art. 1°: ("As arbitration is the most reasonable means of terminating disputes between citizens, the legislators shall not make any provision that would diminish either the favor of the efficiency of an agreement"). Loi N° 16-24, August 1790.

[570] *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263 (1932).

[571] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, entered into force 7 June 1959. The first convention to deal with the matter was the Treaty on International Procedural Law of 11 January 1889, Title III. The Bustamante Code of 1928 in the Americas also contains a provision regarding enforcement in its Article 432. At a global level, the topic was first addressed in the 1922 Geneva Protocol on Arbitration Clauses in Commercial Matters (27 L.N.T.S. 158, 1924) which was ratified by the United Kingdom, Germany, France, Japan, India, Brazil, and about two dozen other nations. The Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 expanded the enforceability of awards rendered pursuant to arbitration agreements subject to the Geneva Protocol.

[572] European Convention on International Commercial Arbitration, signed 21 April 1961.

Convention on International Commercial Arbitration, also known as the "Panama Convention," ratified by 16 States.[573]

The UNCITRAL Model Law on International Commercial Arbitration, adopted in 1985 and modified in 2006,[574] has also been a major success that has created a framework for international arbitration worldwide. More than 110 jurisdictions have passed legislation based on the UNCITRAL Model Law and other arbitration-friendly regulations such as the UNCITRAL Arbitration Rules of 1976, modified in 2010 and 2013.[575] Within the scope of private commercial disputes, the UNCITRAL instruments recognize the option of referring controversies to non-State adjudicators who have the authority to end conflicts. These instruments provide very limited possibilities to appeal awards before State courts – intervention by domestic adjudicators is only available if due process or public policy was clearly compromised.

II. Arbitration as a sui generis alternative to State or international courts

Before World War II, international arbitration was generally considered a simple means of dispute resolution, tolerated by States as an alternative to local tribunals. The *jurisdictional* theory of arbitration reflected this tendency, according to which both judges and arbitrators are vested with decision-making power derived from their sovereign. As a result, the jurisdictional theory of arbitration held that national laws and conflict of laws systems should prevail. The *contractual* theory of arbitration took a different stance, focusing instead on the parties' agreement. The contractual theory was very advanced in times of inappropriate national regulation during which, for instance, the enforcement of arbitral awards was justified as distinct from the restrictive regime for the enforcement of judicial decisions.

After the development of numerous regulatory instruments,[576] the autonomous, *sui generis*, or mixed character of arbitration gained strength. According to this theory, arbitration is subject to complex rules. It is governed by norms related to contracts, procedural regulations connected with the administration of justice, and rules specifically developed for arbitration.

III. Arbitrators' broad discretion

Arbitrators enjoy greater freedom in decision-making than public servant adjudicators. This latitude derives from the broad powers granted to arbitrators in mainstream legislation, combined with the fact that most jurisdictions do not allow review on the merits of their award.

It would be a misconception to consider this broad discretion as *carte blanche* for the arbitrator to casually choose whichever rule seems the best fit for the dispute. Such a view would be completely misguided. In fact, the exact opposite occurs: the arbitrator must consider all the possibilities that exist for the case at hand, opt for a reasoned solution that conforms to international standards, and emphasize in the decision the effort that has been expended on that analysis.

Arbitral discretion is a key feature of international commercial arbitration, as is made clear by the prevailing methodologies for resolving arbitral conflicts of laws that is discussed later in this Guide. As the substantive law governing the contract shapes the parties' rights and obligations, the arbitrator's discretion has the capacity to significantly affect the outcomes of each case. Hence, the freedom that arbitral tribunals enjoy when determining the applicable law is both a challenge and a responsibility, especially when the contract does not include any choice of law clause.

Recently, an ICSID Annulment Tribunal stated very clearly that:

> The acknowledgement that a tribunal has discretion is merely a general affirmation of one of the powers of a tribunal, but such general affirmation, in the context of the award, cannot be the sole

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[573] Inter-American Convention on International Commercial Arbitration, signed in 1975. The States are: Mexico, Brazil, Argentina, Venezuela, Colombia, Chile, Ecuador, Peru, Costa Rica, El Salvador, Guatemala, Honduras, Panamá, Paraguay, Uruguay, and the United States.

[574] UNCITRAL Model Arbitration Law.

[575] UNCITRAL, *Arbitration Texts,* May 2021, https://uncitral.un.org/en/about/faq/texts, (last accessed 11 May 2021).

[576] Such as the arbitral conventions and modern legal enactments, discussed in this chapter.

reason to award a nominal value of damages. The acknowledgement by the Tribunal of its discretion is a stand-alone affirmation that has no clear connection with the preceding paragraphs so that the reasoning of the Tribunal from the premises to the conclusion can be followed.[577]

IV. A neutral forum for international matters

A. A neutral forum for private parties

In trans-border litigation, the parties usually have the option of submitting their disputes to either a national court or international arbitration. Subjecting the dispute to a national court carries the risk that the parties may have to litigate in another country before adjudicators who are trained to decide according to "domestic" criteria and might ignore the problems and necessities of trans-border commerce. In short, there is a risk that local judges will be influenced by their own legal system, which poses a significant risk to the foreign party.

Beyond that, the foreign party will have to seek counsel from that jurisdiction, with whom they might not be familiar or lack confidence. Furthermore, the adjudication process might be conducted in a language other than that specified in the contract, necessitating the translation of documents and proceedings, which once again leads to additional costs, delays, and potential misunderstandings.

In contrast to these challenges, arbitration provides an effective means to resolve international disputes in a neutral forum and before arbitrators who are usually familiar with international commercial matters. Furthermore, arbitrators are often capable of approaching the conflict with a cosmopolitan view – and even in different languages depending upon the needs of the parties.

An adjudicator that has been trained in comparative law will, consciously or unconsciously, look at the problem with *an international eye*. Arbitrators are human beings and as such, cannot dissociate themselves from the frames of reference, social influences, and networks that surround them. There is a common understanding within the arbitration community regarding the methods of determining and interpreting the applicable law and the standards of procedural due process that should be applied. Even when resorting to national laws, arbitrators are likely to do so considering the transnational environment of arbitration.

A 1989 resolution of the Institute of International Law rejects juridical and philosophical objections to the "non-national" character of arbitration, highlighting the inherent differences between arbitrators and national judges.[578] It is undeniable that international arbitration has features that distinguish it from litigation before domestic adjudicators. In general, parties that choose arbitration often do so to avoid "legalist" solutions to their commercial conflicts. For one reason, because business people frequently feel that State courts do not understand the realities of commercial exchange. Another reason is that arbitrators, whose power derives from the parties' agreement) are expected to prioritize the rules that the parties have chosen to govern their relationship – that is, the terms of their contract and the corresponding arbitral norms.

Arbitrators are not considered delegates of the State who must abide by local rules in their application of the law. Instead, arbitrators are appointed by the parties directly, or according to the mechanism chosen by them. Moreover, the mobile character of arbitration allows parties to avoid adjudication in hostile national environments and instead conduct their dispute in jurisdictions where they can control important procedural and substantive aspects of the conflict regarding the applicable law. When it comes to substantive law, the parties can establish their own applicable rules and require – or expect from the tribunal – that non-State norms and principles be applied when appropriate. This way, they liberate themselves from

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[577] *Perenco Ecuador Limited and Republic of Ecuador,* ICSID Case No. ARB/08/6 Decision on Annulment, 28 May 2021, ¶ 467.

[578] Institute of International Law, *Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises*,, 5(1) Rev. – FILJ 139; A.T. von Mehren, *Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution* , 5(1) Rev. – FILJ p. 54.

inadequate domestic rules regulating international commerce and instead make use of a dispute resolution mechanism with transnational criterion.

The arbitral mechanism carries significant advantages when applied to international transactions not only due to its speed and reduced cost, but also due to an increased degree of fairness inherent to the arbitral process. For instance, arbitrators are empowered to apply general principles and may refuse to apply "unlawful laws" that run afoul of the minimum standards of international law. For example, in *SPP v. Egypt*, it was decided that Egyptian law must be construed so as to include [general] principles […and the] national laws of Egypt can be relied upon only in as much as they do not contravene said principles.[579]

Rather than lamenting a *lex dura, sed lex* emerging from domestic law, the arbitrators' discretion may lead them to apply general principles better suited to the case at hand.[580]

The rejection by arbitrators of outcomes without sufficient comparative law support accelerates the evolution of national laws. For example, the arbitral practice of rejecting the leniency of national law in favor of certain questionable practices to obtain contracts is what eventually led to the adoption of the OECD Anti-Bribery Convention.

B. A neutral forum for State contracts

The neutrality of arbitration is also particularly relevant with regard to contractual relationships with State or State companies. In order to remain attractive to international investments, States offer arbitration as a neutral forum to solve future disputes, as foreign investors usually prefer a dispute resolution mechanism outside of national courts and the application of local laws.[581]

If a dispute does come before a domestic court, when it comes to determining the applicable law, that court will be guided by its own mandatory private international law rules. Depending on how the host State incorporates international law into its domestic legal order, that court may give preference to the application of national law over international law, even if the former clearly contradicts the latter. National judges often lack the expertise to apply international law, which adds to the real (or perceived) partiality. During negotiation of the contract parties might have considered choosing as applicable the laws of a third State; firstly, such as choice may be impractical because States frequently act not only in their commercial capacity (*jure gestionis*) but also in the exercise of their sovereignty (*jure imperii*); and secondly, there is a risk that such choice would be dismissed by the courts of the host State, particularly in expropriation cases.

For these reasons, foreign parties often consider national courts to be unattractive for dispute resolution and prefer the neutrality offered by an arbitral tribunal.

V. Private international law and arbitration

Arbitration is in many ways a private international law endeavor. It is not surprising, therefore, that reputable international arbitrators also tend to be outstanding private international law scholars.

The concepts and vocabulary that private international law provides are largely the same in the context of litigation and arbitration. However, the specific form of private international law concepts may differ in these settings. For example, the concept of public policy has its specific refinements in the arbitration context, which will be further discussed in Part 14. These subtle nuances present challenges in the application of traditional private international law concepts in arbitration.

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[579] *SPP (Middle East) Ltd. & Southern Pacific Projects v. Egypt & EGOTH*, ICSID Case No. ARB/84/3, Award, 20 May 1984 ¶ 84.

[580] ICC Case No.7375, Award (extract), 1996, 2(3) Uniform Law Review 598.

[581] *Saudi Arabia v. Arabian American Oil Company (Aramco)*, Ad Hoc Arbitration, Award, 23 August 1958, 28 ILR 117, ¶¶ 117, 136, 154-155 (Already in 1958, in *Saudi Arabia v. Arabian American Oil Company (Aramco)* (1958) the tribunal stated 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".

Conflicts of laws questions that arise in arbitration can be at least or even more complex as those in litigation. These difficulties and complexities stem from the fact that arbitrators in commercial cases not only face the conflict of laws question regarding "which law" applies, but also the question of "which system of Private International Law" applies. Depending on the case, numerous answers are possible, including national laws, conventions such as Rome I or the Mexico Convention, or principles of private international law, among others.

There are several situations in which conflict of laws questions may significantly impact the outcome of the dispute, for instance, regarding the formation, performance, termination, interpretation, and calculation of damages in international contracts.

Determining the applicable law continues to be considered by some a theoretical exercise exacerbated by legal academia. Some experts consider private international law as a conflict of laws and argue that arbitration negates these conflicts by providing material rules to resolve them – a transnational law *par excellence*. Expressions like the latter perhaps explain why conflict of laws issues are often ignored in arbitration. Fortunately, recent initiatives have illustrated the importance of handling conflict of laws issues appropriately.

Private international law, which includes both uniform law and conflict of laws rules, is relevant for international dispute resolution; applying both aspects suitably can be crucial to the outcome of the case and to preserve legitimacy of the arbitration process and predictability of the award. Hence, international arbitral practice must keep up to date on the recent developments in private international law.

REC. 7.1 Adjudicators, including judges and arbitrators, are encouraged to consider private international law, in terms of both uniform law and conflict of laws rules, in the determination of international investment claims and to keep abreast of relevant developments in private international law.

PART 8: INVESTMENT ARBITRATION TRIBUNALS

I. General Considerations

Two separate international investment claims mechanisms are available through arbitration. The first is for disputes between States, which generally concern the interpretation or application of a treaty. The *Lucchetti v. Peru* case is a rare example of this device in action.[582] The second arbitral mechanism is for disputes between foreign investors and States and is used much more frequently. The advantage of this second type of investment arbitration is that it does not potentially generate an international conflict between States and external factors do not influence the claim.

II. Origins

There were three types of arbitration in the public international law field during the Middle Ages: arbitration provided by a head of State, by a mixed commission, or by a tribunal.

Arbitration by a head of State was rooted in the old European tradition that justice as political power comes from above – that is, justice is dispensed by the Pope or emperor, and then by the prince or his delegate. This system led litigating parties to mistrust State-appointed adjudicators, who they felt were preoccupied with and influenced by the interests of their own State over the dispensation of impartial justice. Furthermore, to avoid being bound by precedent in their adjudication of future disputes and out of concern that juridical criticism might undermine royal sovereignty, heads of State rarely included their reasoning in the decisions they rendered.

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[582] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru,* ICSID Case No. ARB/03/4, Award, 7, February 2005. (Peru apparently sought a favorable interpretation of the BIT in the State/State arbitration to assist its case in the investor/State arbitration).

Arbitration before mixed commissions, described in Part 2, Section IX, was generally handicapped by the fact that such judgments were sometimes considered less authoritative than those rendered by an adjudicator wielding State authority. Problems also arose when the adjudicator was a national of one of the State parties involved in the dispute. Notwithstanding these challenges, arbitration before mixed commissions did present some advantages, as the experts in their panels typically gave detailed (often prolix) reasons.

Mixed commissions and individual arbitrators often partly acted as conciliators. In such cases, they applied the concepts of "law and equity" in awards that were not necessarily well-reasoned.

In contrast, nineteenth-century arbitration became progressively oriented toward the judicial model. Adjudicators tended to be independent and impartial experts with recognized technical competence whose decisions were increasingly well-reasoned and in accordance with the law. The famous 1872 Alabama arbitration case between the United States and England illustrates this evolution. The decision was rendered by five tribunal members in accordance with the Treaty of Washington of 1871.

Despite this advancement, arbitration made insufficient progress throughout the nineteenth century. This was partially because arbitral tribunals were only established on occasion and required the prior negotiation of the parties. In addition, these tribunals were frequently inclined towards encouraging settlements, which gave the awards a diplomatic character. Many awards were only supported by weak legal reasoning, which made the development of international case law difficult. This situation changed in 1899 after the First Hague Conference which, in an agreement revised in 1907, created the Permanent Court of Arbitration (as discussed in Part 2, Section IX).

In the twentieth century, all three types of arbitration (head of State, mixed commission, and tribunal) could still be found. Arbitration before a head of State was reserved for certain matters, such as the establishment of borders after both World Wars (which were typically decided by sole arbitrators). Mixed-commission arbitrations have also continued, typically seated in the jurisdiction where the dispute first occurred to facilitate the investigations of the issues discussed (usually related to damages). Finally, cases before arbitral tribunals flourished significantly throughout the past century, particularly in foreign investment-related matters.

III. The ICSID revolution

A. The ICSID idea

The creation of the International Centre for Settlement of Investment Disputes (ICSID) brought about significant new developments which, in light of subsequent advances in international law, now appear almost commonplace.

Before ICSID, most investor-State disputes arose over individually negotiated contracts. Investor-State claims proceeded as ordinary breach-of-contract claims, resolved through international commercial arbitration. Where no investor-State contracts had been negotiated, investment disputes were resolved mostly in national courts that applied their domestic laws. Individuals had very little chance of success if they intended to bring claims against States or State entities. States could bring international claims on behalf of their nationals but otherwise, there was no direct recourse.

Within this legal landscape, the ICSID Convention marked a shift. This instrument allowed investors to escape diplomatic protection schemes, avoid national jurisdictions, and take action directly against a State, making use of public international law where applicable. State immunity also became much more restricted under the ICSID Convention due to the exclusion of local remedies and the possibility of enforcing awards directly within the territories of State parties.

The previous Friendship, Commerce and Navigation treaties were replaced by bilateral investment treaties, which, after the creation of the ICSID, prompted treaty drafters to attempt to escape diplomatic protection by incorporating a clause that established the consent of the State to arbitration with covered investors. In 1969, the ICSID Secretariat released a document that listed a series of model clauses tailored

to bilateral investment treaties and disseminated it widely. Previously, no bilateral investment treaty had included investor-State arbitration clauses. These model clauses helped the widespread adoption of investment treaty arbitration.

Host countries aim to improve their foreign investment climate by adding an arbitration option in treaties, investment legislation, and contractual agreements. Nonetheless, important questions have been raised regarding whether the possibility of resorting to arbitration "by default" actually attracts foreign capital. In addition, by consenting to ICSID arbitration, host States may protect themselves against other forms of international litigation. Consenting to ICSID arbitration also allows States to effectively shield themselves against diplomatic protection launched by opposing States to protect their nationals.

One of the advantages of the ICSID Convention is that it places disputes under the framework of an international treaty that operates as the only source of regulation of the different aspects of the dispute. ICSID provides a "self-contained system of arbitration" that is autonomous and independent of national legal systems.

The Convention has been specifically designed to resolve investment-related disputes and to be immune to State interference. The competence of arbitral tribunals is determined under the Convention. This marks a distinct difference from international commercial arbitrations, where national courts play a significant role in jurisdictional disputes. In addition, ICSID decisions cannot be set aside by national courts[583] – they are only subject to an ICSID annulment procedure as described below. This is also a significant difference from the New York Convention, where awards can be reviewed by the domestic courts of the arbitral seat and by the jurisdiction where enforcement proceedings must occur.

The ICSID Convention only provides a procedural framework for resolving investment-related disputes; it does not contain substantive rules governing the relationship between host States and foreign investors. There have been several proposals to provide further guidance on this issue, but they were discarded during the negotiation of the Convention.[584] Strong conflicting positions in this regard would have jeopardized the whole project.

The only applicable conflicts of laws provision is Article 42 of the Convention, which merely indicates which substantive rules may apply in accordance with party autonomy or where the parties have not chosen an applicable law. This will be discussed in Part 8, Section V.

B. Origins of the ICSID Convention

Economist John Maynard Keynes envisioned three global institutions that were born at the 1944 United Nations Monetary and Financial Conference of Bretton Woods: The International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), and the International Trade Organization, which later became the World Trade Organization (WTO). The IBRD was the largest and the precursor to the other two organizations and was established to assist in the reconstruction of Europe after World War II. As such, the IBRD became the "world's premier institution" for developing countries.

The World Bank was also formed as a specialized agency of the United Nations. Created in 1945, it began operating the following year. The World Bank comprises many institutions (collectively called the "World Bank Group"), with the IBRD as its main organ. Membership in the World Bank is conditioned upon membership in the IMF.

The World Bank created a plan for the settlement of disputes between private parties and host States under the auspices of a neutral institution to which numerous States belonged. As a result, it proposed the

[583] Even though the enforcement of such awards remains subject to local rules granting States immunity from execution.

[584] ICSID, *History of the ICSID Convention*, Vol. II, p. 418 *et seq.*

ICSID Convention. ICSID is the only non-financial institution within the World Bank Group, departing in several respects from the organizational pattern of the others.[585]

Prior to the ICSID Convention, the IBRD had intervened in the settlement of various disputes by means of good offices, mediation, and conciliation. This experience facilitated the negotiations that led to the creation of ICSID. Aron Broches, then General Counsel of the World Bank, played a key role in its creation.

The ICSID Convention was first discussed in 1962 and approved by Executive Directors on March 18, 1965 before entering into force on October 14, 1966 with twenty ratifications.[586] The ICSID Convention now has 165 signatories and 158 deposited ratifications.[587] Notable exceptions include Russia (signed but not ratified) and Brazil.[588]

The Rules and Regulations of the ICSID Convention[589] entered into force on January 1, 1968. Small amendments were made in 1984 and new Rules and Regulations came into effect on January 1, 2003. On March 21, 2022, ICSID Member States again approved a comprehensive set of amendments that entered into effect on July 1, 2022. The new rules for arbitration and conciliation aim to reduce the time and cost of cases. Novel expedited arbitration rules are also now available. The new rules also aim to create greater transparency by enhancing public access to ICSID orders and awards. Furthermore, for the first time the rules address third-party funding.[590]

C. ICSID Functioning

The ICSID Convention, like the ICJ, establishes a Centre with its own international legal identity (Articles 1 and 18). ICSID, on the other hand, seeks to create a depoliticized forum in which parties can resolve their disputes with the help of arbitrators chosen in accordance with the mechanism.

In fact, ICSID does not conduct arbitrations itself (Article 1). Rather, ICSID provides facilities and services, such as, maintaining lists of possible arbitrators (Article 12); screening and registering arbitration requests (Article 36, paragraph 3); assisting in the constitution of tribunals and in the conduct of proceedings (Article 38); adopting rules and regulations (Article 6); and, drafting model clauses for investment agreements.

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[585] There are currently five organizations within the World Bank Group: ICSID, IBRD, the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA). Each of the five World Bank Group organizations contribute to the overall goal of reducing poverty worldwide. ICSID, *World Bank: About*, May 2022, https://icsid.worldbank.org/about, (last accessed 11 May 2022).

[586] *History of the ICSID Convention*, ICSID Secretariat, 1970, Vol. II-2, p. 1041. [FN 356, FN 580]

[587] *Member States Database*, June 2022, https://icsid.worldbank.org/about/member-states/database-of-member-states, (last (accessed 9 June 2022). On June 21, 2021, Ecuador signed again the ICSID Convention, becoming the 164th State to do so. https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention (last accessed 9 June 2022).

[588] ICSID, *Member States Database*, June 2022, https://icsid.worldbank.org/about/member-states/database-of-member-states, p.1.

[589] ICSID, *Service*s, May 2022, https://icsid.worldbank.org/services/overview, (last accessed 11 May 2022). The Rules and Regulations of the ICSID Convention included the Administrative and Financial Regulations, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ('Institutional Rules'), the Rules of Procedure for Conciliation Proceedings ('Conciliation Rules') and the Rules of Procedure for Arbitration Proceedings ('Arbitration Rules').

[590] Also, the amended rules provide broader access to ICSID's dispute resolution rules and services, providing States and investors access to Additional Facility arbitration and conciliation where one or both disputing parties is not an ICSID Contracting State. Regional Economic Integration Organizations—such as the European Union—may also be a party to proceedings under the amended Additional Facility Rules. ICSID, *Rules & Amendments,* June 2022 https://icsid.worldbank.org/resources/rules-amendments (last accessed 13 June 2022).

The Centre provides facilities for arbitration, conciliation, mediation, and fact-finding.[591] The official languages of ICSID are English, French, and Spanish.

The Administrative Council is the governing body of ICSID, which adopts the rules and regulations of the Centre and approves its annual reports and budget. The Administrative Council has no role in the administration of cases.[592]

The Secretariat is headed by a Secretary-General and comprises two Deputy Secretaries-General and approximately 70 staff of diverse backgrounds and nationalities. The Secretary-General is the legal representative and the main officer of the Centre, who is responsible for its internal administration.[593]

ICSID maintains a Panel of Conciliators and a Panel of Arbitrators. Each contracting State may appoint four persons to each panel who may (but need not) be a national of that State.[594] The Chairman of the Administrative Council may appoint ten persons to each Panel, each with a different nationality. Under certain circumstances, such as an absence of agreement between parties,[595] the Chairman of the Administrative Council may appoint the arbitrators and conciliators.

D. Some basic features of the ICSID arbitration mechanism

Some argue that the ICSID arbitration mechanism borrows from commercial arbitration´s reasoning, procedure, and structure. Others argue that the provisions of the Convention and its implementing regulations and rules are not based on private arbitration models but rather, on the provisions of other public international law instruments.[596] Divergences like this are evidenced by the inconsistencies found in practice when ICSID-related matters are approached exclusively from the standpoint of either commercial arbitration or public international law.

One of the most striking features of the mechanism is that it provides a private individual or a corporation a forum in which to pursue States directly.

Similarly, to the Statute of the International Court of Justice, under the ICSID Convention, contracting States have no obligation to submit disputes to the Centre where the parties have not consented to its jurisdiction. Therefore, the ICSID jurisdiction is not compulsory *per se*. It requires written consent of the parties either in an investment agreement or otherwise. According to the ICSID Preamble, "[…] no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."[597]

To avoid the risks of obstruction, consent to ICSID cannot be unilaterally withdrawn (Article 25, paragraph 1), the tribunal enjoys exclusive jurisdiction (Article 41), and the awards are binding and enforceable (Articles 53 and 54). Furthermore, the Centre may appoint an arbitrator where the parties have failed to do so (Article 38) and the parties' lack of cooperation will not prevent the proceedings from continuing (Article 45).

Consent alone is not enough to establish ICSID jurisdiction, however. The Centre has limited jurisdiction in relation to the character of the parties and the nature of the dispute. In this regard, Article 25

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[591] ICSID, *Services,* May 2022, https://icsid.worldbank.org/services, (last accessed 11 May 2022).The Secretary-General may also act as an appointing authority or as the authority deciding a proposal to disqualify an arbitrator in non-ICSID disputes..

[592] The Administrative Council is formed by the representatives of the Member States or, in their absence, by the governors of the World Bank of each Member State. The President of the Bank is the Chairman of the Administrative Council and has no vote in the Council.

[593] https://icsid.worldbank.org/about/secretariat (last accessed 11 May 2022).

[594] ICSID Convention, Art. 13.

[595] ICSID Convention, Art. 30, 38 and 52.

[596] For example, the Conventions for the Pacific Settlement of Disputes, the Statute and Rules of the ICJ, the Model Rules on Arbitral Procedure of the ILC, the Articles of Agreement, By-Laws, and Loan Regulations of the IBRD, etc.

[597] ICSID Convention, Preamble.

of the ICSID Convention establishes jurisdictional requirements related to the nature of dispute (*ratione materiae*) and the parties to the dispute (*ratione personae*). More specifically, the nature of the dispute must arise directly out of the investment and the parties involved must be contracting States or constituent subdivisions (when so agreed) and nationals of other contracting States, including "any juridical person, which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention."[598]

These limitations of *ratione materiae* and *ratione personae* led to creation of the ICSID Additional Facility Rules, which enable arbitrations that do not fall under these jurisdictional requirements. The Additional Facility Rules are discussed in the pages below.

In ICSID proceedings, arbitral tribunals are normally comprised of three arbitrators: one is selected by each party and a third is chosen jointly by the other two if they can agree, or otherwise by the ICSID Chairman. According to Article 39, the majority of the arbitrators must be nationals of States other than the host State or the State of the investor. This requirement distinguishes ICSID proceedings from arbitrations conducted under other institutional rules.

E. Arbitration review mechanism

ICSID has created a review mechanism for the annulment of awards under exceptional circumstances to safeguard against the violation of fundamental principles related to due process (Article 52 of the ICSID Convention, Articles 50 and 52-55 of the Arbitration Rules).[599]

Grounds for annulment are the following: the tribunal was not properly constituted or had manifestly exceeded its powers; there was corruption on the part of one of the members of the tribunal; there was a serious departure from one of the fundamental procedural rules; or the award failed to state the reasons on which it is based.

Annulment applications must be filed within 120 days of the award being rendered. The Chairman of the Administrative Council then appoints three persons from the Panel of Arbitrators to form an ad hoc Committee which will decide the application and either reject or uphold the award in whole or in part. If the ad hoc Committee annuls the award, any party is entitled to request resubmission to a newly constituted tribunal to obtain a new award on the matter.[600]

The first two ad hoc Annulment Committees constituted under the ICSID mechanism, belonging to the cases of *Klöckner v. Cameroon* and *Amco v. Indonesia,* exercised broad powers of review,[601] which was heavily criticized. Subsequent Annulment Committees have created a higher threshold for annulling awards based on other reasons instead of based on an incorrect application of the applicable law. However, applying the wrong law could still lead to annulment of an award on the grounds of the manifest excess of powers of the tribunal.[602]

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[598] ICSID Convention, Art. 25(2)(b).

[599] ICSID, *Updated Background Paper on Annulment for the Administrative Council,* May 2016. https://icsid.worldbank.org/resources/publications/background-papers-annulment (last accessed 11 May 2022). The grounds for annulment in the ICSID Convention derive from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure ("ILC Draft"), which was an effort to codify existing international law on arbitral procedure in State-to State arbitrations. See Documents of the Fifth Session Including the Report of the Commission to the General Assembly, [1953] 2 Yearbook of the International Law Commission 211, UN Doc. A/CN.4/SER.A/1953/Add.1 ("1953 ILC Yearbook II") (Article 30 of the Draft Convention on Arbitral Procedure).

[600] *Updated Background Paper on Annulment for the Administrative Council of May 2016*.

[601] *Klöckner v. Cameroon (Klöckner)*, ICSID Case No. ARB/81/2, Decision on Annulment, 03 May 1985, ¶ 79; *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, ¶ 23.

[602] ICSID,*Updated Background Paper on Annulment for the Administrative Council*, May 2022. https://icsid.worldbank.org/sites/default/files/publications/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf, (last accessed 11 May 2022), p. 57.

F. First ICSID cases and evolution

From the creation of ICSID in 1966 until 1987, all the cases submitted to ICSID tribunals were brought under concession contracts that contained an ICSID arbitration clause. Indeed, the ICSID mechanism was primarily intended to apply to cases involving such contracts, even though the *travaux préparatoires* of the Convention also made clear that State consent to arbitration could be established through the provisions of an investment law.

At first, not much happened at the Centre. The ICSID Convention went into effect two years before the first bilateral investment agreement that had included investor-State arbitration was approved, in 1968.[603] Following that, a proliferation of bilateral and multilateral treaties established the ICSID Convention or its Additional Facility Rules for the resolution of investment disputes. BITs multiplied quickly, beginning with around 40 treaties in 1979 to around 3,000 at present. This propagation has led to an impressive number of cases involving arbitration, Additional Facility arbitration, and conciliation.

The first case submitted to ICSID was the 1972 *Holiday Inns v. Morocco* arbitration,[604] which resulted from an investment concession contract. The first investment treaty case, registered in 1987, was *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*. Prior to the *AAPL* case, 23 non-investment treaty cases had been registered at the ICSID. The flow of cases since then has been impressive;[605] by the end of 2019, a total of 967 ICSID arbitrations have been registered since its founding.[606]

G. ICSID Additional Facility Rules

The ICSID Additional Facility was created on September 27, 1978 and its rules were published that year, along with non-binding explanatory comments. The Additional Facility Rules have subsequently been amended in 2002, 2006, and 2022.[607]

A proceeding under its rules can only be convened for conciliation or arbitration of investment disputes under certain circumstances,[608] since the Facility is not available for the settlement of ordinary commercial disputes.[609]

These Additional Facility rules apply to legal disputes which do not directly arise out of an investment, provided that at least one side is either party to the ICSID Convention or a national of a State

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[603] *Agreement on Cooperation Between Netherlands and Indonesia (with Protocol and Exchanges of Letters Dated on 17 June 1968).*

[604] *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974.

[605] ICSID, Caseload Statistics, May 2022, https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics (last accessed 11 May 2022).

[606] While only four ICSID awards were made between 1971 and 1980, nine were made between 1981 and 1990, 18 were made between 1991 and 2000, 96 were made between 2001 and 2010, and 197 were made between 2011 and 2019. ICSID, *The ICSID Caseload: Statistics* (2024).

[607] ICSID, *Additional Facility Rules*, June 2022, https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview, (Last accessed 24 June 2022). On the last amendment, see: ICSID, Rules & Amendments, June 2022, https://icsid.worldbank.org/resources/rules-amendments, (last accessed 24 June 2022).

[608] The Additional Facility is responsible for the administration of the following proceedings: (i) conciliation or arbitration proceedings for the settlement of investment disputes arising between parties one of which is not a Contracting State or a national of a Contracting State; (ii) conciliation or arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not directly arise out of an investment; and (iii) fact-finding proceedings.

[609] Article 2, paragraph b of the Additional Facility Rules must be read in conjunction with Article 4, paragraph 3. A condition thus emerges that the underlying transaction must have features which distinguish it from an ordinary commercial transaction. Certain investments nexus emerges as a precondition. In practice, only the first group of cases has been relevant.

party to this treaty. Additional Facility rules also govern fact-finding proceedings between a State and a national of another State.[610]

Additional Facility proceedings may be administered by the ICSID Secretariat and can benefit from the Centre's institutional support and expertise. However, the ICSID Convention and its rules of enforcement do not apply to Additional Facility awards.[611] Questions of enforcement are typically governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, when duly ratified.

The ICSID Additional Facility Rules became particularly relevant in the context of NAFTA, given that the United States was a party to ICSID, but Canada and Mexico were not parties at that time.[612] Articles 1120 and 1122 of NAFTA gave parties the option to resort to either Additional Facility arbitration or UNCITRAL arbitration. Since Mexico and Canada were not parties to ICSID, in principle only UNCITRAL arbitration was available to them under NAFTA, unless they resorted to ICSID Additional Facility Rules. [613] In fact, the first ICSID Additional Facility Rules case of 1997, *Metalclad v. Mexico,* derived from NAFTA.[614]

Under Annex 14.D.3 of the recent United States-Mexico-Canada Agreement (USMCA), for investment disputes between Mexico and the US, claimants may submit a claim under the following rules: the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other arbitration rules provided that both the claimant and respondent agree.[615]

The USMCA represents a significant change from the system created under NAFTA, since it eliminates Canada from the investor-State arbitration system altogether. Moreover, the USMCA significantly curtails investor-State arbitration for US and Mexican investors. In contrast to NAFTA, when a dispute arises, the USMCA requires that the investor exhaust local remedies for a minimum of 30 months unless recourse to local courts is "obviously futile." In addition, only specific matters may be claimed under the USMCA mechanism, such as discrimination and direct expropriation.[616]

IV. The UNCITRAL Rules and international investment claims

Other investment tribunals operate pursuant to the UNCITRAL Arbitration Rules, specifically under its first version adopted in 1976, or rules drawn upon them. The UNCITRAL Rules, which inspired commercial arbitration rules worldwide, were not designed to apply specifically to international investment claims. However, they have been used in the investment arbitration context for many years.

The UNCITRAL Rules, or its adoption with minor modifications by many arbitral institutions, have been included in several investment treaties after they were first adopted in the treaty between France and Panama in 1982. Panama did the same with several other treaties. Other countries such as Cuba, Haiti, Panama, Poland, Russia, Bulgaria, and China followed suit.

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[610] Additional Facility Rules, Article 2.
[611] Additional Facility Rules, Article 3.
[612] Additional Facility Rules, p. 705.
[613] Another example is the 1994 Free Trade Agreement between Mexico, Colombia, and Venezuela. *See*: UNCTAD, *Treaties With Investment Provisions*, June 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3122/colombia-mexico-venezuela-fta (last accessed 24 June 2022). Articles 17 and 18 of the Agreement grant the investor option to institute ICSID arbitration, Additional Facility Arbitration, or UNCITRAL arbitration, depending on the state of ratification of the ICSID Convention by the State in question.
[614] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
[615] *United States-Mexico-Canada Agreement*, entered into force in July 2020. https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf (last accessed 11 May 2022).
[616] The USMCA precludes claims for indirect or creeping expropriation, violation of the minimum standard of treatment, and violation of an investor's legitimate expectations.

Besides the UNCITRAL Arbitration Rules themselves, the most frequently used UNCITRAL-inspired rules are the ICC Rules of Arbitration, the SCC Arbitration Rules, and the ICSID Additional Facility Rules.

Investment treaties often offer investors the choice between different dispute resolution options. Most multilateral investment treaties also offer a choice between the ICSID and UNCITRAL Rules, among other options.

The ICSID and UNCITRAL Rules are similar in most aspects. As such, the substantive outcome should be the same regardless of whether ICSID or UNCITRAL Rules are invoked.[617] There is also a common pool of arbitrators currently employed in both ICSID and non-ICSID arbitrations.

Less information is available about arbitrations under UNCITRAL Rules. Unlike ICSID awards which are all accessible in a single database maintained by one institution, awards under UNCITRAL Rules are often handed down by ad hoc tribunals. The decisions (if public) emanating from such tribunals may be collected by a number of institutions with significant differences in publication of these awards and it can be difficult to access this data.

Even though almost half of all known investment treaty disputes are arbitrated under "non-ICSID" rules, there is limited research on these types of disputes, perhaps because investment arbitrations under commercial rules tend to be less publicized.

As discussed, many institutions follow or are inspired by the UNCITRAL Arbitration Rules. Among them is the Permanent Court of Arbitration and it, as well as other institutions of relevance, will be discussed below.

V. Permanent Court of Arbitration (PCA)

The PCA currently has 122 member States.[618] It offers several services such as arbitration, conciliation, fact-finding commissions, good offices, and mediation. Moreover, the PCA has been appointed as the nominating authority, among other functions, under the UNCITRAL Rules.[619]

The PCA administers cases under its own procedural rules, the UNCITRAL Rules, and administers ad hoc proceedings according to the provisions of negotiated treaties. Additionally, as an appointing authority, the PCA is responsible for deciding arbitrator challenges.

The PCA has a three-part organizational structure. The Administrative Council oversees its policies and budgets, the Members of the Court are potential arbitrators, and the Secretariat is the appointing authority.[620] The arbitrators, however, need not necessarily be selected from the list of the Members of the Court.

The Secretariat, known as the International Bureau, is headed by the Secretary-General. The International Bureau has its seat in The Hague,[621] and provides administrative support to tribunals and commissions, serving as the official channel of communication for the PCA and ensuring the safe custody of documents. The PCA has offices in Port Louis (Mauritius), Singapore, Buenos Aires, Vienna and Ho Chi Minh, and a network of host country agreements in four continents. [622] According to those agreements, parties in cases administered by the PCA have certain privileges and immunities analogous to those granted

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[617] This has not, however, been the case in matters such as double nationality.

[618] Contracting Parties which have acceded to one or both Permanent Court of Arbitration's founding conventions. PCA, *Contracting Parties*, July 2022, https://pca-cpa.org/en/about/introduction/contracting-parties/ (last accessed 20 July 2022).

[619] In 2021, the PCA handled 49 requests related to its appointing authority services. PCA, Annual Reports, May 2022: https://pca-cpa.org/en/about/annual-reports (last accessed 11 May 2022).

[620] Article 6, 8-10, PCA Arbitration Rules of 2012.

[621] See more in: <https://pca-cpa.org/en/about> (accessed 11 May 2022).

[622] Ibid.

to the United Nations, as well as inviolability for acts performed in the exercise of its functions. Likewise, non-party participants in proceedings such as witnesses and experts have the corresponding privileges and immunities that come with the exercise of their functions.

The 2012 PCA Arbitration Rules, currently in effect, draw upon prior rules of the 1990s and the UNCITRAL Rules, with certain changes that were made to address public international law issues that may arise in disputes. For example, according to Article 1.2, by submitting disputes to the PCA, States waive their immunity.

By way of background, the PCA was created more than a century ago and originally focused on States. Now, the PCA administers disputes involving States, State-controlled entities, intergovernmental organizations, and private parties. Even though inter-State disputes continue to be one of the PCA's most important activities, mixed arbitrations involving these other parties have expanded substantially and, in 2022, represented a majority of active PCA cases.

Until 1932, only twenty cases had been filed at the PCA. Over the course of its history, the PCA has considered matters concerning territorial sovereignty, State responsibility, the interpretation of treaties or contracts, fishing rights, and financial matters. One of the most famous cases to be heard during this time was the *Island of Palmas* case.[623]

The workload of the PCA has grown significantly since the 1990s. During 2021, the PCA administered 204 cases, comprising: 7 inter-State arbitrations; 115 investor-State arbitrations arising under bilateral/multilateral investment treaties or national investment laws; 80 arbitrations arising under contracts involving a State, intergovernmental organization, or other public entity; and 2 other proceedings.[624]

The PCA also received a significant boost thanks to its involvement in the establishment of the Iran-United States Claims Tribunal in The Hague. This Tribunal was originally seated at the premises of the PCA in the Peace Palace until it moved to its own offices in 1982.

VI. Iran-United States Claims Tribunal

Mixed claims commissions have been "quasi-institutionalized" or "semi-permanent" arbitration mechanisms. The most innovative and recent example is the Iran-United States Claims Tribunal, established by the so-called Algiers Accord of 1981.[625]

The 1979 Iranian Revolution, under the new revolutionary government, nationalized a substantial number of American assets without compensation. A hostage crisis at the US Embassy in Tehran led to an American blockade of Iran and the freezing of Iranian assets in the US. The negotiations that led to the Algiers Accord appeased diplomatic tensions. The agreement provided for the liberation of the hostages and the establishment of a mixed claims commission to settle disputes between both countries, including private claims. All parties involved had something at stake: a significant number of US investors sought compensation for nationalization of their assets in Iran, breaches of contract, and similar harms. Iran had billions of US dollars deposited (and afterward, frozen) in US banks, which in turn faced exposure to a potential default on billions of dollars of loans by Iran's government.

The mandate of the Iran-United States Claims Tribunal is the adjudication of disputes arising out of alleged violations of property rights in the aftermath of the Iranian Revolution. An impressive series of cases ensued. The decisions run to more than thirty volumes and have made a momentous contribution to international law in addition to ground-breaking decisions by the tribunal on issues such as expropriation and State responsibility. The rulings in these and other matters caught the attention of scholars and other international tribunals that resulted in widespread citations.

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[623] Island of Palmas (or Miangas) (The Netherlands / The United States of America), PCA Case No. 1925-01, Award (May 4, 1929).
[624] *See* more in: https://pca-cpa.org/en/about/annual-reports (last accessed 11 May 2022).
[625] *Claims Settlement Declaration of Algiers*, 19 January 1981, 20 ILM 223 (1981).

The tribunal has jurisdiction in two categories of claims: 1) between private parties and the US and 2) inter-State claims between the US and Iran. Thousands of cases have been heard related to several matters involving, for instance, investment rights, expropriation, compensation, and valuation issues.

The decisions of the Iran-United States Claims Tribunal are made public and are frequently considered persuasive sources of authority on relevant investment arbitration issues raised before other tribunals. The tribunal has contributed significantly to the progress and codification of international law generally and has provided important jurisprudence on matters regarding expropriation, compensation, various issues of State responsibility, and the determination of interest on monetary awards. The UNCITRAL Rules also found widespread authoritative application in this context, which has generated commentaries that have contributed to their enhanced and increasingly popular position in international arbitration practice.

The considerable number of cases heard, the monetary sums involved, the continuity of the tribunal, the high-profile status of its members, and the many controversial issues raised have together made the Iran-United States Claims Tribunal a milestone in investment dispute resolution.

VII. Investment arbitration under other institutional rules

Investment treaties or contracts sometimes refer to other rules that emanate from international institutions such as the ICC,[626] the London Court of International Arbitration (LCIA), the SCC, the Swiss Chambers' Arbitration Institution, the Vienna International Arbitral Centre (VIAC), and the Kuala Lumpur Regional Centre for Arbitration (KLRCA), among others. These rules tend to follow similar patterns, inspired by the UNCITRAL Rules.

High-profile cases have been decided under the ICC Rules of Arbitration, such as the *Deutsche Shachtbau* case[627] or the LCIA Rules, such as the *Occidental* case.[628] The SCC Rules of Arbitration have been expressly mentioned in the ECT and in many other bilateral investment treaties signed by successor States of the former Soviet Union.

Recent developments include the 2016 CETA between Canada and the EU and the EU-Vietnam Free Trade Agreement (EVFTA). Both the CETA and the EVFTA are introducing innovation in the field, as they provide for the establishment of a permanent court and an appellate body, instead of ad hoc arbitral tribunals that have historically been used in trade and investment agreements.

The 1993 treaty that established the Organization for the Harmonization of Business Law in Africa (OHADA) is another example of a unique development in the field of international investment arbitration. The treaty, later revised, is currently in force in seventeen African countries and is open to all African States, whether they are members of the African Union. The OHADA organization is comprised of the Conference of Heads of States, the Council of Ministers, the Common Court of Justice and Arbitration (CCJA), the Permanent Secretary, and the High Regional School of Magistracy. The CCJA is a supranational court working towards the uniform application of the OHADA acts. Among other roles, the OHADA organization operates both as an arbitral institution and as a court of final appeal for arbitral awards.

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[626] *See*: ICC Arbitration Involving States and State Entities under the ICC Rules of Arbitration Report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities, 2012. https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf (last accessed 11 May 2022).

[627] *Deutsche Schachtbau-und Tiefbohrgesselschaft mbH v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.*, (1987); ICC Case No. 3572, Award, 4 July 1980.

[628] *Occidental Exploration and Production Company v. The Republic of Ecuador*, England and Wales Court of Appeal, 09 September 2005.

VIII. International investment ad hoc arbitrations

Foreign investment arbitration can also be conducted by means of ad hoc proceedings.[629] For instance, the famous *Aminoil* case[630] was subject to procedural rules "on the basis of natural justice and of such principles of trans-national arbitration procedure as it may find applicable."

When bilateral investment treaties provide for ad hoc arbitration, the mechanism is usually the following: the arbitral tribunal is composed of three arbitrators, two of which are chosen by the parties that independently appoint one arbitrator each. These party-appointed arbitrators then appoint the third arbitrator, who acts as chairman. The third arbitrator must be a national of a third State not involved in the proceedings. If there is no agreement on the third arbitrator, the task is entrusted to an impartial appointing authority. The same applies when one of the parties does not appoint an arbitrator. Recent BITs have been consistent in relying upon authorities to select the third arbitrator, such as the President of the ICJ, the Chairman of the ICC, the Secretary-General of the PCA, or the Secretary-General of the United Nations (UN), who may be approached to this end by either party.

Problems may arise when the ad hoc clauses do not expressly indicate a set of rules but rather, direct the tribunal to decide its own procedural regulations. These difficulties may be overcome when the parties agree to the application of certain rules, as was the case in *ECE Projektmanagement et al. v. Czech Republic* and based on the 1990 German-Czech Republic BIT.[631] With the parties' consent, the tribunal applied the 1976 UNCITRAL Rules. The same approach was adopted by the *Saar Papier* tribunal, thereby effectively turning these awards into UNCITRAL awards, despite the States providing for "pure" ad hoc arbitration in the treaty.[632]

Ad hoc arbitrations have the advantage of procedural flexibility, but difficulties usually arise when the parties or their lawyers do not cooperate, or when they are not supported by an adequate legal system in the place of arbitration. Perhaps this explains why there appears to be reluctance towards ad hoc arbitration.[633] Companies and States increasingly include in their contracts a reference to institutional rules, which are often more predictable than an ad hoc procedure, but still allow the tribunal and the parties to "work out the details of arbitral procedures in particular cases as they see fit – much as they are in ad hoc arbitrations."[634]

Ad hoc arbitration may be more procedurally complicated than arbitration under ICSID Rules, but not when managed professionally and with cooperation of the parties. Moreover, ad hoc arbitrations can bring about other advantages, such as increased confidentiality.

Unlike ICSID arbitrations, ad hoc proceedings open the possibility of a challenge before national courts in the jurisdiction where the award is decided or enforced, and this may cause uncertainty for the

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[629] For instance, the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed 7 October 1988.

[630] *The American Independent Oil Company v. The Government of the State of Kuwait, ad hoc,* Final Award, 24 March 1982.

[631] *ECE Projektmanagement & Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, PCA Case No 2010-5, Final Award, 19 September 2013.

[632] *Saar Papier Vertriebs GmbH v. Republic of Poland* (I), Ad Hoc Arbitration, Interim Award on Jurisdiction, 17 August 1994, ¶ 4. *See* additionally: *Treaty between The Federal Republic of Germany and The People's Republic of Poland Concerning the Encouragement and Reciprocal Protection of Investments*, signed 10 November 1989, Art. 11.

[633] A 2008 study detected a preference for institutional arbitration over ad hoc arbitration. Interviewees expressed "[t]hat the main reason for using institutional arbitration was the reputation of the institutions and the convenience of having the case administered by a third party". This survey was not exclusively concerned with foreign investment disputes, but international arbitration in general. *See in* Price Waterhouse Coopers and Queen Mary University, *International Arbitration: Corporate attitudes and practices 2008* (the PWC Study) https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf (last accessed 12 May 2022).

[634] Ibid., p. 2365.

parties (therefore, it is advisable to assess beforehand if the country of the seat has a competent and efficient judicial system, and that correctness and speed are guaranteed). This was the case in Sweden, in regard to *CME v. Czech Republic*, conducted as an ad hoc arbitration pursuant to the provisions of the parties' BIT.[635]

IX. Internationalized and territorialized tribunals distinction

A distinction is sometimes made between "internationalized" and "territorialized" tribunals. Territorialized tribunals operate under the legal framework of the State of the seat under rules similar to international commercial arbitration. Investment claims heard before territorialized tribunals are filed pursuant to rules such as the UNCITRAL Arbitration Rules for ad hoc cases, the PCA Rules, or the ICC Rules, among others.

By comparison, internationalized tribunals, such as ICSID tribunals and the Iran-United States Claims Tribunal, are governed by their constituent documents and the rules of public international law. When it comes to ICSID tribunals, in the 2002 case *Mihaly v. Sri Lanka* the tribunal wrote that it "maintains that the jurisdiction of the Centre […] is based on the ICSID Convention and the rules of general international law. It does not operate under any national law in particular […]."[636] Similarly, in Case A/27 the Iran-United States Claims Tribunal stated that "[…] it was established by an international agreement [that…t]he Tribunal is "clearly an international tribunal¨ […] and ¨it is subject to international law."[637]

Several criteria have been advanced to characterize a tribunal as "international." For instance, some scholars suggest that internationalized tribunals apply international law. However, that is also the case for national courts. A more plausible approach looks for three interrelated criteria for determining whether a tribunal is truly "internationalized:" their mandate must be determined in a treaty; they must be insulated from applying the law of the seat (which has been relinquished by the State in question); and the State must be treaty-bound to comply with the tribunal's decisions without launching enforcement proceedings under instruments such as the New York Convention. In combination, these three factors ensure that these tribunals operate in the international legal order. Their *lex arbitri* is public international law.

Territorialized tribunals, in contrast, remain linked to a specified domestic jurisdiction. Norms such as the national *lex loci arbitri* provide the normative framework when the arbitration is pending and in the post-award review.

REC. 8.1 Adjudicators, specifically arbitrators, parties to international investment contracts and their counsel, are encouraged to consider the peculiarities of ICSID and "non-ICSID" forms of arbitration in relation to the applicable substantive law.

PART 9: INTERNATIONAL ARBITRATION AND THE APPLICABLE SUBSTANTIVE LAW

I. General considerations

Today, international arbitration is typically transnational in nature. The field incorporates common terms, common practices, the same leading arbitrators, and the most significant institutions competing to develop the most attractive dispute resolution services for transnational business. In contemporary international practice, classical private international law, based on the selection of a national law according to the location of some connecting factors, does not meet the challenges handled by arbitration. A new private international law, one that provides for the flexible application of domestic laws and the application

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[635] *CME Czech Republic B.V. v. The Czech Republic,* Ad Hoc Arbitration, Final Award, 14 March 2003), ¶¶ 264, 348.
[636] *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶ 19. In the same line the following case: *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011, ¶ 6.
[637] *Islamic Republic of Iran and United States of America*, Case No. A/27, Award No. 586-A27-FT (June 05, 1998), ¶ 58 (citing Case No. A/18, fn. 228, 5 Iran–U.S. C.T.R. 251, 261; *Anaconda v. Iran,* fn 230, Interlocutory Award, ¶ 97).

of uniform law and other techniques where appropriate, is now consolidated. The evolution of private international law in this regard was discussed in Part 5 of this Guide.

II. Current trends of conflict of laws in arbitration

Modern trends are reflected in the 1976 UNCITRAL Arbitration Rules, modified in 2010, and the 1985 UNCITRAL Model Law, modified in 2006.[638] From the provisions contained therein, particularly Articles 33 (currently Article 35) of the UNCITRAL Arbitration Rules and Article 28 of the Model Law, in resolving an international dispute, arbitrators can choose a conflict of laws "system," a "rule," or they can "directly" determine the appropriate "law" or "rules of law" to govern the contract.

It is true that where the parties have not selected an applicable law, the Model Law prevents the arbitrators from choosing it directly; Article 28(2) states in this regard that the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable." However, the provisions regarding the applicable substantive law should not be considered mandatory. Since the Model Law does not include a mechanism to review awards, arbitrators that ignore this provision do not put the validity of the decision into question. Certain exceptions to this rule exist in jurisdictions such as England where, unless agreed otherwise, parties can appeal an award on the merits.[639]

Moreover, Model Law Article 28(4) states that in all cases the tribunal must take the contract and usages into account. This rule prevails over conflict rules and does not depend on the will of the parties, thereby granting significant flexibility to the arbitrators in their determination of the applicable law. This will be further discussed in Part 12, Section V.

Modern instruments such as the HCCH Principles, and for the Americas, the OAS Contracts Guide, can be of particular assistance to arbitrators in determining the applicable substantive law because they provide guidance on the general principles of private international law that arbitrators may apply. An important next step towards this effect is broad dissemination of these instruments to raise awareness among adjudicators of these tools and their application.[640]

Several awards refer to arbitrators' ample or discretionary power to determine the applicable substantive law.[641] However, arbitrators should be careful in exercising their discretion in this regard. Questionably, in a 1989 ICC case[642] the tribunal applied a similar provision regarding trade usages in the ICC Rules[643] and the CISG, which caught the parties by surprise since this provision was not the law of the contract and neither party had referred to it in their briefs.

III. Some peculiarities of international investment arbitration

Arbitrators dealing with foreign investment claims usually are required to determine whether the State has actually implemented the guarantees that the investor alleges it enjoys under the applicable

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[638] UNCITRAL Model Arbitration Law.

[639] In England, *see* Art. 69, Arbitration Act 1996.

[640] *See* more information about efforts by the HCCH Permanent Bureau at the following sites: HCCH, *2015 Principles on Choice of Law in International Commercial Contracts: Impact, Promotional Work and Possible Future Work*, March 2022, https://assets.hcch.net/docs/ecde461b-d46a-4eb7-beef-b9efab566063.pdf; https://assets.hcch.net/docs/c89ab8b8-6328-4d35-ac01-ee7493d7c5e3.pdf (last accessed 12 May 2022); HCCH, *2022 Arbitration Institutions Status Table*, March 2022, https://assets.hcch.net/docs/c89ab8b8-6328-4d35-ac01-ee7493d7c5e3.pdf (last accessed 12 May 2022).

[641] ICC Case No, 1982, Award, 1982, in IX *Y.B.Com.* Arb. (1984), 105 (106); CRCICA Case No. 120/1998, Partial Award, 23 June 2000; in *Alam Eldin* (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* (2000), 25 (28); ICC Case No. 3540 (1980), VII *Y.B. Com*. Arb. 1982, 124 (128); ICC Case No. 2730, Award, 1982, in: Sigvard Jarvin and Yves Derains, *Collection of ICC Arbitral Awards 1974-1985*, (1994), 185 (186).

[642] ICC Case No. 5713/1989 *(Seller v. Buyer), XV Y.B. Com. Arb.* (1990), p. 70.

[643] ICC Rules of Arbitration, in force as of 1 January 1998 (ICC Publication No. 581, 1997), reprinted in *ILM*, Vol. 36 (1997), p. 1604, *XXII Y.B. Com. Arb.* (1997), p. 347, Art. 13(5).

investment law, treaty, or contract. Generally speaking, disputes considered in investor-State arbitration go beyond what is usually considered in international commercial arbitration.

Moreover, arbitrators have great flexibility in investment claims when, for instance, interpreting open-textured treaty standards. As in commercial arbitration, they are not bound by rigid prescriptions nor by the provisions of a single domestic system. Thus, notwithstanding application of certain aspects of public international law, investment arbitration does not appear so distant from international commercial arbitration.

ICSID tribunals exercise this discretion, for instance, when determining whether compensation for lawful expropriation attracts simple or compound interest.[644] The ICSID tribunal's reasoning in *CDSE v. Costa Rica* is not so different from other decisions, including the 1989 ICC case mentioned above.[645] Due to the wider margin of discretion available to tribunals under public international law, however, ICSID tribunals may appear more justified in setting the amount of compensation as to "what is appropriate in the circumstances." Nonetheless, the aim of these tribunals remains the same: to adapt the choice of law rule to select the rule that, in the circumstances, will yield the most appropriate and equitable result.

IV. Choice of law in investment arbitration

Investment arbitration usually involves an interplay between the national and international legal orders. The law applicable in investment claims may involve a multitude of layers: public international law has a particular bearing, however, the point of reference might be the commercial contract or contractual relationships underlying the investment.

In investment treaties, laws, or investor-State contracts, choice of law clauses often refer to the law of the host State, or the law of a third State (such as in the case of bonds). Moreover, choice of law clauses in investor-State contracts generally refer to international law, general principles of law, or the standards of protection provided in the bilateral investment treaty.

Some treaties list principles or rules of international law, but omit to include national laws; other treaties combine both domestic and international laws; and, others mention the national law of the host State and contracts between the disputing parties, while omitting any reference to international law.[646] Treaties usually list the following sources, in no particular hierarchical order: (a) the host State's law; (b) the BIT itself and other treaties; (c) any contract relating to the investment; and (d) general international law.

How does a tribunal determine the applicable law in an investment arbitration? Arbitral tribunals generally do not have any choice of law rules of the forum to apply. Therefore, they are in need of their own "transnational" choice of law rules.

As stated, most investment treaties provide for arbitration but few specify the applicable law; in those that do, it is usually a blend of the national law of the host State concerned and the general principles of international law. Many treaties, however, do not address this issue, or refer to broad and generic principles by using formulas such as "generally recognized rules and principles of international law." Moreover, the law to be applied by the tribunal varies from one dispute settlement mechanism to another. Some give ample discretion to the tribunal, while others refer to conflict of laws rules or rules of international law.[647]

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[644] See, for instance, *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, p. 1317.

[645] ICC Case No. 5713/1989 *(Seller v. Buyer), XV Y.B. Com. Arb.* (1990).

[646] Such as Article 26(6) of the Energy Charter Treaty.

[647] For instance, Art. 21 of the 2021 ICC Arbitration Rules provide that in the absence of choice, the *voie directe* applies, which gives ample discretion to the arbitrators. By contrast, Art. 28 of the UNCITRAL Model Law refers to traditional conflict of laws rules that the tribunal considers appropriate, as discussed in Section II of this Part 9. Art. 42 of the ICSID Convention contemplates the application of "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".

It is also common for several sources of law to apply at once. For instance, in the ICSID Additional Facility Rules arbitration case *Tecnicas Tecmed v. Mexico* (2003),[648] the applicable law clause in the BIT listed the treaty itself as well as international law provisions as pertinent in the event of a dispute. This clause was interpreted by the tribunal in accordance with Article 38 of the Statute of the ICJ. In its discussion of expropriation, the tribunal referred to the case law of the European Court of Human Rights, the Inter-American Court of Human Rights, and the Iran-United States Claims Tribunal.[649]

V. Applicable substantive law in the ICSID Convention

A. The content of Article 42

Determining the applicable substantive law has been a major topic since the very beginning of the drafting of the ICSID Convention. In addition to providing a procedural framework for the conduct of international investment arbitrations, the Convention also contains a choice of law provision (Article 42) to remove any uncertainty and unpredictability in this regard.

Article 42 of the ICSID Convention provides the following:

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
>
> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
>
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

In contrast to other procedural provisions that are scattered throughout the ICSID Convention, the provisions on applicable substantive law may be found exclusively within Article 42. Neither the New York Convention nor the Inter-American Convention of Human Rights (IACHR) contain comparable choice of law provisions. Article 28 of the UNCITRAL Model Law and Article 35 of the UNCITRAL Arbitration Rules are analogous provisions to Article 42 of the ICSID Convention.

Subparagraph (1) proceeds from the principle of party autonomy and the freedom of the parties to choose the law they consider most appropriate for their relationship. Where the parties have not chosen an applicable law, the tribunal may refer to both domestic and international law rules. A closer look at Article 42 shows that the two-fold process (party autonomy and the absence of choice) is more complicated than it seems. These complexities will be addressed below.

B. Interplay of national and international law in the ICSID Convention

Article 42 was designed to apply to contractual claims. And in the first twenty years of the ICSID Convention, most claims were for breach of investment contracts.[650] Subsequently, and in a remarkable way, the caseload changed and now the bulk of ICSID cases are primarily treaty claims. Only a minority

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[648] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award 29 May 2003.

[649] *Ibid*¶ 116.

[650] Half of those cases involved the applicable law selected by the parties, which is usually the law of the home State. In the case *Mobil v. New Zealand*, the ICSID arbitration clause stipulated that "[a]n Arbitral Tribunal shall apply the law of New Zealand." (See *Attorney General of New Zealand v. Mobil Oil New Zealand,* High Court of New Zealand, Judgment, in 2 ICSID Rev.—FILJ 497, 502 (1987), 01 July 1987). However, stabilization or "freezing" clauses are typically included (such as in *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989 ¶ 94. Other cases referred to national and international law, "so that application of the former might if necessary be complemented or tempered by the latter" (*AGIP S.p.A. v. People's Republic of the Congo,* ICSID Case No. ARB/77/1, Award, 30 November 1979 ¶ 323.

of bilateral investment treaties specify the applicable law, and those that contain such provisions always list the substantive provisions of the bilateral investment treaty itself.

Article 42 was drafted to be acceptable to developing countries that were suspicious of the law applicable to the merits of the dispute; it did not provide a definitive solution to the question of the applicable law and which norm should prevail in case of conflict.

Since the very beginning, attitudes toward the interplay between national law and international law have been polarized. In principle, the law of the contracting State should be applied to resolve the dispute, but in numerous ICSID awards, international law has been found to have a "complementary" and "subsidiary" role when the law of the contracting State is lacking. This role will be examined in Part 13, Section II.

C. The applicability of public international law under Article 42 of the ICSID Convention

Resort to public international law has become so commonplace that in ICSID arbitration the tribunals rarely question the analytical basis for its application, beyond the mere observation that the breach is based on an international treaty. Although in theory other laws should be applied, in practice public international law has played an important role as the law governing the relationships that emerge from a treaty.

In the negotiation process of the ICSID Convention, there was repeated concern that the simple reference to international law rules was not sufficiently specific.[651] In the drafting history, it was stated 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, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes."[652] It is debatable if this constitutes a complete picture of contemporary international law. Nonetheless, the drafting history makes clear that ICSID tribunals are directed to look at the full range of sources of international law in resolving disputes, in a similar way as the ICJ.

The reference in Article 42 to "rules of international law" must "be understood as compromising the general international law, including customary law […]," and not just the applicable treaty. This was the case in the *LG&E v. Argentina* and *ADC v. Hungary* decisions.[653]

It should be noted that Article 38 of the ICJ Statute was also designed to apply to inter-State disputes. Article 42 of the ICSID Convention does not transpose the rules that apply to relationships between States to links between States and investors. Hence, if tribunals refer to customary international law rules, they must first establish their applicability to individuals as well.

Article 42 also comprises the following general principles of public international law: good faith and the principle that one ought to abide by agreements voluntarily made and ought to carry them out in good faith.

D. Autonomous interpretation of Article 42

Arbitral tribunals often only address conflict of laws problems superficially and are satisfied by referring to Article 42 or to the corresponding choice of law provision in the investment treaty. However, a closer look may lead to a different outcome in certain situations, which would justify deeper analysis on the applicable substantive law.

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[651] ICSID, *History of the ICSID Convention*, Vol. II-1, 1968, Reprinted in 2009, ¶¶. 330, 418, 570, 801.
[652] Ibid., Vol. II-2, p. 962.
[653] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 89. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16*,* Award, 02 October 2006, ¶ 290.

Article 42 is the *lex fori* designed to give guidance to ICSID tribunals in determining the appropriate applicable substantive law. The provision must be interpreted autonomously, taking general principles of law into account when relevant.

For private law-related matters, the arbitrators may apply – as an expression of general principles – uniform law instruments such as the CISG and the UNIDROIT Principles. Where a tribunal does not consider it appropriate or cannot establish general principles of uniform law in a particular case, it can resort to general conflict of laws principles instead.[654] The HCCH Principles can be of great help in this regard, as well as other instruments such as Rome I and the Mexico Convention.

Where general principles cannot be established, there will be no *non liquet*. The ICSID Convention provides guidance in these situations (specifically, Article 42, paragraph 1, section 2), opening the door for the application of the law of the host State and its conflict of laws rules.

E. Conflict of laws rules under the ICSID Additional Facility Rules

Rule 68 of the ICSID Additional Facility Rules states:

> Applicable Law
>
> (1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply: (a) the law which it determines to be applicable; and (b) the rules of international law it considers applicable.
>
> (2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.

Despite the difference in wording by comparison with Article 42 of the ICSID Convention, the result of the application of both provisions should be the same in most situations.

VI. Conflict of laws before the Iran-United States Claims Tribunal

Article V of the Claims Settlement Declaration[655] refers both to "choice of law rules" and "principles of commercial and international law." It also states that the tribunal must consider "relevant usages of the trade, contract provisions and changed circumstances."

In an oft-cited case, the Iran-United States Claims Tribunal wrote:

> It 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. Such freedom 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, claims between the two Governments, certain claims between two banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, 'taking into account relevant usages of the trade, contract provisions and changed circumstances' as Article V directs.[656]

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[654] "If the tribunal is faced with a choice between several national laws, it will choose the 'proper law' by the application of generally accepted principles of Conflict of Laws or Private International Law […]" (ICSID, *History of the ICSID Convention*, Vol. II-1, 1968, Reprinted in 2009, p. 570).

[655] The provision states "[t]he 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".

[656] *CMI International Inc. v. Ministry of Roads and Transport*, Award No 99-245-2, (1983) 4 Iran–USCTR 263, 267–268, 27 December 1983.

Article V of the Claims Settlement Declaration contains a particularly complicated choice of law provision. As such, the Iran-United States Claims Tribunal has proceeded cautiously when applying it, looking primarily at the clauses of the contract under consideration. Instead of recurring to Iranian or United States conflict of laws rules, the Iran-United States Claims Tribunal usually applies general principles of law and non-State law or the *lex mercatoria* (but does not necessarily mention these sources by name). This hesitation mirrors the general reluctance of international tribunals to apply domestic conflict of laws provisions to public international law disputes. In matters related to expropriations or administrative decisions rendered against foreigners, the Iran-United States Claims Tribunal generally applies public international law.

For political reasons, Article V offers little guidance regarding the interplay between public and private international law. In the 1980 negotiations there was no agreement on the system of law or conflict of laws rules that would govern the claims. Therefore, the negotiators thought it best to leave the adoption of choice of law rules to the discretion of the tribunal.

Conscious of this flexibility, the tribunal has applied Article V liberally.[657] It has referred to Article V as a "novel system for determining applicable law […] according to this system the Tribunal is not required to apply any particular national or international system."[658] However, the Iran-United States Claims Tribunal adjudicators also have expressed that they do not enjoy "a discretionary freedom […] as the tribunal is given a rather precise indication as to the factors which should guide its decision."[659] In *Mobile Oil Iran v. Iran* (1987), the Tribunal ruled that "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."[660]

In its application of the law to a particular dispute, the Iran-United States Claims Tribunal is influenced largely by the nature of the dispute. For instance, in *Amoco v. Iran*,[661] the tribunal held that customary international law determined whether just compensation was required for property taken. Likewise, the Tribunal has applied customary international law to other public international law issues such

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[657] *Benjamin R Isaiah v. Bank Mellat, (as Successor to International Bank of Iran)*, IUSCT Case No. 219*,* Award No 35-219-2, (1983) 2 Iran–United States Claims Tribunal Reports 232, 237, 30 March 1983.

[658] *Anaconda-Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, IUSCT Case No. 167*,* Award No ITL 65-167-3 (1986) 13 Iran– USCTR 199, 232, 10 December 1986.

[659] Ibid.

[660] *Mobil Oil Iran Inc. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 74, Partial Award, (Award No. 311–74/76/81/150–3), 14 July 1987, ¶ 72.

[661] *Amoco. International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 15 Iran-U.S. Cl. Trib. Rep*.* 189, 223, 246–48 (1987), 14 July 1987; similar determinations of applicable law were made in: *Shahin Shaine Ebrahimi and others v. The Government of the Islamic Republic of Iran*, IUSCT Case Nos. 44, 46 and 47, Final Award (Award No. 560-44/46/47-3) 30 Iran-U.S. Cl. Trib. Rep. 174 (1994), 12 Oct 1994; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129*,* Award No. 309-129-3, 10 Iran-U.S. Cl. Trib. Rep. 180, 184–187 (1986), 7 July 1987.

as the determination of interest,[662] attribution,[663] succession of rights and obligations,[664] and the nationality of dual nationals.[665]

Determining the applicable law in private claims can be extremely complex. To avoid political sensitivities, the tribunal bases its decisions on neutral factors such as the contract between the parties or the general principles of law that are common to them. In *Mobil Oil Iran, Inc. v. Iran*, the tribunal determined that the agreement should not be governed by the domestic laws of one party, thereby indicating its reluctance to place the domestic law of one party above that of the other.[666]

Judge Gunnar Lagergren, the first President of the Iran-United States Claims Tribunal, explains the tribunal´s attitude in the following terms: "The Tribunal has avoided applying any national conflict of laws rules, but instead applied general principles of conflict of laws." In the same vein, in *FMC Corporation v. Iran* (1987), Judge Bahrami Ahmadi stated that 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."[667]

Further, in *Harnischfeger Corp. v. Ministry of Roads and Transportation*,[668] the tribunal applied general principles of private international law (i.e., the "most significant connection" principle) to conclude that the United States Uniform Commercial Code was the applicable law.[669] In *Economy Forms Corp. v. Iran*,[670] the tribunal also applied general principles of private international law and considered the "closest connection" or "centre of gravity" a generally accepted principle.

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[662] *McCollough & Company, Inc. v. the Ministry of Post, Telegraph and Telephone*, *the National Iranian Oil Company and Bank Markazi*, IUSCT Case No. 89, Award No. 225-89-3, 11 Iran–U.S. Cl. Trib. Rep. 3, 26–31 (1986), 16 April 1986; *Sylvania Technical Systems Inc. v. The Government of the Islamic Republic of Iran,* IUSCT Case No. 64*,* Award No. 180-64-18 Iran–U.S. Cl. Trib. Rep. 298, 320–322 (1985), 27 June 1985.

[663] *Sea-Land Service, Inc. v. The Government of the Islamic Republic of Iran , Ports and Shipping Organization,* IUSCT Case No. 33*,* Award No. 135-33-1, 6 Iran–U.S. Cl. Trib. Rep. 149 (1984), 22 June 1984; *Rankin v. The Islamic Republic of Iran*, , IUSCT Case No. 10913, Award No. 326-10913-2, 17 Iran–U.S. Cl. Trib. Rep. 135 (1986), 02 November 1987.

[664] *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 43, Interlocutory Award (Awards No. ITL 10-43-FT), 9 December 1982.

[665] *Islamic Republic of Iran v. United States of America*, IUSCT Case No. A-18, Decision No. DEC 32-A18-FT, 6 April 1984.

[666] *Mobil Oil Iran, Inc. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran v. Iran and National Iranian Oil Company*, IUSCT Case No. 74, Partial Award (Award No. 311-74/76/81/150-3, 14 July 1987.

[667] *FMC Corporation v. The Ministry of National Defence* , *Ziaran Meat Production and Processing Company Ltd, Bank Melli Iran, Central Bank of Iran, Sazemane Shahanshani and The Islamic Republic of Iran*, IUSCT Case No. 353, Award No. 292'353'2, 12 February 1987, Dissenting Opinion, Judge Hamid Bahrami-Ahmadi, at section B(1). In *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963), Arbitrator Pierre Cavin followed "[t]he 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". *See* in: *Sapphire International Petroleums Ltd. v. National Iranian Oil Company,* Award, 35 I.L.R. 136, 169 (1963), 15 March 1963.

[668] *Harnischfeger Corporation v. Ministry of Roads and Transportation*, *Industrial Development and Renovation Organization of Iran,* Machine *Sazi Arak and Machine Sazi Pars*, IUSCT Case No. 180, Final Award No. 175-180-3, 26 April 1985.

[669] Similar application was made in *Queens Office Tower Associates v. Iran national Airlines Corp*., IUSCT Case No. 172, Award No. 37-122-1, 15 April 1983.

[670] *Economy Forms Corporation v. The Government of the Islamic Republic of Iran; the Ministry of Energy; Dam & Water Works Construction Co. ("Sabir"); Sherkat Sakatemani Mani Sahami Kass ("Mana"); and Bank Mellat (formerly Bank of Tehran)*, IUSCT Case No. 165, 3 Iran-U.S. Cl. Trib. Rep. 42 (1984), Award No. 55-162-2. 14 June 1983.

The freedom granted to the Iran-United States Claims Tribunal through Article V inspired the development of a creative and eclectic approach (or variety of approximations) to the choice of law, which has been the subject of various criticisms. In a dissenting opinion, Judge Mosk expressed his frustration in the following terms:

> 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 appears 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 laws 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.[671]
>
> …the Tribunal has even acknowledged that it has not referred to laws from enough jurisdictions.[672] Moreover, in some cases, the parties were also unable to provide assistance to the Tribunal in determining whether the principles it was applying could be considered general principles.[673]

Taking these criticisms into account, international arbitrators must proceed with caution when referring to awards rendered by the Iran-United States Claims Tribunal that deal with choice of law issues. When it comes to determining the applicable law under Article V, an arbitrator's discretion is only as good as the arbitrator himself.

VII. Applicable law in investment arbitrations under the UNCITRAL Arbitration Law and Rules

In "territorialized" arbitration tribunals operating under UNCITRAL-inspired legislation and rules, the methodology for determining the applicable substantive law is linked to the *lex arbitri*.[674] When it comes to enforcement of the awards issued by such tribunals, the New York Convention may be applicable to arbitrations that arise out of public international law since its application is not confined to commercial disputes alone.

Most of the world's relevant jurisdictions are aligned with Article 28 of the UNCITRAL Model Law regarding the applicable substantive law, according to which:

> (1) The 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 […] (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable […] (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
>
> This provision was inspired by Article 33 of the 1976 UNCITRAL Arbitration Rules.

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[671] *Harnischfeger Corporation v. Ministry of Roads and Transportation, Industrial Development and Renovation Organization of Iran, Machine Sazi Arak and Machine Sazi Pars*, IUSCT Case No. 180, Final Award No. 175-180-3,, Dissenting Opinion of Judge Richard M. Mosk,26 April 1985, ¶ 239, p. 141.

[672] *T.C.S.B., Inc. v. The Islamic Republic of Iran, Ministry of Housing and Urban Development and others*, IUSCT Case No. 140, 16 March 1984.

[673] *Harnischfeger Corporation v. Ministry of Roads , Transportation, Industrial Development and Renovation Organization of Iran, Machine Sazi Arak and Machine Sazi Pars*, IUSCT Case No. 180, Final Award No 175-180-3, Dissenting Opinion of Judge Richard M Mosk, 26 April 1985.

[674] This connection was advanced by Arbitrator Gunnar Lagergren in the British Petroleum Exploration case (although his discussion centered more on pragmatic than legal reasons). However, in his decision Arbitrator Lagergren made clear that the connection between the applicable law and the *lex arbitri* exists primarily for procedural matters, and not necessarily substantive issues. *See* in: *British Petroleum Exploration Co. (BP) v. Libyan Arab Republic,* ad hoc, Award, 10 October 1973.

These texts refer to "rules of law", precisely within the understanding that this term is broader than simple references to "law" alone, which is typically understood as referring to "domestic law." Where the parties have not specified an applicable law, Article 28 refers to "the law determined by the conflict of laws rules which it considers applicable."

The revised provision, now Article 35 of the 2010 UNCITRAL Arbitration Rules (which is identical with the 2013 UNCITRAL Arbitration Rules),[675] removed the reference to "determined by the conflict of laws rules." Thus, Article 35 of the UNCITRAL Arbitration Rules grants the tribunal greater flexibility in determining the law applicable to the dispute. Cases where public international law could be applicable also fall within the purview of Article 35. The intricacies of Article 28 of the UNCITRAL Model Law and the corresponding Article 35 of the 2010 UNCITRAL Arbitration Rules will be considered in further detail in Part 12, Section V.

Several arbitral institutions base their rules on the UNCITRAL Arbitration Rules. The PCA did so in its 2012 Rules, with certain adjustments to reflect aspects of public international law that may arise in disputes. For example, according to the 2012 rules, States that submit their disputes to the PCA waive their immunity from jurisdiction (Article 1.2). Moreover, Article 35 of the PCA Arbitration Rules mirrors Article 28 of the UNCITRAL Model Law regarding the law applicable to the substance of the dispute as follows: it first establishes the application of "the rules of law designated by the parties" and then provides that where no applicable law has been chosen and both parties are States, the arbitral tribunal shall apply international law.[676] In disputes between intergovernmental organizations and private parties, the tribunal will…

> […] have regard both to the rules of the organization concerned and to the law applicable to the agreement or relationship out of or in relation to which the dispute arises, and, where appropriate, to the general principles governing the law of intergovernmental organizations and to the rules of general international law.[677]

Investment agreements that do not refer to ICSID arbitration usually contemplate ad hoc arbitration under the UNCITRAL Arbitration Rules, with or without indicating an authority to appoint the arbitrators. In other cases, arbitration may be administered by institutions such as the ICC or the SCC. In these instances, the arbitration will be governed by procedural provisions of domestic law, the awards will be subject to scrutiny by domestic courts, and recognition and enforcement will likely be subject to the New York Convention.[678]

The choice of dispute resolution forum can influence the choice of law to be applied to the dispute. For instance, Article 26, paragraph 4 of the ECT allows the investor to choose between and among four different arbitral forums: ICSID, the ICSID Additional Facility Rules, UNCITRAL ad hoc arbitrations, or the SCC. Since the arbitral rules of each of these forums has a slightly different provision regarding the choice of law in the absence of party agreement, the investor can directly influence the choice of law to be applied by selecting the forum that most favors that investor's interests.

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[675] UNCITRAL Arbitration Rules, with new Article 1, paragraph 4, as adopted in 2013.

[676] Art. 35 of the PCA Arbitration Rules states "(a) […] by applying: i. international conventions, establishing rules expressly recognized by the contesting States; ii. International custom, as evidence of a general practice accepted as law; iii. The general principles of law recognized by civilized nations; iv. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (b) In cases involving only States and intergovernmental organizations, apply the rules of the organization concerned and the law applicable to any agreement or relationship between the parties, and, where appropriate, the general principles governing the law of intergovernmental organizations and the rules of general international law".

[677] In such cases, the arbitral tribunal shall decide in accordance with the terms of the agreement and shall consider relevant trade usages (c).

[678] Awards rendered pursuant to the ICSID Additional Facility Rules, which is also provided for in some BITs and in NAFTA Article 1130, are also subject to the New York Convention.

REC. 9.1 Negotiators of international investment treaties and investor-State contracts are encouraged to consider and to include clear choice of law provisions into the text of such treaties and agreements.

REC. 9.2 Adjudicators (arbitrators), in determining the applicable substantive law, are encouraged to refer to the OAS instruments for guidance on general principles of private international law.

PART 10: CHOICE OF LAW IN INVESTMENT CLAIMS

I. Party autonomy in investment arbitration

The party autonomy principle raises several issues that are addressed in Parts 7 through 12 of the OAS Contracts Guide. Party autonomy has also reached a noncontroversial, or universal, recognition within the field of international investment arbitration.

In this setting, a differentiation can be made where the choice of law emanates from the provisions in an investment treaty and where the parties have made the election in an investment agreement. In the first situation, given that treaties are negotiated by two (or more) State parties, the investor will have had no direct input into the selection. Unlike the first situation, an investment agreement is entered into between one (or more) private parties and one (or more) State parties. In this situation, the investor presumably does have some possibility of negotiating the choice of law. Apart from that distinction, however, the issues on choice of law discussed in this Part are equally relevant to both situations, regardless of the circumstances by which the choice of law has been determined.

The "menu" of applicable law that can be selected may range from the law of the host State, a choice of international law, and even to the exclusion of domestic law. Apart from these extremes, parties may also choose general principles of law or "rules of natural justice or equity." Some commentary even advocates for a choice of so-called "transnational law" or non-State law. This terminology with its nuances has already been considered in Part 3, Section VII.

The principle of party autonomy is enshrined in the ICSID Convention. It states that the tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties" (Article 42). Only in the absence of a choice of law may the tribunals resort to the second sentence of Article 42(1) and apply the law of the host State (including its conflict of laws rules) and "such rules of international law as may be applicable."

Freedom of choice was a recurrent theme in the *travaux préparatoires* of the ICSID Convention,[679] as many discussions related to the possibility that this liberty might be exploited to the advantage of the foreign investor. Nonetheless, upon completion of the Convention, the principle was enshrined in Article 42(1). By giving priority to the rules of law chosen by the parties, the drafters of the Convention were faithful to the general system of granting the will or consent of the parties a primary role in the functioning of the arbitration.

Even though the Iran–United States Claims Settlement Declaration does not make explicit reference to party autonomy, Article V alludes to "choice of law rules" and "contract provisions" and leads to the interpretation that choice of law agreements must be respected, particularly since party autonomy is also a general principle of private international law. As stated in the 1986 *Anaconda v. Iran* case, the tribunal is "required to take seriously into consideration the pertinent contractual choice of law rules."[680]

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[679] See ICSID, *History of the ICSID Convention*, Vol. I, 1970 p. 190–192.

[680] *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, IUSCT Case No. 167, Interlocutory Award, (Award No. ITL 65-167-3), 10 December 1986, ¶ 131. See also *FMC Corporation v. The Ministry of National Defence Ziaran Meat Production and Processing Company Ltd, Bank Melli Iran, Central Bank of Iran, Sazemane Shahanshani and The Islamic Republic of Iran*, IUSCT Case No. 353, fn 9, Award No. 292-353-2, Dissenting Opinion of Judge Hamid Bahrami Ahmadi, at section B.1.

Territorialized arbitral tribunals will, in turn, consider provisions of the arbitral laws in the jurisdiction where the tribunal is seated and a great number of domestic laws recognize party autonomy in line with the UNCITRAL Model Law.

II. Choice of law mechanisms in investment arbitration

A. Choice of law in the international investment contract

Parties can choose the applicable substantive law in the investment contracts, as is often the case. When it comes to selecting a particular legal system, the parties may be driven by different motives, such as the desire for certainty about which law governs their relationship, the desire to select a law that is familiar or to select one with appropriate protection of the rights of aliens. A State party to an investment relationship may insist on a choice of its own domestic law as a matter of principle or national prestige. The law with the closest connection to the contract is often the most practical choice, as it helps achieve greater legal predictability and limits the opportunity for forum shopping.

To assist parties, ICSID provides a model clause for the exercise of party autonomy.[681] According to its Explanatory Comments, parties may refer to national law, international law, a combination of them, or a law frozen in time or subject to certain modifications.[682] Earlier versions specifically referred to international law and a formula according to which the parties could exclude the application of a particular legal system.[683]

As was already mentioned, most of the ICSID cases that arose during its first twenty years of operation involved alleged breaches of investment contracts. In about half of these, the parties had made a choice of law and, with a few exceptions, chose the law of the State party. This was the case, for instance, in *Mobil v. New Zealand.*[684]

In such situations and where the State party was a developing nation, the choice of law was usually accompanied by a stabilization or "freezing" clause so that the law would be applied as in force on the date of the contract.[685] Such was the provision in the 1971 agreement of the parties in *MINE v. Guinea.*[686] In other cases, reference was made to the law of the State party alongside international law, in order to complement or temper the application of the national law. This was the case, for example, in the arbitration clause of the 1974 agreement between the parties in *AGIP v. Congo.*[687]

B. Choice of law in an investment treaty

When there is no investment contract, or no applicable law clause in the contract, the choice of law together with the offer to arbitrate may be found in the investment treaty. In such a case, by referring the dispute to arbitration the investor is understood to consent to the applicable law.[688] For instance, in the 2007 *Siemens v. Argentina* case, the ICSID tribunal stated that since the applicable BIT provided an offer to

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[681] The 1993 ICSID Model Clauses state the following regarding the "Specification of System of Law" (Clause 10): "[a]ny Arbitral Tribunal constituted pursuant to this agreement shall apply *specification of system of law* [as in force on the date on which this agreement is signed] [subject to the following modifications…]". 4 ICSID Reports 364. *See* ICSID, *Model Clauses,* September 2022, http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/13.htm#a (last accessed 1 September 2022).

[682] 1981 Model Clauses, Clause XVII, 1 ICSID Reports 206.

[683] 1968 Model Clauses, Clauses XIX–XXI, 7 ILM 1175/6 (1968).

[684] *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd. et al.*, High Court of New Zealand, Judgment, 1 July 1987, 2 ICSID Rev.—FILJ 497, 502 (1987).

[685] Ibid., p. 178-179.

[686] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, ad hoc Committee Decision, 22 December 1989, ¶ 94.

[687] *AGIP S.p.A v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, ¶ 323.

[688] In the ICSID Convention cases initiated under BITs in the period 2000 to 2010, the arbitrators generally held international law, including the provisions of the BIT, to be applicable (with domestic law also found to be relevant in many instances).

arbitrate, by accepting Argentina's offer, "[…] 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."[689]

Other BITs may contain an express choice of law provision.[690] Plurilateral treaties may also contain such provisions, as can be found in the ECT, the older NAFTA, the current USMCA (though only for the benefit of American and Mexican investors), and in the CAFTA-DR.

C. Choice of law in host State's legislation

The investment legislation of the host State can also contain provisions that amount to an expression of consent to the arbitral process and to the applicable law. Of course, any investment venture pursued according to such legislation falls within the scope of its regulation, which, as an example, is provided in Venezuela's investment law.[691]

III. Choice of State or non-State law in investment arbitration

A. Choice of the law of the host State

When an arbitration clause is included in an international investment contract, the parties may agree to the application of the host State's law. In turn, treaties usually refer, in some manner, to public international law, which can either stand alone or act in conjunction with domestic rules.

ICSID arbitration cases that deal with the selection of the law of the host State are "relatively rare."[692] An example flows from the 1988 *MINE v. Republic of Guinea* case, in which Guinean law was chosen by the parties and applied by the tribunal without reference to the choice of law clause. Instead, the tribunal alluded to the principle of good faith in the French Civil Code and that Guinean law derives from French law.[693]

Territorialized tribunals have also applied domestic law when so agreed upon by the parties. In *Alsing Trading Co. v. Greece* (1954), which involved an alleged breach of contract, the arbitrator wrote that "the plaintiffs accepted before the arbitration tribunal that the case be judged according to Greek law, as

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[689] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06 February 2007, ¶ 76. *See* also *Antoine Goetz v. Burundi*, Award, 10 February 1999, ¶ 94. *See also* ICSID, History *of the ICSID Convention*, Vol. II-1, (1968), p. 267, ¶ 54.

[690] For instance, the Australia–Argentina BIT includes an applicable law provision that permits the tribunal to apply the terms of the treaty, the law of the host State, and relevant principles of international law. Another example can be found in the Portugal–Turkey BIT, which permits the tribunal to apply the terms of the treaty (which may be considered an implicit choice of international law) and national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflicts of law.

[691] Article 2 of Decree No. 356/1999 "Law on Promotion and Protection of Investments" provides: "This "[t]his Law-Decree shall apply both to investment already existing in the country at the time it comes into force, and to investments made afterwards, as well as to investors in one or the other. The provisions hereof shall not, however, apply to any controversy, claim or difference arising from occurrences or actions that took place before the effective date hereof."

[692] *New Zealand v. Mobil*, *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited,* ICSID Case No. ARB/98/8, Final Award, 12 July 2001; *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea v. Guinea*, ICSID Case No. ARB/84/1, Award, 21 April 1986; *Maritime International Nominees Establishment v. Republic of Guinea,* ICSID Case No. ARB/84/4*,* Award, 06 January 1988, p. 59

[693] *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 06 January 1988, section A, at section 8. Although not properly a choice of law issue, interestingly the Iran US Tribunal in *Questech, Inc. v. Ministry of National Defense of the Islamic Republic of Iran* (1985), considering that the contract did not contain any provision designed to protect the investor against unilateral changes by the State party, did not entertain with Public International Law matters and decided to apply national law. *See* in: *Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran*, IUSCT Case No. 59, Award, 20 September 1985. *See also FMC Corporation v. The Ministry of National Defence, Ziaran Meat Production and Processing Company Ltd, Bank Melli Iran, Central Bank of Iran, Sazemane Shahanshani and The Islamic Republic of Iran*, IUSCT Case No. 353, Dissenting Opinion of Judge Hamid Bahrami Ahmadi, section B.1.

requested by the defendant" and the law of the host State was to be applicable to the dispute.[694] In turn, in *National Oil Corporation (NOC) v. Libyan Sun Oil Company* (1985/1987), the ICC tribunal applied the doctrine of *force majeure* as found within the Libyan Civil Code and the case law of the Libyan Supreme Court. In its award of damages, the tribunal made references to reports by Libyan legal experts.[695] Further, in *Zeevi Holdings Ltd. v. Republic of Bulgaria and The Privatization Agency of Bulgaria* (2006), the UNCITRAL tribunal applied Bulgarian law, which had been expressly chosen in the privatization agreement.[696]

B. Choice of a third State's law

In commercial arbitration, parties frequently select the law of a third State and a neutral seat in an attempt to "delocalize" the transaction. This is not the case in foreign investment State contracts. Selecting the law of a neutral third State law can potentially create greater difficulties if the investor's activities are closely linked to the host State, or strongly connected to its legislation in matters such as employment, taxation, etc.

By comparison with investment contracts, commercial transactions such as transportation or sales contracts are relatively straightforward and simple when it comes to the parties' obligations. In international investment contracts, the investor undertakes obligations under guarantees provided by the host State. The fulfilment of these obligations may require the investor to enter into a series of contracts on matters such as sales, purchases, construction, and the hiring of personnel. Each of these obligations will have its own legal rules and most will likely be performed in the country where the investment is made. In turn, the host State will assume those obligations that are within its control, such as tax arrangements and exemptions, customs tariffs, and others. For these reasons, it is often difficult or impractical to choose any law other than that of the host State to govern the contract.

The situation is different for investment contracts that take the form of loans, for example, and in such cases laws other than the State's own law are commonly chosen. In fact, in loan contracts it is common to select the law of the lender's State. Although a less frequent choice, the law of a third State that is an important financial center is another option.[697] It is also common for the parties to select the law of the State from where the loan is issued, rather than the law of the borrowing State or the jurisdiction in which the borrower is a subordinate agency.

Traditional conflict of laws issues still prevail in these types of cases because loan contracts more closely resemble international commercial contracts rather than complex direct investment agreements with strong public law elements. Therefore, choosing the law of a neutral third State may be desirable for certain investments, such as loans or licensing agreements.

Some ICSID cases have expressly dealt with the choice of law of a third State.[698]

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[694] *Alsing Trading Company Ltd. v. Greece*, Award, 22December 1954, in 23 ILR 633, ¶¶ 637–638.
[695] *National Oil Corporation v. Libyan Sun Oil Company*, ICC Case No. 4462, First Award (on force majeure), 31 May 1985, in 29 I.L.M. 565 (1990), ¶¶ 615, 608.
[696] *Zeevi Holdings Ltd. v. Republic of Bulgaria and The Privatization Agency of Bulgaria*, UNCITRAL Case No. UNC 39/DK, Final Award, 25 October 2006, ¶¶ 104–105.
[697] Examples are the following: *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 10 May 1992, ¶ 225; *CDC Group P.L.C. v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Award, 17 December 17 2003, ¶ 43; and *Colt Industries Operating Corporation v. Republic of Korea* ICSID Case No. ARB/84/2, this case was settled and discontinued with no published record of the proceedings.
[698] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits 10 May 1992), ¶ 225; *CDC Group P.L.C. v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Award, 17 December 2003, ¶ 43; *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 04 October 2006 ¶ 158-159.

C. Choice of the investor's home State law

In the ICSID case *Colt Industries v. Korea*, the parties chose the law of the investor's home country due to the fact that the investment encompassed technical and licensing agreements for the production of weapons and was, in the parties' view, most closely connected with the licensor's home country.[699] In *World Duty Free v. Kenya*, due to substantial similarities in both of the systems involved, the tribunal had no difficulty applying the awkward wording of choice of both laws.[700]

When it is both feasible and desirable to apply a law other than that of the host State, such as the domestic law of the investor, it is important for the parties to choose the governing law expressly. Otherwise, in the event of an ICSID arbitration, pursuant to the second sentence of Article 42(1), the tribunal will likely apply the law of the State party to the dispute (together with any applicable international law) even if it is not the law most closely connected to the transaction.

D. Choice of non-State law

1. In international arbitration in general

See OAS Contracts Guide, Part Six, V. Non-State Law in Arbitration.

2. In investment arbitration

As discussed earlier, Article 42(1) of the ICSID Convention directs the tribunal to "[…] decide a dispute in accordance with such rules of law as may be agreed by the parties." The expression "rules of law" is understood to comprise both State and non-State law. The same solution emerges from Article 28(1) of the UNCITRAL Model Law.

In the ICSID case *Joseph Charles Lemire v. Ukraine*, the tribunal ruled that:

> 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.[701]

> In the United States-Iran context, in the case of *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corp.*, at Section III it was decided that if a contract…
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> […] 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'.[702]

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." Having found that neither Iranian law nor the law of the United States or Maryland was applicable, the tribunal chose to apply a "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.'"

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[699] *Colt Industries Operating Corporation v. Republic of Korea*, ICSID Case No. ARB/84/2.
[700] *World Duty Free Company v. Republic of Kenya*, Award, 04 October, 2006), ¶ 158–159.
[701] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010), ¶ 111.
[702] *The Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corporation,* ICC Case No. 7375/CK, Award on Preliminary Issues, 5 June 1996.

E. Choice of public international law

Public international law can also be selected to govern an international investment relationship. The expression "rules of law" is broad enough to encompass the possibility. The 1979 Athens Resolution of the Institute of International Law states:

The parties may specifically choose either one or more domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.[703]

In the selection of public international law, the parties may even refer to a treaty that is not in force, as was the case in *CSOB v. Slovakia*,[704] or they may opt for a non-binding code of conduct such as the World Bank's 1992 Guidelines on the Treatment of Foreign Direct Investment.[705] In this sense, the term "rule of law" can mean that not only existing norms can be chosen, but the parties can also adopt their own rules by reference to a non-binding document as the law governing their relationship.

Article 35 of the PCA Arbitration Rules offers another example of the selection of public international law. The PCA Drafting Committee noted in discussions prior to the final text that parties could, for example, choose the ILC's Draft Articles on State Responsibility as the applicable rules of law for their contract.

In the context of the ICSID Convention, Article 42(1) provides for the application of "[…] such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" ., and not "all" international law rules, as observed by the tribunal in the *LG&E v. Argentina* case.[706] The selection of "public international law" as the only governing law may be problematic, as it will be described in the following paragraphs.

Investors see the selection of public international law as a way of avoiding the laws of the State where the investment was made, perceiving it as a neutral solution to these challenges. Public international law copes satisfactorily with cases in which the government seeks to modify the contract in its favor, unilaterally divesting the private party of its contractual rights. Indeed, its application shields against such unilateral modifications by States acting under their own law. If submission to public international law involves some difficulty and even uncertainty of result, that may well be a price that the parties find is worth paying.

In general, however, the applicability of public international law to State contracts is a highly controversial topic. Public international law is ill-suited for investment matters related to, for instance, breaches of contracts or default. This situation is understandable considering that public international law has traditionally been concerned over relationships between States.

Unsurprisingly, some experts consider that referring only to international law, general principles, or usages, to govern the transaction is "not advisable." There are usually several specific provisions of the host State's law that should be considered, referring to international law alone quite impractical.

Only very few State contracts select public international law as the sole law to govern ensuing disputes. It is more common for contracting parties to an international investment to choose a combination of legal systems, including the host State's law and general principles of law or international rules and principles.

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[703] The Athens resolution is cited in J.F. Lalive, "Contrats entre Etats ou entreprises étatiques et personnes privées : Développements récents", *Recueil des cours*, Vol. 181 (1983) p. 51-52.

[704] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objetctions to Jurisdiction, 24 May 1999, ¶ 36–55.

[705] See above in Part 3, Section II, Subsection C, 2.b.

[706] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (October 03, 2006), ¶ 88.

There are a great variety of clauses in this regard. Many express that the agreement will be governed by general principles of law recognized by civilized nations[707] or, in addition, by international law.[708] Many provide for some combination of national and non-national laws arranged in a complex hierarchy.[709] The common objective of these clauses is to insulate the agreement wholly or partially from the political risk of changes in the host State's law to the investor's detriment.

In several public international law conventions, arbitrators are expressly instructed to render their decision in accordance either with principles "of justice, equity, and the law of nations" or according to other similar formulas.[710] These instruments show that conventional public international law rules alone are often insufficient for the resolution of international disputes.

It is noteworthy that both the USMCA and ECT contain clauses on the applicable law that refer only to the respective treaty and rules of international law.[711] Under the heading "Governing Law", Article 14.D.9 of the USMCA, Annex 2 of Chapter 14 specifies: "[…] when a claim is submitted under Article 14.D.3.1 (Submission of a Claim to Arbitration), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." In turn, Article 26(6) of the ECT provides that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

IV. Formalities for the choice of law

Arbitration instruments usually do not address the issue of formalities for the choice of law.

In the ICSID context, the provision for choice of law and determination of the applicable law (Article 42(1) section 1) is ambiguous. Considering that Article 25 paragraph 1 explicitly requires "consent in writing" regarding the dispute resolution clause, it can be argued that, absent this requirement in Article 42, the parties can agree on a choice of law in any form. This reasoning is endorsed by the *travaux*

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[707] For instance, the Agreement between the Gov't of Abu Dhabi and Amerada Hess Petroleum Abu Dhabi Ltd., 13 October 1980, Art. 35(G), reprinted in Basic Oil Laws and Concession Contracts: Middle East (Supp. 75) at 5 (Barrows 1982).

[708] For instance, in *Elf Aquitaine Iran (France) v. National Iranian Oil Company* (Art. 41.5 of the Agreement between *National Iranian Oil Company* and *Entreprise de Recherches et d'Activités Pétrolières*, 27 August 1966): "[t]he Arbitration Board or the sole arbitrator in arriving at the award, shall in no way be restricted by any specific rule of law, but shall have the power to base his award on considerations of equity and generally recognized principles of law and in particular International Law."

[709] For instance, the Draft Agreement between American Indep. Oil Co. and the Gov't of Kuwait, 1973, annex 1, pr. 2, art. XII: "[t]aking account of the different nationalities of the parties, the agreements between them shall be given effect, and must be interpreted and applied, in conformity with principles common to the laws of Kuwait and of the State of New York, United States of America, and in the absence of such common principles, then in conformity with principles of law normally recognized by civilized States in general, including those which have been applied by international tribunals". Reprinted in the Aminoil award, 66 I.L.R. 519, 560 (1982). *See also* the Deeds of Concession executed by the Gov't of Libya on the one hand and Texaco Overseas Petroleum Co. and California Asiatic Oil Co. on the other, cf. 28, *reprinted in TOPCO* award, 53 I.L.R. 389, 442 (1977); Agreement for Petroleum Exploration and Production between the Ministry of Energy and Minerals of the People's Democratic Republic of Yemen (South Yemen) and Canadian Oxy Offshore Int'l Ltd., 15 September 1986, art. 27.3(d), reprinted in Basic Oil Laws and Concession Contracts: Middle East (Supp. 75) at 5 (Barrows 1982); Sale and Purchase Agreement between Iran and a Consortium of Oil Companies, 1973, art. 29, reprinted in Mobil Oil Iran, Inc. v. Government of the Islamic Republic of Iran (*Mobil Oil* Iran Inc. *. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 74, Award No. 311-74/76/81/150-3, 14 July 1987, Mealy's Lit. Rep. (Iranian Claims) 928, 941 (¶ 59).

[710] For instance, Article 7 of the unratified Hague Convention XII relative to the Establishment of an International Prize Court, the 1910 Convention establishing the British-American Claims Arbitral Tribunal, the Hague Conventions for the Pacific Settlement of International Disputes, and the Statute of the Permanent Court of International Justice.

[711] Article 26(6) of the ECT provides: "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

préparatoires, specifying that whether the term "agreement" includes implicit agreements was an issue discussed during the Convention's negotiation. The Drafting Committee decided that the term "agreement" should include implicit agreements, but despite a clarification sought by two delegations, it was not included.[712]

The HCCH Principles can aid in the interpretation of the ICSID Convention on this matter. Under these principles, choice of law, in principle, is not subject to any requirement of form, unless otherwise agreed by the parties (Article 5). Agreements regarding the choice of law can be made orally or via electronic communication.[713] This solution is consistent with protecting the parties' legitimate expectations which, as seen above, includes the *favor validitatis* principle.

Of course, this only applies to the choice of law clause. The remainder of the contract must comply with the formal requirements applicable to it. As such, if a particular law is chosen, the formal requirements of that law must be met within the contract.[714]

V. Dépeçage

In private international law, the French term *dépeçage*, or "splitting" of the law, refers to the division of the contract so that distinct parts of it can be governed by different laws. There are many reasons why parties may wish to do this (for example, if payment is to be made in the currency of a third State). As it is essentially a manifestation of the principle of party autonomy, not surprisingly, there are scholars in favor of the concept and those who oppose. There are two possible situations for its use: one is where the parties have made such an election pursuant to legislation that so provides; the second is where there has been a partial (and effective) choice of law, leaving open the determination of the applicable law for the remaining contractual provisions. *Dépeçage* is provided for in the Mexico Convention (Articles 7 and 9) and in the HCCH Principles (Article 2.2) and in many domestic laws. For an elaboration of the concept, see the OAS Contracts Guide, Part Fourteen.

The arbitral forum has its peculiarities and the issue of *dépeçage* is not addressed expressly in neither the UNCITRAL Model Law nor the UNCITRAL Arbitration Rules. According to scholarly doctrine, *dépeçage* is widely accepted pursuant to the principle of party autonomy, which, as discussed previously, clearly prevails in the arbitration context.

In investment arbitration, *dépeçage* is likely to arise particularly where the overall relationship is governed by separate agreements concluded at different times and that regulate distinct issues. *Dépeçage* can also result in the application of different laws to different aspects of the parties' relationship, as occurred in the ICSID case *SPP v. Egypt.*[715]

In fact, the parties may decide upon the applicable law from among various pieces of legislation within a particular legal system. The ICSID tribunal in *Aucoven v. Venezuela* endorsed this method by stating that Article 42(1) in its first sentence refers to "rules of law" and not systems of law, which is generally interpreted to meant that the wording entitles the parties to agree on a partial choice of law and select specific rules from a system of law.[716] Accordingly, Article 42(1) does not mandate the choice of an entire system of law but opens the possibility of choosing rules of law selectively.

Notwithstanding this, where the parties have not clearly chosen an applicable law (or multiple laws), the agreement should not be interpreted lightly as intending a choice of different laws for different

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[712] ICSID, *History of the ICSID Convention*, Vol. II, 1970, p. 570.

[713] This same logic regarding formal validity is reflected in Part Nine of the OAS Contracts Guide. This Guide, together with the HCCH Principles, constitute strong advocacy for change. This is particularly true in Latin America, where written form is a requirement in many domestic laws.

[714] Official Comment of the HCCH Principles 5.5.

[715] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 10 May 1992), ¶¶ 224-225.

[716] *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 02 September 2003, ¶ 96.

questions. In relationships where tribunals have concluded that the parties have only made a partial choice (i.e., they agreed to apply the BIT), tribunals have not hesitated to find the applicable law to the remaining questions pursuant to ICSID Article 42(1), section 2.

Dépeçage can be voluntary or involuntary. Where *dépeçage* is involuntary, the adjudicator decides upon the partial application of other laws or imperative norms. For example, the tribunal in *Wena v. Egypt* found that the parties had chosen the BIT as "the primary source of applicable law for this arbitration." The tribunal noted that the BIT was a short and limited document that did not specify all the applicable rules, and decided instead to apply both equity and law. The tribunal also decided to apply international law rules by virtue of the pleadings made by the parties.[717]

The situation is different where the parties have chosen an entire legal system to govern their contract, which would include that system's own gap-filling rules.

VI. Reasonable connection of the law chosen

Historically, it was considered that the law chosen by the parties should have some connection either to the parties or to the transaction. As explained in the OAS Contracts Guide, although the thinking around this concept has evolved considerably, some domestic legal systems still require such a connection or another reasonable ground for the choice of law. Perhaps reflecting this evolution over time, the Mexico Convention does not expressly address the point, Rome I is silent (with two specific exceptions), whereas the HCCH Principles expressly state that no such connection is required (Article 2.4).[718]

With respect to arbitration, the issue of the reasonable connection of the law chosen has not been clarified in neither the UNCITRAL Arbitration Rules nor in the Model Law. There are arbitral decisions that, under a broad interpretation of the principle of party autonomy, would allow the parties to choose any law to govern their contract, even if it is not obviously related to the dispute.[719] Nevertheless, arbitrators must act with considerable caution in this area, given that failure to acknowledge public policy issues connected to the case can be the basis for setting aside an award or preventing its enforcement pursuant to Article V(2)(b) of the New York Convention. This requirement flows from the general duty of arbitrators to issue enforceable awards.

The reasonable connection requirement is less of an issue in investment arbitration, as it is generally more rational and desirable to adjudicate investor-State disputes under an unrelated, neutral legal system. Within such a mechanism, there is no reason to require a connection between the contract and the chosen law.[720] Not surprisingly, it is generally accepted that ICSID arbitration, for example, does not require a reasonable connection between the law and the transaction.

VII. Renvoi

Under the doctrine of *renvoi*, when the conflict of laws rules of an adjudicatory body requires that body to apply the law of another State, it must also apply the conflict of laws rules of that other State. The doctrine was specifically excluded in the Mexico Convention (Article 17), Rome I (Article 20) and the HCCH Principles, unless the parties expressly provide otherwise (Article 8). As stated in the OAS Contracts Guide, in the field of private international law exclusion of *renvoi* could be considered as the prevailing position (see OAS Contracts Guide, Part Twelve, III).

In the UNCITRAL Model Law, there is also a presumption against the *renvoi* principle. Article 28.1 provides that "[…a]ny designation of the law or legal system of a given State shall be construed, unless

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[717] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08 December 2000, ¶ 79. This decision was annulled considering its vague references to equity. *See also Wena Hotels LTd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 05 February 2002.

[718] *See also* OAS Contracts Guide, Part Twelve, II.

[719] See, for example, ICC Case No. 4145, Award, 1984.

[720] See in this regard the case *Elf Aquitaine Iran (France) v. National Iranian Oil Company,* ad hoc, Preliminary Award, 14 January of 1982 (96 ILR 254, ¶¶ 15 and 17).

otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."

Not surprisingly, arbitral rules that deal with the matter exclude *renvoi*, primarily because it undermines legal certainty. As such, generally, the choice of law or legal system of a given State is construed to refer directly to the substantive law of that State and not to its conflict of laws rules.[721]

In the ICSID Convention, the concept of *renvoi* is contemplated in the second sentence of Article 42(1). The decision of its drafters to include *renvoi* in the second sentence rather than the first may be taken as an indication that it should not be interpreted within the first sentence whatsoever. Moreover, this provision on *renvoi* refers to "rules of law" rather than to a "system of law," and only a legal system as a whole could be expected to also contain conflict of law rules.

If *renvoi* is to be applied according to principles that prioritize the parties' intentions, it must be assumed that, when choosing the applicable law, they did not intend to subject their relationship to the uncertainty of *renvoi* – to an undetermined system of law. However, in the drafting of their choice of law clause, the parties can avoid this outcome by making express reference to the substantive rules of law that they wish to be applied. The parties can also expressly include or exclude the application of national conflict of laws within the law chosen to avoid problems of interpretation.

Arbitral case law regarding the principle of *renvoi* has been contradictory. Some ICC awards exclude *renvoi*,[722] while others accept the principle.[723] In the tribunal in *Amco v. Indonesia* held that: "[a]s to Indonesian law, there is no need to enter into a discussion of its conflicts of laws' rules." Indeed, Claimants as well as Respondent were constantly referring, in their discussion on the merits, to the substantive law of Indonesia.[724]

Where the parties have not chosen an applicable law, the residual rule within Article 42 directs the tribunal to examine the host State's law to determine whether or not another system of law is referred to. If no other legal system is applicable within this rule, the tribunal may then proceed to apply the host State's rules. This will most typically occur in commercial loan contracts or licensing agreements.

VIII. Supervening choice of law

A choice of law may be made or modified at any time, however, if made after the contract has been concluded, such choice or modification may not prejudice the formal validity of the contract or the rights of third parties. This is expressly provided in the Mexico Convention (Article 8.1), Rome I (Article 3(2)) and the HCCH Principles (Article 2.3) as elaborated in the OAS Contracts Guide (see Part Twelve, I).

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[721] The following rules address the matter: Art. 27(1) of the VIAC Rules of Arbitration and Mediation (2018); for similar, if not identical, wording, see Art. 33(2) of the Dubai International Arbitration Centre (DIAC= Rules (2007); Art. 46 of the English Arbitration Act 1996; Art. 36(1) of the Japanese Arbitration Act of 25 July 2003; Art. 28(1) of the Danish Arbitration Act of 24 June 2005; Art. 34(2) of the Spanish Law 60/2003 on Arbitration of 23 December 2003; Art. 23(1) of the Arbitration Rules of the German Institution of Arbitration (DIS) (1998); Art. 27(2) of the Arbitration Institute of the SCC (2017).

[722] ICC Preliminary Award, 1987, *XIII Y.B. Com. Arb*. (1988), 110 (117-118).

[723] ICC Case No. 1704, Award, 1977, in Sigvard Jarvin and Yves Derains,*Collection of ICC Arbitral Awards 1974-1985*, (1994) 312, 313.

[724] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, ¶ 148. This reasoning was also endorsed by the tribunal in *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability 03 October 2006, ¶ 87.

Similar provisions have been included in recent legislation[725] and certain arbitral decisions,[726] which have addressed many of the controversies that have arisen in the past.

In investment arbitration, the initiation of arbitration proceedings or the first session of the tribunal may be good opportunities to agree on a choice of law. However, this can also be done at some later stage of the proceedings.[727]

In the ICSID context, a literal reading of the language in Article 42 may permit the parties to adopt rules of law up until the time that the Centre assumes authority. The parties may even determine their rules of law during the arbitration proceedings,[728] since the competence of the ICSID Centre is founded upon the presence of a dispute and not on the legal regime under which the investment was made.

IX. Severability

The term "severability" refers to the situation where the invalidity of an international contract will not necessarily affect or cause the invalidity of the choice of law agreement. As explained in the OAS Contracts Guide, the concept flows from the Mexico Convention (Article 12, paragraph one) and is explicitly outlined in the HCCH Principles (Article 7) (for details, see OAS Contracts Guide, Part Eleven).

Severability had its origins in arbitration, where it is a widely accepted principle that actually contributed to the development of this dispute settlement mechanism. The concept is enshrined in the UNCITRAL Model Law (Article 16(1)) and in the domestic laws that govern international commercial arbitration in many States in the Americas. It should be noted, however, that the effects of severability of the arbitration clause differ from those of the severability of a choice of applicable law clause; one refers to the validity of the arbitration agreement and the other to the validity of the choice of law clause.

X. Express and tacit choice of law in international contracts

Parties may choose the law applicable to their contracts either expressly or tacitly. Party autonomy applies if the parties have effectively exercised their desire to make that choice. Express choice, which may be verbal or written, clearly arises from the agreement; nonetheless, a choice might have been made that is not so clear. As elaborated in the OAS Contracts Guide, Part Eight, there are several ways such a choice may be evidenced. For example, provisions in Rome I require that the choice be "expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" (Article 3.1); in the Mexico Convention it must "be evident from the parties' behavior and from the clauses of the contract, considered as a whole" (Article 7, paragraph 1); in the HCCH Principles it must "appear clearly from the provisions of the contract or the circumstances" (Article 4). Selection of a forum by the parties, however, does not necessarily entail selection of the applicable law, as stated in the Mexico Convention (Article 7, paragraph

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[725] For instance, the Japanese Law of Private International Law of 2006 (Article 9), the Russian Civil Code (Article 1210(3)), and the Argentinian Civil and Commercial Code (Article 2651, ¶ a).

[726] *See* precedent at: Case No. T-13/05, *Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce*,Award, 23 January 2008 http://www.unilex.info (last accessed 29 June 2022). *See also*: *Tribunal Arbitral Ad Hoc*, Award, 17 December 1975, IV (1979) *Y.B: Com. Arb*., (1979) 192 (193). The matter has not, however, been addressed by the UNCITRAL Model Law or the UNCITRAL Arbitration Rules.

[727] In *Adriano Gardella v. Cote de Ivoire*, it is unclear if the tribunal decided under 42(1) or (2). The tribunal said: "[b]oth 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". *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977, ¶ 4.3.

[728] *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award (February 25, 1988), ¶ 5.02; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶ 22.

2), which is consistent with the HCCH Principles and other relevant instruments. Similar provisions are also contained in the domestic laws of many States in the Americas.

XI. Express and tacit choice in investment arbitration

A. Express choice

A choice of law may be made expressly in the investment contract, in the investment law of the host State, in the investment treaty, or in a subsequent agreement between the parties.

Explicit choice of law provisions in treaties are the exception and not the rule. Nonetheless, a few BITs contain choice of law clauses that serve as the basis for an agreement on the choice of law between the host State and the investor. In this regard, the tribunal in *Goetz v. Burundi* held that the applicable law is determined in the investment treaty. Burundi had decided in favor of the applicable law in the Belgium-Burundi investment treaty and investors also made this choice by initiating an arbitration based on such an instrument.[729] The tribunals in *Middle East Cement v. Egypt* and *Siemens v. Argentina* also decided in accordance with this criterion.[730]

Multilateral treaties in which the contracting States consent to arbitration with investors may also contain provisions stating the applicable law. In this regard, the USMCA, Article 14.D.9, Annex 2 of Chapter 14 states that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." A similar provision is found in Article 26 of the Energy Charter, which was applied in the *Kardassopoulos v. Georgia* case, in which the tribunal quoted the provisions of the treaty to determine that it could only decide the disputed issues by considering the applicable rules and principles of international law.[731]

B. Vagueness of rules on tacit choice in investment arbitration

The ICSID Convention does not deal with the issue of express and tacit choice in arbitration. Instead, the Convention leaves the issue to be decided in accordance with conflict of laws rules. Within this context, the following question arises: should the ICSID Convention be interpreted on its own or should the conflict of laws rules of the host State be considered on a residual basis? The only certainty is the vagueness of ICSID Article 42 as to the adoption of the governing law by the parties.

Case law provides little guidance in this regard. The first ICSID case to discuss this issue was *Holiday Inns v. Morocco,* wherein the tribunal held that an implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the parties' intention.[732] In *CDSE v. Costa Rica*, the tribunal stated that the choice of applicable law must be clear and unequivocal.[733] Therefore, the situation must be limited to cases in which such an agreement can be ascertained with

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[729] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3.

[730] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 86, 87. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 06 February 2007, ¶ 76.

[731] *Joannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 06 July 2007, ¶ 146.

[732] "The Tribunal had to consider whether the consent to treat a locally incorporated company as a national of another country should be express or implied. The Tribunal confirmed that the terms of Article 25(2)(b) created an exception to the ICSID Convention and therefore one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit." This paragraph was quoted by the tribunal in *Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings Ltd. v. The Federation of St Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 13January 1997.

[733] The tribunal in *CSDE v. Costa Rica* stressed: "Article 42(1) of the ICSID Convention does not require that the parties' agreement as to the applicable law be in writing or even that it be stated expressly. However, for the tribunal to find that such an agreement was implied it must first find that the substance of the agreement, irrespective of its form, is clear" *See Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 15 .

reasonable certainty. In *Benvenuti v. Congo*, the determination of the choice of law provision was done by first looking at the agreement of the parties (which was silent on the matter) and then by resorting to Article 42(1) of the Convention, which led to the application of the law of the contracting State and the principles of international law on the matter.[734] In such situations, some would advocate for the tribunal to first determine whether an agreed-upon choice of law clause does, in fact, exist before proceeding to an analysis of the applicable law on the basis of the first or second sentence of Article 42(1).

Article V of the 1981 Iran-United States Claims Settlement Declaration also does not deal with the issue of express and tacit choice in arbitration.

There does not appear to be any case decided before the Iran-United States Claims Tribunal 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.

In certain cases, such as *Mobil Oil Iran v. Iran* (1987), the tribunal has nevertheless found an implied choice of international law by examining the nature of the contract.[735] In that case, the tribunal reasoned as follows:

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.[736]

Thus, the tribunal concluded that the law applicable to the contract was Iranian law for interpretive issues and the general principles of commercial and international law for all other issues. The law applicable to the party's liability was found to be international law.[737]

C. Clear and unequivocal choice

ICSID tribunals have recognized the possibility of an indirect choice of law, for instance in a clearly implicit agreement or in a reference by the parties to an instrument with a clause on applicable law,[738] which supports a broad reading of the first sentence of Article 42(1).

In *CDSE v. Costa Rica*, it was held that an agreement on the choice of law would have to be clear and unequivocal.[739] The tribunal found that although Article 42(1) of the ICSID Convention did not require that the parties' arrangement as to the applicable law be in writing or even that it be stated expressly, nonetheless, the agreement had to be clear and unequivocal. To determine that such an agreement was implied, the tribunal must first conclude that the substance of the arrangement is clear, which could not be determined in that case.[740]

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[734] *Benvenuti & Bonfant v. Congo*, Award (August 15, 1980), ¶ 4.2. See C.H. Schreuer, *op. cit.*, p. 593.
[735] *Mobil Oil Iran Inc. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran and National Iranian Oil Company,* IUSCT Case No. 74 Partial Award (Award No. 311-74/76/81/150-3), 14 July 1987.
[736] *Mobil Oil Iran Inc. and Mobil Sales and Supply Corporation v. Government of the Islamic Republic of Iran and National Iranian Oil Company,* IUSCT Case No. 74, Partial Award (Award No. 311-74/76/81/150-3), 14 July 1987, ¶ 80.
[737] Ibid., ¶ 81.
[738] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, ¶ 63; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 02 October 2006 ¶ 290; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, ¶ 792.
[739] *Compañia del Desarrollo de Santa Elena S.A.* v. *Costa Rica*, Award, 17 February 2000), ¶¶ 28, 35, 37, 40, 60–68.
[740] In paragraph 63 of the award the tribunal explains the rationale behind its conclusion.

In turn, the *CME v. Czech Republic* case involved UNCITRAL Arbitration Rules that emerged from the Netherlands-Czech bilateral investment treaty.[741] In that case, the tribunal decided that the choice of the applicable law could not be implied and must be made "clearly and unequivocally."[742] This is a matter of interpretation of the parties' intention, as opposed to an interpretation of the ICSID Convention itself.[743]

D. Choice of law as implied from a law in the parties' contract

Another method of determining the choice of law involves searching for an indirect or implicit choice of law either in the original agreement or in the subsequent conduct of the parties.

In this regard, reference to a specific part of the host States' legislation in the agreements between the parties may amount to a general choice of its law. This argument was accepted in *Letco v. Liberia.*[744] In that case, the opening paragraph of the investment contract specified that the contract had been concluded under the General Business Law of Liberia. The tribunal understood that such language seemed "to indicate an express choice by the parties of the Law of Liberia as the law governing the Concession Agreement." However, the tribunal also took international law into account.[745]

Despite that finding, a mere reference by the parties to specific legislation of the host State's law is generally insufficient indication of the parties' intention to choose that entire legal system as the applicable law. Nor can acceptance of an offer to consent to jurisdiction be taken as a choice of the host State's law. That was the determination of the tribunal in *Aucoven v. Venezuela*,[746] in which case the application of Venezuelan law was only partially accepted. The Preamble of the Concession Agreement stated that the contract would be governed by certain specified Venezuelan decrees "and the provisions of any other laws, regulations, or other documents as may be applicable." The arbitral tribunal ruled that the parties could easily have adopted language showing their common intent to choose Venezuelan law as the general applicable law. Failing any indication to this effect, no agreement on Venezuelan law could be found.[747]

E. Choice of law if the parties argue on the basis of the same law

Another method to determine the parties' choice of applicable law involves review of the parties' submissions during the proceedings or their reliance upon a treaty as an indirect choice of law. As a general proposition, any agreement on choice of law should be proven and not inferred by the tribunal without evidence.

The decision in AAPL *v. Sri Lanka* (1990) represents the first time that an ICSID tribunal's jurisdiction was determined to derive from an investment treaty.[748] The treaty contained no provisions on applicable law and the tribunal understood that the parties' pleadings "[…] demonstrated their mutual agreement to consider the BIT as being the primary source of the applicable legal rules."[749] The dissent noted that the respondent had no choice but to respond to the arguments of the claimant and to refer to the laws the opposing party had cited, but that this did not amount to an implied choice of law.[750] The arbitral

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[741] *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Final Award, 14 March 2003.
[742] *Ibid*. It is also interesting the reasoning of the Svea Court of Appeal following the Czech Republic's application for annulment of the Partial Award of September 13, 2001. *The Czech Republic v. CME Czech Republic B.V.*, Svea Court of Appeal, Judgment 15 May 2003, 42 ILM 919, 965 (2003).
[743] Ibid., p. 199.
[744] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, ¶ 35.
[745] *Ibid*, ¶ 36.
[746] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5*,* Award, 23 September 2003.
[747] *Ibid* ¶ 94.
[748] *Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.
[749] *Ibid*., ¶¶ 246, 250, 256.
[750] *Ibid*., Dissenting Opinion of Samuel K.B. Asante, 15 June 1990, ¶ 299.

tribunal could also have directly applied the second sentence of Article 42(1) of the ICSID Convention to decide that both Sri Lankan and international law were applicable.

In other cases, ICSID tribunals have relied upon the parties' submissions merely to corroborate their findings on applicable law. For instance, the tribunals in *Amco v. Indonesia*, *Wena v. Egypt,* and *Enron v. Argentina* decided that the parties' references and pleadings involving a specific law allowed for that law to be applied to their contract.[751]

In *Biloune and Marine Drive v. Ghana*, the UNCITRAL tribunal considered the parties' pleadings and referred to customary international law despite an agreement in the contract that the laws of Ghana would apply. The tribunal stated that "[…] 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."[752]

F. Reference to certain aspects of a law through the parties' implied choice

Any assertion that the inclusion of a particular provision of domestic law or an entire piece of legislation thereby amounts to an overarching choice of that State's law is unconvincing. This is particularly so in the context of an arrangement that grants the parties significant latitude in combining, selecting, and excluding parts of different legal systems. Moreover, certain aspects of the domestic law of the host State will almost inevitably be applicable.

G. Tacit agreement and the selection of arbitration

No conclusions in regard to the applicable law may be drawn from the fact that a dispute has been submitted to international arbitration, nor can a choice of law derive from the jurisdiction where the proceedings are to take place. In a decision to the contrary and that has been criticized, the District Court in *MINE v. Guinea* based its finding of the applicability of US law on the fact that ICSID arbitration was expected to take place in that country.[753]

Some treaties that provide for ICSID arbitration contain their own rules to decide the applicable law. In these cases, acceptance by the investor of an offer to consent to jurisdiction also implies the acceptance of the clause on the applicable law specified within the treaty. Such acceptance is evidenced by the initiation of proceedings on the basis of the treaty's dispute resolution provision.

H. Arbitration as an implicit choice of public international law

Early cases found that the inclusion of an arbitration clause in a contract leads to the implicit acceptance of public international law as the parties' choice of applicable law. In *Texaco v. Libya* (1977), the arbitral tribunal stated: "[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."[754]

The same conclusion had been reached in the *Sapphire* case (1963), however, on the basis of different reasoning. The tribunal held that "if no positive implication can be made from the arbitral clause, it is

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[751] *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Award, 20 November 1984); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08 December 2000, ¶ 79; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 209.

[752] See *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, *ad hoc*, Award on Jurisdiction and Liability, 27 October 1989, sections I, VI, and F.

[753] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, US Court of Appeals District of Columbia Circuit Decision, 12 November 1982.

[754] *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, fn. 53, Award on the Merits, 19 January 1977, ¶ 44.

possible to find there a negative intention, namely, to reject the exclusive application of Iranian law."[755] On this basis, the tribunal went on to apply international law.

A significant number of treaties referring to the ICSID mechanism do not provide for any express choice of law. Strictly speaking, the absence of a choice of law should lead to the application of the default provisions of Article 42(1), Section 2, that reads "in absence of such agreement […]". However, several ICSID tribunals have considered the absence of a choice in these situations as evidencing an implicit choice of public international law. The tribunals in *Middle East Cement v. Egypt,*[756] *MTD v. Chile,*[757] *CSOB v. Slovakia,*[758] and *ADC v. Hungary*[759] all adopted this view.[760]

In *MCI v. Ecuador*, the claimant argued that "the Tribunal should consider that no such agreement exists, the force of the second part of Article 42(1) of the Convention is such that international law must be applied." For its part, Ecuador argued that its own domestic law should be applied. In the end, the tribunal decided that it…

> […] finds no evidence of any agreement on the law applicable to this dispute. Therefore, the Tribunal considers that it must respect the provisions of the second part of Article 42(1) of the ICSID Convention, i.e., in the absence of an agreement, the Tribunal shall apply Ecuadorian law, including its rules of private international law and such rules of international law as may be applicable.[761]

Similar argument was rejected in *LG&E v. Argentina* (2006). In that case, the tribunal stated that "[…] 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, no implied agreement was deemed to be present.[762]

In other cases, tribunals have resorted directly to the application of Article 42 of the ICSID Convention, since the applicable investment agreement contained no choice of law clause. This rationale was subsequently followed by the tribunals in *Vestey Group v. Venezuela* and *Ioan Micula et al. v. Romania.*[763]

Furthermore, the tribunal in *Goetz v. Burundi* (1999) held that…

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[755] *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, Award, 35 I.L.R. 136, 140 (1963), 15 March 1963, ¶ 173.

[756] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 86.

[757] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

[758] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, ¶ 61.

[759] *Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 02 October 2006, ¶ 290.

[760] In *LG&E v. Argentina* the tribunal discussed but did not follow the concept of an implicit choice of international law through the invocation of the BIT. However, although the tribunal addressed the issue of applicable law under the second sentence of Article 42(1), its solution came very close to an implicit choice of law. *See LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 85.

[761] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 214-217.

[762] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 85. *See also M.C.I. Power Group v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 217.

[763] *Vestey Group Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/06/4*,* Award, 15 April 2016,¶ 117. *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 [I], ICSID* Case No. ARB/05/20, Final Award, 11 December 2013, ¶ 287.

> […] choice 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 […].[764]

In *Quirobax S.A. and Non-Metallic Minerals S.A. v. Bol.*, the tribunal determined that "except for the undisputed application of the BIT, the Parties have not agreed on the rules of law that govern the merits of this dispute. Consequently, the tribunal shall apply Bolivian law and international law when appropriate."[765]

Since claimants regularly assert violations of the substantive treatment standards contained in treaties, in the absence of express choice of law provisions, these public international law standards are considered the rules of law applicable to the dispute. Whether such an implicit choice of law encompasses other rules of public international law, such as customary international law or general principles, is less clear.

XII. Stabilization clause

When a national law is chosen, a question arises whether that law should be understood according to its own terms at the time the agreement was concluded, or interpreted in the way in which it may have been amended by subsequent legislation. A mere reference to the law of a country must be understood as a reference to that law as it exists at the time when the dispute arises.

Stabilization clauses work to counter this default effect and are intended to exclude legislation passed by States after the conclusion of a contract that would defeat, cancel, or gravely affect expectations. As expressed in the case *Liberian Eastern Timber Corporation v. Liberia*, "otherwise the contracting State may easily avoid its contractual obligations."[766]

Changes to legislation can be expected, of course, in light of evolving social, economic, and technological conditions. For instance, governments may decide to amend labor or tax laws, or update technical safety standards and regulations. Accordingly, the parties may specifically agree to exempt the investor from certain changes in fiscal, foreign exchange, or social security legislation. Since investment in countries of the Global South involves many uncertainties, not only over economic expectations but also political risk, in order not to discourage foreign investment, the technique to expressly stabilize particular terms of an agreement is valid under international law and should be recognized as such in any forum in which the issue arises.

The situation is different when the stabilization clause concerns legislation that defeats undertakings freely made by the host State and that affect the root of the legal relationship, which thereby create an environment in which the investor can no longer operate. Direct or indirect expropriation, or actions selectively directed towards particular investors or a group of investors cannot be tolerated for this reason. In these situations, if the stabilization clause is governed by the law of the host State, the rules of the game will change significantly and maintaining minimum standards of protection will only be possible if the transaction is governed by international law.

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[764] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, 15 ICSID Rev.-FILJ 457, ¶¶ 488–489.

[765] *Quirobax S.A. and Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16September 2016, ¶ 91. This decision is also aligned with *Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, 09 October, 2014, ¶ 221 and with *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶¶ 4.18, 4.192. With another rationale, the tribunal in *LG&E v. Argentina* questioned that claiming a breach could result in an implicit choice of law but did not question that choice of law agreements can be made implicitly. *See LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03 October 2006, ¶ 96.

[766] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, ¶ 368.

In *Elf Aquitaine Iran v. NIOC* the tribunal held that…

> […] a State which has itself entered into an international agreement or has permitted companies or institutions controlled by it to enter into such agreement regulated as lex contracts by recognized principles of international law is not free to change the *lex contractus* by subsequent legislation.[767]

Surprisingly, the ICSID Convention does not address stabilization clauses. The drafting history of the Convention reveals that the drafters were generally aware of the issue, however no obvious solution was offered.[768] In reference to the final text of Article 42, Aron Broches (considered the father of the ICSID Convention) suggested that the parties may decide to stabilize their contractual relationship by incorporating a particular law as of a certain date. In that case, if the host State subsequently amends its law in order to defeat the rights of the investor, the tribunal would be free to disregard such a change on the grounds that it violated international law.[769] Stabilization clauses do not prevent the law from being changed, but rather, communicate a promise that legal variations will not apply to investors or will be accompanied by compensation for any adverse consequences caused by such changes.

Stabilization clauses are generally accepted in investment arbitral decisions.[770] For instance, in the ICSID case *AGIP v. Congo*, the tribunal demonstrated not only a general deference to stabilization clauses but also a willingness to accept them as part of international law, thereby shielding them against any unilateral abrogation through host State legislation.[771] Stabilization clauses have not featured as centrally in other cases, but were still referred to and favored by tribunals in *Letco v. Liberia*,[772] *MINE v. Guinea*,[773] *CMS v. Argentina*,[774] and *Duke Energy v. Peru*,[775] among others.

Stabilization clauses are also accepted by Article 3 of the 1979 Resolution of *L'Institut de Droit International*. Article 1 states that "[c]ontracts between a State and a foreign private person shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has the closest link." Article 3 states that "[t]he parties may agree that domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract."[776]

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[767] *Elf Aquitaine Iran v. National Iranian Oil Company*, ad hoc, Preliminary Award, 14 January 1982, 96 ILR 254, ¶ 19. In an ICC case, the tribunal found that the chosen law was Utopian law, "purely and simply", as opposed to Utopian law "in its evolution". The tribunal stated that "it cannot be accepted that the parties which do simply accept that the validity and effectiveness of a contractual clause as fundamental as an arbitration clause should be subject to a sort of condition entirely within the power of one party, the occurrence of which would depend solely on the will of the State of which the public organization party to the said contract and to the undertaking to arbitrate is an instrumentality" (*See Company Z and others v. State Organization ABC*, Award, April 1982.

[768] "It was suggested that subsequent legislation should not apply if it were to the detriment of the investor. However, Broches manifested that the issue is up to the parties to decide" (*History*, Vol. II, p. 502).

[769] Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", *Recueil des cours*, Vol. 136 (1972), p. 390.

[770] *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, Award, 17 ILM 1, 19 January 1977, 24 (1978); *The American Independent Oil Company (AMINOIL) v. The Government of the State of Kuwait*, Award, 66 ILR, pp. 586 *et seq.* (1984), 24 March 1982, C.H. Schreuer, *op. cit.*, p. 588. ICSID Model Clause 10 of 1993. 4 ICSID Reports 364.

[771] *AGIP S.p.A. v. People's Republic of the Congo,* ICSID Case No. ARB/77/1, Award, 30 November 1979, ¶¶ 68-70.

[772] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 ICSID Reports 368.

[773] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4 Decision on Annulment, 22 December 1989, ¶¶ 6.33. 6.36.

[774] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 145-151.

[775] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru,* ICSID Case No. ARB/03/28 Decision on Jurisdiction, 01 February 2006, ¶¶ 24-31, 85. See more in C.H. Schreuer, *op. cit.*, p. 590-591.

[776] *Annuaire d'Institut de droit international* (Vol. 58-II, 1979), pp. 192-195; *see* also p. 72, 74, and 84.

Stabilization clauses are used in diverse ways. A common provision is that the agreement may not be changed except by mutual consent.[777] Alternatively, the clause may be more specific to restrict certain governmental powers, such as, to stabilize the level of taxes or royalties,[778] considering that these are the principal means of dividing the benefits of the enterprise and limiting the return to the investor.

Moreover, stabilization clauses can be grouped into several categories. One type of clause, sometimes called an "intangibility" clause, establishes that the State may not unilaterally modify or terminate the contract.[779] Another (the so-called "stabilization clause *stricto sensu*" group) provides that the governing law of the contract shall be that as of the execution of the agreement, thereby excluding subsequent changes in the contracting State's law.[780] A third group of clauses provide that the agreement shall be performed consistently with "good will" or in "good faith" and these can also be regarded as a type of stabilization clause. The requirement of performance in good faith precludes unilateral modification or termination.

XIII. Pactum de lege utenda

An international contract sets out the parties' rights and obligations. The parties may or may not decide upon a choice of law to govern their contract and may do so either in the main contract or in a separate agreement. When a choice of law is made by the parties, the law governing the main contract is derived from that choice, however, the question arises as to which law will serve as the basis upon which to assess the validity and consequences of that choice of law agreement. This delicate question refers to the *pactum de lege utenda*, or the selection of the law (*electio juris*). This may create a vicious circle, since once the law has been chosen, the governing law will derive from the will of the parties. Even in this circumstance, however, the question remains regarding which law the *pactum* is based upon.

In principle, the OAS Contracts Guide favors the applicability of the law chosen by the parties. However, it is acknowledged that the law of the State in which a party has its establishment may prevail under certain circumstances.

In the context of investment arbitration, a difficult issue arises if the host State's domestic law contains provisions limiting its authority to enter into certain types of arrangements pertaining to the applicable law. For instance, some domestic legal systems attempt to curtail the capacity of the government to submit to international arbitration or to consent to the application of systems of law other than their own. In *Kaiser v. Jamaica*, the choice of law provision in the 1969 agreement purported to exclude, *inter alia*, any rule of Jamaican law "which could throw doubt upon the authority or ability of the Government to enter into this […] Agreement."[781]

The question may be formulated as follows: can a State contract out of one of its own legal rules that limit its freedom to enter into agreements? The answer is complex. Much will depend on whether the domestic provision is seen to affect the State's capacity to contract, thereby resulting in the agreement's nullity, or whether the provision is seen as a simple prohibition that does not affect the validity of the

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[777] *See*, e.g., Guinea-Bissau, 1982 Offshore Model Contract for Agreements between PETROMINAS (a State company) and Foreign Private Companies, art. 31.1, reprinted in Basic Oil Laws and Concession Contracts: South and Central Africa (Supp. 71) at 48 (Barrows 1983).

[778] *See*, e.g., Agreement between Revere Jamaica Alumina Ltd. and the Gov't of Jamaica, 10 March, 1967, Arts. 12, 13, discussed in *Revere Copper and Brass, Inc. v. Overseas Private Inv. Corp.*, AAA Case No. 1610013776, Award, 24 August 1978, 56 I.L.R. 258, 273 (1978).

[779] *See*, e.g., Agreement between the Gov't of the Yemen Arab Republic (North Yemen) and Deutsche Shell A.G.; Agreement between the Gov't of Abu Dhabi and Amerada Hess Petroleum Abu Dhabi Ltd., Art. 34.

[780] *See*, e.g., Agreement between the Republic of Liberia and Liberia Iron and Steel Corp.; Joint-Venture Agreement between ONAREP (a State company) and Amoco Morocco Oil Co., 17June 1982, art. 13.3, reprinted in Basic Oil Laws and Concession Contracts: North Africa (Supp. 62) at 29 (Barrows 1983).

[781] *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction 06 July 1975, ¶ 12.80. In this sense: Institute of International Law, Articles on Arbitration between States, State Enterprises, or State Entities and Foreign Enterprises, 1989, Art. 4, 63 Annuaire IDI II 328 (1990).

agreement. Where any doubt arises, it will be preferable to uphold the validity of the agreement, especially where the investor has relied in good faith on the host State's capacity to contract. Nevertheless, provisions of this kind in domestic law should be a cause for concern and should be investigated thoroughly before relying on a contractual clause purporting to exclude them.

In validating the choice of law agreement,[782] some arbitral tribunals will consider the law of the State where the award is to be enforced and determine whether this law is consistent with the solution of domestic laws.[783] This is a variation of the validation principle that attempts to avoid implausible and uncommercial results by selecting an applicable law that will give effect to the parties' agreement. If the chosen law would invalidate an international contract or material provisions of it, the validation principle should be understood as providing for an implied exception to the parties' selection of the chosen law, instead applying the law of the arbitral seat regarding the relevant issues.

REC. 10.1 OAS Member States are encouraged to take into account the recommendations of the OAS Contracts Guide concerning choice of law as applicable in the international investment context and to ensure that their domestic legal regime:

- affirms clear adherence to the internationally-recognized principle of party autonomy;
- provides that a choice of law, whether express or tacit, should be evident or appear clearly from the circumstances;
- provides that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties;
- confirms that a choice of law applicable to international investment contracts cannot be contested solely on the ground that the contract to which it applies is not valid;
- provides that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties;
- provides that no connection is required between the law chosen and the parties or their transaction;
- excludes the principle of *renvoi* to provide greater certainty as to the applicable law; and,
- admits the "splitting" of the law (*dépeçage*).

REC. 10.2 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to take the above recommendations into account when drafting such treaties and agreements, all with a view towards providing greater clarity in the choice of law applicable to international investment disputes.

PART 11: ABSENCE OF CHOICE OF LAW IN INVESTMENT ARBITRATION

I. Absence of choice of substantive law in international commercial transactions

Parties often fail to exercise a choice of applicable law due to several reasons, including plain oversight. Or, they may have made a choice, but one that is ineffective. In either circumstance, the applicable law will be determined by the adjudicator in accordance with relevant conflict of laws rules. As explained in Part Thirteen of the OAS Contracts Guide, some of the rules under various international instruments, such as those in the Montevideo Treaties and the Bustamante Code, led to uncertainty and controversies. Comparable efforts in Europe led to the Rome Convention and Rome I, which were not without similar challenges. All this history led to the Mexico Convention, which aimed above all to promote party autonomy, but also offered a way to determine the applicable law in the absence of an effective choice. The Mexico Convention stipulates that if the parties have not selected the applicable law, or if their selection

[782] For instance, ICC Case No. 7920, Partial Award, XXIII *Y.B. Com.* Arb. 80 (1998); ICC Case No. 5505, XIII Y.B. Com. Arb. 110 (1988); ICC Case No. 4145, Interim Award, *XII Y.B. Com.* Arb. 97, pp. 100 *et seq.* (1987).
[783] For instance, *Restatement (Second) Conflict of Laws* §200 comment c (1971); *Kahler v. Midland Bank* [1950] AC 24 (House of Lords); *NV Handel My J. Smits Imp.-Exp. v. English Exps. (London) Ltd.* [1955] 2 Lloyd's Rep. 317 (English Ct. App.) *Etler v. Kertesz*, (1960) 26 DLR2d 209, 222 (Ontario Ct. App.).

proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties or connections (Article 9, paragraph 1). This is known as "the proximity principle."

In a survey that was conducted in 2015, OAS Member States were asked whether their domestic legislation was consistent with this provision. Out of the eleven States that responded, seven States replied in the affirmative. Although many States still adhere to the traditional approach that had been advocated by the earlier Montevideo Treaties and the Bustamante Code, change in the direction of the flexible approach as encouraged by the Mexico Convention is underway in the Americas. This is consistent with a similar trend in Europe (see OAS Contracts Guide, Part Thirteen).

Arbitrators are in a fundamentally different position than judges and are generally granted broader discretion. This discretion is further expanded when there is no choice of law provision at all.

II. The absence of choice in international investment law

Investment contracts, national laws, and treaties often neglect applicable law issues. This is particularly the case with investment treaties. Some provide for the application of a certain law, combination of laws, or rules of law. However, most do not contain an explicit reference.

Arbitral regulations provide some guidance in this regard. For instance, the second sentence of Article 42(1) of the ICSID Convention includes an applicable substantive law provision and imposes a two-step process: first, tribunals must determine whether a law was chosen, consistent with the fundamental principle of party autonomy. Second, in the absence of such a choice, the arbitrators "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."[784]

This two-fold process is more complicated than it seems. When a choice of law is not clear, the tribunal must assume that no agreement exists and must apply the residual rule. The most difficult and controversial task for arbitrators to complete is likely managing the relevance of the application of the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and the eventual interaction of the laws of the host State and international law.[785]

In ICSID practice, tribunals dealing with treaty claims generally apply the substantive provisions of the treaty itself (such as fair and equitable treatment) and other sources of public international law, such as international customary law or general principles. The laws of a host State usually have a role to play in these cases as well, such as determining whether the investment was made in accordance with domestic rules or ensuring that compensation for expropriation was accurately calculated.

During the first twenty years of the ICSID Convention and until the 1990s, most of the cases involved breaches of investment contracts. Half of these included a choice of law agreement related to the substance of the dispute and almost all cases referred to the law of the State party of the dispute. In the remaining cases, no applicable law had been agreed upon. Hence, the appropriate handling of choice of law issues became of utmost relevance and several disputes decided by ICSID dealt with this matter. This was the

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[784] For instance, in *Mobil Exploration and Development Inc. Suc. Argentina*, *and Mobil Argentina S.A. v. Argentine Republic*, ICSID No. ARB/04/16. Decision on Jurisdiction and Responsibility 10 April 2013, the tribunal stated the following: "[t]here is no express agreement between the Claimants and Argentina on the applicable law. Neither does the BIT contain any express clause on applicable law. Thus, the Tribunal agrees with Argentina that the second sentence of Article 42 (1) of the ICSID Convention applies in the instant case. The Tribunal notes that the parties agree that the BIT is the point of reference for judging the merits of MEDA's and MASA's claim. The Tribunal further notes that, according to the Argentine Constitution, the Constitution and treaties entered into with other States have primacy over domestic laws."

[785] There is at least some place for international law even in the presence of an agreement on choice of law which does not incorporate it. *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 ICSID Reports 358.

case, for instance, in *Benvenuti v. Congo*,[786] *SOABI v. Senegal*,[787] *Letco v. Liberia*,[788] *CDSE v. Costa Rica*[789] and *MCI v. Ecuador.*[790]

Most of the ICSID disputes heard after 2000 involved BITs and, in the absence of a choice, the arbitrators generally applied international law because the claims invariably asserted breaches of the BIT in question.[791]

For investment claims conducted in accordance with UNCITRAL-inspired mechanisms, the Model Law states that in the absence of a choice of law, the arbitral tribunal shall apply "[…] the law determined by the conflict of laws rules which it considers applicable" (Article 28(2)). This traditional approach has been reflected in many arbitration laws and rules governing investment arbitration cases. Others, such as the ICC Arbitration Rules, are more forward-looking and allow for the *voie directe* approach.

The PCA Arbitration Rules also draw upon the UNCITRAL Model Law and include provisions that apply directly to States and intergovernmental parties. In the absence of a choice of law, Article 35.1.b of the PCA Arbitration Rules states that:

In cases involving only States and intergovernmental organizations, apply the rules of the organization concerned and the law applicable to any agreement or relationship between the parties, and, where appropriate, the general principles governing the law of intergovernmental organizations and the rules of general international law.

Certain national arbitration laws and arbitration rules direct tribunals that are faced with the absence of an agreement by the parties to apply national law to the exclusion of international law.[792] Notwithstanding, international law may apply in a supervening way as will be further elaborated in Subsection E, below.

III. Conflict of laws mechanisms in investment arbitration

Investment tribunals have often sought to avoid clear statements regarding the applicable substantive law and evade a rigid application of the law of the host State. Numerous conflict of laws formulas have been advanced in the absence of a choice of law: the center of gravity, the place of characteristic performance, 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, and the law of the place of domicile, among others. Application of these different formulas depends on the relevant issue and the conflict of laws system governing the relationship.

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[786] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 08 August 1980, ¶¶ 4.1-4.4.

[787] *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, February 1988, ¶¶ 5.01-5.37.

[788] *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March, 1986, ¶¶ 34-37.

[789] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17(February 2000, ¶¶ 60-67.

[790] *MCI Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award 31 July, 2007, ¶ 217.

[791] In these cases, the BIT is not only invoked as a basis for jurisdiction but also as the applicable law under the arbitration convention. This distinction does not always appear to have been clearly made by the parties during the proceedings, which has given rise to some confusion. *Duke Energy Electroquil Partners and Electroquil S.A. & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award, 12 August 2008, ¶. 190.

[792] CRCICA Arbitration Rules (in force from 1 March 2011) in its Article 35(1) expressly states that: "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which has the closest connection to the dispute".

Regarding the selection of the applicable conflict of laws or uniform law rules, as in international commercial arbitration, several approaches are available in international investment law that will be discussed in the following sections.

A. The conflict of laws system of the host State

Negotiations during the drafting of the ICSID Convention reveal that early discussions and draft versions of the instrument did not make reference to the law of the host State. The applicability of national and international law rules were referenced, however, no mention was made of the law of the host State.[793] The drafters of the Convention opted for such an open-ended formula in Article 42 to aid arbitral tribunals in determining the proper applicable law by applying generally accepted conflict of laws rules or private international law.[794] By following this approach, arbitrators could determine the applicable law by finding the law with the most significant connection to the dispute. The law of the host State would be applicable in most cases, but other national laws may also be applicable in other cases.[795]

This solution was criticized during the drafting of the Convention for being too vague and broad, particularly by delegates of developing countries.[796] As a consequence, the final version of the ICSID Convention contemplates application of the law of the State party to the dispute, including its conflict of laws rules. Therefore, tribunals should generally apply the law of the host State unless its choice of law rules lead to the application of a different law. Several ICSID cases applied the law of the host State,[797] such as *Benvenuti v. Congo*,[798] *Cable TV v. St. Kitts and Nevis*,[799] *Amco v. Indonesia*,[800] *SOABI v. Senegal*,[801] *Genin v. Estonia*,[802] and *MCI v. Ecuador.*[803]

The law of the host State is generally the one that is most closely connected to the dispute and, as such, the law would likely be applied in any case. Moreover, the second sentence of Article 42(1) explicitly includes conflict of laws rules. Therefore, if there are stronger connections to another legal system, it is likely that *renvoi* would lead to the application of that law.

Of course, the parties may exercise party autonomy in accordance with the first sentence of Article 42(1) and select other rules if applying the host State's law would lead to unsatisfactory results.

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[793] ICSID, *History of the ICSID Convention*, Vol. I 1970, p. 190, 192.
[794] Ibid., Vol. II-2, 1968, Reprinted in 2006, p. 79, 110, 267, 330, 506, 570. Article 42, ¶ 1, second sentence states: "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
[795] Ibid., pp. 514, 571, 800.
[796] *Ibid*., pp. 418, 419, 466, 513, 515-516, 653, 660, 663, 800-802.
[797] Ibid., p. 596.
[798] The tribunal decided to apply Congolese as well as international law. *S.A.R.L Benvenuti & Bonfant v. People's Republic of the Congo*, Award, 15 August 1980, ¶ 4.2.
[799] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶¶ 6.02, 6.25.
[800] "[…] the Tribunal has 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" (*See Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Award, 20 November 1984, ¶ 148).
[801] The tribunal characterized the contracts "as "government contracts," the effect and execution of which are governed primarily by the Code of Governmental Obligations (CGO). It appears from the position of the Government as stated in its Counter-Memorial (p. 11) and that of SOABI contained in its Reply (p. 7) that both parties agree that the applicable law is Senegalese administrative law. *See Société Ouest Africaine des Bétons Industriels v. Senegal,* ICSID Case No. ARB/82/1, Award, 25 February 1988, ¶ 5.02.
[802] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,* ICSID Case No. ARB/99/2, Award 25June, 2001, ¶ 350.
[803] *MCI Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July, 2007, ¶ 217. See also: *Ambiente Ufficio S.P.A. and Others v. Argentine Republic*. ICSID Case No. ARB/08/9, Decision on Jurisdiction, 08 February 2013, ¶. 236

B. Cumulative application of the rules of all States with a connection to the dispute

As has been mentioned, cumulatively applying the rules of all States with a connection to the dispute is an approach consistent with the transnational nature of international arbitration. The cumulative application of these laws is also more in line with the parties' expectations and reduces the possibility of challenges arising that allege that the wrong law was applied. This approach was adopted by the ICSID tribunals in cases such as *SOABI v. Senegal*,[804] *Klöckner v. Cameroon*,[805] among others.[806]

C. Conflict of laws rules of another State

Tribunals may also apply conflict of laws rules from another State. This possibility emerges, for example, from the second sentence of Article 42(1) of the ICSID Convention. This rule states that "[i]n the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

According to this provision, the host State's law applies in the absence of choice and its conflict of laws rules may lead to the application of another substantive law.

D. The application of general principles of private international law

Some investment arbitration cases have referred to general principles of private international law.[807] For instance, in the *SPP* case, an ICC tribunal expressed the following:

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.[808]

Similarly, several ICSID tribunals have also applied "general principles of conflict of laws" by recurring to the closest connection test. This approach seeks to ensure greater predictability and limit opportunities for forum shopping.

The closest connection test was also used in the ad hoc foreign investment case *Wintershall A.G. et al. v. Government of Qatar*,[809] and in various Iran-United States Claims Tribunal decisions, such as in *Economy Forms Corporation v. Government of the Islamic Republic of Iran et al*., and *Harnischfeger Corp. v. Ministry of Roads & Transportation.*[810]

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[804] *Société Ouest Africaine des Bétons Industriels v. Senegal,* ICSID Case No. ARB/82/1, Award, 25 February 1988, ¶¶ 5.01-5.37.

[805] *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, 2 ICSID Reports 59. This decision was annulled, as explained in Chapter VII under the subsection "Consequences of neglecting comparative law."

[806] See also *Azurix Corp v. The Argentine Republic*, ICSID No. ARB/01/12, Decision on Jurisdiction, 08 December 2003 ¶. 67.

[807] *Libyan American Oil Company (*LIAMCO), Award, 12 April 1977, fn. 53, 20 I.L.M. 1, 32 (1977); *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, Award, 23 August 1958, 27 I.L.R. 117, 156–7 (1963). *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corp*. ., ICC Case No. 7375/CK, Award on Preliminary Issues, 5 June 1996), fn. 89, at Section III.

[808] *Southern Pacific Properties Limited v. Arab Republic of Egypt*, *and Egyptian General Company for Tourism and Hotels*, ICC Award No. 3493, Award, 16 February 1983 (G. Bernini, M. Littman, A. Elghatit, arbs), ¶ 49.

[809] *Wintershall A.G. v. Government of Qatar*, ad hoc, Partial Award, 05 February 1988, and Final Award, 31 May 1988, ¶¶ 800, 802, 821–823.

[810] *Economy Forms Corporation v. The Government of the Islamic Republic of Iran ; the Ministry of Energy; Dam & Water Works Construction Co. ("Sabir"); Sherkat Sakatemani Mani Sahami Kass ("Mana"); and Bank Mellat (formerly Bank of Tehran)*, IUSCT Case No. 165, Award No. 55–165–1, 3 I. U.S. C.T.R. 42, at section III(1). G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal, An Analysis of the Decisions of the Tribunal*, Clarendon Press, Oxford, 1996, p. 159. See also *Harnischfeger Corporation v. Ministry of Roads and Transportation*,

E. Application of public international law

How public international law should be applied where the parties have not agreed upon an applicable law will depend on the context of the dispute and the nature of the relationship more broadly.[811] In some cases, however, the application of public international law will be clear – for instance, with several issues related to treaty claims.[812]

In the context of ICSID arbitrations, public international law may always be applicable in a supervening way, according to Article 42, Paragraph 1 (second sentence) of the ICSID Convention.[813] This matter will be further elaborated in Part 13.

It is also clear that public international law will apply when appropriate in US-Iran Tribunal decisions due to the broad wording of Article V of the 1981 Iran-United States Claims Settlement Declaration, a provision addressed extensively in Chapter XVI.

In territorialized arbitrations, if the arbitral rules authorize the tribunal through *voie directe* to apply the appropriate "rules of law" (for example, as in ICC arbitrations), no questions will arise regarding the power of the arbitrators to decide the dispute applying public international law if pertinent. Difficulties may emerge regarding the more traditional solution, found in the UNCITRAL Rules, of deciding which "law" to apply (rather than rules of law) in the absence of the parties' choice. Notwithstanding this provision, when appropriate, arbitrators may apply public international law and general rules of law, as advocated earlier in this Part.

The ICSID Additional Facility Rules attempt to eliminate complications on this issue when referring 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."[814]

The applicability of public international law in investment claims raises several other issues that have been further addressed in Chapter XVII(J)(5).

F. Uniform law techniques or recurrence to non-State Law

What has been discussed already regarding the applicability of non-State law to commercial arbitration is also relevant for investment arbitration.

, Industrial Development and Renovation Organization of Iran, Machine Sazi Arak and Machine Sazi Pars, IUSCT Case No. 180, Partial Award, 13 July 1984.

[811] Justice Richard Aikens stated in *Ecuador v. Occidental* (2001) that the "[…] rights are granted under public international law […] must be determined on principles of public international law". *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), ¶ 61.

[812] In international investment agreement cases, the treaty is *lex specialis* and its provisions "[s]upersede principles of customary international law." Unless those principles are general principles of international law in the nature of *jus cogens*" (*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*,, ICSID Case No. ARB/09/01, Award, 21 July 21 2017, ¶ 475). But as decided by the tribunal in *Emmis International v. Hungary*, a tribunal "[h]as to apply international law as a whole to the claim, and not the provisions of the BIT in isolation". *Emmis International Holding, B.V. Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v. The Republic of Hungary.*, ICSID Case No. ARB/12/2, Objection under ICSID Arbitration Rule 41(5), 11 March 2013, ¶ 78; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile,* ICSID Case No. ARB/01/7, Annulment 21 March 2007, ¶ 61. Interesting questions arise where, like in case of EU law and intra-EU IIAs, several treaties potentially conflict. *See*, e.g., Judgment of 6 March 2018,Case C-284/16 *Slowakische Republik v. Achmea B.V.*, Case C-284/16: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0284 (last accessed 16 May 2022), where the court found that arbitration clauses in intra-EU IIAs are contrary to EU law; the underlying dispute was *Achmea B.V. (formerly Eureko B.V.) v. Slovk.*, UNCITRAL, PCA Case No. 2008-13, Final Award, 07 December 2012. See J.A. Bischoff, *op. cit*., pp. 758-759.

[813] *MTD Equity Sdn. Bhd. and MTD Chile S.A v. Republic of Chile*, ICSID No. ARB/01/07, Decision on the Merits, 25 May 2004, ¶. 87.

[814] ICSID AF Arbitration Rules, Art. 54(1).

In the famous 1989 case *Deutsche Schachtbau-und Tiefbohr GmbH v. R'As al-Khaimah National Oil Co. (Rakoil)*,[815] in the absence of an express choice of law, the tribunal considered the application of national law inappropriate. It made reference to "what has become common practice in international arbitrations particularly in the field of oil drilling concessions" which "must have been known to the parties […] and should be regarded as representing their implicit will." The tribunal decided the case by making reference to "internationally accepted principles of law governing contractual relations."[816]

In *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corp.* (1996),[817] the tribunal took into account that (i) the parties did not operate within the same environment and legal culture; and, (ii) they did not have a long history of cooperation, and then proceeded to address all the potential outcomes given that the contract did not contain extensive or detailed provisions. In this context, the absence of a choice of law provision was considered by the tribunal to be a "shouting silence," or at the very least an "alarming silence" or "*un silence inquiétant*" that required the tribunal to look "behind" to determine the parties' intentions. The tribunal found that the parties had made an "implied negative choice" excluding the application of either of the parties' national law. Instead, the tribunal decided in favor of a "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.'"[818]

G. The law of the contract: *contrat sans lois*?

The theory that international contracts, and in particular international State contracts, are not subject to any rules other than those of the agreement itself is not only questionable on theoretical grounds, but can also create practical problems regarding issues not contemplated therein.

The decision in *MINE v. Guinea*[819] reduces the impact of domestic law but does not turn the agreement a *contrat sans loi*.

In any case, if the tribunal does not find guidance in the contract regarding a particular issue, the prohibition of *non liquet* in Article 42(1) of the ICSID Convention can lead to the application of other sources, such as general principles.

H. Voie directe

The delicate balance between flexibility and predictability is a unique feature of the ICSID Convention. The tribunals in the *Wena v. Egypt* case,[820] the *CMS* case,[821] and others appear to have interpreted the second sentence of Article 42(1) of the ICSID Convention as allowing a similar freedom: several modern commercial arbitration rules grant the tribunal the power to determine the applicable law through *voie directe*.

Similarly, Article V of the 1981 Claims Settlement Declaration for the Iran-United States Tribunal also grants the arbitrators the freedom to apply those rules and principles which they determine to be appropriate in the case at hand.

As seen previously in Part 11, Section III, Subsection E, this *voie directe* freedom also exists in several UNCITRAL-inspired arbitration laws and rules governing territorialized investment arbitrations.

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[815] *ICC Case No. 3572*, Final Award, 1982, XIV Y.B. Com. Arb. 111, 117 (1989).
[816] Ibid.
[817] *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corp.*, ICC Case No. 7375-/CK, 05 June 1996, at section III.
[818] *Ibid*., ¶ 86, at section III.
[819] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988.
[820] *Wena Hotels Ltd. v. arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000.
[821] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

REC. 11.1 The domestic legal regime on the law applicable to international investment contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the "closest connection."

REC. 11.2 Adjudicators faced with absence of an effective choice of law should resort to the relevant choice of law rules of the applicable arbitral mechanism. If no such mechanism is deemed applicable or does not include such choice of law rules, adjudicators should apply the flexible criteria of the "closest connection," as a general principle of private international law.

PART 12: THE APPLICABLE SUBSTANTIVE LAW IN INVESTMENT ARBITRATION *EX AEQUO ET BONO*

I. Equity in arbitration

In arbitration, equitable powers are interpreted in several ways. Firstly, equitable powers dictate that the tribunal must observe the applicable law but ignore purely formalistic rules, such as the observance of a particular form in a contract. Secondly, equitable powers may require that the tribunal follow the applicable law but may allow particular rules to be ignored that operate unfairly in the case at hand. Thirdly, the tribunal may have to decide cases in accordance with general principles of law instead of per the contract or the ostensibly applicable legislation. Finally, equitable powers may – sporadically – permit the tribunal to completely ignore all rules of law and decide the case according to its own conscience. This last interpretation of equitable powers has been rejected in arbitral scholarly writings.

Arbitration in equity is also referred to as "amiable composition." Although the issue has generated debates, the terms *ex aequo et bono* and *amiable compositeur* are used interchangeably. Due to terminological disparities, both expressions are found in the UNCITRAL Rules and Model Law.

With some exceptions,[822] numerous regulations around the world today provide for arbitration *ex aequo et bono*, as reflected in Article 28(3) of the Model Law. The explanatory note to the Model Law elaborates on this provision and its application, because previously, the principle of *ex aequo et bono* had not been commonly known or applied across the world's legal systems.[823]

Some national laws went further than the Model Law, stating that the arbitrators must decide according to equitable principles unless expressly agreed otherwise. This recalls the origin of *ex aequo et bono* arbitration as a "friendly" dispute resolution mechanism, which runs contrary to the law-based process it has become.[824] However, the concept is distinct from the inherent discretion of a tribunal to determine matters such as compensation and quantifying damages.[825]

The European Convention of 1961 includes in its Article VII(2) a provision on *amiables compositeurs,* which states that *"*the arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.*"*[826] Such a provision can also be found in the MERCOSUR arbitration agreement of 1998 that recognizes the influence of the UNCITRAL Model

[822] Russian International Arbitration Law, Art. 28; Bulgarian Arbitration Law, Art. 38.
[823] 2006 UNCITRAL Model Law, Secretariat's Explanatory Note, p. 34.
[824] For example, Ecuador's Law of Arbitration No. 145/1997 stated at Section 3: "[t]he parties will decide whether the arbitrator shall decide in law or in equity. Unless otherwise agreed, the award shall be in equity."
[825] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Annulment, 22 September 2014, ¶¶ 206-207. The Committee's view was that arbitral tribunals may proceed with some discretion in quantifying damages and that a reasoned exercise of such discretion does not amount to a decision *ex aequo et bono*.
[826] The European Convention states that "the arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration" (Art. VII(2)).

Law both in its "considerando" and when remitting to its solutions in article 25,[827] the UNCITRAL Arbitration Rules, and the PCA Arbitration Rules, as well as other rules that follow these models.

In practice, parties agree to arbitration *ex aequo et bono* in extremely rare cases. At most, only 2-3% of all commercial arbitration agreements include *ex aequo et bono* provisions.[828] The unpopularity of *ex aequo et bono* arbitration is due to its perceived unpredictability, which has caused the arbitration community to overlook its potential usefulness in redressing the "over-judicialization" of the proceedings in a balanced manner. The over-judicialization of arbitration usually brings about the over-regulation of the proceedings and the adoption of litigation techniques that reduce flexibility and lead to an escalation of costs for both parties; *ex aequo et bono* arbitration could provide a remedy for these problems.

II. Express agreement for ex aequo et bono arbitration

Article 28(3) of the UNCITRAL Model Law requires that *ex aequo et bono* arbitration be expressly agreed upon,[829] either at the beginning or during the proceedings. Tacit agreement is not valid.[830] For this reason, an Egyptian court annulled an award decided *ex aequo et bono* when the arbitrator was not properly authorized,[831] and the same has occurred in other jurisdictions.[832]

Something similar occurred in the ICSID *Klöckner v. Cameroon* case, where there was also no agreement to decide the case *ex aequo et bono*. The ad hoc Committee held that "an excess of powers might consist not only in failure to apply the governing law but also in a solution in equity where there was a requirement to decide in law."[833] Similarly, in the ICSID *MINE v. Guinea* case, the ad hoc Committee confirmed the principle that a decision based on equity without authorization may constitute "an excess of powers," considering that "unless the parties had agreed on a decision *ex aequo et bono*, a decision not based on any law would constitute a derogation from the Tribunal's terms of reference."[834]

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[827] MERCOSUR/CMC/DEC. No. 3/98, Art. 9; *See also* UNCITRAL Arbitration Rules and PCA Arbitration Rules (containing a similar provision on *amiables compositeurs*).

[828] In 2018, the ICC reported only one arbitration involving a contract authorizing arbitrators to decide "*ex aequo et bono,*" out of more than 800 ICC arbitrations filed in 2018. In 2016 and 2017, of the nearly 1,000 arbitrations filed in each year, there were no reported ICC case on the matter. *See* ICC, *ICC Dispute Resolution Statistics 2018*, 2019, https://nyiac.org/wp-content/uploads/2019/08/icc_disputeresolution2018statistics.pdf (last accessed 12 November 2023); ICC, *ICC Bull*., Issue 2 2019, 2019, https://jusmundi.com/en/search?query=%22icc%20dispute%20resolution%20bulletin%22&page=1&lang=en&document-types%5B0%5D=publication&publication-types%5B0%5D=4&publication-types%5B1%5D=6&publication-types%5B2%5D=12&publication-publishers%5B0%5D=50495 (last accessed 12 November 2023) pp. 13, 22.; ICC, *ICC Dispute Resolution Statistics 2017*, 2018, https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/2017-icc-dispute-resolution-statistics/ (last accessed 12 November 2023); ICC, *ICC Dispute Resolution Statistics 2016 No. 2*, 2017, https://jusmundi.com/en/document/publication/en-2016-icc-dispute-resolution-statistics (last accessed 12 November 2023), p. 106, 113.

[829] *See also* UNCITRAL Arbitration Rules, Art. 35(2).

[830] *Liberty Reinsurance Canada v. QBE Insurance and Reinsurance (Europe) Ltd.*, [2002] CanLII 6636 [ON SC)] (a Canadian court ruled that the contract included an express agreement to allow for *ex aequo et bono* arbitration when the parties agreed that the contract may be interpreted as an "honourable agreement". The Court also stated that the tribunal was exempted of all formalities to reach a decision.

[831] *Case No. 72/117,* Court of Appeals of Cairo, Egypt, Ruling, on 08, January 2002, reported at the UNCITRAL Digest of Case Law on the Model Law, p. 153,.

[832] See also *Gold Reserve Inc. v. Venezuela*, 146 F.Supp.3d 112, 134 [2015]; *Case No. 10-14.687* (Civ. (1ère, 12 October, 2011); 34 Sch 10/05 (Oberlandesgericht München); Judgment, 13 May 2009, Case No. 34525 (Colombia Consejo de Estado), in G. Born, *op. cit.*, p. 3592.

[833] *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 03 May 1985, ¶ 59.

[834] *Maritime International Nominees Establishment v. Republic of Guinea,* ICSID Case No. ARB/84/4*,* Decision on Annulment 22December 1989, ¶ 5.03.

III. Conflict of laws in ex aequo et bono arbitrations

Even within *ex aequo et bono* arbitrations, recourse to conflicts methodologies may still be necessary. Arbitrators are free to use national law as a departing point and subsequently to exclude its effects if necessary, or they may directly apply the solution they consider equitable in the circumstances.[835] Also, if authorized to decide *ex aequo et bono*, arbitrators may apply non-State law to support their reasoning and may refer, for instance, to the UNIDROIT Principles.[836]

Furthermore, if the parties include a clause in their contract selecting *ex aequo et bono* arbitration, arbitrators should first determine the governing law and then evaluate whether or not its application is appropriate in the circumstances. Interestingly, in the *Atlantic Triton v. Guinea* case, the parties included a choice of law provision (referring to the law of the host State) as well as a clause authorizing the tribunal to decide the arbitration *ex aequo et bono*. The tribunal decided to apply the law of Guinea to certain aspects of the decision and equitable principles to others.[837]

Some domestic courts have interpreted the inclusion of a choice of law clause as inconsistent with granting the tribunal the power to decide *ex aequo et bono.*[838] However, a preferable interpretation is that such an inclusion should cause arbitrators (i) to recur to the conflict of laws mechanism; and, (ii) to mitigate any harsh or unfair results through the application of equitable principles.[839]

IV. Mandatory rules and ex aequo et bono arbitration

The situation is different with mandatory rules, since *ex aequo et bono* arbitrators are bound by mandatory rules of law.

Consequently, the parties cannot evade the application of mandatory rules of law by agreeing to arbitration *ex aequo et bono*, as was held in ICC Case No. 2216. In the same vein, the tribunal in ICC Case No. 1677 decided that it did not have the power to render a decision that would run contrary to morality and public policy.

Therefore, when mandatory rules might be in play, arbitrators may perceive the need to make clear in their decision that no such rules have been violated. Failure to do so may subject the award to annulment or may prevent its enforcement.

V. Observance of the terms of the contract in ex aequo et bono arbitration?

Can arbitrators disregard terms of the parties' contract? In the 1982 ICC Case No. 3938, the sole arbitrator acting as *amiable compositeur* determined that the principles that an arbitrator can apply to correct an overly strict application of legal rules are not valid with regard to the contract. This is because the contract must be understood as a particular body of rules that emerges from the parties' negotiation.

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[835] *See, e.g., ICC Case No. 2216*, *Award,* 1975; ICC Arbitral Awards Vol. I, p. 224; *ICC Case No. 2139*, *Award,* 1975; *Ad hoc case in Paris, Award* [choice of Russian law supplemented by UNIDROIT *Principles*], *21 April 1997,* UNILEX (UNIDROIT *Principles*)..

[836] *Chamber of National and International Arbitration of Milan, Case No. 1795, Final Award, 01 December 1996*; *Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No., ARB/77/2, Award, 15 August 1980. In the ICSID *Benvenuti & Bonfant v. Congo* case, the parties authorized the tribunal to decide *ex aequo et bono*. For its decision, the tribunalconsidered rules of law.

[837] *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea,* ICSID Case No. ARB/84/1, Award, 21 April 1986, 3 ICSID Reports 17, 19, 23.

[838] *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953); *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N.Y. 392, 401 [1875]; and *ICC Case No. 4237*, Award, 1985. *See* G. Born, *op. cit.*, p. 2990.

[839] *ICC Case No. 3755*, Award, 1990, 1(2) ICC Ct. Bull. 25,. *See also ICC Case No. 3327*, Award, 1982, 109 J.D.I. (Clunet) 971, 975; *ICC Case No. 13509*, Award, in S. Jarvin, Y. Derains and J.-J. Arnaldez (eds.); *ICC Case No. 5118*, Award, in S. Jarvin, Y. Derains and J.-J. Arnaldez (eds.), *Collection of ICC Arbitral Awards 1986-1990* 318 [1994].

Other scholarly writings have also reached a similar conclusion, based on an argument that when deciding *ex aequo et bono*, arbitrators may depart from the terms of the parties' contract by fashioning a fair and equitable result, provided that they do not rewrite the structure or material terms of the agreement.[840]

Articles 28(4) of the UNCITRAL Model Law and 35(3) of the UNCITRAL Arbitration Rules expressly state that in all cases arbitrators must take into account the terms of the contract and contract usages when interpreting a particular contract.

A majority of scholarly writings accept that without modifying the contract as a whole, arbitrators acting as *amiables compositeurs* may still refuse to apply certain rights created by the contract or, at the very least, reduce or extend their effects. Arbitrators could, for instance, recur to hardship rules or reduce the effects of contractual terms, as was decided by the Court of Appeals of Paris in 1988 in the *Société Unijet* case.[841] However, arbitrators may not alter the structure of the agreement and may not substitute the contractual obligations for new terms that the parties have not agreed upon. In short, arbitrators cannot create new rights or obligations, nor can they eliminate the obligations from the agreement altogether,[842] as this would disrupt the bargain struck in the contract or would risk running beyond the parties' intentions.[843]

An issue arises when tribunals authorized to decide *ex aequo et bono* do so by strictly applying the relevant law. In this sense, it has been determined that applying the relevant law does not imply that the result is not "equitable."[844] Similarly, it has been decided that a tribunal that merely applies the law without taking equitable considerations into account violates its mandate.[845]

If an arbitral tribunal decides *ex aequo et bono* without the parties' authorization to do so, the award may risk annulment and non-recognition on the grounds that the tribunal exceeded its authority.[846] However, national courts are generally reluctant to rule that arbitrators have exceeded their authority by acting *ex aequo et bono.*[847]

VI. Is there a duty to motivate or decide equitably in ex aequo et bono arbitration?

In *ex aequo et bono* arbitration, the parties can liberate the arbitrators from their duty to provide reasons.[848] If the parties do not exempt the arbitrators of this duty, however, they must give reasons.

In the *Fotovista* case, the Paris Court of Appeal annulled an award made in *amiable composition* because the arbitrator did not provide reasons for applying French law in his award.[849]

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[840] *See, e.g.*: *Parfums Stem France v. CFFD*, C.A. Paris, 1991, Rev. Arb. 669,; *Unijet S.A. v. Sarl Int'l Bus. Relations Ltd.*, Judgment, C.A. Paris, 06 May 1988, 1989, Rev. Arb. 83, 86; *ICC Case No. 3344*, 1982, Award, 109 J.D.I. (Clunet) 978 ; *ICC Case No. 3327,* 1982, Award, 109 J.D.I. (Clunet) 971; *Ad hoc case, Final Award, 10 December 1997),* 3 Unif. L. Rev. 178.

[841] *Société Unijet S.A. v. S.A.R.L. International Business Relations Ltd. (I.B.R.),* C.A. Paris, Ruling, 06 May 1988.

[842] *See Coderre v. Coderre*, [2008] QCCA 888 (Québec Ct. App.); *Louis Dreyfus S.A.S. v. Holding Tusculum B.V.*, [2008] QCCS 5903 (Québec Super. Ct.).

[843] *Sté Parfums Stem France v. CFFD*, C.A. Paris 19 April 1991, 1991, Rev. Arb. 669, 673.

[844] *Unijet S.A. v. Sarl Int'l Bus. Relations Ltd.*,,C.A. Paris, 06 May 1988, 1989 Rev. Arb. 83; *Soubaigne v. Limmereds Skogar*, C.A. Paris, Judgment, 15 March 1985, 1985 Rev. Arb. 285, 287.

[845] *Halbout v. Epoux Hanin,* Civ. 2ème, 15 February 2001) 2001 Rev. Arb. 135; *Centrale Fotovista v. Vanoverbeke*, 15 January 2004, 2004 Rev. Arb. 908, 912.

[846] R.b Amsterdam, Judgment of 18 April 2007 - *DBM Blending B.V. v. WRT Beheers B.V.* ; *SA SDMS Int'l v. Cameroon Telecommunications – Camtel*, C.A. Paris 17 January 2008, XXXIII Y.B. Comm. Arb. 484, 486 (2008*,* Civ. 1ère*, 12 October 2011,* 2012 Rev. Arb., p. 93.

[847] In this regard, *Certain Underwriters at Lloyd's v. BCS Ins. Co*., 239 F.Supp.2d 812 (N.D. Ill. 2003); Case No. 80-13.177, Civ 2ème, 30 *September 1981;* DFT 116 II 634 of 14 November 1990; OLG München; *Judgment,14 March 2011,* 34 Sch 08/10; *Food Servs. of Am. Inc. v. Pan Pac. Specialties Ltd.*, [1997] CanLII 3604 (B.C. Sup. Ct.): *SA Fleury Michon v. Pac. Dunlop Ltd.*, C.A. Paris, 16 November 2001 Rev. Arb. 731.

[848] 2012 ICC Rules of Arbitration, Art. 31(2)

[849] *Société Centrale Fotovista v. Vanoverbeke et al.*, C.A. Paris, 15 January 2004.

In short, arbitral tribunals have the power, but not the duty, to decide in accordance with equitable principles. For instance, in the *Brig Macedonian* case "the arbitrator did not appear to expressly rely on equity, despite his *ex aequo et bono* mandate."[850] A similar result occurred in the *James Pugh* case.[851] Arbitrators may decide not to apply such principles, for instance, if the award will be enforced in jurisdictions where arbitration in equity is not provided for by the law.

VII. Equity in international law

Both the International Court of Justice and the Permanent Court of International Justice have been granted by statute the power to decide *ex aequo et bono*, provided that the parties agree. However, although *ex aequo et bono* clauses have been contemplated in a considerable number of treaties, to date, neither the PCIJ nor the ICJ have rendered any decision on that basis.

In the *Cayuga Indians* case, the tribunal distinguished *ex aequo et bono* jurisdiction from its possibility to apply equity as a general principle.[852] In the *Diversion of Waters from the River Meuse* decision, the PCIJ emphasized its importance[853] and applied an equitable principle originating in one of the early maxims of English equity that "he who seeks equity must do equity" – analogue to the *venire contra factum proprium* principle derived from the Roman law and familiar to modern continental systems.

Thus, also in public international law, the use of expressions such as "rules of justice," "equity," and "general principles of law" do not mean that a settlement outside the law – or *ex aequo et bono* – can be reached without express authorization. In the *Free Zones* case, the PCIJ wrote that *ex aequo et bono* powers are of an "absolute exceptional character" and that they could only derive from "a clear and explicit provision to that effect."[854]

States only exceptionally confer *ex aequo et bono* powers upon international courts and tribunals. On the rare occasions when tribunals are instructed to act *ex aequo et bono*, they discharge their powers conservatively. For instance, in *Free Zones*, a "sharply divided" PCIJ refused to decide *ex aequo et bono.*[855] It held that such powers are of "an absolutely exceptional character" and could only derive from "a clear and explicit provision to that effect."

There has been considerable discussion on the question of whether equity is part of the law to be applied, or whether it is an antithesis to law. This latter conception of equity can be understood in the sense in which the term "*ex aequo et bono*" is used in Article 38, paragraph 2 of the ICJ Statute. In these cases, the tribunal "may not only take into account equitable considerations *infra legem*, that is in interpreting the law, or *praeter legem*, that is in supplementing the law, but may decide *contra legem*, in disregard of the law, when considerations of equity and justice so require." This does not mean that the tribunal can act capriciously or arbitrarily. The tribunal must proceed in accordance with objective considerations of what is fair and just and must not reach a result that could not be explained on rational grounds.

As seen, the "*ex aequo* proceedings" are one thing, but the "principle of equity" is quite another. In non *ex aequo* proceedings, equity may be applied not *contra legem* (Article 38(2) of the ICJ Statute), but as a general principle of law in accordance with Article 38(1)(c) of the ICJ Statute.

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[850] *Case of the Brig Macedonian [United States v. Chile],* Decision of the King of Belgium, 15 May 1863, in C. Titi, *The Function of Equity in International Law*, Oxford University Press, 2021, p. 146.
[851] In the matter of the death of James Pugh [Great Britain, Panama] 1944,, 3 RIAA 1439.
[852] *Case Concerning the Cayuga Indian*; [*Great Britain v. U. S.*], 1926.PCIJ Ser. A/B, No. 70 Rep. 203, p.307.
[853] *Diversion of Water from Meuse [Netherlands v. Belgium],* 28 June 1937, PCIJ (Series A/B) No. 70.
[854] *Free Zones of Upper Savoy and the District of Gex [France v. Switzerland],* PCIJ Series A No 24 in C. Titi, *op. cit.*, p. 143.
[855] *Free Zones of Upper Savoy and the District of Gex [France v. Switzerland],* Order, 06 December 1930, PCIJ Series A No 24.

In the *Barcelona Traction* case, the ICJ did not consider that the Belgium government could intervene in the proceedings "by considerations of equity."[856] *A contrario*, these considerations could have had this result. The *Barcelona Traction* example is a confirmation of the large measure of caution or discretion that the Court must apply to the sources of law in each case. Article 38 of the ICJ Statute is, in this way, a toolbox from which to select the appropriate rules to be applied: treaties, customary law, or general principles. The provision allows the Court to adapt its decisions to the particular circumstances of the case.

VIII. Equity in investment arbitration

Equity can be important in arbitration over major investments that typically unfold over long periods of time. Since it is difficult to predict future developments, it is often problematic to agree on fair or suitable terms to govern the entire course of an agreement. When new developments raise contentious issues, *ex aequo et bono* decisions not only settle controversies, but also encourage cooperation between investors and host States. If renegotiating contractual terms is impossible, *ex aequo et bono* can be a good alternative to seek fair results suited to changed circumstances.

Contrary to generally accepted criteria, in the UNCITRAL investment case *Parienti v. Panama*, the tribunal decided that, in the absence of an express provision, it would conduct an arbitration in equity.[857] Later, however, this award was set aside by the Supreme Court of Panama because the tribunal had acted *ex aequo et bono* without the express agreement of the parties.[858]

In ICSID arbitrations, the choice of law may extend beyond legal rules *stricto sensu* to principles of equitable justice (Art. 42(3), ICSID Convention). Authorization must also be express in the context of investment claims. The tribunal in the *Zhinvali v. Georgia* case held that "Article 42(3) of the ICSID Convention provides that an ICSID tribunal only has the power to decide a dispute *ex aequo et bono* if the parties so agree […]."[859]

In the *Amco v. Indonesia* case, the Annulment Committee stated:

Neither does the ad hoc Committee consider that any mention of "equitable consideration" in the Award necessarily amounts to a decision *ex aequo et bono* and a manifest excess of power on the part of the tribunal. Equitable considerations may indeed form part of the law to be applied by the tribunal, whether that be the law of Indonesia or international law […] The ad hoc Committee thus believes that invocation of equitable considerations is not properly regarded as automatically equivalent to a decision *ex aequo et bono*.[860]

The tribunal in *Tecmed v. Mexico* case[861] and the Annulment Committee in *MTD v. Chile* reasoned in similar terms.[862]

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[856] *Barcelona Traction*, Judgment, 1970 ICJ Rep., p. 48, ¶ 101.The Court literally stated that it was "not of the opinion that, in the particular circumstances of the present case, jus standi [was] conferred on the Belgian Government by considerations of equity."

[857] *Laurent Jean-Marc Parienti v. Autoridad de Transito y Transporte Terreste and Panama*, UNCITRAL, Award in Equity, 27January, 2005.

[858] Supreme Court of Justice of Panama, Judgment, 20 September 2006. Later, the arbitral award received exequatur in France.

[859] *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 (January 2003, ¶ 418.

[860] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, ¶¶ 26, 28. Ibid., p. 637.

[861] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29May 2003, ¶ 190.

[862] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶ 48.

Acting *ex aequo et bono* without authorization can be considered an error subject to annulment for manifest excess of powers.[863] Nonetheless, authorization for deciding *ex aequo et bono* can be given after the dispute has arisen.

The flexibility granted by Article 42(3) to decide a case according to equitable principles comes at considerable cost to predictability. Perhaps this explains why the *Benvenuti v. Costa Rica* and *Atlantic Triton* cases are the only reported ICSID cases where an *ex aequo et bono* resolution was handed down.

With respect to "territorialized arbitrations," some jurisdictions do not accept equitable principles. When seated in these countries, tribunals are not permitted to decide *ex aequo et bono.* This does not occur in ICSID arbitrations, as they are free from the interference of domestic rules. Choosing the place of an ICSID arbitration is thus purely a matter of convenience and will have no impact on matters such as the selection of *ex aequo et bono* arbitration.

In relation to Iran-United States claims, the wording of Article V of the 1981 Claims Settlement Declaration for the Iran-United States Tribunal was subsequently incorporated into the first paragraph of Article 33 of the Tribunal Rules of Procedure, 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 and is included in the current Article 35 of the UNCITRAL Rules. No case has yet been decided by the tribunal on such a basis.

REC. 12.1 Parties to international investment contracts and their counsel are encouraged to consider the guidance on applicable substantive law contained in this Guide also for arbitration in equity or *ex aequo et bono.*

PART 13: THE SUPPLEMENTAL AND CORRECTIVE ROLE OF INTERNATIONAL LAW

I. General considerations

International law may be applied in a supplementary or corrective fashion. It can often be difficult to discern which of the two is the best way to proceed in any particular case. The OAS Contracts Guide describes flexible formulas that can be used in the context of international relationships generally (see Part14) and more specifically, in arbitration (Part 14, VIII).

II. Supplemental application of international law or national law

When there are gaps within the applicable law, arbitrators must consider supplementation. *Non liquet* is not an alternative in situations where there is "silence or obscurity in the law" as provided, for instance, in Article 42(2) of the ICSID Convention.[864] This matter was also discussed in Part 3, Section III, Subsection D in relation to Article 38 of the ICJ Statute and the *non liquet* principle.

The supplementary role of international law is expressly recognized in bilateral investment treaties and multilateral treaties such as the Energy Charter Treaty (Article 26), NAFTA (Article 1131), the USMCA (Article 14.D.9), the Trans-Pacific Partnership (TPP), Comprehensive and Progressive Agreement

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[863] *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment 16 May 1986, ¶ 28; *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award, 03 December 1992, ¶ 7.28; *MTD Equity Sdn Bhd and MTD Chile v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶ 45 (citing *MINE v. Guinea*); *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, ¶ 50 (citing *MINE v. Guinea*); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Annulment, 01 September 2009, ¶ 136*; Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, ¶ 218 (citing *Azurix v. Argentina*); *Total v. Argentina*, ICSID Case No. ARB/04/1, Decision on Annulment, 01 February 2016, ¶ 198; *Mobil Exploration and Development Argentina and Mobil Argentina v. Argentina*, ICSID Case No. ARB/04/16, Decision on Annulment, 08 May 2019, ¶ 67.

[864] See, in this regard, ICSID *History of the ICSID Convention*, Vol. II-2, p. 802-804, fn. 73.

for Trans-Pacific Partnership (CPTPP) and the CAFTA. When investors decide to pursue their claims in an arbitral forum, they consent to this supplementary role as provided for in the relevant treaty.

The ad hoc Annulment Committee in the *Klöckner* case (1985) stated that principles of international law may have "a complementary role (in the case of a 'lacuna' in the law of the State)."[865] Similarly, the ad hoc Annulment Committee in the *Amco v. Indonesia* case (1986) applied rules of international law to "fill up lacunae in the applicable domestic law."[866] This issue was similarly decided in the resubmitted case of *Amco v. Indonesia* (1990),[867] in *Aucoven v. Venezuela,*[868] and in the *Micula* case.[869]

In *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic* (2007), the tribunal stated the following:

While on occasions [sic] 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.[870]

By contrast, in *AAPL v. Sri Lanka*, the tribunal stated that…

> […t]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[871]

These cases make clear that tribunals use a variety of techniques in order to apply international law on a supplementary basis. The matter requires a rigorous examination as will be attempted in the ensuing pages. The following differentiations must be made:

A. Supplementation by considering the convergence of international law and domestic law

Several arbitral tribunals use the technique of pointing out convergences between national and international law in drafting their reasons. The technique is no different than that used by many national courts. A survey undertaken by the International Law Association's Committee on International Law in National Courts indicates that, on occasion, domestic courts apply international law to confirm what that national law already mirrors from the international law.

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[865] *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 (03May 1985, ¶ 60.
[866] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment 16 May 1986, ¶ 20.
[867] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 Resubmitted Case, Award 31 March 1990, ¶ 40.
[868] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Award, 23 September 2003, ¶ 102.
[869] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and SC Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 151.
[870] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 207.
[871] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 June 1990, 4 ICSID Rep 250, p. 257.

In *Adriano Gardella v. Côte d'Ivoire*[872] and *Letco v. Liberia*,[873] the tribunals held that the host States' laws were applicable and found no divergence from international law in the matters under discussion. In *CMS v. Argentina* (2005), the tribunal wrote that…

> […] 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.[874]

The case *BG Group v. Argentina* (2007) is also illustrative in this regard.[875]

Likewise, international tribunals often find that there is no contradiction between national law and international law. In *LG&E Energy Corp. v. Argentina* (2006), the arbitral tribunal held:

> 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 [which was the situation for the Tribunal in this case], it is not an easy task to establish the relationship between international law and domestic law.[876]

In turn, national law can be applied when international law is silent. In the SCC rules case *Eastern Sugar B.V. v. Czech Republic* (2007), the tribunal applied Czech law after determining that international law was silent on the matter of damages, writing 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."[877]

In the Iran-United States Claims Tribunal case *American Bell International Inc. v. Government of the Islamic Republic of Iran et al.*, Judge Mosk wrote 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."[878] Other examples emerge from *Benjamin R. Isaiah v. Bank Mellat* (1983)[879] and *Morrison-Knudsen Pacific Limited v. Ministry of Roads and Transportation (MORT) and Iran* (1984).[880]

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[872] *Adriano Gardella v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977, ¶ 4.3.
[873] *Letco v. Liberia*, ICSID Case No. ARB/83/2, Award, 31 March, 1986, 2 ICSID Rep. 343.
[874] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 117.
[875] *BG Group P.L.C. v. Argentina*, Award, 24 December 2007. *See also Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 01 July 2004, ¶ 93.
[876] *LG&E Energy v. Argentina*, ICSID Case No. ARB/02/1, IIC 152, Decision on Liability, 03 October 2006, ¶¶ 94-95 (applying ICSID Convention, art. 42(1), second sentence).
[877] *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶¶ 196, 373, fn. 166. In *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 140, it was ruled that: "[w]henever 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."
[878] *American Bell International Inc. v. Government of the Islamic Republic of Iran et al.*, Concurring and Dissenting Opinion of R. M. Mosk, 6 Iran–U.S. C.T.R. 74, p. 98. See also *Harnischfeger Corp. v. Ministry of Roads and Transportation et al.*, Award (April 26, 1985), Dissenting Opinion of Judge R. M. Mosk, 8 Iran–U.S. C.T.R. 119, Award, 26 April 1985, pp. 140–141; *Government of the State of Kuwait v. American Independent Oil Company (Aminoil)*, Ad hoc, Award 24 May 1982, ¶ 10; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January, 2007, ¶ 249.
[879] *Benjamin R. Isaiah v. Bank Mellat*, IUSCT Case No. 219, Award, 30 March 1983, § IV.
[880] *Morrison-Knudsen Pacific Limited v. Ministry of Roads and Transportation (MORT) and Iran*, IUSCT Case No. 127, Award, 13 July 1984: "[n]othing in Iranian law has been called to the Tribunal's attention that contradicts this general legal principle." *See also*: *Dic of Delaware, et al. v. Tehran Redevelopment Corp. et al.*, Award No. 176-255-3, 26 April 1985, § B(1); *R.N. Pomeroy v. Iran*, IUSCT Case No. 40, Award, 08 June 1983, § V(1); *Oil Field of Texas, Inc. v. Iran*, *National Iranian Oil Company and Oil Service Company of Iran*, IUSCT Case No. 43, Concurring

The United States Supreme Court Justice O'Connor stated in *Roper v. Simmons* (2005) that "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 […]."[881]

B. Supplementation by incorporating international law within domestic law

Potential conflicts between international and municipal law disappear when tribunals note the incorporation of international law into domestic law. In *BG Group v. Argentina*, the tribunal wrote:

> […T]he 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.[882]

C. Supplementation by *renvoi* to international law

In *Wena v. Egypt*, the treaty in question contained a "without prejudice clause" in favor of the relevant treaty provisions. According to the *Wena* ad hoc Annulment Committee, this amounted to a type of *renvoi* to international law by the very law of the host State.[883]

As described in Part 9, Section V, Article 42(1) of the ICSID Convention alludes to the "whole law" of the host State, but its second sentence makes clear that the provision would not inevitably lead that law to be applied to the substance of the claim. Therefore, if a law other than that of the host State is more connected to the dispute, the conflict of laws rules of the host State would likely dictate its application. Under the assumption that *dépeçage* is recognized, different laws could apply to diverse parts of the claim. The provision of Article 42(1) gives arbitrators a great deal of discretion in deciding the applicable law.

D. Supplementation by considering a lacuna in domestic law

In *SPP v. Egypt*, the tribunal reasoned those lacunae (or gaps) within the chosen domestic law imply that the parties had not chosen an applicable law within the meaning of Article 42(1) of the ICSID Convention. As such, the proper law to be applied was international law in accordance with Article 42(1)(2) of the Convention.[884] In this case, the tribunal did not conclude with the lacuna, but rather, placed the national law under the scrutiny of international law.[885]

The *Liberian Eastern Timber Corporation v. Government of the Republic of Liberia* (1986) case is also illustrative in this regard. In that case, the ICSID tribunal stated:

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

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Opinion of Judge R.M. Mosk; 1 Iran–U.S. C.T.R. 347, 361–2, Interlocutory Award, 09 December 1982; *Bendone-DeRossi Int'l v. Iran*, IUSCT Case No. 375, Award No. 352-375-1 29 February 1988, Concurring Opinion of H.M. Holtzmann, (§II) and Concurring Opinion of Judge A. Noori.

[881] *Roper v. Simmons*, 125 S.Ct. 1183, 1216 (2005), dissenting opinion of J. O'Connor.

[882] *BG Group P.L.C. v. Republic of Argentina*, UNCITRAL Final Award, ¶ 97. See also *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (2007), ¶¶ 78–79.

[883] *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 05 February 2002, ¶ 42. See also the Argentine cases: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 119-120; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 65; *LG&E Energy v. Argentina*, ICSID Case No. ARB/02/16, Decision on Liability, 03 October 2006, ¶¶ 90-91; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 06 February 2007, ¶ 79; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 208; *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 237-238.

[884] *SPP v. Egypt*, Award, 20 May 1992, ¶ 80.

[885] *SPP* v. *Egypt*, Dissenting Opinion, 20 May 1992, 3 ICSID Reports 249, 321. The dissenting opinion, however, expressed that domestic systems have their own devices to close perceived gaps.

'residual law'. […] In the absence of any relevant constitutional or statutory provisions, residual law will be applied.[886]

According to this decision, before determining the existence of a lacuna in the national law, the tribunal should, in principle, look to statute and case law in the national jurisdiction in question, in addition to considering its own arbitral mechanism for filling the lacuna. It is important to note that the absence of a remedy does not necessarily represent a gap in the domestic law to be applied – it may reflect a conscious decision by national legislators to avoid regulating a certain matter or to regulate it differently. As such, within these types of cases the application of public international law will not always be appropriate.

E. Choice of law and the supplementary role of international law

In their exercise of party autonomy, the parties may decide to accord international law a supplementary role. In *AGIP S.p.A. v. People's Republic of the Congo* (1979), the ICSID tribunal recognized the parties' choice in this regard and that it permitted the tribunal to apply the philosophy that "principles of international law can be made either to fill a lacuna in Congolese law, or to make any necessary additions to it."[887] In that case, the tribunal used the terms "supplement," "addition," and "compete" to describe the relationship between international law and the host State's law. This terminology is particularly vague and imprecise. Nevertheless, the circumstances of that case permitted the tribunal to conclude that the claim would have been upheld even if the host State's action had been found legal under the Congolese law.

III. Corrective application of national or international law

National laws include formidable tools for correcting the harsh application of rules. Thus, investment tribunals must give full effect to their own mandate in applying national law, when selected. This mandate must be fulfilled to the extent that the tribunal – much as courts of first and last instance – should strike down "unlawful laws" without reference to international law by broadly construing the concept of national law.

Notwithstanding the existence of a treaty, if the matter could be decided in accordance with local law, then the host State could simply pass legislation preventing the application of a particular part of the treaty. This situation is unacceptable to foreign investors.

According to the 1969 Vienna Convention on the Law of Treaties (VCLT), treaties are "governed by international law" and must be interpreted in light of "any relevant rules of international law applicable."[888] In this regard, the Annulment Committee in the *Vivendi v. Argentina* case held that:

"[I]n respect of a claim based upon a substantive provision of that BIT […] the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law […].[889]

Treaties are creations of international law and operate within the international legal system. As decided in *Georges Pinson (France v. Mexico)*,[890] "[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."

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[886] *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, 26 I.L.M. 647, 665 [1987].
[887] *AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, ¶ 82.
[888] VCLT, opened for signature 23 May 1969, Arts 2(1)(a) and 31(3)(c), 1155 United Nations Treaty Series 331, reprinted in 8 ILM 679 [1969].
[889] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 Decision on Annulment, 03 July 2002, ¶ 102. See also *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27June 1990, ¶¶ 20–21.
[890] *Concerning the case of Georges Pinson (France) v. Mexico*, 5 RIAA 327, Decision No. 1, 19 October 1928.

The substantive standards in investment treaties are *lex specialis* and, as such, are a primary source from which to determine the applicable law. Since these treaties are international law instruments, the VCLT applies in their interpretation, that must be made in light of "any relevant rules of international law applicable."[891]

Moreover, the standard by which to assess the legality of the host State's conduct can be found in international law. In this regard, Article 3 of the International Law Commission's Draft Articles on State Responsibility provides that the "characterization of an act of a State as internationally wrongful is governed by international law."[892]

Sometimes, however, tribunals unduly twist the balance in favor of the application of international law. The *Aucoven v. Venezuela* decision may have mistakenly applied international law as a "corrective" source of rules.[893] In that case, the tribunal found Venezuelan *force majeure* rules applicable to the merits of the dispute but maintained that its application could be corrected if international law were violated. Venezuelan law should have been applied unless it was demonstrated that the doctrine of *force majeure* under Venezuelan administrative law violated an obligation of general international law regarding the treatment of foreign nationals.

If national law violates international law rules, tribunals must not uphold discriminatory or arbitrary action by host States or bad faith breaches of the State's undertakings which amount to a denial of justice (even if they conform to the law of the host State). In short, tribunals may not apply the law of the host State if it would violate international law rules, such as the minimum standards for the protection of aliens and their property.

IV. Direct application of public international law

In situations in which the relevant international norm grants investors a higher degree of protection, international law applies directly. When this is the case, it is not entirely appropriate to refer to the application of international law as "supervening." Rather, international law applies directly.

International law can also be applied by itself if the appropriate rule is found in this ambit. According to this view, where the claim in question is international in nature, national law will not apply on a primary basis. National law applies when the "essential basis" has a national character, as is often the case with contract claims. In these situations, international law will only be applied in a supervening fashion when in conflict with domestic law.

V. Combined application of national and international law

As has been discussed, bilateral investment treaties may or may not contain applicable law provisions. When they do, these provisions frequently mention both international law and domestic law without indicating which prevails or how each one should be applied.[894] Whether or not the investment treaty specifies the applicable law, it is clear that public international law has a "controlling role." As

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[891] VCLT, Art. 31(3)(c).

[892] International Law Commission's Articles on State Responsibility, Art. 3 also states that, "… [s]uch characterization is not affected by the characterization of the same act as lawful by internal law." This provision was relied in: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 03 July 2022, ¶¶ 95–96. See also: *Azurix Corporation v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 67.

[893] *Autopista Concesionada de Venezuela v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, 10 ICSID Rep 309, pp. 131-132.

[894] For instance, Article 8 of the United Kingdom–Argentina BIT states that: "[t]he 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". Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993.

decided in the *CME v. Czech Republic* (2001/03) case, "[t]o the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law."[895]

Also, when the parties agreed upon the combined application of national and international law in an investment contract, international law can apply in a supervening way. For instance, in the three Libyan oil cases, the choice of law clauses was identical and specified that "[t]his Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law […]."[896]

VI. Can minimum public international law standards be waived?

Given that instruments like the ICSID Convention (and Article 42(1) in particular) give prominence to the principle of party autonomy, the parties may in principle choose the sole application of national laws.

However, international tribunals may not disregard questions of international law and must consider their eventual prevalence. As several writers have argued, the traditional procedure of diplomatic protection may not be replaced or discarded using the ICSID Convention in favor of a mechanism that ignores internationally guaranteed minimum standards. Moreover, it would be difficult to explain how awards that disregard international law would fall into the general obligation to recognize and enforce awards under Article 54(1) of the Convention.

Calvo Clauses that have been designed to waive substantive international law standards have not been successful when invoked before international tribunals, as was discussed in Part 2, Section IX. This must cast grave doubt on the ability of a choice of law clause to exclude international minimum standards due to the mere omission of a reference to international law. In addition, it is highly unlikely that parties intend to make a choice of law to the total exclusion of international law including the international minimum standards.

In addition to investment treaties, arbitral rules may also provide guidance regarding the supervening application of international law to a contract. For instance, in accordance with Article 42 of the ICSID Convention, where the parties have not agreed on an 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."

International law should be applied in a supervening way, particularly for internationalized tribunals on the basis that they operate within the international legal field.

This is not always the case when it comes to territorialized tribunals. Article 35(1) of the 2010 UNCITRAL Arbitration Rules provides that, failing designation by the parties, the tribunal "shall apply the law which it determines to be appropriate." As was outlined above in Part 11, the reference to "law" within Article 35(1) has been interpreted to exclude "rules of law," which, in this context, are generally understood to also include public international law.

VII. Controversy regarding the ICSID Convention absence of choice provision

A. General Considerations

Where the parties have not chosen an applicable law, the relationship between national and international law becomes "complex", as reflected in the second sentence of Article 42(1) of the ICSID Convention.

A wide range of interpretations of this provision are currently in competition. Many writers consider international law to have a supplemental and corrective role, while others argue that it should be applied on its own. Even regarding the supplemental and corrective powers, commentators have come to markedly

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[895] *CME v. Czech Republic*, UNCITRAL Final Award, 14 March 2003, ¶ 91.

[896] *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic,* Award, 10 October 1973, ¶ 1; *Libyan American Oil Company v. The Government of the Libyan Arab Republic,* Award, 12 April 1977, ¶¶ 122-123; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, ¶ 23.

divergent conclusions depending on whether they emphasize the importance of domestic law or of international law.

The matter received significant attention after two decisions emerged during the mid-1980s: the *Klöckner* and *Amco v. Indonesia* cases. At the time, it was widely accepted that Article 42(1) should play a corrective role. However, among the cases registered in the first twenty years of the Convention, few actually applied international law in a supervening way. Several tribunals merely stated that domestic law was not in conflict with international law, as was the case in the *Letco v. Liberia* award, for instance. This decision referred to Article 42(1) as providing…

[…] 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.[897]

Article 42(1) of the ICSID Convention uses the words "such rules of international law as may be applicable." From this drafting, it should be interpreted that not *all* international law rules must be applied – only *relevant* international law rules.[898] Interpretations vary on when this will be the case.

B. The interpretation in early cases

In early ICSID cases, particularly from the 1980s with some others following thereafter,[899] international law exercised a supplementary or corrective role only when there was a lacuna within domestic law, or where international law was inconsistent with the applicable national law.

In a landmark decision in 1985, the ICSID ad hoc Annulment Committee in the *Klöckner* case held the following:

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 […] 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 international law […].[900]

In turn, in *Amco v. Indonesia*, in 1986 the ad hoc Annulment Committee wrote:

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[897] *Liberian Eastern Timber Corporation v. Republic of Liberia,* ICSID Case No. ARB/83/2, Award, 31 March 1986, ¶ 358).

[898] *LG&E Energy v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 88. As observed by the *LG&E tribunal*, this reading of Art. 42(1) is corroborated by the French version of the provision: with reference to the rules of international law and, particularly, to the language "as may be applicable," found in Art. 42(1) of the ICSID Convention, the tribunal holds the view that it should not be understood as if it were in some way conditioning application of international law. Rather, it should be understood as referring, within international law, to the competent rules to govern the dispute at issue. This interpretation could find support in the ICSID Convention's French version that refers to the rules of international law "*en la matière.*"

[899] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, 03 May 3 1985; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, 16 May 1986; *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, rectified 14May 14 1986; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3*,* Award, 20 May 1992; *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award, 17 February 2000.

[900] *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, 03 May 1985), ¶ 69.

> […W]here there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus, international law is fully applicable and to classify its role as 'only supplemental and corrective' seems a distinction without a difference.[901]

International law lays down standards by which to judge actions taken by host States in relation to contracts with foreign investors. These standards lead to a two-step analysis: first of national law and then of international law. These do not have distinct spheres of application; if domestic law has not been exhausted prior to the application of international law, it must be applied.

This interpretation has been upheld in the *travaux préparatoires* of the ICSID Convention, although it does not clearly emerge from the written text. Where the contract does not contain a choice of law clause, this approach entitles tribunals to apply public international law directly. As such, it is not necessary for the tribunal to first establish (a) the investor's rights under municipal law or (b) the gap that exists within municipal law, or that (c) municipal law violates international law. However, the investor can nevertheless base their claims upon municipal law if it contains more favorable terms.

Outside the ICSID mechanism, in *CME v. Czech Republic* (2003), the UNCITRAL tribunal wrote that there is "a strict inter-relationship of domestic and international law requiring an arbitral tribunal to follow a certain ranking when applying the law applicable to an investment treaty."[902] This ranking is unconvincing. As stated in *Methanex v. United States*, "…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."[903] Therefore, only in these *jus cogens* situations should international law prevail over the parties' choices.

C. Pragmatism in later cases

After the *Klöckner* and *Amco v. Indonesia* cases, ICSID tribunals began to depart from the approach of first applying the host State law and then international law in a supplementary or corrective manner.

In *Wena v. Egypt*, the ad hoc Annulment Committee held that the second sentence of Article 42(1) of the ICSID Convention "allowed for both legal orders to have a role," for "the law of the host State […to] be applied in conjunction with international law if this is justified" or for "international law […to] be applied by itself if the appropriate rule is found in this other ambit."[904]

This decision recognized that the BIT had been selected by the parties as "the primary source of applicable law for this arbitration," however, it "was a terse document that did not contain all the applicable rules."[905]

In 2005, the tribunal in *CMS v. Argentina* advocated in favor of this "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."[906]

Several scholars have also argued in favor of this logic. Article 42(1) grants arbitrators the freedom to apply the law that they consider most appropriate, whether national or international. ICSID tribunals enjoy a great deal of latitude in determining the applicability of international law. This was the position taken by the tribunal in the *Wena v. Egypt* case.

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[901] ILR 580, p. 594, ¶ 40. See also *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986), *12 Y.B. Comm. Arbitration*, 129–148 (1987), ¶ 186.
[902] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶ 410.
[903] *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, 03 August 2005.
[904] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision on Annulment, 05 February 2002.
[905] Ibid., ¶ 79.
[906] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005. This approach was followed by *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 236 and 240.

Others warn about the danger of granting arbitral tribunals excessive discretionary powers. They point to the *Venezuela Holdings v. Venezuela* decision, in which the Annulment Committee dealt with a broadly drafted choice of law clause.[907] The Committee found that there are limitations to the tribunals' discretion to determine the applicable law and held that it is "obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires."[908]

The tribunal in *Venezuela Holdings v. Venezuela* failed to recognize the limitations of arbitrators' discretionary powers and that their corrective powers must be exercised in accordance with choice of law rules.

Nonetheless, despite criticisms, the discretionary approach remains dominant.

VIII. Uniform law for supplementary and corrective purposes?

Public international law typically only provides broad standards and rules that are often subject to contradictory interpretations by tribunals. Comparative law, and particularly uniform law, can provide assistance in determining the scope of the standards to be applied when dealing with matters such as the interpretation of investment contracts. For instance, the UNIDROIT Principles comprehensively tackle issues related to the parties' legitimate expectations when entering into contractual relationships. As such, these principles can prove useful for supplementary purposes to interpret the broad standards provided in investment treaties, such as fair and equitable treatment or legitimate expectations in relation to investment contracts.

Furthermore, uniform law can serve for interpretative purposes when the adjudicator is authorized to a flexible application of the law. If a solution provided for by local law is anachronistic or ill-suited to an international contract, the application of a neutral and balanced text like the UNIDROIT Principles can guide the adjudicator in exercising flexibility in their interpretive task, as authorized by several private international law and arbitral rules.

Trade usages appear unrelated to the general principles of commercial law and to an analysis of their role in international investment claims. However, certain commentary advocates in favor of a broad notion of trade usages, considering them as rules of conduct that complement the legal relationship and applicable regardless of the parties' express intention. According to this position, the distinction between implied terms to the contract and normative principles becomes blurred and trade usages thus apply, as do the general principles of commercial law.

It is noteworthy that Article 21(2) of the ICC Rules provides that "[t]he arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages". The words "if any" and "any" were added to the 2012 revision of these rules to take into account situations in which no contract underlying the dispute exists, as is typically the case in investor-State disputes involving only treaty claims.

Uniform law has, undoubtedly, an enormous – often underexplored – potential for supplemental and corrective purposes in relation to international investment claims issues not only emerging from contracts but also deriving from treaties.

REC. 13.1 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to include in the relevant choice of law clauses clear acceptance of the supplementary and corrective role of international law and are encouraged to consider the use of uniform law, where appropriate.

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[907] *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V. et al.) v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Annulment, 09 March 2017, ¶¶ 153-189.
[908] Ibid., ¶ 181.

REC. 13.2 Arbitrators implementing a choice of law or faced with absence of an effective choice of law in an investment treaty or contract are reminded, in light of the complex relationship between international and domestic law, that there are various techniques to apply international law for supplementary or corrective purposes and are encouraged to consider the use of uniform law, where appropriate.

PART 14: PUBLIC POLICY IN INVESTMENT ARBITRATION

I. General Considerations

As described in the OAS Contracts Guide, Part Seventeen, public policy has two facets in the international context. The first precludes the use of the applicable law as determined by the conflict of laws rule if the result would be "manifestly incompatible" with the public policy of the forum. From this first standpoint, public policy serves as a "barrier" or a "shield" that bars the application of the law that would otherwise be applicable under the conflicts rules.

The other facet comprises "overriding mandatory rules" of the forum that must be applied irrespective of the applicable law as determined by the conflict of laws rule. In this second facet, public policy is manifested through "mandatory rules" applied directly to the international case, without any consideration of the conflict of laws rules that may point to a different result. Many State laws contain these types of provisions that function as a "sword" and apply directly to transborder issues, without regard for the intent of the parties or any other conflict of laws rule.

II. Public policy and public international law

Public international law is generally recognized as existing on a horizontal plane.[909] However, certain of its norms have a superior status to others. These peremptory norms of international law, or *jus cogens* norms, are according to Article 53 of the Vienna Convention on the Law of Treaties "accepted and recognized by the international community of States as a whole from which no derogation is permitted."[910] These norms may also be considered as public policy in accordance with public international law; accordingly, they apply not only within discipline but also in private international legal relationships.

From Article 53 emerge three basic elements of *jus cogens*. First, they are norms of general international law. Second, *jus cogens* norms are accepted and recognized by the international community of States as a whole, and third, derogation from these norms is not permitted.

An ILC report on *jus cogens* adds other elements not explicitly mentioned in Article 53, but generally accepted in practice and scholarly writings. First, *jus cogens* norms are universally applicable. Secondly, *jus cogens* norms are superior to other norms of international law. Finally, *jus cogens* norms serve to protect fundamental values of the international community.[911]

The *jus cogens* norms invalidate norms that conflict with them, whether emerging from treaty law or customary law.[912] For instance, Article 103 of the United Nations Charter provides that:

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[909] 2006 UN General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (last accessed 17 May 2022), p. 166, ¶ 324.

[910] VCLT Report of the Proceedings of the Comm. of the Whole, 21 May 1968, UN Doc. A/Conf. 39/11 at 471–2; VCLT, 21 March 1986, Art. 53.

[911] International Law Commission (ILC), Rep. on the work of the sixty-eighth session in 2016, Ch. IX – *Jus Cogens*, p. 299. https://legal.un.org/docs/?path=../ilc/reports/2016/english/chp9.pdf&lang=EFSRAC (last accessed 09 June 2022). This has been recently reaffirmed by United Nations General Assembly, International Law Commission, Peremptory norms of general international law (jus cogens), https://t.co/Hr74lL2tQh (last accessed 09 June 2022), Conclusion 2 [3], p. 1.

[912] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (last accessed 17 May 2022), fn. 93, p. 166, ¶ 324; p. 185, ¶ 367. Also, the Restatement of the Law, Third, Foreign Relations Law of the United States,

> "In 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."

This provision is interpreted to mean that the United Nations' mandate of maintaining peace and security and protecting human rights forms part of international public policy and as a result, all other treaty regimes must abide with same.[913] Consequently, United Nations Member States, for instance, must comply with the UN Security Council's resolutions regardless of their treaty obligations. The *Nicaragua* case followed this logic; the International Court of Justice emphasized the predominance of obligations under the Charter over other treaty obligations.[914]

An ILC report on *jus cogens* traces the roots of the theory of non-derogable norms to Roman law,[915] but notes that the adoption of the Covenant of the League of Nations and a number of its provisions that reflect the principle of peremptoriness played a significant role in consolidating the notion in international law.[916] An individual opinion of Judge Schücking in the *Oscar Chinn* case before the Permanent Court of International Justice in 1934 explicitly refers to *jus cogens*, admitting that the "doctrine of international law in regard to questions of this kind is not very highly developed." He concludes, however, that…

> […] it is possible to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.[917]

Jus cogens was also invoked in an arbitral award under the French-Mexican Claims Commission, in the *Pablo Najera* case, in reference to the acceptance of the idea that there are, as a matter of principle, rules from which no derogation is permitted.[918]

In the 1930s Alfred Verdross wrote an influential article on the matter[919] that later inspired the work of the Commission and the final text of the Vienna Convention on the Law of Treaties (VCLT) regarding the issue. The VCLT served to solidify the concept of *jus cogens* as part of the body of international law.[920] Article 53 of the VCLT refers to the question, as well as other provisions such as Article 64 (emergence of new peremptory norms) and Article 66, subparagraph (a) (disputes concerning the interpretation and application Articles 53 and 64).

Sir Humphrey Waldock, the last Special Rapporteur for the VCLT, proposed a text on *jus cogens*, noting in the commentary of the provision that the concept is controversial but "the view that in the last

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Case Citation, Rules and principles, pt. 1 – International Law and Its Relation to United States Law, Ch. 1 – International Law: Character and Sources, The American Law Institute, 1987, p. 5.

[913] Ibid., p. 21, ¶ 35; Canadian Model Investment Treaty, 2004, Art. 10(4)(c), p. 14. The Canadian Model Investment Treaty provides the following: "[n]othing 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".

[914] *Nicaragua v. United States of America*, Jurisdiction and Admissibility, 26 November 1984, in ICJ Rep. p. 440, ¶ 107; ILC, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international Law*, p. 180.

[915] ILC, Sixty-eighth session, Geneva, 2016, First rep. on *jus cogens* by Dire Tladi (A/CN.4/693), Special Rapporteur, Boston, 2021, p. 22.

[916] ILC, Sixty-eighth session, Geneva, 2016, First rep. on *jus cogens* by Dire Tladi (A/CN.4/693), Special Rapporteur, Boston, 2021, p. 13.

[917] Case Concerning *Oscar Chinn*, separate opinion of Judge Schücking, Judgment of 12 December 1934, PCIJ, Ser. A/B No. 63, p. 65, ¶ 148.

[918] *Case Concerning Pablo Najera [France] v. United Mexican States*, Decision No. 30-A, 19 October 1928, Ser. A No. 30, Vol. V *UNRIAA* 466, ¶¶ 470 and 472.

[919] A. Verdross, *Forbidden Treaties in International Law*, American Journal of International Law, Vol. 31 (1937), p. 572.

[920] A/CN.4/693, p. 15.

analysis there is no international public order – no rule from which States cannot at their own free will contract out – has become increasingly difficult to sustain." He also cautions that rules having the character of *jus cogens* are the exception rather than the rule.[921]

After the VCLT, references to *jus cogens* by States and tribunals increased manyfold. By 2016, the International Court of Justice had made, since its 1969 adoption of the VCLT, eleven explicit references to *jus cogens* in majority judgments or orders.[922] The ICJ sometimes refers to *jus cogens* as "obligations *erga omnes*,"[923] and other times as "intransgressible principles of international customary law."[924] In addition, by 2016 there were 78 express mentions of *jus cogens* in individual opinions of the members of the Court.[925]

In 2019, after five years of intense discussions, the International Law Commission adopted a complete set of Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*). In its final wording, Conclusion 3 conveys the "[g]eneral nature of peremptory norms of general international law (*jus cogens*)": peremptory norms of general international law (*jus cogens*) that reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

While it is true that the text of Article 53 of the VCLT does not refer specifically to fundamental values, *jus cogens* norms have some special characteristics that distinguish them from other rules of international law – hence their superiority. They are characterized not by coming from a special or superior formal source, but rather, because they protect the values of the international community as a whole. They are superior because they cannot be derogated from and can only be modified by subsequent norms having the character of *jus cogens*.

However, several issues attracted fierce debate and disagreement within the Commission and even the General Assembly.[926] Strong opposition occurred in reaction to the notion that peremptory norms reflect and protect the fundamental values of the international community and are universally applicable and hierarchically superior. Uncertainties emerge if there is a hierarchical superiority of peremptory norms: the doctrine of *jus cogens* becomes tantamount to a doctrine of constitutional law norms. If so, something like the definition of a material constitution of the international community has to be established. In this understanding, *jus cogens* becomes a body of substantive rules of international law distinguished from all

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[921] Second Report on the Law of Treaties, by Mr. Sir Humphrey Waldock, Special Rapporteur, A/CN.4/156, Yearbook of the International Law Commission, 1963, Vol. II, p. 36. 89 Ibid., Art. 13, pp. 52-53. The term "*jus cogens*" first appeared in the third report of Sir Gerald Fitzmaurice, which was the eighth report on the law of treaties overall. See Third Report on the Law of Treaties by Mr. GG Fitzmaurice, Special Rapporteur, A/CN. 4/115 and Corr. 1, under the title "legality of the object," Yearbook of the International Law Commission, 1958, Vol. II, p. 26–27.

[922] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Serbia and Montenegro*], Judgment, 26 February 26 2007, 2007 ICJ Rep., p. 43, ¶¶ 147-184; *Accordance with International Law of The Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 22 July 2010, 2010 ICJ Rep., p. 403; *Jurisdictional Immunities of the State [Germany v. Italy: Greece Intervening]*, 2012 ICJ Rep., p. 99, ¶¶ 92 *et seq.*; *Questions Relating to the Obligation to Prosecute or Extradite [Belgium v. Senegal]*, Judgment, 20 July 2012, 2012 ICJ Rep., p. 422, ¶¶ 99-100; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Croatia v. Serbia]*, ICJ Judgment, 03 February 2015, ¶ 87.

[923] *Barcelona Traction, Light and Power Company, Limited (New Application) [Belgium v. Spain], Second Phase*, 1970ICJ Rep.,, ¶ 33; *East Timor [Portugal v. Australia]*, 1995ICJ Rep., ¶ 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep., p. 136, ¶¶ 155-157; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019ICJ Rep., p. 156, ¶ 180.

[924] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996ICJ Rep., ¶¶ 79, 83.

[925] A/CN.4/693, p. 26.

[926] 2019 Commentaries to Draft Conclusion 3 of the Draft Conclusions on Peremptory Norms, in United Nations, Report of the International Law Commission, Seventy-first session, https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf (last accessed 09 June 2022), p. 150.

other rules. However, those who defend this position were never able to provide a precise list of such norms, and even when proposed, the list is not exhaustive. Moreover, not only is the lack of proper identification of the norms a problem, but also the lack of identification of the precise peremptory content of each norm.

Further, another ILC report referring to fragmentation of international law notes that it is a difficult challenge to determine which norm prevails between "conflicting *jus cogens* norms – for example the question of the right to use force in order to realize the right of self-determination." At this point, "it cannot be presumed that the doctrine of *jus cogens* could itself resolve such conflicts: there is no hierarchy between *jus cogens* norms *inter se*."[927]

Perhaps the root of these divergences lies in the different theories that have been advanced to explain the peremptory nature of *jus cogens* norms. Natural law and positivism are the two main schools of thought behind the concept.

According to ILC Reporter Dire Tladi, natural law generally assumes the idea of higher norms, whether derived from divinity, reason, or some other source of morality as a basis for *jus cogens*. The problem here is who determines these norms. In practice, international law relies on the opinions of scholars, judges, or officials, which often diverge. This position also runs against the text of Article 53 of the VCLT. By providing that peremptory norms may only be modified by other peremptory norms, these provisions recognize that norms of *jus cogens* are not "immutable," which is a hallmark of natural law. Moreover, Article 53 contains the requirement that peremptory norms be "recognized by the international community of States" – suggesting a role for the "will" of States in their emergence.[928]

Per the same report by Tladi, from a positivist stance, international law is only made by consent of States and thus, norms can only achieve *jus cogens* status once consent is given. But this position seems at odds with the idea of a higher set of norms from which no derogation even by consent of States is permissible.[929]

Unsurprisingly, both approaches appear in judicial practice. The ICJ, for example, at times appears to endorse the natural law approach to *jus cogens*, while at other occasions relying on positivist and consent-based thinking.[930] The case law of other courts and tribunals is equally inconclusive on the matter,[931] which has led to scholarly opinions that the binding and peremptory force of *jus cogens* is perhaps best understood as an interaction between natural law and positivism.[932] Further developments must, however, unfold in public international law to achieve greater clarity on this matter and its practical impact.

On a final note on this topic, evidently *jus cogens* - or public policy in accordance with public international law - applies not only within this discipline but also in private international legal relationships. Later in this Part the matter will be addressed, particularly in regard to foreign investment claims.

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[927] 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, UN Doc. A/CN.4/L.682, finalized by Marti Koskenniemi, 2006, p. 168-169.

[928] A/CN.4/693, pp. 30-32.

[929] Moreover, it is difficult to understand, if States have the free will to make any rules, why some rules cannot be derogated from by consent. Even if there were a way to address the question of emergence of peremptory rules through consent — or consensus — it is not clear why those States that have joined in the consensus could not later withdraw their consent, thus damaging the consensus. See A/CN.4/693, p. 32.

[930] Individual opinions of the judges of the Court have been similarly diverse. Many such opinions have expressed *jus cogens* as a rejection of positivism and an embrace of the immutable, natural law approach while others have advanced a positive law approach to *jus cogens*. See Ibid., p. 33.

[931] Ibid., p. 34.

[932] Ibid., p. 37.

III. Public policy in investment arbitration

A. In general

The terminology used in reference to public policy in investment arbitration is not homogeneous. For instance, some refer to "peremptory rules of international law," "international public policy," and "mandatory rules of international law" that must be observed, such as the prohibition of the denial of justice, the discriminatory taking of property, and the arbitrary repudiation of contractual undertakings. These apply independently of any choice of law and are the public order framework within which such transactions operate. This framework is not open to the disposition of the parties.

Since international investment arbitration draws upon the classical party-driven model of arbitration, it has been said that no rethinking is required for the issues that arise, regarding, for instance, public policy. However, many caveats must be made to this statement, as will be discussed in this section.

Public policy issues may become relevant in several matters related to international investment arbitration, including norms governing access to information, environmental laws, or foreign exchange control regulations. Public policy matters may also relate to subjective non-arbitrability (or incapacity of the State to arbitrate), the absence of special powers by the signatory of an arbitration agreement, immunity from jurisdiction, and contracts in violation of a United Nations resolution or embargo, among others.

In cases of investment arbitrations that are contract-based rather than treaty-based, the transaction will be subject not only to the *lex causae* but potentially to the mandatory laws of third countries as well. These scenarios will be discussed below.

Another issue relates to the possibility for arbitrators to disregard laws in a national system that violate superior domestic laws, which often occurs due to the impugned law's conflict with a constitution. Although international tribunals have no national *lex fori*, their members routinely deal with the interpretation and application of national norms. When doing so, they must not become paralyzed by declarations or decisions of the State, its legislature, or its judiciary. Arbitral tribunals are plenary empowered to apply the national laws to their full extent.

B. International or transnational public policy in investment arbitration

Many arbitrators do not realize, or at least do not mention expressly, that they are applying international or transnational public policy principles in their decisions, as was the case in *S.D. Myers v. Canada.*[933] Notwithstanding the nuances of these terms, which have been addressed elsewhere, both expressions will be used interchangeably in the following.

In investment arbitration, only international or transnational public policy ought to be relevant. Host States may not rely on their national public policy to override a rule or principle of international or transnational public policy. This is because, by its very nature, transnational or international public policy is based on internationally and commonly recognized principles that must be unquestionably accepted.

Matters involving the application of transnational or international public policy often relate to corruption or fraud, which have both been addressed in ICSID cases. In the *World Duty Free v. Kenya* decision, the tribunal stated that it 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."[934]

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[933] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶¶ 246-250.

[934] See *World Duty Free Company Ltd. v. Republic of Kenya,* ICSID Case No. ARB/00/7, Award, 04 October 2006, ¶¶ 158 and 172. See also: *Niko Resources v. Bangladesh*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, ¶¶ 431–433; *Unión Fenosa Gas v. Egypt*, ICSID Case No. ARB/14/4, Award, 31 August, 2018, ¶ 7.48.

In the *Inceysa* case brought against El Salvador,[935] the tribunal recurred to the notion of "international public policy" to refuse jurisdiction on a dispute arising from a contract obtained through fraud committed in the bidding process. According to the tribunal:

International public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it.[936]

The tribunal also stated that "respect for the law is a matter of public policy not only in El Salvador, but in any civilized country […] there is a meta-positive provision that prohibits attributing effects to an act done illegally."[937]

The tribunal was not entirely clear in this decision and applied international public policy as one of several "general principles of law" such as good faith and the prohibition against unjust enrichment. Reliance on these principles would have sufficed to support the tribunal's ultimate conclusion.

As stated, in the *World Duty Free v. Kenya* case the tribunal addressed corruption issues by applying international public policy. Interestingly, those matters could have been resolved by recurring to either (or both) English and Kenyan law, each of which were applicable to the case. As in the *Inceysa* case, the issues could have been decided by invoking the laws applicable to the contract rather than to the notion of international public policy, which the tribunal resorted to despite not identifying a gap in the applicable governing legal regimes.

Certain rules of public international law present additional challenges. While it is difficult to conceive of a setting where an investment treaty conflicts with a *jus cogens*, the United Nations Charter obligations present an interesting scenario. For instance, if the UN Security Council passed a resolution seizing individual assets for funding piracy on the high seas, the affected party cannot succeed in an investment arbitration claiming damages against the State. In this situation, the UN resolution will prevail over the bilateral investment treaty. However, *jus cogens* norms and Charter obligations apply here as the legal order governing the treaty, as part of international law, and not because of a *per se* mandatory character.

Public policy has also been invoked by investment treaty tribunals dealing with jurisdictional issues. In *Banro v. Congo*, the tribunal referred to international public policy considerations which prohibit an investor from abusing the investor-State dispute settlement system.[938] This is consistent with practice in the Americas; Colombia made a similar argument in *Vercara*.[939] Also in *Maffezini v. Spain*,[940] the tribunal analyzed whether public policy considerations would limit the operation of the most-favored nation clause, and thus extend a BIT between Argentina and Spain to a BIT between Chile and Spain. The tribunal found public policy considerations applicable against the most-favored nation clause, particularly regarding its claim for treaty shopping. The decision was followed in the case *Siemens v. Argentina.*[941] Further, in *Liman Caspian Oil v. Kazakhstan*, the tribunal referred to the invalidating effect of a violation of public policy in the following statement:

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[935] See *Inceysa Vallisoletana, S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 02 August 2006.
[936] Ibid., ¶ 145.
[937] Ibid., ¶ 248.
[938] See *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 01 September 2000.
[939] *Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia* ICSID Case No. ARB/20/7. Colombia alleged that the company had abused the investor-State dispute settlement mechanism to exert pressure on the State.
[940] See *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ¶ 64.
[941] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 03 August 2004, ¶ 120.

[T]here are situations in which a transaction is to be considered as automatically invalid from the very beginning. A violation of international public policy is such a case in which an investment is invalid without a legal action for invalidation and without a court declaration of invalidity having to be issued.[942]

Despite these precedents, the use of public policy in treaty interpretation still has its problems, as made clear in *Wintershall v. Argentina*,[943] and *Plama v. Bulgaria.*[944] The origin of public policy considerations to limit most favored nation clauses is unclear. Furthermore, it is questionable whether public policy allows a tribunal to read important qualifications and implicit policy objectives into international treaties. Neither Article 31 nor Article 32 of the Vienna Convention on the Law of Treaties include public policy as a primary or supplementary tool for interpreting treaties.

Moreover, in *Plama v. Bulgaria* the tribunal referred to "the basic notion of international public policy," without further examining the legal nature of this notion.[945] The same can be said in respect of *Vladislav Kim v. Uzbekistan,*[946] *Unión Fenosa Gas v. Egypt*,[947] and *Churchill Mining v. Indonesia.*[948]

In sum, these uncertainties put into question whether transnational public policy has a place in international investment arbitration, at least in relation to treaty claims.

C. Mandatory rules of the host State

State courts apply overriding mandatory rules of their forum to international relationships. By contrast, in the context of investment arbitration, a mandatory national law cannot prevail over international law applicable under the relevant investment treaty. Investment treaties also typically contain substantive investment protections regarding fair and equitable treatment, full protection and security, freedom of transfer, prohibition of expropriation, and non-discrimination. These treaty obligations are imposed upon signatory States and cannot be overridden by national law.

In *CME v. Czech Republic* (2003), the host State argued that the "Tribunal must apply any Czech laws of mandatory nature."[949] The tribunal did not accept this argument.[950] However, as decided by the tribunal in *Metalclad v. Mexico* (2000), in accordance with the ICSID Additional Facility Rules, "[a] State

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[942] *Liman Caspian Oil B.V. and NCL Dutch Investment B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 193.
[943] *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, 08 December 2008, ¶ 182.
[944] *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 08 February 2005, ¶ 221.
[945] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 143.
[946] *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 08 March 2017, ¶ 593.
[947] See *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶ 7.48.
[948] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, *ICSID Case No. ARB/12/14 and 12/40*, Award, 6 December 2016, ¶ 508. The absence of a proper explanation by the Tribunal in *Churchill Mining v. Indonesia* was even cited in the Application for Annulment, challenging the proposition that "claims arising from rights based on fraud or forgery which the claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy." Other awards also relied upon transnational public policy, such as in *Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/03/25, Dissenting Opinion of Mr Bernardo M Cremades, 16August 2007, p. 23, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 04 October 2013, ¶ 292, and *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3, Award, 27 December 2016), ¶ 264.
[949] *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶ 398.
[950] *CME v. Czech Republic*, UNCITRAL, Partial Award, Dissenting Opinion by J. Hándl, 13 September 2001, pp. 22. With a dissenting opinion of arbitrator Hándl, who criticized his colleagues for "non-respecting of the provisions of the Czech Law that are of mandatory character, e.g., the Media Law or the Administrative Proceedings Code." *See also AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, Dissenting Opinion of S.K.B. Asante, 15 June 1990, p. 577.

party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty."[951] The *Kaiser v. Jamaica* case was decided following a similar logic.[952]

On occasion, arbitral tribunals have applied, or *in dicta* supported the application of, international law in a supervening manner despite an agreement made by the parties regarding the application of national law alone. The *Aucoven v. Venezuela*,[953] *Caratube v. Kazakhstan*,[954] and *Methanex v. USA*[955] cases serve as examples. In the *Methanex v. USA* case, the arbitral tribunal that had been constituted in accordance with NAFTA[956] stated that 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."[957]

Several writers have raised doubts regarding the applicability of the mandatory rules' doctrine in investment-related contexts. After embarking on an analysis of arbitral practice (rather than theory), there have been virtually no cases where the application of a mandatory rule was needed to justify a decision other than what would have been found by applying the law chosen by the parties. In the situations they discussed, mandatory rules were never applied to override the parties' choice.

Importantly, the chosen law itself will sometimes require tribunals to consider the rules of another system. Other times, such as in situations of *force majeure*, national law has not been chosen but constitutes an underlying fact of the case. The conflict of laws rules of the chosen law, if not excluded, may also lead to the application of mandatory rules of another legal system. In addition, the tribunal may also consider the mandatory rules of a third country where necessary. For instance, the mandatory rules related to performance may be considered in situations where an export or import ban exists.

When it comes to the ICSID Convention, the domestic legal system of the home State cannot by itself provide standards for public policy. A State that invokes its own *ordre public* contrary to what it agreed upon regarding the application of another system is simply breaching its commitment concerning the selection of the chosen law. The *ordre public* of another State in which an ICSID award might potentially be enforced is irrelevant in principle, since Articles 53 and 54 of the ICSID Convention do not provide an *ordre public* exception to the obligation to recognize and enforce awards.

D. Regional public policy in investment arbitration

Some groups of States (generally those that ratify substantively similar treaties or the same regional treaty) may find themselves more extensively linked to public policy values emerging therefrom. Thus, a regional public policy could be developed, for instance, within the European Union or NAFTA.

The European Court of Justice considered certain provisions of EU law "as a matter of public policy within the meaning of the New York Convention."[958]

The ICSID tribunal in *AES v. Hungary* (2010) addressed this issue specifically.[959] Hungary argued that EU competition law should be considered as part of the applicable law or should be considered in

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[951] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 70 (referring to Article 27 of the VCLT; see also *Total v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶ 40, section § 2.3.

[952] *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction, 06 July 1975.

[953] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Award, 23 September 2003.

[954] *Caratube International Oil Company L.L.P. and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 290.

[955] *Methanex v. United States of America,* UNCITRAL, Award, 03 August 2005.

[956] Ibid.

[957] *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, 03 August 2005, p. 11, ¶¶ 24-26.

[958] *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97, E.C.R. I-3055, 01 June 1999, ¶ 39.

[959] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

relation to the Energy Charter Treaty providing for the arbitrator's jurisdiction. The tribunal resolved any potential clash between the applicable laws by deciding that the respondent's acts would be assessed under the ECT as the applicable law and that EU law would be contemplated as a relevant fact.[960]

Another example of how an ICSID tribunal took into account – while not strictly applying – national and European Union law was illustrated in the *Maffezini v. Spain* (2000) case.[961] 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."[962]

Interesting developments have been occurring in the European Union. It remains to be seen how the concept of public policy and its relevance for investor-State arbitration will develop in the Americas.

REC. 14.1 Negotiators of international investment treaties and parties to international investment contracts and their counsel are encouraged to consider relevant international or transnational public policy and any possible conflict with national law or policy in relation to the foreign investment.

REC. 14.2 Arbitrators should consider and, where appropriate, make express reference to the application of international or transnational public policy principles.

[960] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010, ¶¶ 7.2.1–7.2.5, and 7.6.12.
[961] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.
[962] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, p. 24, ¶ 71.

APPENDIX I

TABLE OF CONVENTIONS & OTHER LEGAL INSTRUMENTS

Abbreviation	*Citation**
Hague Conventions for the Pacific Settlement of International Disputes	*1899 Convention for The Pacific Settlement of International Disputes, signed on 29 July 1899*
Hague Conventions for the Pacific Settlement of International Disputes; Pacific Settlement of International Disputes (1907); 1907 Convention; The Hague Convention 1907; Hague (I) 1907	*1907 Convention for the Pacific Settlement of International Disputes*
Australia – Uruguay BIT	*Agreement between Australia and the Republic of Uruguay on the Promotion and Protection of Investments, signed on 05 April 2019*
Canadian Model Investment Treaty; Canada Model BIT	*Agreement Between Canada And ---------- For the Promotion and Protection of Investments (2004)*
Chile – Spain BIT	*Agreement between Republic of Chile and the Kingdom of Spain for the Mutual Promotion and Protection of Investments, signed on 02 November 1991*
Belgium-Burundi Investment Treaty	*Agreement Between the Belgium-Luxembourg Economic Union and The Republic of Burundi Concerning the Reciprocal Encouragement and Protection of Investments, signed on 13 April 1989*
Australia – Argentina BIT	*Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, signed on 23 August 1995, Canberra*
Denmark – Indonesia BIT	*Agreement between the Government of Denmark and the Government of the Republic of Indonesia Concerning the Encouragement and the Reciprocal Protection of Investments, signed on 30 January 1968*
Egypt-United Kingdom BIT	*Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, signed on 11 June 1975*
United Kingdom–Argentina BIT	*Agreement Between the Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The Republic of Argentina for The Promotion and Protection of Investments, signed on 11 December 1990*
Portugal–Turkey BIT	*Agreement Between the Portuguese Republic and The Republic of Turkey on The Reciprocal Promotion and Protection of Investments, signed on 19 February 2001*
Chile – Spain BIT	*Agreement between the Republic of Chile and the Kingdom of Spain for the Mutual Protection and Promotion of Investments, signed on 02 October 1991*

Pakistan – Switzerland BIT	*Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, signed on 11 July 1995*
Switzerland – Uruguay BIT	*Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed on 07 October 1988*
USMCA	*Agreement between the United States of America, Mexico, and Canada, signed on 30 November 2018*
Treaty of Pavia; Pactum Lotharii	*Agreement between Venice and Pavia, signed on year 840 after Christ*
Argentina – Spain BIT	*Agreement for the Mutual Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Argentina, signed on 03 October 1991*
Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union	*Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed on 05 May 2020*
Netherlands – Indonesia BIT	*Agreement on Cooperation Between Netherlands and Indonesia (with Protocol and Exchanges of Letters Dated on 17 June 1968), signed on 07 June 1968*
Netherlands -Czech BIT	*Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991*
The Algiers Accords, Algier Declarations	*Algiers Accords, signed on 19 January 1981*
Argentina – U.S. BIT	*Argentina - United States of America Bilateral Investment Treaty, signed on 14 November 1991*
Argentina Arbitration Law	*Argentina Arbitration Law, enacted 26 July 2018*
Articles of Agreement	*Articles of Agreement, By-Laws, and Loan Regulations of the IBRD, As amended effective 27 June 2012*
Asean Comprehensive Investment Agreement	*Asean Comprehensive Investment Agreement, signed on 26 February 2009*
2016 Indian Model BIT	*Bilateral Investment Treaty Between the Government of The Republic of India And ---- (2016)*
Buenos Aires Protocol	*Buenos Aires Protocol on the Promotion and Protection of Investments Made for Countries that are not Parties to MERCOSUR, signed on 8 August 1994*
Cape Town Treaty; Cape Town Convention	*Cape Town Convention on International Interests on Mobile Equipment, signed on 2001*

Charter of the OAS	*Charter of the Organization of the American States, signed 30 April 1948*
Argentinian Civil and Commercial Code	*Civil and Commercial Code of the Argentine Republic, approved by Law No. 26.994 of October 1, 2014, and amended up to Decree No. 62/2019 of January 21, 2019*
HCCH Convention on the Recognition of the Legal Personality of Foreign Companies, Associations, and Institutions	*Convention Of 1 June 1956 Concerning the Recognition of The Legal Personality of Foreign Companies, Associations, and Institutions, concluded 1 June 1956*
HCCH Convention on the Law Applicable to Products Liability	*Convention of 2 October 1973 on the Law Applicable to Products Liability, entered into force on 01 October 1977*
HCCH Convention on the Law Applicable to Traffic Accidents	*Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, entered into force on 03 April 1975*
Bustamante Code	*Convention on Private International Law, signed on 20 February 1928, Havana, Cuba*
1927 Geneva Convention	*Convention On the Execution of Foreign Arbitral Awards, signed on 26 September 1927 (Geneva)*
1948 Geneva Convention	*Convention on the International Recognition of Rights in Aircraft, enacted on 19 June 1948.*
Hague Securities Convention	*Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, signed on 05 July, 2006*
Rome Convention	*Convention on the Law Applicable to Contractual Obligations, signed on 19 June 1980, Rome*
ICSID Convention	*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965*
1930 Convention providing Uniform Law on Bills of Exchange	*Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, signed 07 June 1930, Geneva*
CFIA Model	*Cooperation And Facilitation Investment Agreement Between the Federative Republic of Brazil And (Hereinafter Designated as the "Parties" Or Individually As "Party") (2015)*

Rome III Regulation	*Council Regulation (Eu) No 1259/2010 Of 20 December 2010 Implementing Enhanced Cooperation in The Area of The Law Applicable to Divorce and Legal Separation, signed on 20 December 2010*
Covenant of the League of Nations	*Covenant of the League of Nations, signed on 28 June 1919*
Claims Settlement Declaration	*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, signed on 19 January 1981*
Claims Settlement Declaration	*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, signed on, 19 January 1981*
Venezuelan law on Promotion and Protection of Investments	*Decree No. 356/1999, Law on Promotion and Protection of Investments, published in 1999*
CAFTA - DR	*Dominican Republic–Central America Free Trade Agreement, signed on 05 August 2004*
International Law Commission's Articles on State Responsibility	*Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)*
Draft Conclusions on Peremptory Norms of General International Law	*Draft Conclusions on Peremptory Norms of General International Law (jus cogens), adopted in 2019*
The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners	*Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners Prepared by Harvard Law School (1929)*
Draft Code of Conduct on Transnational Corporations	*Draft United Nations Code of Conduct on Transnational Corporations (1983)*
ECOWIC	*ECOWAS Common Investment Code and Policy, July 2018*
ECOWAS Energy Protocol	*Ecowas Energy Protocol A/P4/1/03 (2003)*
ECOWAS Protocol on Movement of Persons and Establishment	*Ecowas Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, signed 29 May 1979*

ECOWAS Treaty of the West African Economic Community	*ECOWAS Revised Treaty of the Economic Community of West African States, revised 24 July 1993*
ECOWAS Supplementary Act on Investments	*ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008)*
EFTA	*EFTA Convention, signed on 04 January 1960*
ECT	*Energy Charter Treaty, signed on 07 December 1994*
CETA	*EU–Canada Comprehensive Economic and Trade Agreement, signed 30 October 2016*
EU-Mercosur Association Agreement	*EU-Mercosur Association Agreement, European Parliament resolution on economic and trade relations between the EU and Mercosur with a view to the conclusion of an Interregional Association Agreement (2006/2035(INI)), reached on 28 June 2019*
EEC	*European Energy Charter, entered into force on 17 December 1991*
EVFTA	*European Union -Vietnam Free Trade Agreement, signed on 30 June 2019*
FIDIC Contracts	*FIDIC Conditions of Contract for Works of Civil Engineering Construction (1987)*
Mexico FTA	*Free Trade Agreement between the EFTA States and Mexico, signed on 27 November 2000*
French Code of Civil Procedure	*French Code of Civil Procedure, as adopted in decrees promulgated on 14 May 1980, 12 May 1981, and 13 January 2011*
French Code of Commerce	*French Code of Commerce, Version en Vigueur au 22 Décembre 2023*
French Law of 16-24 August 1790	*French Law of 16–24 August 1790 on judicial organization, decreed on August 1790*
GATT	*General Agreement on Tariffs and Trade, signed on 30 October 1947*
Resolution 1803 (XVII) of 1962	*General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty Over Natural Resources"*
General Business Law of Liberia	*General Business Law of Liberia, published on 08 September 1978*

G3 Free Trade Agreement	*Group of Three Free Trade Agreement between Mexico, Colombia, and Venezuela, signed on 1994*
1899 Hague Convention	*Hague Convention for the Pacific Settlement of International Disputes of 1899, signed on 1899*
Porter Convention; 1907 Hague Convention	*Hague Convention of the Peaceful Resolution of International Disputes, signed on 1907*
The Havana Charter of 1948	*Havana Charter for an International Trade Organization*
ICSID Additional Facility Rules	*ICSID Additional Facility Rules*
ICSID Administrative and Financial Regulations	*ICSID Administrative and Financial Regulations (2023)*
ICSID Model Clauses	*ICSID Model Clauses (1993)*
ICSID Arbitration Rules	*ICSID Rules of Procedure for Arbitration Proceedings (1968)*
ICSID Conciliation Rules	*ICSID Rules of Procedure for Conciliation Proceedings (1968)*
ICSID Institutional Rules	*ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (1968)*
ILC Draft Articles	*ILC (International Law Commission) Draft Articles on Diplomatic Protection (2006)*

ILC Draft Convention	*ILC (International Law Commission) Draft Convention on Arbitral Procedure, adopted in 1953*
The Proper Law of the Contract in Agreements Between a State and a Foreign Private Person	*ILI, The Proper Law of the Contract in Agreements between a State, and a Foreign Private Person, signed 11 September 1979*
Institutes of Justinian	*Institutes of Justinian, Book I, published on 21 November 21 of 533 and promulgated with the Digest on 30 December of 533*
Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices; The Inter- American Conventions; Inter-American Convention on Conflict of Laws concerning Bills of Exchange	*Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, signed 30 January 1975, Panama*
Inter-American Convention on Conflict of Laws concerning Checks; The Montevideo Treaties; The Inter-American Conventions	*Inter-American Convention on Conflict of Laws concerning Checks, signed on 30 January 1975, Panama; and 8 May 1979, Montevideo*
Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices; The Montevideo Treaties; The Inter- American Conventions	*Inter-American Convention on Conflict of Laws concerning Commercial Companies, signed in 8May 1979*
1979 OAS Convention on Conflicts of Laws Concerning Commercial Companies	*Inter-American Convention on Conflicts of Laws Concerning Commercial Companies, concluded on 08 May 1979*
Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, The Inter- American Conventions	*Inter-American Convention on General Rules of Private International Law, May 8, 1979, Montevideo*

Mexico Convention	*Inter-American Convention on the Law Applicable to International Contracts, signed on 15 March 1994*
1926 Convention for the Unification of Rules relating to Maritime Liens and Mortgages	*International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, signed on 27 May 1967*
1993 International Convention on Maritime Liens and Mortgages, 1993	*International Convention on Maritime Liens and Mortgages, signed on 06 May 1993*
IISD Model Agreement for Sustainable Development	*International Institute for Sustainable Development Model International Agreement on Investment for Sustainable Development (2005)*
EU-Vietnam BIT	*Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part, signed 30 June 2019*
AfCFTA	*Investment Protocol to the Agreement establishing an African Continental Free Trade Area, drafted on 19 February 2023*
Japanese Law of Private International Law	*Japanese Law of Private International Law, newly titled and amended on 21 June 2006*
Jay Treaty	*Jay Treaty, signed on 19 November 1794*
Brazil LD No. 54 of 1964	*Legislative-Decree No. 54 of 1964*
LCIA Rules	*London Court of International Arbitration Rules (2020)*
Luxembourg Rail Protocol	*Luxembourg Rail Protocol of 26 February 2007*

ILC Model Rules	*Model Rules on Arbitral Procedure of the International Law Commission (1958)*
Inter-American Convention on Commercial Arbitration; Panama Convention	*Multilateral Inter-American Convention on Commercial Arbitration, signed 30 January 1975, Panama*
1984 Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law	*Multilateral Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, concluded At La Paz on 24 May 1984*
NAFTA	*North American Free Trade Agreement*
OECD Guidelines	*OECD Guidelines for Multinational Enterprises (first issued in 1976, most recently updated in 2011)*
OPIC Legislative Charter	*Overseas Private Investment Corporation's Legislative Charter (1971)*
PAIC	*Pan-African Investment Code, drafted on 31 December 2016*
Paris Agreement; Paris Accords; Paris Climate Accords	*Paris Agreement, signed on 22 April 2016*
PCA Rules; PCA Arbitration Rules	*Permanent Court of Arbitration Arbitration Rules (2012)*
PECL	*Principles of European Contract Law, (Parts I & 11, 1999), (Part III, 2003)*
CPTPP	*Progressive Agreement for Trans-Pacific Partnership, signed on 04 February 2016*
Protocol of Colonia	*Protocol of Colonia for the Mutual Promotion and Protection of Investments in MERCOSUR*
1922 Geneva Protocol on Arbitration Clauses in Commercial Matters	*Protocol On Arbitration Clauses Signed at A Meeting of The Assembly of The League of Nations, held on 24 September 1923*
South American Mercosur Protocol	*Protocol on Cooperation and Facilitation of Intra MERCOSUR Investments (2017)*
SADC Investment Protocol	*Protocol on Finance and Investment of SADC (2006)*
ECOWAS Protocol	*Protocol on the Community Court of Justice, adopted on 06 July 1991*

Aircraft Protocol	*Protocol To the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town On 16 November 2001)*
Space Protocol	*Protocol To the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 9 March 2012)*
Pretoria MAC Protocol	*Protocol To the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, adopted on 11-12 November 2019*
RCEP	*Regional Comprehensive Economic Partnership (RCEP) Agreement, entered into force on 1 January 2022*
RCEP	*Regional Comprehensive Economic Partnership, signed 15 November 2020*
Rome II Regulation	*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, entered into force 11 January 2009*
Rome I Regulation	*Regulation of the European Parliament and of the Council on the Law applicable to Contractual Obligations, entered into force 17 December 2009*
ICC Rules of Arbitration (2012)	*Rules of Arbitration of the International Chamber of Commerce (2012)*
ICC Rules of Arbitration (2017)	*Rules of Arbitration of the International Chamber of Commerce (2017)*
ICC Rules of Arbitration (2021)	*Rules of Arbitration of the International Chamber of Commerce (2021)*
ICJ Rules	*Rules Of Court (1978), Adopted On 14 April 1978 and Entered into Force On 1 July 1978*
Russian Civil Code	*Russian Civil Code, signed on 1994*

The 1910 Convention establishing the British-American Claims Arbitral	*Special Agreement concluded between the United States and Great Britain, signed on 18 August 1910*
ICJ Statute	*Statute of the International Court of Justice, signed 26 June 1945*
Statute of the PCIJ	*Statute of the Permanent Court of International Justice*
SCC Rules	*Stockholm Chamber of Commerce Arbitration Rules (2023)*
ECOWAS Supplementary Act on Investment	*Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS signed 19 December 2008*
(CPIL)	*Switzerland's 1987 Code on Private International Law, published on 18 December 1987*
MIGA	*The 1985 Convention establishing the Multilateral Investment Guarantee Agency, signed on November 1985*
1992 World Bank Guidelines	*The 1992 Guidelines on the Treatment of Foreign Direct Investment (1992)*
TRIPS Agreement	*The Agreement on Trade-Related Aspects of Intellectual Property Rights, signed on 15 April 1994*
CRCICA Arbitration Rules	*The Cairo Regional Centre for International Commercial Arbitration Arbitration Rules, in force since 1 March 2011*
CPTPP	*The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 08 March 2018*
OECD Antibribery Convention	*The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997*
ECICA	*The European Convention on International Commercial Arbitration, signed on 21 April 1961*
Hague Convention (XII)	*The Hague Convention XII relative to the Establishment of an International Prize Court (18 October 1907)*

Hague Principles, HCCH Principles	*The Hague Principles on Choice of Law in International Commercial Contracts (19 March 2015)*
TTIP	*The Transatlantic Trade and Investment Partnership, negotiated until 2016*
TPP	*Trans-Pacific Partnership, signed on 04 February 2016*
Treaty of Washington of 1871	*Treaty between Her Majesty and the United States of America for the Amicable Settlement of all Causes of Difference Between the Two Countries ("Alabama" Claims; Fisheries; Claims of Corporations, Companies or Private Individuals; Navigation of Rivers and Lakes; San Juan Water Boundary; and Rules Defining Duties of a Neutral Government during War), signed on 8 May 1871 (Washington), Ratifications exchanged on 17 June 1871 (London)*
Germany – Israel BIT	*Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments, signed on 24 June 1976*
United States-Ecuador BIT	*Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993*
COMESA	*Treaty Establishing the Common Market for Eastern and Southern Africa, signed 045 November 1993*
Lisbon Treaty	*Treaty of Lisbon, signed on 13 December 2007*
Treaty of Peace and Friendship between Great Britain and Spain	*Treaty of Peace and Friendship between Great Britain and Spain, signed on 13 July 1713*
The Montevideo Treaties	*Treaty on International Civil Law, signed on 12 February 1989, Montevideo*
The Montevideo Treaties	*Treaty on International Civil Law, signed on 19 March 1940, Montevideo*
TFEU	*Treaty on the Functioning of the EU, signed on 13 December 2007*
OHADA Treaty	*Treaty on the Harmonization of Business Law in Africa (OHADA), signed on 17 October 1993*

OHADA Treaty	*Treaty on the harmonization of the business law in Africa, signed on 17 October 2008*
CISG; Vienna Convention on Sale of Goods	*UN Convention on Contracts for the International Sale of Goods, signed on 11 April 1980, Vienna*
UN Convention on the Assignment of Receivables in International Trade	*UN Convention on the Assignment of Receivables in International Trade, adopted on 12 December 2001*
New York Convention	*UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958*
UN Business and Human Rights Principles	*UN Guiding Principles on Business and Human Rights (2011)*
UN Human Rights Norms	*UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003)*
1976 UNCITRAL Arbitration Rules	*UNCITRAL Arbitration Rules (1976)*
2010 UNCITRAL Arbitration Rules	*UNCITRAL Arbitration Rules (2010)*
2013 UNCITRAL Arbitration Rules	*UNCITRAL Arbitration Rules (2013)*
1985 Model Law	*UNCITRAL Model Law on International Commercial Arbitration (1985)*
2006 Model Law	*UNCITRAL Model Law on International Commercial Arbitration (2006)*
Secured Transactions Model Law	*UNCITRAL Model Law on Secured Transactions (2016)*
Ruggie Principles	*UNHRC Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (16 June 2011)*
UNIDROIT Convention on Factoring	*UNIDROIT Convention on International Factoring (Ottawa, 1988)*

UNIDROIT Convention on Financial Leasing	*UNIDROIT Convention on International Financial Leasing (Ottawa, 1988)*
UNIDROIT Rules for Intermediate Securities	*UNIDROIT Convention on Substantive Rules for Intermediated Securities signed on Geneva, 2009*
UPICC Model Clauses	*UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (2016)*
UNIDROIT Factoring Model Law	*UNIDROIT Model Law on Factoring (2023)*
UNIDROIT Leasing Model Law	*UNIDROIT Model Law on Leasing (2008)*
1994 UNIDROIT Principles	*UNIDROIT Principles of International Commercial Contracts (1994)*
2004 UNIDROIT Principles	*UNIDROIT Principles of International Commercial Contracts (2004)*
2010 UNIDROIT Principles	*UNIDROIT Principles of International Commercial Contracts (2010)*
2016 UNIDROIT Principles	*UNIDROIT Principles of International Commercial Contracts (2016)*
ALIC	*UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts (2021)*
Unified Agreement for the Investment of Arab Capital in the Arab States	*Unified Agreement for the Investment of Arab Capital in the Arab States, signed on 26 November 1980*
UCP	*Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (2008)*
UN Charter	*United Nations Charter, signed on 26 June 1945*

UN Convention on Bills of Exchange and Promissory Notes	*United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)*
UN Convention on Receivables	*United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)*
U.S. – Colombia TPA	*United States—Colombia Trade Promotion Agreement (TPA), entered into force on 15 May 2012*
USMCA; CUSMA	*United States-Mexico-Canada Agreement, signed on 30 November 2018*
VCLT	*Vienna Convention on the Law of Treaties, signed on 23 May 1969*
World Bank Guidelines	*World Bank Guidelines on the Treatment of Foreign Direct Investment (1992)*
WTO Agreements	*World Trade Organization Agreements (1994)*

APPENDIX II

LIST OF LEGAL FRAMEWORK

A. Included in this text

- International Treaties, Conventions, Model Laws, and Principles
  - Convention on the Law Applicable to Contractual Obligations, June 19, 1980, Rome ("Rome Convention")
  - Regulation of the European Parliament and of the Council on the law applicable to contractual obligations, June 17, 2008, Rome ("Rome I")
  - Principles on Choice of Law in International Commercial Contracts, March 19, 2015 ("Hague Principles")
  - Convention on the Law Applicable to International Sales of Goods, June 15, 1955. ("1955 Hague Sales Convention")
  - Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006
  - UNIDROIT Principles of International Commercial Contracts (2016 revision and prior)
  - UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts
  - Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, Geneva
  - UN Convention on Contracts for the International Sale of Goods ("CISG")
  - UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention")
  - UN Convention on the Assignment of Receivables in International Trade, December 12, 2001
  - UNCITRAL Model Law on International Commercial Arbitration (1985)
  - UNCITRAL Arbitration Rules (1976) and as revised in 2010.
  - UNCITRAL Model Law on Secured Transactions (2016)
  - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965 ("ICSID Convention")
  - UNHRC. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, June 16, 2011 ("Ruggie Principles")
  - Universal Declaration of Human Rights, 1948
  - Statute of the International Court of Justice
  - European Convention on International Commercial Arbitration, April 21, 1964
  - Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950
  - Treaty on the Functioning of the EU, December 13, 2007 ("TFUE")
  - Principles of European Contract Law, (Parts I & 11, 1999), (Part III, 2003) ("PECL")
  - Draft Common Frame of Reference, 2008 ("DCFR")
- Other International References
  - FCI, Code of International Factoring Customs
  - FIDIC, Conditions of Contract for Works of Civil Engineering Construction (1987)
  - ICC, Rules of Arbitration (2012 and 2017)

- ICC, Uniform Customs and Practice for Documentary Credits or "UCP."
- ILI, The Proper Law of the Contract in Agreements between a State and a Foreign Private Person, September 11, 1979

- Inter-American Treaties and Conventions
  - Treaty on International Civil Law, February 12, 1889, Montevideo
  - Treaty on International Civil Law, March 19, 1940, Montevideo
  - Convention on Private International Law, February 20, 1928, Havana, Cuba ("Bustamante Code")
  - Inter-American Convention on the Law Applicable to International Contracts, March 15, 1994 ("Mexico Convention")
  - Inter-American Convention on Commercial Arbitration, January 30, 1975, Panama
  - Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, January 30, 1975, Panama
  - Inter-American Convention on Conflict of Laws concerning Checks, January 30, 1975, Panama and May 8, 1979, Montevideo
  - Inter-American Convention on Conflict of Laws concerning Commercial Companies, May 8, 1979, Montevideo
  - Inter-American Convention on General Rules of Private International Law, May 8, 1979, Montevideo
  - Charter of the OAS
- Other Inter-American References
  - OHADAC Principles on International Commercial Contracts

B. Not included in this text

- UDHR
- AAA, International Arbitration Rules (2009)
- Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964 ("1964 Sales Convention")
- Convention on the Law Applicable to Contracts for the International Sale of Goods, December 22, 1986 ("1986 Hague Sales Convention")
- Convention on the Law Applicable to Agency, March 14, 1978 ("Hague Agency Convention")
- Convention on Choice of Court Agreements, June 30, 2005
- Convention Providing a Uniform Law for Cheques, January 1, 1934, Geneva
- IBA, Rules on the Taking of Evidence in International Arbitration
- ICC, International Commercial Terms, or "INCOTERMS"
- ICC, Advertising and Marketing Communication Practice
- ILI, The Autonomy of the Parties in International Contracts Between Private Persons or Entities, 1991
- ITC, Model Contract for the International Commercial Sale of Perishable Goods
- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, Montevideo
- Rules of Procedure of the Inter-American Commission on Commercial Arbitration (as amended and in effect April 1, 2002)
- Treaty establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay (Common Market of

the South [MERCOSUR]), March 26, 1991 (“Treaty of Asuncion”)

- Agreement on International Commercial Arbitration of 1998, Article 10
- Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR, May 27, 1992
- Protocol on Precautionary Measures of MERCOSUR, Dec. 1, 1994

- Principles of Latin American Contract Law
- ASADIP Principles on Transnational Access to Justice

APPENDIX III

TABLE OF CASES

1. *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic) (29 December 2016).
2. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Advisory Opinion (22 July 2010).
3. *Achmea B.V. (formerly Eureko B.V.) v. Slovk.*, PCA Case No. 2008-13 (7 December 2012).
4. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16 (2 October 2006).
5. *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Final Award (9 January 2003).
6. *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1 (29 August 1977).
7. *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005).
8. *Ad hoc case,* Final Award (10 December 1997).
9. *Ad hoc case in Paris,* ad hoc (21 April 1997).
10. *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Final Award (23 September 2010).
11. *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21 (29 July 2008).
12. *AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1 (30 November 1979).
13. *Agroinsumos Ibero-Americanos, S.L., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/16/23, Final Award (23 March 2022).
14. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005).
15. *Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo)*, I.C.J. 639 (30 November 2010)
16. *Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo)*, I.C.J. 639 (19 June 2012).
17. *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6 (7 October 2003).
18. *Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Eur. Comm'n*, 2010 E.C.R. I-08301.
19. *Alberto Carrizosa Gelzis et al. v. Republic of Colombia*, PCA Case No. 2018-56, Final Award (7 May 2021).
20. *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (25 June 2001).
21. *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Final Award (8 November 2010).
22. *Alsing Trading Company Ltd. v. Greece*, non-ICSID case, ILR, vol. 23 (22 December 1954).
23. *Ambatielos Case (Greece v. U.K.)*, 1953 I.C.J. Pleadings 71 (19 May 1953).
24. *Ambiente Ufficio S.P.A. and Others v. Argentina*, ICSID Case No. ARB/08/9 (8 February 2013).
25. *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Final Award (20 November 1984).
26. *America Movil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Final Award (7 May 2021).
27. *American Bell International Inc. v. The Islamic Republic of Iran, the Ministry of Defense of the Islamic Republic of Iran, the Ministry of Post, Telegraph and Telephone of the Islamic Republic of Iran and the Telecommunications Company of Iran*, IUSCT Case No. 48 (11 June 1984).
28. *American Mfg. & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Final Award (21 February 1997).

29. *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, (14 July 1987).
30. *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, IUSCT Case No. 167 (29 October 1992).
31. *Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. Pleadings 124, Oral Arguments and Documents 84 (July 2).*
32. *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, ad hoc, UNCITRAL (27 October 1989).
33. *Antoine Goetz et al. v. République du Burundi*, ICSID Case No. ARB/95/3, Final Award (10 February 1999).
34. *Apotex Holdings Inc. & Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Final Award (25 August 2014).
35. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro),* 2007 I.C.J. 43 (26 February 2007).
36. *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece),* 2011 I.C.J. 695 (5 December 2011), Separate Opinion of Judge Simma.
37. *Arbitral Tribunal Ad Hoc*, ad hoc, IV Y.B. Comm. Arb (17 December 1975).
38. *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Final Award (21 November 2007).
39. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (27 June 1990).
40. *Astrida Benita Carrizosa v. Republic of Colombia* (II), ICSID Case No. ARB/18/5, Final Award (19 April 2021).
41. *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. 266 (20 November 1950).
42. *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1 (21 April 1986).
43. *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Final Award (23 September 2003).
44. *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010).
45. *Azinian et al. v. Mexico*, ICSID Case No. ARB(AF)/97/2, Final Award (1 November 1999).
46. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003).
47. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Final Award (14 July 2006).
48. *Balkan Energy (Ghana) Limited v. Republic of Ghana*, PCA Case No. 2010-7 (22 December 2010).
49. *Bankswith Ghana Ltd. v. Republic of Ghana*, UNCITRAL, Final Award (11 April 2014).
50. *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7 (1 September 2000).
51. *Barcelona Traction, Light & Power Co. Case (Belg. v. Spain)*, 1970 I.C.J. 3 (5 February 1970).
52. *Barcelona Traction, Light and Power Company, Limited* [Belgium v. Spain] *(New Application: 1962)*, ICJ Case (24 July 1964).
53. *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).
54. *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Final Award (30 November 2017).
55. *Bendone-DeRossi Int'l v. Iran*, IUSCT Case No. 375 (29 February 1988).
56. *Benjamin R. Isaiah v. Bank Mellat (as Successor to International Bank of Iran)*, IUSCT Case No. 219 (30 March 1983).
57. *BG Group P.L.C. v. Republic of Argentina*, UNCITRAL, Final Award, IIC 321 (24 Decmeber 2007).

58. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Final Award (24 July 2008).
59. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3 (27 December 2016).
60. *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69 (15 December 1988).
61. *BP Exploration Co. (Libya) Ltd. v. Gov't of the Libyan Arab Republic*, Ad hoc Award (10 October 1973).
62. *Bureau Veritas, Inspection, Valuation, Assessment & Control, BIVAC B.V. v. Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012).
63. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012).
64. *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2 (13 January 1997).
65. *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005).
66. *Canevaro Claim (Italy v. Peru)*, 11 R.I.A.A. 397 (1910-01) (2 May 1912).
67. *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13 (27 September 2017).
68. *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16 (11 January 2021).
69. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Serbia and Montenegro*], ICJ Case (26 February 2007).
70. *Case Concerning Certain German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (25 May 1926).
71. *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (20 July 1989).
72. *Case Concerning Oscar Chinn*, PCIJ Series A/B. No 63 (12 December 1934).
73. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [Croatia v. Serbia], ICJ Case (3 February 2015).
74. *Case Concerning the Cayuga Indian* [Great Britain v. U. S.], American and British Claims Arbitration Tribunal (22 January 1926).
75. *Case Concerning the Gabčikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (5 February 1997).
76. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cam. v. Nig.)*, 1999 I.C.J. 102 (11 March 1999).
77. *Case Concerning the Payment of Various Serbian Loans Issued in France*, 1929 P.C.I.J. (ser. A) Nos. 20/21 (12 July 1929).
78. *Case No. 1795*, Chamber of National and International Arbitration of Milan (1 December 1996).
79. *Case No. T-9/07*, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (23 January 2008).
80. *Case of the Brig Macedonian* [United States v. Chile], Decision of the King of Belgium (15 May 1863).
81. *Casinos Austria Int'l GmbH & Casino Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Final Award (5 November 2021).
82. *Cayman Power Barge I, Ltd. v. 1. The State of the Dominican Republic, 2. Corporacion Dominicana de Electricidad*, ICC Case No. 11772/KGA/CCO (19 September 2003).
83. *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14 (17 December 2003).
84. *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, CJEU Case C-212/97 (9 March 1999).
85. *Certain German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (25 August 1926).

86. *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9 (6 July 1957).
87. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. Fr.)*, 2008 I.C.J. 177 (4 June 2008).
88. *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Final Award (29 December, 2004).
89. *Channel Tunnel Group & Another v. UL Sec'y for Transport & Another*, PCA, Partial Award (30 January 2007).
90. *Cheek Claim (U.S. v. Siam)*, Award (21 March 1898).
91. *Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 March 2010).
92. *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No. 2009-23 (20 March 2010).
93. *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (6 December 2016).
94. *CME Czech Republic B.V. v. Czech Republic*, Final Award (14 March 2003).
95. *CMI International Inc v Ministry of Roads and Transport*, IUSCT Case No. 99-245-2 (27 December 1983).
96. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003).
97. *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Final Award (12 May 2005).
98. *Colt Industries Operating Corporation v. Republic of Korea*, ICSID Case No. ARB/84/2, (3 August 1990).
99. *Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002).
100. *Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Final Award (20 August 2007).
101. *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000).
102. *Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Decision on Preliminary Objections (10 January 2005).
103. *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Final Award (5 September 2008).
104. *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment (16 September 2011).
105. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13 (21 March 1985).
106. *Corn Products Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008).
107. *CRCICA Case No. 120/1998*, CRCICA (23 June 2000).
108. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/2, Final Award (4 April 2016).
109. *Daimler Financial Services A.G. v. Argentina*, ICSID Case No. ARB/05/1, Final Award (22 August 2012).
110. *Delagoa Bay Railway Arbitration (U.S. v. Portugal)*, Award (19 March 1900).
111. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (12 October 1984).
112. *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*, ICC Case No. 3572 (24 March 1987).
113. *DIC of Delaware, Inc. and Underhill of Delaware, Inc. v. Teheran Redevelopment Corporation and The Government of the Islamic Republic of Iran*, IUSCT Case No. 255 (26 April 1985).

114. *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (18 August 2008).
115. *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28 (1 February 2006).
116. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (30 June 1995).
117. *Eastern Extension, Australasia & China Telegraph Co. Ltd. Case*, British-U.S. Claims Arbitral Tribunal, Award (1923).
118. *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004 (27 March 2007).
119. *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5 (19 September 2013).
120. *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021).
121. *Eco Swiss China Time Limited v. Benetton International NV*, CJEU Case C-126/97 (1 June 1999).
122. *Economy Forms Corporation v. The Government of the Islamic Republic of Iran; the Ministry of Energy; Dam & Water Works Construction Co. ("Sabir"); Sherkat Sakatemani Mani Sahami Kass ("Mana"); and Bank Mellat (formerly Bank of Tehran)*, IUSCT Case No. 165 (14 June 1983).
123. *EDF Int'l et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Final Award (12 June 2012).
124. *EDF Servs. Ltd. v. Romania*, ICSID Case No. ARB/05/13, Final Award (8 October 2009).
125. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006).
126. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Final Award (31 October 2011).
127. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/1, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).
128. *Electrabel SA v. Hungary*, ICSID Case No. ARB/07/19, Final Award (25 November 2015).
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