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► **To cite this version:**

Franck Latty, Marina Sim. The Applicable Law Saga. Hélène Ruiz Fabri and Edoardo Stoppioni. International Investment Law. An Analysis of the Major Decisions, Hart Publishing, 2022, 978-1-50992-904-7. halshs-04006916

**HAL Id: halshs-04006916**

**<https://shs.hal.science/halshs-04006916>**

Submitted on 7 Mar 2023

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## *The Applicable Law Saga*

FRANCK LATTY AND MARINA SIM\*

International investment disputes are to be resolved on the basis of the applicable law,<sup>1</sup> unless the arbitrators are (expressly) authorised to act as *amiable compositeur* or to decide the case *ex aequo et bono*.<sup>2</sup> Identifying which law applies, or, in case of conflict, prevails, is of primary importance as it will give the dispute its general character. It may have an impact on the tribunal's jurisdiction; it may also determine the success of a particular claim or even the outcome of the whole dispute. Moreover, a failure by the arbitrators to apply the proper law constitutes a ground for annulment of the award under the International Centre for Settlement of Investment Disputes (ICSID) Convention (as manifest excess of powers, Article 52(1)(b))<sup>3</sup> and may also lead to the setting aside of the award in non-ICSID proceedings.

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<sup>1</sup> For a recent bibliography on the issue of the applicable law in investment disputes see C Titi, 'Applicable Law in Investment Agreements', *Oxford Bibliographies*, 27 March 2019.

<sup>2</sup> See the ICSID Convention, Art 42(3); 2010 UNCITRAL Arbitration Rules, Art 35(2); ICSID Additional Facility Rules, Art 54(2); 2021 ICC Arbitration Rules, Art 21(3); 2020 LCIA Arbitration Rules, Art 22.4; 2017 SCC Arbitration Rules, Art 27(3). See also *CME Czech Republic BV v The Czech Republic*, Final Award (14 March 2003), para 403 ('The basic mandate of the Treaty obligates the Tribunal to "decide on the basis of law", which is a self-explanatory confirmation of the basic principle of law to be applied in international arbitration according to which the arbitral tribunal is not allowed to decide *ex aequo et bono* without authorization by the parties.');

CH Schreuer, 'Decisions Ex Aequo et Bono Under the ICSID Convention' (1996) 11(1) *ICSID Review – Foreign Investment Law Journal* 37.

<sup>3</sup> *Klöckner Industrie-Anlagen GmbH et al v United Republic of Cameroon and Société Camerounaise des Engrais*, Decision on Annulment (3 May 1985) ICSID Case No ARB/81/2, paras 58–62. For a more extensive interpretation, see *MTD Equity Sdn Bhd & MTD Chile SA v Chile*, Decision on Annulment (21 March 2007) ICSID Case No ARB/01/7, para 47 ('The Committee accepts that the notion of endeavouring to apply the law is not a merely subjective matter. An award will not escape annulment if the tribunal, while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be "manifest", not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.'). See also *Sempra Energy International v Argentine Republic*, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010) ICSID Case No ARB/02/16, para 164 ('As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.').

Notwithstanding the importance of the issue, the ambiguity regarding the applicable law in investment disputes persists and it remains a contentious topic. This ambiguity is exacerbated by the ad hoc and non-hierarchical nature of the system of arbitration and the fact that there is no doctrine of *stare decisis* in international investment arbitration.<sup>4</sup> As a result, the practice \*\*\*292\*\*\* on the issue of applicable law ‘varies considerably’.<sup>5</sup> At the same time, it is highly important to discern the existing trends in determining the applicable law in order to enhance legal certainty and predictability.

The law applicable to investment disputes is reflective of the complex nature of investment arbitration. It presents an intricate interplay between various rules of law, most notably public international law and national law norms.<sup>6</sup> Traditionally, international law treats municipal law as a fact ‘with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law’.<sup>7</sup> The particularity of foreign investments is that they are regulated by both international and national rules.<sup>8</sup> This is explained by a diverse range of legal relationships that arises in an investment dispute, which necessitates the application of several different applicable laws by a tribunal.<sup>9</sup> A complex approach to the applicable law is necessitated by the status of the claiming party and the private rights and interests that constitute the object of the international protection provided by investment treaties.<sup>10</sup> It is also a result of the competing interests of the disputing parties: while the investor often invokes international law as a neutral legal system, the host state frequently advocates the application of its own national law in order to retain the highest possible degree of control over the investor or investment in

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<sup>4</sup> HE Kjos, *Applicable Law in Investor-State Arbitration* (Oxford, Oxford University Press, 2013) 9. See also *SGS Société Générale de Surveillance SA v Republic of the Philippines*, Decision on Jurisdiction (29 January 2004) ICSID Case No ARB/02/ 6, para 97.

<sup>5</sup> CH Schreuer, ‘Investment Arbitration: A Voyage of Discovery’ (2005) 71 *Arbitration* 73, 75.

<sup>6</sup> See, eg, JW Salacuse, *The Three Laws of International Investment. National, Contractual, and International Frameworks for Foreign Capital* (Oxford, Oxford University Press, 2013). See also CH Schreuer, ‘International and Domestic Law in Investment Disputes: The Case of ICSID’ (1996) 1 *Austrian Review of International and European Law* 89, 89 (‘Investment relationships typically involve domestic law as well as international law. The host State’s domestic law regulates a multitude of technical questions such as admission, licensing, labour relations, tax, foreign exchange and real estate. International law is relevant for such questions as the international minimum standard for the treatment of aliens, protection of foreign owned property, especially against illegal expropriations, interpretation of treaties, especially bilateral investment treaties, State responsibility and, possibly, human rights.’).

<sup>7</sup> R Jennings and A Watts (eds), *Oppenheim’s International Law*, Vol 1, 9th edn (London, Longman, 1996) 83. See also *Certain German Interests in Polish Upper Silesia (Germany v Polish Republic)*, Merits (1926) PCIJ Rep Series A, No 7, 19.

<sup>8</sup> JE Viñuales, ‘The Source of International Investment Law’ in S Besson and J d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford, Oxford University Press, 2016) 1074. See also RD Bishop, J Crawford and WM Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary*, 2nd edn (Alphen aan den Rijn, Kluwer Law International, 2014) 437.

<sup>9</sup> Z Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009) 40.

<sup>10</sup> *ibid* 41.

question.<sup>11</sup> On the other hand, a respondent state may seek arguments in general international law (principle of sovereignty, circumstances precluding wrongfulness, etc) or in specific branches of international law (eg international environmental law, international health law) for the arbitral tribunal to broaden its scope and not only to verify the strict observance of the investor's treaty rights.<sup>12</sup>

In this respect, the different issues of a case may be governed by different laws and a *dépeçage* of the applicable law is also possible<sup>13</sup> and occurs, eg in case of a combination of treaty-based and contract-based claims.

The present chapter deals exclusively with the substantive rules applicable to the merits of investment disputes or *lex causae* (as opposed to the law applicable to procedural issues of investment disputes). It focuses on the applicable law in investment treaty arbitration.<sup>14</sup> **\*\*\*293\*\*\***

In the case of investment treaty arbitration, the primary source or *lex specialis* would be an international investment treaty itself. Indeed, almost always the dispute is to be decided in accordance with its provisions.<sup>15</sup> At the same time, as was explained in the very first investment treaty case, *AAPL v Sri Lanka*, such a treaty cannot be read in isolation:

Furthermore, it should be noted that *the 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.*<sup>16</sup> (emphasis added)

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<sup>11</sup> Kjos, above (n 4) 7.

<sup>12</sup> See, eg, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, Award (8 July 2016) ICSID Case No ARB/10/7, paras 216 et seq.

<sup>13</sup> See, eg, CH Schreuer and others, *The ICSID Convention: A Commentary*, 2nd edn (Cambridge, Cambridge University Press, 2009) 563-64.

<sup>14</sup> For contract arbitration, see D Müller, 'Ad hoc Investment Arbitration Based on State Contracts: From *Lena Goldfields* to the Libyan Oil Arbitrations', ch 3 in this volume.

<sup>15</sup> Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford, Oxford University Press, 2010) 197.

<sup>16</sup> *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Award (27 June 1990) ICSID Case No ARB/87/3, para 21. See also *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Decision on Annulment (21 March 2007) ICSID Case No ARB/01/7, para 61 ('MTD's claim is one for "an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor" (BIT, Article 6(1) (ii)), and thus international law as the proper law of the BIT is applicable to that claim and to any defence thereto. The Respondent insists—and the Claimants do not disagree—that *the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation.*') (emphasis added). See E Lagrange, '*SPP v Egypt, AAPL vs Sri Lanka: Some Revolutionary Steps?*', ch 6 in this volume.

The present contribution focuses on sources other than investment treaties. It categorises these applicable external rules and for each category presents the relevant major arbitral decisions while analysing the function of each set of rules and the articulation between them.

In what follows, after addressing the issue of the choice of law, we examine in turn international, national, and EU law as applied by arbitral tribunals. We conclude by questioning the very nature of investment treaty arbitration from the point of view of its applicable law.

## I. CHOICE OF LAW

The possibility to choose the law that would be applied to a dispute is a corollary of the principle of party autonomy, which is fundamental in international arbitration. Such choice may be both express or implied,<sup>17</sup> at the same time, it should be ‘clear and unequivocal’.<sup>18</sup> In general terms, it may be contained, whether in the investment contract, in the investment law of the host state, in a bi- or multilateral investment treaty, or in a subsequent agreement between the parties.<sup>19</sup> It may also be incorporated by a *renvoi* to procedural rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the ICSID Convention or the ICSID Additional Facility Rules. Article 42(1) of the ICSID Convention provides in this respect that ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.’ Article 35(1) of the UNCITRAL Rules establishes that ‘The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute.’ **\*\*\*294\*\*\***

While some investment treaties (eg, the former NAFTA,<sup>20</sup> the Energy Charter Treaty (ECT)<sup>21</sup> and certain BITs) contain a provision on applicable law, the vast majority of the BITs do not provide for any choice of law.<sup>22</sup> In such circumstances, the relevant arbitration rules or the ICSID Convention may circumscribe the applicable law. The residual rule in Article 42(1) of the

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<sup>17</sup> Kjos, above (n 4) 71.

<sup>18</sup> *Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Award (17 February 2000) ICSID Case No ARB/96/ 1, paras 63–64 (‘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. [...] the Tribunal is unable to conclude that the parties ever reached a clear and unequivocal agreement that their dispute would be decided by the Tribunal solely in accordance with international law.’).

<sup>19</sup> Kjos, above (n 4) 71.

<sup>20</sup> North American Free Trade Agreement, Art 1131(1).

<sup>21</sup> Energy Charter Treaty, Art 26(6).

<sup>22</sup> E Gaillard and Y Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18(2) *ICSID Review – Foreign Investment Law Journal* 375, 379; Banifatemi, above (n 15) 200.

ICSID Convention states that in the absence of an agreement of the parties, ‘the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable’. Under various arbitration rules, in the absence of choice arbitral tribunals enjoy considerable discretion with regards to the applicable law.<sup>23</sup>

Interestingly, while the very first investment treaty arbitration, *AAPL v Sri Lanka*,<sup>24</sup> implicitly recognised the possibility of dissociated consent to arbitration by the host state and the investor, it did not go as far as to recognise the possibility of dissociated agreement on \*\*\*295\*\*\* the choice of law.<sup>25</sup> The tribunal considered that since the arbitration request was ‘exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the Parties’ in dispute, they ‘have had no opportunity to exercise their right to choose in advance the applicable law determining the rules governing the various aspects of their eventual disputes’. It drew the conclusion that:

the prior choice-of-law referred to in the first part of Article 42 of the ICSID Convention could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals investing within the territory of the other Contracting State.<sup>26</sup>

The tribunal stated that under those special circumstances, the choice-of-law process would normally materialise after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.<sup>27</sup> Based on the Parties’ written and oral pleadings, the tribunal concluded that both Parties acted in a manner that demonstrated their mutual agreement to consider the provisions of the Sri Lanka/UK BIT as being the primary source of the applicable legal rules and to apply, within the limits required, the relevant international or domestic legal rules.<sup>28</sup>

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<sup>23</sup> 2010 UNCITRAL Arbitration Rules, Art 35(1); 2021 ICC Arbitration Rules, Art 21(1); 2017 SCC Arbitration Rules, Art 27(1); ICSID Additional Facility Rules, Art 54(1). See also Douglas, above (n 9) rule 3, 40 (‘An investment treaty tribunal has the inherent authority to characterise the issues in dispute and determine the laws applicable thereto.’).

<sup>24</sup> *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Final Award (27 June 1990) ICSID Case No ARB/87/3. For more details on the case see E Lagrange, ‘*SPP v Egypt, AAPL vs Sri Lanka: Some Revolutionary Steps?*’, ch 6 in this volume.

<sup>25</sup> See E Gaillard, *La jurisprudence du CIRDI*, Vol I (Paris, Pedone, 2004) 541.

<sup>26</sup> *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Final Award (27 June 1990) ICSID Case No ARB/87/3, paras 18–19.

<sup>27</sup> *ibid* para 20.

<sup>28</sup> *ibid* paras 20–24. This was however criticised by the Arbitrator S Asante in his Dissenting Opinion (See Dissenting Opinion, 576–78).

A few years later, the arbitral tribunal in the *Antoine Goetz v Burundi* case,<sup>29</sup> initiated pursuant to the Belgium-Burundi BIT, recognised the possibility of dissociated agreement on the choice of law. According to the tribunal, Burundi accepted the applicable law as determined in the provision of the BIT by becoming a party to it, and that the investors did the same by filing their request for arbitration pursuant to the BIT:

A bilateral treaty on investment protection has a juridical impact on both jurisdiction and applicable law.

Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty. If this is not the first time, as it has been pointed out, that the jurisdiction of the Centre ensues directly from a bilateral treaty on investment protection rather than from a separate agreement between the host State and the investor, *this is apparently one of the first instances in which an ICSID Tribunal has to apply the law directly determined by such a treaty.*<sup>30</sup> (emphasis added)

The tribunal also predicted that the situation would occur with increasing frequency:

The Bilateral Treaty on investment protection is not only the basis for the jurisdiction of the Centre and of the Tribunal; *it also determines the applicable law. The present case is one of the first ICSID cases where this happens. Considering the growing use of choice of law clauses in investment treaties, as well as their considerable variety, such situation is equally likely to occur with increasing frequency.*<sup>31</sup> (emphasis added)

The tribunal also pointed to ‘a remarkable come-back of international law’:

It may be interesting to remark on this subject that 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 come-back of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors. This internationalization of investment relations, be they contractual or not, surely does not lead to a radical ‘denationalization’ of the legal relations born of foreign investment, to the point that the national law of the host State is totally irrelevant or inapplicable in favour of the

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<sup>29</sup> *Antoine Goetz et al v Republic of Burundi*, Award (10 February 1999) ICSID Case No ARB/95/3 (Arbitrators: P Weil, M Bedjaoui, and JD Bredin); see English translation in ‘Goetz, et al. v The Republic of Burundi, Award, ICSID Case No ARB/95/3, 10 February 1999’ in AJ Van den Berg (ed), *Yearbook Commercial Arbitration*, Vol XXVI (Alphen aan den Rijn, Kluwer Law International, 2001) 24.

<sup>30</sup> *ibid* 36.

<sup>31</sup> *ibid* 31.

exclusive role played by international law. It merely means that simultaneously—one could say in parallel—these relations depend on both the sovereignty of the host State on its national law and its international obligations.<sup>32</sup>

It concluded that ‘it suffices that it gives effect, according to the first sentence of Art. 42(1) ICSID Convention, to the parties’ choice as expressed in the BIT’.<sup>33</sup> Since the applicable law clause in the BIT provided for a variable hierarchy between international and domestic law, depending on which was the most favourable to the investor, the tribunal analysed the measures with regard to both legal orders.

Today the possibility of dissociated agreement on choice of law is widely recognised both in doctrine and jurisprudence.<sup>34</sup> At the same time, it is not always straightforward whether the parties reached an agreement on the applicable law. Thus, in a situation similar to **\*\*\*296\*\*\*** the *AAPL* case, the *LG&E* tribunal concluded that there was no choice of law.<sup>35</sup> In any event, in investment treaty arbitration, due to the inherently international nature of the legal acts subject to their jurisdiction, tribunals are naturally led to apply international law.

## II. INTERNATIONAL LAW

As many tribunals have stated, investment treaties (and even the ICSID Convention) are not self-contained regimes<sup>36</sup> and there is no clinical isolation of these instruments from public international law.<sup>37</sup> As a matter of fact, international law is applicable law in all treaty-based investment disputes, as many major decisions have recognised. After dealing with general international law,

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<sup>32</sup> *ibid.*

<sup>33</sup> *ibid* 36–37.

<sup>34</sup> See, eg, Banifatemi, above (n 15) 195; *Siemens AG v The Argentine Republic*, Award (17 January 2007) ICSID Case No ARB/02/8, para 76 (‘By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.’).

<sup>35</sup> *LG&E Energy Corp et al v Argentine Republic*, Decision on Liability (3 October 2006) ICSID Case No ARB/02/1, para 85 (‘It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the treaty, thus presumably choosing the treaty and the general international law as the applicable law for this dispute. Nevertheless, *these elements do not suffice to say that there is an implicit agreement by the parties as to the applicable law, a decision requiring more decisive actions.* Consequently, the dispute shall be settled in accordance with the second part of Article 42(1).’) (emphasis added).

<sup>36</sup> See *AAPL v Sri Lanka*, Award (27 June 1990) ICSID Case No ARB/87/3, para 257. See also *National Grid plc v Argentine Republic*, Award (3 November 2008) UNCITRAL, para 87.

<sup>37</sup> See *Phoenix Action v Czech Republic*, Award (15 April 2009) ICSID Case No ARB/06/5, para 78: ‘the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles’.

and more specific instruments, we will discuss the articulation of international law with national law as applicable law.

## A. General International Law

In investment disputes, the primary role of international law is traditionally ‘the role of guarantor’ – it places restraints on the use of public authority to interfere with private rights under municipal law.<sup>38</sup> With investment *treaty* arbitration, as opposed to state contract disputes, the role of international law has evolved.

Investment treaty arbitration is always about the international responsibility of states<sup>39</sup> and international law is the *lex causae* of the investment treaty breaches.<sup>40</sup> As Y Banifatemi put it:

irrespective of whether or not an investment treaty refers to international law as the law applicable to the merits of the dispute, international law will always be the law governing the interpretation and the application of the treaty providing the basis for the arbitration, to the extent that what is at stake, in investment treaty arbitration, is the international responsibility of a State.<sup>41</sup>

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<sup>38</sup> I Alvik, ‘The Hybrid Nature of Investment Treaty Arbitration: Straddling the National/International Divide’ in CC Eriksen and M Emberland (eds), *The New International Law: An Anthology* (Leiden, Nijhoff, 2010) 92; Bishop, Crawford and Reisman, above (n 8) 445.

<sup>39</sup> F Latty, ‘Conditions d’engagement de la responsabilité de l’Etat d’accueil de l’investissement’ in C Leben (ed), *Droit international des investissements et de l’arbitrage transnational* (Paris, Pedone, 2015) 415.

<sup>40</sup> Douglas, above (n 9) rule 10, 81–90 (‘The law applicable to the issue of liability for a claim founded upon an investment treaty obligation is the investment treaty as supplemented by general international law.’); *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Decision on Annulment (21 March 2007) ICSID Case No ARB/01/7, para 72; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Annulment (3 July 2002) ICSID Case No ARB/97/3, paras 95–103.

<sup>41</sup> Banifatemi, above (n 15) 210. See also E De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge, Cambridge University Press, 2014) 27–28.

In this context, apart from the investment treaties themselves, tribunals may apply various norms of general international law,<sup>42</sup> arising out of customary international law<sup>43</sup> or general principles of law.<sup>44</sup> As it was indicated in the *ADC v Hungary* case:

The consent [to apply the provisions of the BIT] must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty. This is so since the generally accepted presumption in conflict of laws is that parties choose one coherent set of legal rules governing their relationship [...], rather than various sets of legal rules, unless the contrary is clearly expressed.<sup>45</sup>

The *LG&E* tribunal also explained in respect of Article 42(1) of the ICSID Convention that the reference to the term ‘as may be applicable’ should not be understood as if it were in some way conditioning application of international law; rather, it should be understood as referring, within international law, to the competent rules to govern the dispute at issue. According to the tribunal, this interpretation could find support in the ICSID Convention’s French version, which refers to the rules of international law ‘*en la matière*’.<sup>46</sup>

Among the primary norms of international law, arbitral tribunals often apply the international minimum standards of treatment of aliens and the customary law on expropriation.<sup>47</sup> These customary norms may be applied by *renvoi* in the investment treaty,<sup>48</sup> or to interpret its terms,<sup>49</sup> or as a ‘gap-filler’,<sup>50</sup> when the treaty is silent on a point of law.

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<sup>42</sup> See F Latty, ‘Arbitrage transnational et droit international général’ (2008) 54 *Annuaire français de droit international* 467, 475 et seq (and the annual review since 2008 on international law in investment arbitration, with P Jacob and A de Nanteuil).

<sup>43</sup> On the issue of application of customary international law see, eg, J Kurtz, ‘Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law’ in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford, Oxford University Press, 2013) 280–295.

<sup>44</sup> eg, *El Paso Energy International Company v Argentina*, Award (31 October 2011) ICSID case No ARB/03/15, para 624: ‘there [...] seems to be a general principle of law recognised by civilised nations that necessity cannot be recognised if a Party to a contract has contributed to it’. See T Gazzini, ‘General Principles of Law in the Field of Foreign Investment’ (2009) 10 *Journal of World Investment and Trade* 103.

<sup>45</sup> *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, Award (2 October 2006) ICSID Case No ARB/03/16, para 290.

<sup>46</sup> *LG&E Energy Corp et al v Argentine Republic*, Decision on Liability (3 October 2006) ICSID Case No ARB/02/1, para 88.

<sup>47</sup> C McLachlan, ‘Investment Treaties and General International Law’ (2008) 57(2) *International & Comparative Law Quarterly* 361, 378.

<sup>48</sup> See, eg, the case-law on Art 1105(1) NAFTA. P Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Alphen aan den Rijn, Kluwer Law International, 2013).

<sup>49</sup> Eg, *Rompetrol Group NV v Roumania*, Award (6 May 2013) ICSID Case No ARB06/3, para 197.

<sup>50</sup> L Ahtouk-Spivak, ‘Le droit applicable aux arbitrages en matière d’investissements’ in Leben, above n 39 at 853.

For example, the *Methanex v USA*, as well as the *Saluka v Czech Republic* tribunals applied the police powers of states as customary international law. The *Saluka* tribunal held:

[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police powers of States’ forms part of customary law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v USA* said recently in its final award, ‘[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required’.<sup>51</sup>

The tribunal acknowledged that the expropriation clause in the Netherlands-Czech and Slovak Federal Republic BIT was drafted very broadly and did not contain any exception for **\*\*\*298\*\*\*** the exercise of regulatory power. However, in using the concept of deprivation, the clause imported into the treaty the customary international law notion that a deprivation could be justified if it resulted from the exercise of regulatory actions aimed at the maintenance of public order.<sup>52</sup>

The *Methanex v USA* tribunal also recognised an ‘independent duty’ of an international tribunal to apply peremptory norms: ‘[A]s a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties’ choices of law that are inconsistent with such principles.’<sup>53</sup>

More fundamentally, because of the nature of investment arbitration, arbitral tribunals routinely resort to secondary rules of international law, primarily the law of treaties (including the rules governing the interpretation of treaties),<sup>54</sup> and the law of responsibility for internationally wrongful acts.<sup>55</sup>

Thus, customary rules on state responsibility are particularly relevant for determining compensation in case of unlawful expropriations, since expropriation clauses address instances of expropriation carried out pursuant to the BITs. In this respect, the tribunals rely almost

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<sup>51</sup> *Saluka Investments BV v The Czech Republic*, Partial Award (17 March 2006) UNCITRAL, para 262.

<sup>52</sup> *ibid* para 254.

<sup>53</sup> *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) UNCITRAL, para 24. See also *Phoenix Action, Ltd v the Czech Republic*, Award (15 April 2009) ICSID Case No ARB/06/5, para 78.

<sup>54</sup> eg *Daimler Financial Services AG v Argentine Republic*, Award (22 August 2012) ICSID case No ARB/05/1, para 254 (concerning the ‘holistic approach’ resulting from Art 31et seq of the Vienna Convention on the Law of Treaties).

<sup>55</sup> But see Douglas, above (n 9) 96–97, suggesting that Parts Two and Three of the ILC’s Articles on State Responsibility are not applicable to the responsibility in investment treaty disputes.

systematically on the *PCIJ Chorzow Factory* case<sup>56</sup> and the Draft ILC Articles on State Responsibility that reflect customary international law in this regard. As the *Siemens* tribunal explains: ‘The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.’<sup>57</sup>

The key difference between compensation under the Draft Articles on State Responsibility and the *Factory at Chorzów* case formula on the one hand, and the expropriation provision in the BIT on the other hand, is that under the former, compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’ as opposed to compensation ‘equivalent to the value of the expropriated investment’ under the Treaty. Under customary international law, the investor is entitled not just to the value of its enterprise as of the date of expropriation, but also to any greater value that enterprise has gained up to the date of the award, plus any consequential damages.<sup>58</sup>

## B. Non-Investment Instruments

Sometimes tribunals apply (or at least consider) non-investment instruments from other international law branches, mainly to address human rights or environmental considerations. This is in line with Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires that ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account together with the context (the so-called ‘principle of \*\*\*299\*\*\* systemic integration’ of treaties). Here, the question of applicable law and the rules of interpretation of treaties become inextricably linked.<sup>59</sup>

As E De Brabandere indicates, when deciding on an investment dispute, there is no reason for the tribunal to exclude *ipso facto* human rights considerations as a matter of applicable law.<sup>60</sup> Thus, they will be considered, but only in the event that the party to an investment dispute that invokes these considerations can effectively demonstrate a conflict of norms.<sup>61</sup>

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<sup>56</sup> *Case Concerning the Chorzow Factory* (13 September 1928) PCIJ, Series A, No 17. But see Douglas, above (n 9) 100–101.

<sup>57</sup> *Siemens AG v The Argentine Republic*, Award (17 January 2007) ICSID Case No ARB/02/8, para 349.

<sup>58</sup> *ibid* para 352.

<sup>59</sup> H Ascensio, ‘Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law’ (2016) 31(2) *ICSID Review – Foreign Investment Law Journal* 366.

<sup>60</sup> De Brabandere, above (n 41) 134.

<sup>61</sup> *ibid* 135.

The rules of treaty interpretation make it possible to import into investment litigation substantive norms that can rebalance the distribution of rights and obligations between states and protected investors. In *Philip Morris v Uruguay*, the interpretation of the Switzerland/Uruguay treaty by this means justified the application of customary rules on the police powers of the state.<sup>62</sup> Later, the tribunal tasked with assessment of the tobacco regulations adopted by Uruguay for the protection of public health, decided to use the World Health Organization Framework Convention on Tobacco Control as ‘a point of reference on the basis of which to determine the reasonableness of the measures’.<sup>63</sup> Since Uruguay merely implemented its obligations assumed under the Convention, it was not held liable.

The *Urbaser* tribunal also relied on Article 31(3)(c) of the VCLT to hold that ‘The BIT cannot be interpreted and applied in a vacuum’; and that it ‘has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights’. This ‘approach’ was, according to the tribunal, reflected in the applicable law clause of the treaty which provided for the application of international law. For the tribunal it proved that ‘the BIT is not framed in isolation, but placed in the overall system of international law’.<sup>64</sup>

In the same vein, in *S.D. Myers v Canada*, the tribunal analysed Canada’s obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal and held it liable, since while intending to comply with its obligations under the Convention, Canada did not choose the alternative that was least inconsistent with the NAFTA.<sup>65</sup>

In the *Maffezini v Spain* case, while addressing the investor’s obligation to conduct an Environmental Impact Assessment, the tribunal concluded that the procedure was ‘basic for the adequate protection of the environment and the application of appropriate preventive measures’ and that it was true ‘not only under Spanish and EEC law, but also increasingly so under international law’. In stating this, it relied, inter alia, on the Convention on Environmental Impact Assessment in a Trans-boundary Context.<sup>66</sup>

It should also be noted that external instruments, including soft law ones or non-applicable treaties, may be used by tribunals for argumentative (or even ‘legitimising’) purposes. In order to demonstrate the customary nature of the doctrine of state police powers, the arbitral tribunal in

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<sup>62</sup> *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, Award (8 July 2016) ICSID Case No ARB/10/7, paras 290 et seq.

<sup>63</sup> *ibid* para 401.

<sup>64</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, Award (8 December 2016) ICSID Case No ARB/07/26, paras 1200–01.

<sup>65</sup> *S.D. Myers, Inc. v Government of Canada*, Partial Award (13 November 2000) UNCITRAL.

<sup>66</sup> *Emilio Agustín Maffezini v The Kingdom of Spain* (13 November 2000) ICSID Case No ARB/97/7, para 67.

*Philip Morris v Uruguay*<sup>67</sup> referred to the Harvard Draft Convention on the International **\*\*\*300\*\*\*** Liability of States for Damage Caused in their Territory to the Person or Property of Foreigners (1960), to the Third Restatement of the Foreign Relations Law (1987), to an OECD working paper on expropriation of 2004, to which should be added in a more recent period ‘a range of investment decisions [that] have contributed to develop the scope, content and conditions of the State’s police powers doctrine, anchoring it in international law’.<sup>68</sup> Finally, to complete its demonstration, the tribunal referred to the recent treaty practice of certain states (model investment treaties of the US and Canada, as well as the EU’s trade agreements with Canada and Singapore), from which it deduced that the relevant provisions ‘whether or not introduced *ex abundanti cautela*, reflect the position under general international law’.<sup>69</sup> In *Urbaser v Argentina*, in establishing that corporations, as subjects of international law, are bound by international law obligations, the tribunal relied successively on the Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework (Ruggie Principles), the 1948 Universal Declaration of Human Rights, the General Comment of the Committee on Economic, Social and Cultural Rights No 15 of 2002 on the right to water, the resolution on the same issue of the UN General Assembly 64/292 of 28 July 2010, and the ILO Tripartite Declaration of 1977 on Multinational Enterprises and Social Policy.<sup>70</sup> Investment arbitration thus contributes to blurring the boundaries between hard and soft law.<sup>71</sup>

### C. International Law/National Law

One of the most controversial questions concerns the respective roles of the national legal order on the one hand, and the international legal order on the other,<sup>72</sup> and in particular, the interpretation of the second sentence of Article 42(1) of the ICSID Convention.<sup>73</sup> As CH Schreuer stated, ‘The applicable law in investment disputes has turned out to be a dangerous area. It takes great nautical

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<sup>67</sup> *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, Award (8 July 2016) ICSID Case No ARB/10/7, paras 290 et seq.

<sup>68</sup> *ibid* para 295.

<sup>69</sup> *ibid* para 301.

<sup>70</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, Award (8 December 2016) ICSID Case No ARB/07/26, paras 1195 et seq.

<sup>71</sup> See F Latty, ‘De la tendresse dans le monde des juges : la *soft law* devant les juridictions internationales’ in P Deumier and JM Sorel (eds), *Regards croisés sur la soft law en droit interne, européen et international* (Paris, LGDJ/Lextenso, 2018) 387 et seq.

<sup>72</sup> R Rivier, ‘L’articulation entre droit international et droit national devant les tribunaux arbitraux internationaux d’investissement’ in S Robert-Cuendet (ed), *Droit des investissements internationaux ? Perspectives croisées* (Brussels, Bruylant, 2017) 413 et seq.

<sup>73</sup> Gaillard and Banifatemi, above (n 22) 375.

skill to keep the proper balance between the Scylla and Charybdis of the two legal systems.<sup>74</sup> It must be said that Article 42(1) leads ICSID tribunals to articulate norms, not legal orders,<sup>75</sup> and as a consequence the primacy of international law may occasionally be affected.

Before the *Wena Hotels* decision,<sup>76</sup> the predominant view first formulated by the *Kl ockner ad hoc* committee<sup>77</sup> was that international law played ‘complementary’ or ‘corrective’ roles **\*\*\*301\*\*\*** and applied only in the case of *lacunae* in the law of the host state or its inconsistency with the requirements of international law. In this regard, the ad hoc committee in *Wena Hotels v Egypt* recognised the arbitrators’ freedom to resort to international law directly.

The committee upheld the tribunal’s reliance on international law. It considered that there does not seem to be a single answer as to which of the approaches to the role of international law is the correct one – the circumstances of each case may justify one or another solution. It also indicated that the use of the word ‘may’ in the second sentence of Article 42(1) indicated that the Convention ‘does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain margin and power for interpretation’.<sup>78</sup>

On the basis of the negotiation history of the ICSID Convention it concluded that both legal orders could play a role and international law could also be applied by itself:

[T]he sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. *So too international law can be applied by itself if the appropriate rule is found in this other ambit.*<sup>79</sup> (emphasis added)

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<sup>74</sup> C Schreuer, above (n 5) 75.

<sup>75</sup> M Forteau, ‘Le juge CIRDI envisag e du point de vue de son office : juge interne, juge international, ou l’un et l’autre   la fois ?’ in *Liber Amicorum Jean-Pierre Cot* (Brussels, Bruylant, 2009) 112 et seq. See *SAUR International SA v Argentine Republic*, Decision on Jurisdiction (6 June 2012) ICSID case No ARB/04/4, para 327 (confronted with the different sources of applicable law provided for by the treaty, the tribunal must not follow the principle of hierarchy but the principle of specialty: to each question must be applied the relevant norm according to its own nature).

<sup>76</sup> *Wena Hotels LTD v Arab Republic of Egypt*, Annulment Proceeding (5 February 2002) ICSID Case No ARB/98/4.

<sup>77</sup> *Kl ockner Industrie-Anlagen GmbH et al v United Republic of Cameroon and Soci et e Camerounaise des Engrais*, Decision on Annulment (3 May 1985) ICSID Case No ARB/81/2. See also *Amco Asia Corporation et al v Republic of Indonesia*, Decision on the Application for Annulment of 16 May 1986, ICSID Case No ARB/81/1, 1 ICSID Rep 509 (1993).

<sup>78</sup> *Wena Hotels LTD v Arab Republic of Egypt*, Annulment Proceeding (5 February 2002) ICSID Case No ARB/98/4, para 39.

<sup>79</sup> *ibid* para 40.

The ad hoc committee also noted that ‘when a tribunal applies the law embodied in a treaty to which Egypt is a party it is not applying rules alien to the domestic legal system of this country’, and that this might also be true for other sources of international law.<sup>80</sup>

This non-hierarchical interpretation of Article 42(1) of the ICSID Convention was subsequently upheld in numerous awards, such as *LG&E*,<sup>81</sup> *Enron*,<sup>82</sup> *Azurix*,<sup>83</sup> *Sempra*<sup>84</sup> etc. The *CMS* tribunal described it as ‘a more pragmatic and less doctrinaire approach’ allowing for the application of both domestic law and international law if the specific facts of the dispute so justify.<sup>85</sup> The *Burlington* tribunal referred to it as ‘prevailing case law’.<sup>86</sup>

Thus, it was established that Article 42(1) of the ICSID Convention

empowers the tribunal to apply either the municipal law of the host state (or the municipal laws of other states as per the host state’s conflict of laws rules) or international law depending upon the causes of action advanced by the parties within the scope of the tribunal’s jurisdiction *ratione materiae* as determined by the relevant instrument (investment treaty, investment agreement or investment authorisation).<sup>87</sup> **\*\*\*302\*\*\***

In this respect, the Annulment Decision in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* formulated what would become the so-called ‘*Vivendi test*’<sup>88</sup> based on the ‘essential’ or ‘fundamental basis’ of the claim, allowing a tribunal or ad hoc committee to distinguish between the law applicable to violations of the treaty and the proper law of the contract.<sup>89</sup>

The case was brought pursuant to the Argentina-France BIT, but some of the investors’ claims were closely interrelated with the concession contract concluded between one of the investors and the province of Tucumán, which provided for the exclusive jurisdiction of the

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<sup>80</sup> *ibid* para 44.

<sup>81</sup> *LG&E Energy Corp et al v Argentine Republic*, Decision on Liability (3 October 2006) ICSID Case No ARB/02/1, paras 95–96.

<sup>82</sup> *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, Award (22 May 2007) ICSID Case No ARB/01/3, para 207.

<sup>83</sup> *Azurix Corp v The Argentine Republic*, Award (14 July 2006) ICSID Case No ARB/01/12, para 66.

<sup>84</sup> *Sempra Energy International v Argentine Republic*, Award (28 September 2007) ICSID Case No ARB/01/6, para 236.

<sup>85</sup> *CMS Gas Transmission Company v The Republic of Argentina*, Award (12 May 2005) ICSID Case No ARB/01/8, para 116.

<sup>86</sup> *Burlington Resources Inc. v Republic of Ecuador*, Decision on Ecuador’s Counterclaims (7 February 2017) ICSID Case No ARB/08/5, para 74.

<sup>87</sup> Douglas, above (n 9) 132–33.

<sup>88</sup> Kjos, above (n 4) 110.

<sup>89</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Annulment (3 July 2002) ICSID Case No ARB/97/3.

administrative courts of Tucumán. This was the reason the tribunal declined to consider them on the merits, despite the fact that it accepted Tucumán's jurisdiction under the BIT.<sup>90</sup>

In determining the relationship between Argentina's responsibility under the BIT and the rights and obligations of the parties to the concession contract, the ad hoc committee stressed that Articles 3 and 5 of the BIT (fair and equitable treatment, full protection and security standards, prohibition of expropriation, war clause) did not relate directly to breach of a municipal contract, rather they set an independent standard. The committee referred to Article 3 of the ILC Articles which provides that 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'<sup>91</sup> Therefore, it held that each claim should be determined by reference to its own applicable law; in the case of the BIT, by international law:

In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. *Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract*, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.<sup>92</sup> (emphasis added)

The committee indicated that where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard; at most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.<sup>93</sup> It also concluded that:

[I]t is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have \*\*\*303\*\*\* been dealt with by a national court. *In such a case, the inquiry which the*

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<sup>90</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Award (21 November 2000) ICSID Case No ARB/97/3.

<sup>91</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Annulment, ICSID Case No ARB/97/3, para 95.

<sup>92</sup> *ibid* para 96.

<sup>93</sup> *ibid* para 101.

*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, including any municipal law agreement of the parties.*<sup>94</sup> (emphasis added)

Since the tribunal declined to decide key aspects of the Claimants' BIT claims on the ground that they involved issues of contractual performance or non-performance,<sup>95</sup> the award was annulled with regards to the acts of the Tucumán authorities for manifest excess of powers (Article 52(1)(b) of the ICSID Convention).<sup>96</sup> The tribunal, constituted anew, applied international law when holding that Argentina was liable for violating the fair and equitable treatment standard and the prohibition of expropriation, as set out in the BIT.<sup>97</sup>

The conclusions of the *Vivendi* decision were cited with approval by the ad hoc committee in *Azurix*, which ruled:

Each of Azurix's claims in this case was for an alleged breach of the BIT. The BIT is an international treaty between Argentina and the United States. By definition, a treaty is governed by international law, and not by municipal law. [...] In any claim for breach of an investment treaty, the question whether or not there has been a breach of the treaty must therefore be determined, not through the application of the municipal law of any State, but through the application of the terms of the treaty to the facts of the case, in accordance with general principles of international law, including principles of the international law of treaties. Bearing in mind that an investment treaty, whether bilateral or multilateral, is itself a source of international law as between the States parties to that treaty, the applicable law in any claim for a breach of that treaty can thus be said to be the treaty itself specifically, and international law generally.<sup>98</sup>

The tribunal in *LG &E Energy Corp. et al. v Argentina* indicated that the absence of a contract between the parties favours application of international law in the first place:

The fact that there is no contract between the Argentine Republic and LG&E favors in the first place, the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by the domestic law.<sup>99</sup>

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<sup>94</sup> *ibid* para 102.

<sup>95</sup> *ibid* para 108.

<sup>96</sup> *ibid* para 119.

<sup>97</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Award (20 August 2007) ICSID Case No ARB/97/3, paras 7.3.8–7.3.10.

<sup>98</sup> *Azurix Corp v Argentine Republic*, Decision on Annulment (1 September 2009) ICSID Case No ARB/01/12, para 146.

<sup>99</sup> *LG&E Energy Corp et al v Argentine Republic*, Decision on Liability (3 October 2006) ICSID Case No ARB/02/1, para 98.

The tribunal clarified that as part of the Argentine legal system, the BIT prevails over domestic law, ‘especially, inasmuch as in most of the Bilateral Treaty’s assumptions there is an express mention of international law, be it when referring to the treatment to be given to investments, or to the compensation in the event of expropriation or any other like measure, etc’<sup>100</sup> and that 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.<sup>101</sup> \*\*\*304\*\*\*

The *Enron* tribunal also justified the supremacy of international law by reference to the Argentine Constitution and the VCLT:

It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognized among the sources considered ‘the supreme law of the Nation’. It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. Consistent with this role of international law, regulatory instruments have also made specific reference to the protection of investments under the Treaty (Decree 669/00).<sup>102</sup>

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<sup>100</sup> *ibid* para 91.

<sup>101</sup> *ibid* para 94.

<sup>102</sup> *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, Award (22 May 2007) ICSID Case No ARB/01/3, para 208. See also *CMS Gas Transmission Company v The Republic of Argentina*, Award (12 May 2005) ICSID Case No ARB/01/8, para 120; *BG Group Plc v The Republic of Argentina*, Final Award (24 December 2007) UNCITRAL, para 97 (‘More importantly, the interplay between international law and municipal law under Article 8(4) of the BIT should not overlook that the former may be deemed incorporated into the latter, depending on the status conferred to international treaties and international law in general by a particular constitutional system. This is particularly relevant to the case of Argentina, whose constitutional framework and doctrine have traditionally admitted the direct application of international law whenever feasible and, at least since the constitutional reform undertaken in 1994, expressly providing for the principle that international treaties preempt provincial and federal law. Accordingly, the challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as “the supreme law of the land”, are incorporated into Argentine domestic law, superseding conflicting domestic statutes.’)

### III. National Law

Unlike international law, national law, usually the host state's, provides answers to the 'local' questions, such as the existence or scope of property rights<sup>103</sup> or contract law issues (especially, administrative contracts), to which international law does not give responses. It applies by default for assessing whether there has been a breach of contractual obligations, where the arbitration agreement in the relevant investment treaty is broad enough to encompass contract-based claims.<sup>104</sup> As Z Douglas put it: 'If the investment treaty tribunal has jurisdiction over contractual claims, and the investor has a contract with an emanation of the host state, then its contractual rights fall to be determined by the law governing the contract.'<sup>105</sup> Apart from that, in certain cases international investment tribunals need to take municipal law into account in order to determine the international law content of a treaty standard (an incidental question requiring a *renvoi* to national law).<sup>106</sup> It is also particularly relevant for assessing breaches of the so-called umbrella clauses<sup>107</sup> and can serve as the basis for counterclaims by host states.<sup>108</sup> **\*\*\*305\*\*\***

The role of national law for the assessment of treaty-based claims was clarified by the *MTD* ad hoc committee, in which the parties disagreed on the law applicable to the granting of the permits necessary for the claimants to carry out their investment in Chile:

As noted above, the *lex causae* in this case based on a breach of the BIT is international law. However it will often be necessary for BIT tribunals to apply the law of the host State, and this necessity is reinforced for ICSID tribunals by Article 42(1) of the ICSID Convention. Whether the applicable law here derived from the first or second sentence of Article 42(1) does not matter: *the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law. At the same time, the implications of some issue of Chilean law for a claim under the BIT were for international law. In short, both laws were relevant.*<sup>109</sup> (emphasis added)

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<sup>103</sup> Douglas, above (n 9) rule 4, 52–72; *Vestey Group Ltd v Venezuela*, Award (15 April 2016) ICSID Case No ARB/06/4, para 257 ('The requirements for acquiring property rights over immovable assets situated in Venezuela are governed by specific norms of Venezuelan property law. For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law.')

<sup>104</sup> Kjos, above (n 4) 171.

<sup>105</sup> Douglas, above (n 9) 40.

<sup>106</sup> See, eg, M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Alphen aan den Rijn, Kluwer Law International, 2010) 171.

<sup>107</sup> See B Samson, 'Umbrella Clauses and Contract Claims', ch 23 in this volume.

<sup>108</sup> See AK Bjorklund, 'Counterclaims', ch 17 in this volume.

<sup>109</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Decision on Annulment (21 March 2007) ICSID Case No ARB/01/7, para 72.

The committee agreed with the tribunal that in order to establish the facts of the breach of the BIT, it was necessary to consider the contractual obligations undertaken by the respondent and the claimants and their scope under Chilean law.<sup>110</sup> Thus, for assessing the fair and equitable treatment claim, the meaning of a Chilean contract was a matter of Chilean law; its implications in terms of an international law claim were a matter for international law.<sup>111</sup>

In *EnCana v Ecuador*, to assess the expropriation claim the tribunal verified the existence of property rights under domestic law even though the relevant BIT clause only referred to ‘applicable rules of international law’:

The relevant clause, Article XIII (7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT ‘shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law’. *Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.* The effect of the opening words of Article XII(4) is to permit this Tribunal to determine and apply the taxation law of Ecuador to the extent that it is necessary to do so in order to deal with a claim under Article VIII.<sup>112</sup> (emphasis added) **\*\*\*306\*\*\***

In the *Azurix* case, since all the claims were for alleged violations of the BIT, the tribunal adopted a rather limiting approach. It characterised the issues arising out of the Concession Agreement as factual elements to be considered, and dealt with the municipal law of Argentina in a part of the award headed ‘The Facts’. It explained as follows:

*Azurix’s claim has been advanced under the BIT and, as stated by the Annulment Committee in Vivendi II, the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. While the Tribunal’s inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal’s inquiry into the alleged breaches of the Concession Agreement to which Argentina’s law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration.*<sup>113</sup> (emphasis added)

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<sup>110</sup> *ibid* para 73; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Award (25 May 2004) ICSID Case No ARB/01/7, para 187.

<sup>111</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Decision on Annulment (21 March 2007) ICSID Case No ARB/01/7, para 75.

<sup>112</sup> *EnCana Corporation v Republic of Ecuador*, Award (3 February 2006) LCIA Case No UN 3481, para 184.

<sup>113</sup> *Azurix Corp v The Argentine Republic*, Award (14 July 2006) ICSID Case No ARB/01/12, para 67. See also *Energy International Company v The Argentine Republic*, Award (31 October 2011) ICSID Case No ARB/03/15, paras 135, 141.

The tribunal's approach was endorsed by the ad hoc committee, which rejected Argentina's application for annulment of the award:

In some cases, it may be an express term of the investment treaty that the host State is required to comply with specified provisions of its own municipal law. In such cases, a breach by the host State of municipal law may thus amount to a breach of the treaty. Although municipal law does not as such form part of the law applicable to a claim for breach of a treaty, *in such cases it may be necessary to determine whether there has been a breach of municipal law as a step in determining whether there has been a breach of the treaty.*<sup>114</sup> (emphasis added)

The committee indicated that, even if it had been necessary to apply Argentine municipal law in determining whether there was a breach of obligations under municipal law, the municipal law would not thereby become part of the applicable law under Article 42 of the ICSID Convention for purposes of determining whether there was a breach of the BIT. Rather, any breach of municipal law that might be established 'would be a fact or element to which the terms of the BIT and international law would be applied in order to determine whether there was a breach of' the BIT.<sup>115</sup> It clarified that Article 42(1) of the ICSID Convention 'cannot possibly be understood as having the effect that, in the absence of an express choice of law clause, the municipal law of the Contracting State will be the applicable law in claims for alleged breaches of an investment treaty'.<sup>116</sup>

A broader role for domestic law as applicable law was highlighted by the *Enron* tribunal:

The Respondent is right in arguing that domestic law is not confined to the determination of factual questions. It has indeed a broader role, as it is evident in this very case from the pleadings and arguments of the parties that have relied heavily on the Gas Law and generally the regulatory framework of the gas industry, just as they have relied on many other rules of the Argentine legal system, including the Constitution, the Civil Code, specialized legislation and the decisions of courts. The License itself is governed by the legal order of the Argentine Republic and it must be interpreted in its light.<sup>117</sup>

Since in examining the Argentine law as pertinent to various issues disputed by the parties, the tribunals concluded that there was generally no inconsistency with international law as far as the basic principles governing the matter were concerned; they applied both Argentine law and international law to the extent relevant to the decision of the claims submitted to them, while noting

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<sup>114</sup> *Azurix Corp v The Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) ICSID Case No ARB/01/12, para 149.

<sup>115</sup> *ibid* para 151.

<sup>116</sup> *ibid* para 147.

<sup>117</sup> *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, Award (22 May 2007) ICSID Case No ARB/01/3, para 206.

that in case of inconsistency between Argentine law and the treaties in force, international law would prevail.<sup>118</sup>

At the same time, as the *CMS* tribunal observed, it is not always possible to separate the various laws under consideration:

Indeed there is here a close interaction between the legislation and the regulations governing the gas privatization, the License and the international law, as embodied in the Treaty and customary international law. All of these rules are inseparable and will, to the extent justified, be applied by the tribunal.<sup>119</sup> \*\*\*307\*\*\*

## IV. European Union Law

A particular difficulty in respect of the applicable law arises in the context of the so-called intra-EU investment arbitrations, since EU law has direct effect and primacy over national law and may apply to a particular dispute.<sup>120</sup> This poses problems with regards to the autonomy of the EU (Community) legal order, first formulated in the landmark decision *Costa v ENEL*<sup>121</sup> and reiterated in particular in *Kadi I*<sup>122</sup> and in Opinion 2/13,<sup>123</sup> as it creates the risk of EU law being interpreted and applied by arbitral tribunals without control by the Court of Justice of the European Union (CJEU), or even without residual control by the courts of the Member States.<sup>124</sup> In this respect, Article 344 of the Treaty on the Functioning of the European Union (TFEU) prevents Member States from submitting a dispute concerning the interpretation or application of the TEU and TFEU to any method of settlement other than those provided for in the treaties.

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<sup>118</sup> *ibid* paras 208–09.

<sup>119</sup> *CMS Gas Transmission Company v The Republic of Argentina*, Award (12 May 2005) ICSID Case No ARB/01/8, para 117.

<sup>120</sup> See, eg, *Emilio Agustín Maffezini v Kingdom of Spain*, Award (13 November 2000) ICSID Case No ARB/97/7, where the tribunal applies the EEC Directive 85/337 of 27 June 1985.

<sup>121</sup> Judgment of 12 July 1964, *Costa v Enel*, C 6/64, EU:C:1964:66; J Czuczai, ‘The Autonomy of the EU legal Order and the Law-making Activities of International Organisations: Some Examples Regarding the Council’s Most Recent Practice’ (2012) 31(1) *Yearbook of European Law* 452.

<sup>122</sup> Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461.

<sup>123</sup> Opinion 2/13 (*Accession of the European Union to the ECHR*), 18 December 2014, EU:C:2014:2454, para 170 (‘The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law [...]’).

<sup>124</sup> Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, EU:C:2018:158, para 60.

In fact, EU law can operate on three possible levels: (i) as international law; (ii) as a distinct legal order within the EU, separate both from the national laws of EU Member States, and international law; and (iii) as part of national law.<sup>125</sup>

One of the major problems in this respect concerned the proceedings initiated pursuant to the ECT, a multilateral agreement to which the EU itself is a party. This was the case in *Electrabel S.A. v Republic of Hungary*, in which the tribunal constituted pursuant to Article 26 of the ECT considered that it was required to operate in the international legal framework of the ECT and the ICSID Convention, outside the EU:

Under Article 26 ECT and Article 42 of the ICSID Convention, the Tribunal is required to apply the ECT and “applicable rules and principles of international law.” In other words, this Tribunal is placed in a public international law context and not a national or regional context. [...] This ICSID arbitration is a dispute resolution mechanism governed exclusively by international law. As a result of the Tribunal’s international status under the ECT and the ICSID Convention, several of the Commission’s submissions cannot be taken into account in this arbitration, because they are based on a hierarchy of legal rules seen only from the perspective of an EU legal order applying within the EU, whereas this Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside the European Union.<sup>126</sup>

The tribunal admitted that EU law was a *sui generis* legal order, presenting different facets and having a multiple nature.<sup>127</sup> When analysing it as part of international law, the **\*\*\*308\*\*\***tribunal did not find any fundamental difference in nature that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law.<sup>128</sup> Thus, the tribunal concluded that EU law formed part of the rules and principles of international law applicable to the parties’ dispute under Article 26(6) of the ECT. Moreover, EU law, as part of Hungary’s national legal order, was also to be taken into account as a fact relevant to the parties’ dispute.<sup>129</sup>

On 6 March 2018, the European Court of Justice (ECJ) adopted a controversial decision in *Achmea v Slovak Republic* declaring the arbitration clauses in intra-EU BITs to be incompatible with EU law, as they were precluded by Articles 267 and 344 of the TFEU.<sup>130</sup> However, arbitral

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<sup>125</sup> *Electrabel SA v Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) ICSID Case No ARB/07/19, para 4.20.

<sup>126</sup> *ibid* para 4.112.

<sup>127</sup> *ibid* paras 4.117–8.

<sup>128</sup> *ibid* para 4.126.

<sup>129</sup> *ibid* paras 4.195, 4.127.

<sup>130</sup> Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, EU:C:2018:158, para 60.

tribunals found a way around *Achmea*, thus restricting its practical consequences. In particular, tribunals considered that *Achmea* did not affect proceedings initiated pursuant to the ECT.

In *Eskosol v Italy*, the tribunal did not consider that ‘applicable rules and principles of international law’ in Article 26(6) of the ECT operate as ‘a direct and broad *renvoi* to the EU Treaties’. According to it, the Article could not be interpreted as encompassing EU law, which is ‘a regional and not a worldwide system of law’.<sup>131</sup> At the same time, the tribunal stated that its conclusion that EU law was not part of the ECT’s applicable law did not mean that an ECT tribunal could not consider EU law as a matter of fact if potentially relevant to the merits of a dispute, ‘just as an ECT tribunal may consider a State’s domestic law as part of the factual matrix of a case’; considering EU law to that extent ‘would be perfectly consistent with the tribunal’s interpretation of Article 26(6)’.<sup>132</sup>

In *RREEF v Spain*, the tribunal concluded that the *Achmea* judgment was inapposite in that case, since the applicable law in *Achmea* was the Netherlands–Czech and Slovak Federative Republic BIT exclusively concluded between two EU Member States. This was not the case of the ECT which ‘binds both the EU and its Member States on the one hand and non-EU States on the other hand’.<sup>133</sup>

In this context, in the *Moldova v Komstroy* ruling, rendered on 2 September 2021, the ECJ extended the *Achmea*’s reasoning to intra-EU disputes initiated under ECT.<sup>134</sup> Furthermore, on 5 May 2020, the majority of EU Member States adopted an agreement for the termination of the intra-EU BITs, which entered in force on 29 August 2020.<sup>135</sup> This agreement is intended to mark the end of intra-EU BIT arbitration, and thus the issue of the applicable law within the EU context may also disappear in the future. At the same time, the question remains whether arbitral tribunals will abide by the *Achmea* and *Komstroy* decisions. **\*\*\*309\*\*\***

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<sup>131</sup> *Eskosol SpA in liquidazione v Italian Republic*, Decision on Termination Request and Intra-EU Objection (7 May 2019) ICSID Case No ARB/15/50, para 121.

<sup>132</sup> *ibid* para 123. See also Statement of Dissent of Pr MG Kohen in *Theodoros Adamakopoulos et al v Republic of Cyprus* (3 February 2020) ICSID Case No ARB/15/49.

<sup>133</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*, Decision on Responsibility and on the Principles of Quantum (30 November 2018) ICSID Case No ARB/13/30, para 211. See D Azaria, ‘The Renewable Energy Arbitrations Under the Energy Charter Treaty’, ch 10 in this volume.

<sup>134</sup> Judgment of 2 September 2021, *Republic of Moldova v Komstroy LLC*, Case C-741/19, EU:C:2021:655.

<sup>135</sup> Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, [2020] OJ L169/1–41.

## V. Conclusion

The analysis of the main decisions on the substantive law applied to investment disputes allows to question the very nature of international investment arbitration as public international law. One could agree that investment arbitration is rather of a *sui generis* nature ‘which cannot be adequately rationalized either as a form of public international or private transnational dispute resolution’<sup>136</sup> or a ‘hybrid legal process relying on and applying both municipal and international law in one integrated legal process’.<sup>137</sup> It comprises characteristics of commercial arbitration and inter-state adjudication, public (administrative or constitutional) and private law.

Regarding the private law aspects, it recognises party autonomy and in particular allows the parties to choose the law that would govern their dispute. It also uses some concepts and techniques peculiar to private international law, such as characterisation, choice of law and *dépeçage*.

Unlike in public international law, in investment dispute settlement the municipal and international law apply conjunctly and perform complementary roles. At the same time, in the context of investment treaty arbitration, the role of national law is quite limited. It may govern contractual issues, where contract-based claims are encompassed by an arbitration clause or apply to counterclaims of the host states. Otherwise, if claims are treaty-based, national law is considered because international law makes it relevant and some tribunals even go as far as to limiting its role to the traditional role of a fact. EU law in inter-EU disputes is usually treated by tribunals as part of national law, *id*, as a fact, since a different approach would have deprived them from jurisdiction.

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<sup>136</sup> Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74(1) *British Yearbook of International Law* 151, 152–53.

<sup>137</sup> Alvik, above (n 38) 91.