The Role of the Domestic Law of the Host State in Determining the ratione materiae Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory

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Introduction

I. The Relevance of the Host State Domestic Law in Investment Treaty Arbitrations: Revival of the Classical 'Localisation' Theory?

1. Beginning in the late 1950s and continuing well into the 1960s and the 1970s, Western European countries started concluding bilateral investment treaties with developing countries with the aim of legally protecting the overseas investments of their nationals in the latter countries.[1] This process of concluding bilateral investment treaties got a momentum when the United States and later Canada also joined the club by concluding many bilateral investment treaties in the 1980s and the 1990s.[2] Bilateral investment treaties were apparently invented by the North mostly in response to a trend of 'localisation' of foreign investment contracts and disputes in the developing world.[3] With the pervasive decolonisation in the world in the 1960s, and consequently, the emergence of many new developing countries, old and new Southern countries, now having a numerical majority in international organisations, in particular in the General Assembly of the United Nations ("UN"), went about updating the 'Calvo' doctrine[4] and attempted to create a legal framework pursuant to which the laws of the host state were considered as the applicable law to contractual disputes arising from foreign investment contracts. Furthermore, according to this 'localisation' theory, the national court of the host state, rather than courts of any other country or international arbitration, was the competent forum for deciding disputes arising out of foreign investment contracts. These efforts materialised in various forms and guises but were most notably reflected in the three Resolutions passed by the UN General Assembly in the 1960s and 1970s.[5] In the scholarly writings, this theory of leaving the destiny of foreign investment disputes in the hands of sovereign local elements (i.e., local laws and local courts) was known as the 'localisation' theory.[6]
2. The Western world understandably disliked this theory and did all it could to wipe out its effects on foreign investment contracts and disputes. In particular, through bilateral investment treaties, European and North American countries intended to insulate the investments of their subjects in developing countries from the interference of the laws and

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[1] R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2012) 6-7; JW Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24(3) The International Lawyer 656-657.

[2] R Dolzer and C Schreuer (n 1) 7; JW Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (n 1) 657-658.

[3] Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 206.

[4] For the genesis and specifications of the 'Calvo' doctrine, see Chapter 5, Section One.

[5] 'Permanent Sovereignty over Natural Resources' GA Res 1803, XVII, 14 December 1962; 'Declaration on the Establishment of a New International Economic Order' GA Res 3201, S-VI, 01 May 1974; 'Charter of Economic Rights and Duties of States' GA Res 3281, XXIX, 12 December 1974.

[6] The term 'localisation' was used, *inter alia*, by Sornarajah. See M Sornarajah (n 3) 116. Another commentator uses the term 'relocalisation' for the same theory put forward by developing countries in the 1960s-1980s. See VC Igbokwe, 'Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word been Said?' (1997) 14(1) J Int'l Arb 99, 116-123.

the courts of the host state.[7] The 'treatification'[8] of international investment law sought to elevate the mere domestic public and private law relationship between states and foreign investors to an international level where international law was expected to overtake the domestic law of the host state and was supposed to have the last say on all matters. Furthermore, under the recently designed scheme of bilateral investment treaties, international law was believed to be uttered principally by international arbitral tribunals not the courts of the recipient state. Therefore, arbitration was opted for as the preferred method of dispute resolution under the regime of bilateral investment treaties. In comparison to national judges, arbitrators usually find it easier to apply international law to an international investment dispute.[9]

3. It could be argued that the wave of 'localisation' movements of developing countries represented by three Resolutions of the UN General Assembly was, *inter alia*, abated by the vast conclusion of bilateral – and later multilateral – investment treaties.[10] Under the new legal framework of the protection of foreign investments, even the most supportive scholars of 'localisation' theory admitted that the laws and the courts of the host state are not determinative of the fate of disputes arising out of the bilateral investment treaties.[11] As time went by, the 'localisation' theory was almost forgotten by all the stakeholders.

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[7] J Voss, 'The Protection and Promotion of European Private Investment in Developing Countries-An Approach Towards A Concept For A European Policy on Foreign Investment: A German Contribution' (1981) 18(3) Common Market Law Review 363, 369; K Kunzer, 'Developing a Model Bilateral Investment Treaty' (1983) 15 Law & Policy of International Business 273, 292-293; JW Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (n 1) 659-661.

[8] The term 'treatification' in this context has been devised by Salacuse. JW Salacuse, 'The Treatification of International Investment' (2007) 13(1) Law and Business Review of the Americas 155. See also JW Salacuse, *The Three Laws of International Investment: National, Contractual, and International Framework for Foreign Capital* (OUP 2013) 331-332.

[9] O Spiermann, 'Applicable Law' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 94. See also HE Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP 2013) 24.

[10] In the words of Judge Brower and one of his former legal clerks, "the 'Southern' tsunami of NIEO [New International Economic Order] and the Charter [of Economic Rights and Duties of States] eventually abated. The subsequent conclusion of thousands of bilateral investment treaties, and, more recently, several multilateral investment treaties, in which States record their true, practical interests, have replaced the 'soapbox' Resolutions of the General Assembly…" CN Brower & S Melikian, ''We Have Met The Enemy And He Is US!' Is the Industrialized North 'Going South' on Investor–State Arbitration?' (2015) 31(1) Arb Int'l 22. In this respect, the *Antoine Goetz* tribunal considered that the emergence of bilateral investment treaties revived the role of international law in international investment disputes:

> 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 comeback of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors.

Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999 [20]. The English translation of the Award can be found in (2001) XXVI Yearbook Commercial Arbitration 24, 36.

[11] In consequence of these developments, even a commentator like Sornarajah, who is known to be always supportive of the localisation-related theories, concedes that when subject to bilateral investment treaties, international investment arrangements will slip out of the hands of domestic laws and national courts of the host state and will fall in the domain

4. Bearing these observations in mind, one would expect that international law is controlling in the resolution of disputes arising out of bilateral investment treaties. To be sure, it has been stated time and again by many investment treaty tribunals that in resolving disputes submitted to it, the investment treaty arbitral tribunal should apply the underlying investment treaty in tandem with rules and principles of international law.[12]
5. Generally speaking, this statement is correct. Indeed, in cases where the investor invokes the substantive rights conferred by an investment treaty (like national treatment or fair and equitable treatment), international law will be controlling since the question is whether the recipient state has violated the international standards of protection offered by the relevant international treaty. To be more accurate, however, the absolute statement that international law governs all aspects of disputes arising out of investment treaties should be more scrutinised. Two points are in order. Firstly, although not explicitly stated, the statement that international law governs investment treaties seems to concern the merits of the dispute rather than the jurisdiction of the arbitral tribunal.[13] In this regard, the ICSID Annulment

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of international law and international arbitration: "The proposition that a State contract falls within the domestic sovereignty of a host State may not hold valid where the investment made in pursuance of it is protected by a bilateral investment treaty or an international convention like the Convention on the Settlement of International Disputes [sic]." M Sornarajah, 'The Climate of International Arbitration' (1991) 8(2) J Int'l Arb 47, 66, 81-86.

[12] See, e.g., *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 03 July 2002 [102] (expressing that: "[…] 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, including any municipal law agreement of the parties."); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 [116] (observing that: "In addition to the provisions of the Agreement, the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions […] for which purpose the Arbitral Tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice […]"); *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]-[292] (stating that: "In the Tribunal's view, by consenting to arbitration under Article 7 of the BIT […] the Parties also consented to the applicability of the provisions of the Treaty […] Those provisions are Treaty provisions pertaining to international law. […] The consent 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 […] The sole exception to the foregoing is Article 4(3) of the BIT which provides: "The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made." In the present case, that law is Hungarian law. As the reference to domestic law is used for one isolated subject matter only, it must be presumed that all other matters are governed by the provisions of the Treaty itself which in turn is governed by international law.")

[13] A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 77 (making a distinction between "the law applicable to the substance of the dispute" and "the law applicable to jurisdictional issues"). On the same point, it should be recalled that Article 42 of the ICSID Convention on applicable law is not helpful in determining the applicable law to jurisdiction. In *CMS v. Argentina*, the tribunal correctly said: "Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions…" The 'consent instrument' under examination in that case was an international investment agreement, which in turn has an express or implied *renvoi* to the national law of either of the contracting states in some respects including on matters affecting the jurisdiction of the tribunal. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 [88]. The tribunal in *Noble Energy v. Ecuador* also adhered to this viewpoint: "The Tribunal is of the opinion that Article 42(1) is irrelevant for purposes of jurisdiction. Article 42 of the ICSID Convention is a conflict rule which deals with the law governing the merits of the dispute […]

Committee in *Azurix v. Argentina* made it clear that it is to the allegations of the breach of the investment treaty that international law applies to the exclusion of domestic law:

> 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 […][14]

6. It is very well conceivable, and, in fact, it happens not infrequently, that in respect to a matter concerning the jurisdiction of the investment treaty tribunal, the underlying investment treaty makes reference to domestic laws for the determination of a given issue. In such circumstances, the domestic law will have a significant role to play as 'law' in resolving the jurisdictional matter at stake.[15]
7. The second point is that many terms used in an investment treaty are generic and mostly not defined or otherwise directly regulated in the investment treaty itself (e.g., 'property', 'asset', 'investment', 'national' etc.). To be sure, an investment treaty is an agreement that regulates the relations between two or more states on the subject of mutual foreign

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Jurisdiction is a different matter. It is not subject to this conflict rule but is governed by Article 25 of the ICSID Convention." *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad,* ICSID Case No. ARB/05/12 Decision on Jurisdiction, 05 March 2008 [57]. See also *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 [68]; C Schreuer *et al*, *The ICSID Convention: A Commentary* (CUP 2009) 550-552; E De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 123.

[14] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 01 September 2009 [146]. See also *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011 [130] (stating that: "The Claimant relies on Argentina's responsibility for the violation of various provisions of the BIT [...] the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions.")

[15] In this regard, see *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 [47]-[52] (where the tribunal states that "[b]oth Parties agree, and rightly so, that the Tribunal's jurisdiction is governed by the ICSID Convention, by the Bolivia-Chile BIT […] and, to the extent the latter refers to it, by Bolivian law." Having noted that as per Article I(2) of the Bolivia-Chile BIT, 'investment' is defined as any kind of assets or rights related to an investment made in accordance with the laws and regulations of the host state, the tribunal concluded that: "… Bolivian law applies to determine (i) whether Quiborax and Allan Fosk were shareholders of NMM at the time the dispute arose in June 2004, and (ii) whether the Claimants' purported investment was made "in accordance with the laws and regulations" and the "legal provisions" of Bolivia […] Both Parties agree that these issues are governed by Bolivian law"; *Churchill Mining PLC v. Republic of Indonesia*, ICSID Case No. ARB/12/14 & *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB12/40, Decisions on Jurisdiction for both Cases, 24 February 2014, both at [86] (stating that: "The Tribunal's jurisdiction is contingent upon the provisions of the ICSID Convention on the one hand, and of the […] BIT, […] on the other hand. In addition, where an international law instrument refers to jurisdictional requirements governed by the municipal law of a Contracting State, that municipal law shall also govern the jurisdiction of the Tribunal to the extent provided by the BIT."); M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2017) 1-3.

investment. As such, the rights and duties of the state contracting parties, as well as the investors availing themselves of such treaties, are determined by these treaties. However, no investment treaty constitutes a self-standing regime. It is dependent on other sources of law to become operative. It is submitted that investment treaties are grounded on two legal pillars: international law and domestic law.[16] Therefore, in addition to the resources enumerated in Article 38(1) of the Statute of the International Court of Justice ("ICJ"),[17] either by expression or by implication, rules of domestic law may also be read into an investment treaty in order to supplement it and make it a complete legal system. Indeed, to avoid a situation of *non liquet*, an investment treaty tribunal should refer to an applicable body of law to define the open-textured terms and concepts in investment treaties exemplified above (e.g., asset) and apply the germane legal rules to the questions at issue. As such, an arbitral tribunal should first identify and describe the question at stake and then recognise the law applicable to it, which could be either international or municipal law.

8. The main task of an arbitral tribunal is to discern and to distinguish the areas of application of each legal system. In this way, no conflict will arise between the application of municipal law and international law. According to Fitzmaurice, when one makes a distinction between the international field and the domestic field, there will be no conflict between the two legal systems as each body of law will operate and will have supremacy within its own

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[16] *Asian Agricultural Products v. Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990 [19]-[21] (stating: "[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 …"; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08 December 2000 [79] (noting that "… the IPPA is a fairly terse agreement of only seven pages containing thirteen articles. The parties in their arguments have not treated it as containing all the rules of law applicable to their dispute, and this is also the view of the Tribunal…"; *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 [97] (citing the above-mentioned statement from *Asian Agricultural Products v. Democratic Republic of Sri Lanka* Award with approval].

[17] Article 38(1) of the Statute of the ICJ reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

realm.[18] In this sense, "[n]ational law may be part of the 'applicable law' either governing the basis of a claim or more commonly governing a particular issue."[19]

9. With these points in mind, I argue that the applicable law to an investment treaty dispute, in its totality, is a combination of international and domestic law.[20] In other words, one can consider that domestic law can indeed play a role in the settlement of disputes arising out of international investment treaties, in particular, when matters concerning the jurisdiction of an investment treaty tribunal are at stake.
10. Indeed, through a proper review of the terms of bilateral investment treaties, as well as the more recent practice of investment treaty tribunals, one can readily recognise the role assigned to domestic laws in settling a number of jurisdictional issues in investment treaty arbitrations. To be more precise, it is axiomatic that the subject-matter jurisdiction of an investment treaty tribunal revolves around the concept of 'investment'. It is submitted that, in most cases, it is the domestic law of the host state which determines whether there are binding and enforceable rights underlying investments which are subject to an investment treaty claim.[21] Furthermore, it is the domestic law of the host state which determines whether the investment has been established legally and is thus capable of protection by

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[18] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Collected Courses of the Hague Academy of International Law 68. See also J Crawford (ed), *Brownlie's Principles of Public International Law* (8th Edition, OUP 2012) 110 (observing that each system of national and international law "is supreme *in its own field*; neither has hegemony over the other"); O Spiermann (n 9) 108 (stating that in investment treaty cases, "international and national law gain their own and exclusive fields of application"); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 [66] (holding that "Article 42(1) has been the subject of controversy on the respective roles of municipal law and international law. It is clear from the second sentence of Article 42(1) that both legal orders have a role to play, which role will depend on the nature of the dispute and may vary depending on which element of the dispute is considered."); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007 [207] (noting that: "While on occasions writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognized …")

[19] J Crawford (n 18) 52.

[20] *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, 09 March 1998 [30] (stating that "[i]t is of interest to note in this respect that the various sources of the applicable law [...] including the laws of the Contracting Party, the Agreement, other special agreements connected with the investment and the general principles of international law, have all had an important and supplementary role in the considerations of this case as well as in providing the basis for the decision on jurisdiction and the award on the merits [...]"); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [116]-[117] (observing that the "more pragmatic and less doctrinaire approach [is] allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies." The tribunal further found that there is a 'close interaction' between the laws of Argentina, the underlying contract, and international law "as embodied both in the Treaty and in customary international law." It said that "all these rules are inseparable and will, to the extent justified, be applied by the Tribunal."); A Newcombe & L Paradell (n 13) 86; F Grisel, 'The Sources of Foreign Investment Law', in Z Douglas, J Pauwelyn, JE Viñuales (eds), *The Foundations of International Investment Law* (OUP 2014) 223.

[21] See, for instance, *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015; *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, Award, 16 April 2014; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL *(formerly EnCana Corporation v. Government of the Republic of Ecuador),* Award, 03 February 2006; *Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award, 16 September 2003; *William Nagel v. The Czech Republic,* SCC Case No. 049/2002, Final Award, 09 September 2003.

the investment treaty.[22] Questions like the existence of rights/interests underlying investments and the legality of the investment are significant questions of jurisdiction *ratione materiae* which should be answered by reference to domestic law. Such references to domestic law for the determination of these threshold issues arguably gives the laws of the host state a prime role in settling disputes arising out of investment treaties. To assimilate the importance of domestic laws of the host state in this regard, it is sufficient to bear in mind that the jurisdictional conditions of an investment treaty tribunal are cumulative. Therefore, if only one pre-condition is non-existent, the whole case may be dismissed. This by itself explains the all-importance of local laws of the host state in determining the outcome of an investment treaty case.

11. Furthermore, as the recent practice of investment treaty tribunals reveals, courts of the host state have now a more determinative role in the resolution of investor-state disputes. For instance, there are clauses in certain investment treaties that require investors to resort primarily to the courts of the host state for a defined period (like 18 months) before initiation of their arbitration case. This, on the surface, gives a chance to the courts of the host state to resolve the dispute before the investor could bring the case to international arbitration. Before the 2010s, these preconditions were effectively ignored by investment treaty arbitral tribunals and an investor who had failed to use local remedies for the defined period of time was absolved by the arbitral tribunal, either on the basis of the doctrine of 'futility' or by circumventing the requirement by resorting to the MFN clause of the underlying investment treaty.[23] Recent practice, however, demonstrates that such clauses are being more effectively interpreted nowadays. In point of fact, according to the more recent decisions on this matter, when the treaty so requires, before filing its case before an arbitral tribunal, an investor has to use local remedies for the defined period of time and non-compliance with such a precondition would have serious jurisdictional or admissibility consequences for the investor's case.[24] This development gives a more prominent role to

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[22] See, for example, *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/07/3, Award, 19 May 2010; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Award, 16 August 2007; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 04 October 2013; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 15); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 08 March 2017; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014.

[23] See Chapter 7, subsection A.

[24] See, for instance, *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (declining jurisdiction due to the claimant's failure to comply with the 18-month local courts requirement provided for by Article 8 of the Argentina-UK BIT and finding that the MFN clause did not extend to international dispute resolution issues); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (finding by majority that the claimant does not have yet standing to assert its claims under the treaty because the investor had failed to observe the 18-month recourse to-local-courts requirement set forth in Article 10 of the Argentina-Germany BIT and finding that the MFN clause could not be used by the claimant to circumvent the conditions precedent to arbitration laid down in Article 10 of the BIT.) (The claimant's subsequent attempts to have this award annulled failed. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, 07 January 2015, Decision on Annulment); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 02 July 2013 (finding that recourse

the courts of the host state as the first stop in the resolution of investment disputes. Moreover, the findings and the practice of the courts of the host state have in more recent years become the first reference book for arbitration tribunals when dealing with matters of municipal law in an investment treaty case.[25] For instance, if the question is whether the investor has committed a crime of bribery in the course of establishment of its investment, arbitral tribunals usually refer to the general practice of the courts of the host state in the application of municipal penal laws concerning bribery or to their specific rulings regarding the alleged bribery in question. These and other similar examples show that the courts of the host state which by the emergence of bilateral investment treaties were stripped of any function in the resolution of foreign investment disputes have now regained some of the lost roles in the field of investor-state arbitration.

12. The ever-increasing role of the laws and the courts of the host state in investor-state disputes is not limited to the practice of investment treaty tribunals. To be sure, when one reviews the text of the more recent investment treaties, one plainly sees that states are assigning more and more tasks to be discharged by the laws and the courts of the recipient state.
13. When one recalls that the two pillars of the 'localisation' theory were: (i) disputes arising out of foreign investment contracts should be resolved by reference to the host state law, and (ii) disputes arising out of foreign investment contracts should be resolved by the national courts of the host state and then considers this 'creeping' growth of the role of the municipal laws and municipal courts of the host state in the resolution of investment treaty arbitration disputes, one may pause to ponder the question of the overall impact of this 'remarkable comeback' of municipal laws and courts on the whole regime of investment treaty arbitration. Indeed, keeping these developments in law in mind – regarding the role of the laws and the courts of the host state in investment treaty arbitrations – it is not untenable to suggest that the forgotten doctrine of 'localisation' – which was once applied to foreign investment contracts – has been revived in the land of investment treaty arbitrations to some extent.

II. Questions and Arguments

14. In light of the above, the main research question that this Thesis seeks to answer is (a) what is the role of domestic law in the jurisdiction *ratione materiae* of an investment treaty tribunal? and (b) to what extent has the 'localisation' theory been revived in light of the current role of the host state law in jurisdictional and other matters in investor-state arbitrations and the growing importance of the role of the courts of the host state in the resolution of investment treaty cases?

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to local courts in Article VII.2 of the Turkey-Turkmenistan BIT to be an impermissible requirement and precondition and eventually finding that it lacked jurisdiction over the dispute.)

[25] See, for instance, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 07 July 2004 [55]; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 05 June 2007 [96]-[97]; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 [236]; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 21) [175]; *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 [509].

15. To find the answer to this main research question, the two Parts of this Thesis will try to ask and answer a number of sub-questions. In Part I, the Thesis enquires about the ensuing questions: (i) Does domestic law apply in investment treaty arbitrations? (ii) If domestic law is applied in investment treaty arbitrations, is it applied only as 'fact', as held by the PCIJ in *Certain German Interests in Polish Upper Silesia*,[26] or is it applied as 'law'? (iii) What is the role of domestic law, in particular, the domestic law of the host state, in determining the jurisdiction of an investment treaty tribunal? (iv) More specifically, what is the function of the domestic law of the host state in determining the jurisdiction *ratione materiae* of an investment treaty tribunal (which questions of jurisdiction *ratione materiae* are governed or impacted by host state law)? (v) What are the legal grounds for the application of domestic law of the host state to the questions of jurisdiction *ratione materiae* of an investment treaty tribunal? (vi) What are the legal consequences of the application of host state law to the jurisdiction *ratione materiae* of an investment treaty arbitral tribunal? (vii) How should an investment treaty tribunal ascertain the contents of the host state law? In Part II, the Thesis will look for answers for the following questions: (i) What were the roots, tenets, and pillars of the 'localisation' theory and what happened to this theory? (ii) What elements were responsible for the disappearance of the 'localisation' theory? (iii) More specifically, what was the role of bilateral investment treaties in wiping out the 'localisation' theory? (iv) Exploring the current state of jurisprudence and trends in investment treaty rulemaking, what can one say regarding the current role of the host state law in investment treaty arbitrations; (v) In the same vein, being mindful of the current state of jurisprudence and trends in investment treaty rulemaking, what can one say regarding the role of the host state courts in investment treaty arbitrations? (vi) Recalling answers to all previous questions in Part I and Part II of this Thesis, to what extent can one claim that the forgotten 'localisation' theory has been revived in the field of investment treaty arbitrations?
16. In short, this Thesis seeks to show in Part I that domestic law of the host state, and in certain instances, domestic law of the home state, applies in investment treaty arbitrations. In some cases, mostly matters of merits entailing an analysis as to whether the host state has complied with the treaty's substantive standards of protection as well as in issues of compensation, domestic law is applied principally in its 'factual' cloak. However, as will be shown, in a number of important jurisdictional matters, particularly matters concerning the jurisdiction *ratione materiae*, the laws of the host state are applicable as 'law', thus, directly determining the jurisdictional questions before an investment treaty tribunal. These areas of influence of the domestic law include, amongst other things, the legality of the investment and the creation/existence of property rights constituting investments. There are two principal grounds which warrant the application of domestic law of the host state as the 'law' applicable to these jurisdictional questions: first, the agreement of the contracting parties in the underlying investment treaty, and second, the nature of the issue which requires the application of the host state law. In the latter situations, although the parties to the treaty do not expressly refer to the application of domestic law to a given issue, they nevertheless use concepts like 'national', 'property', 'asset' etc. which, absent a definition in the treaty itself or through subsequent agreement or practice, could only be

[26] *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*), Judgment, P.C.I.J. Rep. Series A, No. 7, 1926 (25 May 1926) p 19.

determined pursuant to an analysis of domestic law.[27] Indeed, when these concepts have not otherwise been defined by the parties in the treaty or through subsequent agreement or practice, one would be left with a situation that customary international law has no answer to these issues. To avoid a situation of *non liquet*, the tribunal should refer to a body of law which has an answer to these questions. In such instances of a vacuum in international law, the application of general principles of law and conflict of laws rules leads to the application of local laws to the jurisdictional questions before the tribunal. It is further submitted that the application of the host state law to these subject-matter jurisdiction questions does entail important legal consequences for the tribunal's decisions on its competence, sometimes ending with dismissing jurisdiction to the whole case. As will also be established in Part I, there are reliable methods to ascertain the contents of the host state law in order to approach the above-mentioned threshold questions, chief amongst them being the case law and practice of the national courts of the host state.

17. Part II of the Thesis will show that the 'localisation' theory with its tendency to dominate the laws and the courts of the host state over foreign investment disputes was seriously defeated by a flood of commentaries and arbitral awards, but most importantly by the advent of bilateral investment treaties, equipping foreign investors with the unprecedented opportunity to avail themselves directly of international arbitration against the host state for seeking redress against violations of treaty standards governed principally by international law. However, as will be demonstrated, recent trends in investment treaty lawmaking and the jurisprudence of investment treaty tribunals now consider a much more influential role for the laws and courts of the host state, which in some respects is reminiscent of the then 'localisation' theory. Based on these developments, and the answers already provided to questions in Part I, it is my considered argument that the 'localisation' theory has been partially revived in the field of investment treaty arbitration.

III. Structure

18. This Thesis is divided into two Parts. Part I concerns the role of domestic law in investment treaty arbitrations. In particular, the focus in Part I will be on the function of the domestic law of the host state in determining the jurisdiction *ratione materiae* of an investment treaty tribunal. This Part is broken into four Chapters (Chapters 1-4). Building on what has transpired in Part I, Part II of this Thesis entails an analysis of the 'localisation' theory and considers whether it has been revived in the field of investment treaty arbitration through the latest developments in the practice of investment treaty tribunals and trends in investment treaty rulemaking. Three Chapters comprise Part II (Chapters 5-7). The contents of each of these seven (7) Chapters are briefly described below.
19. **Chapter 1**: Following this Introduction, the first Chapter examines the role of domestic law (whether that of the host state or the home state) in matters of jurisdiction and merits in investment treaty arbitrations in general. This Chapter will pinpoint the situations that domestic law applies as 'law' and the situations that this body of law is taken into account as 'fact'. The function of Chapter 1 is, thus, outlining and flagging the role of the domestic law in investment treaty arbitrations in general.
20. Having set out the role of domestic law in investment treaty arbitrations in general, the following two Chapters will focus on the two particular subject-matter jurisdiction issues foreshadowed in Chapter 1, i.e., the legality requirement and the existence and creation of

[27] J Crawford (n 18) 54.

private law rights/interests underlying investments. These two Chapters will demonstrate the basis on which the internal laws of the host state apply to these questions in investment treaty arbitrations and will show what legal consequences would follow from the application of the local laws of the host state to these jurisdictional prongs. Furthermore, these twin Chapters will be followed by another Chapter which will examine the modality by which the contents of the host state domestic law should be ascertained by investment treaty tribunals. Thus, with the scene being set in Chapter 1 for more technical issues, **Chapter 2** of this work moves on to consider a particularised issue of subject-matter jurisdiction and the role that the laws of the host state play in the determination of the related question. The specific subject-matter jurisdiction question that Chapter 2 attends to is the legality requirement. **Chapter 3** looks into a distinct but subject-matter jurisdiction-related question of the creation and the existence of property rights underlying investments and the function that host state law carries out in resolving discrepancies in this connection. Unfortunately, many of the awards and literature which have found the laws of the host state applicable to the question of the creation and the existence of property rights have done so in a conclusory manner and without much reasoning. In particular, these conclusions have been, more often than not, totally divorced of the required conflict of laws analysis when such an analysis is required. This Chapter will, thus, demonstrate that in many occasions, a classic conflict of laws analysis attests to the application of the host state law to the question of the creation and the existence of property rights constituting investments. **Chapter 4** of this Thesis will then consider the question of the modality of ascertaining the contents of the laws of the host state. The discussions in Chapter 4 apply equally to both issues of subject-matter jurisdiction discussed in Chapters 2 and 3, i.e., the legality requirement and the creation and existence of rights/interests underlying investments.

21. In **Part II** of this Thesis, I turn to the question of whether, in light of the recent developments, the theory of 'localisation' has been revived in the context of investment treaty law. In order to do so, in **Chapter 5**, I go through a historical review of the theory of 'localisation'. In the course of this discussion, I will first move on to review the genesis and the historical background of this theory. In particular, the examination will demonstrate the considerable endeavour that developing countries went through on various fronts to strengthen this theory. The discussion will then be followed by exploring the contents of this legal theory in its heyday, especially in the period of the 1960s-1980s. As will be seen, the 'localisation' theory rested on two pillars: **First**, laws of the host state govern the foreign investment contract and the consequent contractual dispute. **Second**, the competent forum for resolving any contractual discrepancies between the host state and the foreign investor is a court and/or a tribunal of the host state. Finally, the consideration of the classic 'localisation' theory will come to an end by attending to the nadir of the theory, and, in particular, the role that bilateral investment treaties played in the fall of this theory. **Chapters 6 and 7** of this Thesis undertake to examine whether the 'localisation' theory has been revived in the context of investment treaty law in light of the recent developments of this body of international law. As was alluded to above, the classic 'localisation' theory was founded on two principles: **First**, laws of the host state govern the foreign investment contract and the consequent contractual dispute. **Second**, the competent forum for resolving any contractual discrepancies between the host state and the foreign investor is a court and/or a tribunal of the host state. As noted above, Chapters 1 to 4 of this Thesis deal

with the role of the host state law in the resolution of investment treaty disputes in general and the role of such law in the settling of matters of subject-matter jurisdiction in particular. **Chapter 6** will offer a contextualised distillate of Chapters 1 to 4, briefly recalling the role of host state law in the resolution of investment treaty disputes in general and the question of jurisdiction *ratione materiae* of an investment treaty tribunal in particular. This brief recollection will be followed by a brief comparison of investment treaty arbitration and rulemaking practice in the invocation of the laws of the host state in different periods in order to show the shift in the attention to the laws of the host state in the resolution of such issues. Having dealt with the role of the laws of the host state in Chapter 6, the main task of **Chapter 7** will then be to examine the role of the host state courts and tribunals in the resolution of investment treaty disputes. As will be seen in this Chapter, on some occasions, the courts of the host state have a direct role in the resolution of certain investment disputes. In addition, there are other occasions in which the courts and the tribunals of the recipient state have an indirect, but determinative, function in the settlement of some investment treaty disputes. Such municipal courts have a direct role in the resolution of investment disputes when they are one of, or the only, option(s) for a foreign investor to pursue investment treaty claims. These national judicial *fora* also have an indirect saying on jurisdictional or substantive issues when they should be referred to by the investor prior to the filing of the investment treaty dispute before investment treaty arbitration tribunals. This mostly occurs on two occasions: (i) when local remedies should be used for a defined timeframe as a precondition for the initiation of arbitral proceedings. (ii) when preliminary recourse should be had to the courts of the host state as a precondition to establishing the violation of the substantive treaty standards. Another indirect role of the national courts of recipient states in investor-state arbitrations is in matters which squarely fall within the jurisdiction of investment treaty tribunals but are better analysed and spelled out by the municipal courts of the host state. For instance, although it is for each investment treaty tribunal to rule upon its own subject-matter jurisdiction, the determinations of the courts of the host state in domestic law issues that an investment arbitration tribunal has to deal with as a preliminary matter, e.g., the existence of enforceable contractual rights underlying investment, are the best sources of inspiration for investment treaty tribunals. Chapter 7 will try to cover all these areas.

22. Since the role of the domestic laws of the host state in determining the jurisdiction *ratione materiae* of an investment treaty tribunal has not been previously explored in a comprehensive manner, I have devoted the lion share of Part I of this Thesis (consisting of Chapters 2 and 3) to dissecting the theoretical and practical function of the municipal laws of the host state in the subject-matter jurisdiction of investor-state arbitral tribunals. The novelty and originality of these two relatively longer Chapters is that they thoroughly analyse the legal bases for referring to the laws of the host state for the purpose of determining whether an underlying private right/interest exists and whether the investment in question stemming from the above-described right/interest has been made legally. These two Chapters produce new knowledge by discussing and analysing the actual application of the internal laws of the host state to subject-matter jurisdiction questions that may be posed to an investment treaty tribunal in practice. In contrast, matters concerning the role of the host state courts in investor-state arbitrations have already been discussed by

others.[28] As such, I have, as a consequence, allocated one Chapter (i.e., Chapter 7) directly to this discussion summarising the treaty practice, case law, and academic writings in this regard. Chapter 7, however, not only merely reproduces the treaty practice, case law, and academic writings on the subject; it portrays the recent trends in bolstering the role of the courts of the host state in international investor-state dispute settlement and thus constitutes an original contribution to existing knowledge on the subject-matter. Chapter 7 also identifies and synthesises all the four pertinent major recent developments regarding the promotion of the functioning of the national courts of the recipient state in the resolution of investment treaty disputes.

23. Finally, the Conclusion of this Thesis will undertake to make some concluding remarks regarding the two principal issues that this Thesis is entrusted to deal with: first, the role of the domestic laws of the host state in determining the jurisdiction *ratione materiae* of investment treaty tribunals, and, second, whether the classic 'localisation' theory has been revived in the course of the recent developments in investment treaty law. Indeed, the Conclusion will examine, first, the extent which the laws of the host state are relevant in settling matters of jurisdiction *ratione materiae* of investment treaty tribunals and, second, the extent that the growing importance of the role of the laws and the courts of the host state in investment treaty law tends to revive the 'localisation' theory in the context of investment treaty arbitrations.

IV. Essential Concepts

24. In order to properly understand certain fundamental concepts not otherwise properly defined or described throughout this Thesis, in what follows, I have undertaken to address certain concepts and issues at the outset. The concepts under consideration here are 'applicable law' and 'domestic law'.

A. Applicable Law

25. Every agreement has a governing law, which is called 'proper law' in common law, and 'applicable law' in continental law.[29] Indeed, a contract cannot exist in a vacuum.[30] The

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[28] See, for instance, B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018); J Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 103 *et seq*; C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4(1) The Law & Practice of International Courts and Tribunals; C Schreuer, 'Interaction of International Tribunals and Domestic Courts in Investment Law' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers 2010).

[29] J Hill & MN Shuilleabhain (eds), *Clarkson & Hill's Conflict of Laws* (OUP 2016) 211; AFM Maniruzzaman, 'Choice of Law in International Contracts, Some Fundamental Conflict of Laws Issues' (1999) 16(4) J Int'l Arb 141. See also N Blackaby & C Partasides (eds), *Redfern and Hunter on International Arbitration* (OUP 2015) 157 (using the following various terms to describe the same concept: 'applicable law', 'governing law', 'the proper law of the contract', and 'the substantive law'.)

[30] As FA Mann has eloquently put it, "freedom of contract does not exist independently of the legal systems which grant it or confer any measure of sovereignty upon the contracting parties." See FA Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 BYIL 56. See also *Saudi Arabia v. Arabian American Oil Company* (*Aramco*) (1963) 27 ILR (indicating that "[i]t is obvious that no contract can exist *in vacuo*, i.e. without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties. The contract cannot even be conceived without a system of law under which it is created.")

governing law with which we are concerned here deals with the substance of the dispute, i.e., the so-called "*lex cause*", rather than the law governing the arbitral procedure.[31] The applicable substantive law determines various questions regarding the rights, obligations, and liabilities of the parties.[32]

26. In case of bilateral investment treaties which accord both substantive and procedural rights to investors, the substantive applicable law, in its totality and comprising all of its components, also determines the Tribunal's jurisdiction. Jurisdiction is a well-known concept which has four aspects: *ratione materiae, ratione personae*, *ratione temporis*, and *ratione voluntatis*.[33] Jurisdiction *ratione materiae* (subject-matter jurisdiction) refers to a court or a tribunal's authority to decide a particular dispute. As noted above, in investment treaty arbitrations, the particular law applicable to the jurisdiction of the tribunal may be different from the particular law applicable to the merits.[34] Although as a principle, splitting the applicable law is not usually desirable,[35] when necessary, as Giuliano and Lagarde have put it, sometimes it is 'logically consistent' when the choice of another applicable law "relate[s] to elements in the contract which can be governed by different laws without giving rise to contradictions."[36] As such, this Thesis will mainly dissect the law applicable to the jurisdiction *ratione materiae* of an investment treaty tribunal which could be

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See also Lord McNair, 'The General Principle of Law Recognized by Civilized Nations' (1957) 33 BYIL 7; N Blackaby & C Partasides (n 29) 156-157.

[31] See N Blackaby & C Partasides (n 29) 157 (identifying various systems of law that have a bearing on an international arbitration, e.g., the law governing the arbitration agreement, the law governing the capacity of the parties, the law governing the procedure of arbitration, the law governing the recognition and enforcement of an arbitration agreement, and the applicable substantive law.) As noted, it is the latter body of law with which we are principally concerned in this Thesis.

[32] N Blackaby & C Partasides (n 29) 185-186.

[33] M Sornarajah, *The International Law on Foreign Investment* (n 3) 359-360. See also *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 [54]. There is sometimes a suggestion of a further aspect of jurisdiction, i.e., *ratione loci*. The addition of this supposed extra component, however, seems to be mistaken as "international jurisdiction exists outside territorial jurisdiction so it is conceptually not a place—*locus*—but rather a space." See V Heiskanen, '*Menage a` trois*? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2013) 29(1) ICSID Rev-FILJ 237.

[34] A Newcombe & L Paradell (n 13) 77 (making a distinction between "the law applicable to the substance of the dispute" and "the law applicable to jurisdictional issues"). On the same point, it should be recalled that Article 42 of the ICSID Convention on applicable law is not helpful in determining the applicable law to jurisdiction. In *CMS v. Argentina*, the tribunal correctly said: "Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions…" The 'consent instrument' under examination in this case was an international investment agreement, which in turn has express or implied references to the national law of either of the contracting states in some respects including on matters of jurisdiction. See *CMS Gas Transmission Company v. Argentine Republic* (n 13) [88]. The tribunal in *Noble Energy v. Ecuador* adhered to this viewpoint. It noted: "The Tribunal is of the opinion that Article 42(1) is irrelevant for purposes of jurisdiction. Article 42 of the ICSID Convention is a conflict rule which deals with the law governing the merits of the dispute […] Jurisdiction is a different matter. It is not subject to this conflict rule but is governed by Article 25 of the ICSID Convention." See *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad* (n 13) [57]. See also *Saipem S.p.A. v. The People's Republic of Bangladesh* (n 13) [68].

[35] J Hill & MN Shuilleabhain (n 29) 225.

[36] M Giuliano & P Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' (1980) C 282 Official Journal 17.

different from the substantive law governing the issues of merits and reparation in an investor-state dispute.

27. The second point of prime significance under the rubric of 'applicable law' is recalling the importance of choosing the right applicable law to a given question. It is of vital importance to determine the applicable substantive law to legal questions arising in investment treaty arbitrations since "the outcome of the dispute may sometimes greatly depend on the rules determined to be applicable."[37] The failure by an investment treaty arbitral tribunal to select and apply the proper law may result in the annulment or non-enforcement of the investment treaty award. Pursuant to Article 52(1)(b) of the ICSID Convention,[38] failure to select and apply the proper law may be a valid ground for annulment of the arbitration award.[39] Such an approach is indeed warranted. The simple reason is that, as noted above, the applicable law determines the fate of the case and the correct selection of the proper law is the first

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[37] Y Banifatemi 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed) *Arbitration under International Investment Agreements* (OUP 2010) 192. See also AFM Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12(2) Eur. J. Int'l L. 309; E Gaillard & Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18(2) ICSID Rev-FILJ 380-381.

[38] Article 52(1) of the ICSID Convention reads: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] (b) that the Tribunal has manifestly exceeded its powers."

[39] See JF Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26(1) ICSID Rev-FILJ 139 (stating that: "ICSID *ad hoc* committees have concluded that manifest excess of powers can occur if tribunals err by: • Totally disregarding the applicable law, or • Basing the award on a law that is not the applicable law under Article 42 of the ICSID Convention."). For the practice of ICSID on this matter, see e.g., *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 (Klöckner I), Decision on Annulment, 03 May 1985 [3], [59]-[60], and [83]; *Amco Asia Corporation and Others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986 [7.28]; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1999 [4.04], [5.04]; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 05 February 2002 [21 *et seq*]; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005 [44 *et seq*]; *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 [44]-[49], and [58 *et seq*]; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki (n 25) [83 *et seq*]; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 05 September 2007 [97]-[98]; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 [48]-[51]; *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, 01 November 2007; *Azurix Corp. v. The Argentine Republic* (n 14) [136]; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Ad hoc Committee on Annulment, 14 June 2010 [55]; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 [67], [377], [393], and [405]; *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 09 March 2017. For doctrinal authorities in this respect, see AK Bjorklund, 'Applicable Law in International Investment Disputes' in C Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 262; E Gaillard, 'The Extent of Review of the Applicable Law in Investment Treaty Arbitration,' in E Gaillard & Y Banifatemi (eds) *Annulment of ICSID Awards, IAI International Arbitration Series No. 1* (Juris Publishing 2004) 223; C Schreuer *et al* (n 13) 191-270; A Broches, 'Observations on the Finality of ICSID Awards' (1991) 6(2) ICSID Rev-FILJ 92. In the context of *ad hoc* UNCITRAL investment arbitrations, see *The Czech Republic v. CME Czech Republic B.V.*, Challenge of Arbitral Award, Judgement of Svea Court of Appeal, 15 May 2003 (2003) 42 ILM 919, 963.

necessary substantive prerequisite of the correct settlement of the dispute. Indeed, in certain cases, the application of international law may result in finding a violation on the part of the host state whereas if one were to apply domestic law to the same factual scenario, the claim may be dismissed by the arbitral tribunal for lack of any breach. The same could happen the other way round. The ICJ observed in the *ELSI* case that "what is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision."[40]

28. Finally, I should say a few words on the method to identify the applicable law to jurisdictional questions in investment treaty arbitrations. When faced with a legal question that it needs to resolve, a tribunal has to determine the applicable law to that question in the first place. This requires a conflict of laws analysis. However, in the investment treaty arbitration field, there does not seem to be so many commentators and/or arbitrators who have approached the question based on a proper conflict of laws analysis, which is the sound approach to identify the governing law to a particular issue. This is sometimes a problem of having too much expertise in one field of law without having an interest in the other. As Pierre Lalive has aptly observed, "too many distinguished public international lawyers seem to have little experience or understanding in problems in choice of law."[41] In his monograph on the "International Law of Investment Claims", Zachary Douglas describes the need to refer to conflict of laws rules to be more 'acute' in investment treaty arbitrations in comparison to public international disputes. He explains that in the absence of conflict of laws rules in investment treaties, the tribunals should articulate such rules by having recourse to general principles of private international law and principles derived from the particular architecture of investment treaties.[42] He then goes on to point out that:

> Some choice of law rules have attained such universal application that their transplant into the investment treaty regime cannot generate controversy. Such is the case with the *lex situs* rule for tangible property, which is universally applied by municipal courts […] and must be the appropriate choice of law rule for determining the existence or scope of property rights that comprise an investment. There is considerable authority for the proposition that the application of the *lex situs* rule is even required by general international law …[43]

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[40] *Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), Judgment, I.C.J. Rep. 1989 (20 July 1989) p 15, p 51 [73]. See also Article 3 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") by the International Law Commission ("ILC") adopted in August 2001; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 12) [95]-[96] (relying on Article 3 of the Draft Articles).

[41] P Lalive, 'Concluding Remarks', in E Gaillard and Y Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing 2004) 313.

[42] On this point, see also C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in AJ van den Berg (ed), *50 Years of the New York Convention, ICCA International Arbitration Conference* (Kluwer Law International 2009) 143 (stating with regard to the appropriate choice of law approach in investment treaty arbitrations that: "… [T]his choice of law process may be distinguished from that undertaken in private international litigation or arbitration, since national and international law stand in a vertical, and not horizontal, relationship to each other.")

[43] Z Douglas, *The International Law of Investment Claims* (CUP 2009) 44-45.

29. Therefore, when required to identify the applicable law, an investment treaty tribunal should refer to the conflict of laws rules as they may be applicable in an investment treaty case. Some choice of law rules, like the *lex situs*, are so widely-accepted throughout the world that I can reasonably argue that the rule in question constitutes a 'general principle of law' which a tribunal needs to consider as a source of law under Article 38(1) of the Statute of the ICJ and as a tool of interpretation under Article 31 of the Vienna Convention on the Law of Treaties ("VCLT").

B. Domestic Law

30. Throughout this Thesis, I refer directly or by reference to various terms synonymous with 'domestic law', such as 'municipal law', 'internal law', 'national law', and 'local law'.[44] As explained in Brownlie's Principles of Public International Law, although these terms might have 'slightly different connotations', in this Thesis, they are all used interchangeably to refer to the same concept which is 'the legal order of or within the state'.[45] Unless otherwise stated, the term domestic law in this Thesis refers to the domestic law of the host state.

V. Thesis Approach and Sources

31. In the three subsections that will follow, I will outline my general approach and my interpretive approach in this Thesis regarding the questions that I seek to answer and will explain the sources that I have availed myself of in analysing the issues at stake.

A. General Approach

32. Throughout this Thesis, I will undertake various academic exercises. Mostly I deal with the questions at issue in this Thesis in an analytical way. In certain limited points, the effort undertaken entails a descriptive exercise in that I have considered the past and/or current state of international law in general or international investment law in particular. The creativity in such exercises is actually identifying the practice, drawing the threads of such practice together, and distilling the applicable principles from the identified practice. Indeed, the novelty of this Thesis in such situations is gathering the bits and pieces scattered around and not picked up by others and trying to draw a meaningful picture of the investment treaty law as concerns the matters in question. In addition, in the course of this Thesis, I will come across issues as to which no practice exists or the existing practice is inconsistent or unpersuasive. In all such circumstances, the analysis will tend to enter into a problem-solving effort in order to provide guiding principles to the reader with regard to the unresolved matters at stake.
33. It should also be noted that I have tried to reflect the views expressed by others (including jurisprudence and scholarship) on any difficult issue as much as possible. However, as the present Thesis is an analytical piece of academic work, I have offered my own independent legal view on each subject in an effort to add a brick on the wall of legal knowledge.

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[44] See G Fitzmaurice (n 18) 68 (enumerating the various titles that refer to the same concept: "… State law, or domestic, municipal, national, or internal law, as it is variously called.")

[45] J Crawford (n 18) 48.

B. Interpretive Approach

34. Bilateral investment treaties are treaties in the sense of Article 2(1)(a) of the VCLT. Therefore, in order to interpret them, one should employ rules of treaty interpretation. For various purposes in this Thesis, I will undertake a treaty interpretation exercise. Thus, it is important to clarify the approach to treaty interpretation at the outset.
35. My point of departure for treaty interpretation would be Articles 31 and 32 of the VCLT. By the end of May 2019, 116 countries have ratified the VCLT.[46] Therefore, it is widely applicable in the relations between various states in regulating their overseas international investment relations as set out in investment treaties. Moreover, these provisions of the Vienna Convention reflect customary international law rules of treaty interpretation.[47] Article 31 of the VCLT enumerates various tools of interpretation, including 'the ordinary meaning of the terms', 'object and purpose', 'context', etc. In my opinion, treaty interpretation is a combined exercise in which all the tools and elements of interpretation should be analysed and weighed together.[48] Therefore, together with the 'text' and 'the

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[46] See<https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en> 'accessed 31 May 2019'.

[47] See, e.g., *Daimler Financial Services AG v. Argentine Republic* (n 24) [46] (stating that "This claim arises under the German-Argentine BIT, in conjunction with the ICSID Convention. As both the BIT and the ICSID Convention are international treaties concluded between sovereign States, both are subject to the usual customary law rules governing treaty interpretation under public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). The Tribunal will apply these rules in discerning whether all of the jurisdictional requirements of the ICSID Convention and the BIT have been met."); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 [140] (holding that "with respect to the interpretation of the BIT, the Tribunal will resort to the Vienna Convention on the Law of Treaties […] to which both States are parties, and which is in any event recognized as a codification of the customary international law governing treaty interpretation …"); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 [75] (noting that "The Tribunal shall proceed to the interpretation of this Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law.")

[48] It should be borne in mind that Article 31 of the VCLT contains the 'rule' [in singular in contrast to 'rules' in plural] of interpretation of treaties. This implies that all the means of interpretation referred to in this provision, should be considered in totality, as the "process of interpretation is a unity". The relevant Report of the ILC is instructive in this respect: "Having regard to certain observations in the comments of Governments, the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in article 27 [now Article 31] and the relation between these elements and those in article 28 [now Article 32]. Those observations appeared to indicate a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled "General rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word "context" in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account together with the context" is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3. …" Report of the International Law Commission on the Work of Its Eighteenth Session, Geneva, 04 May-19 July 1966 (1966) (Vol. II) YB ILC 219-220. See also *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 [91] (aptly observing that: "Interpretation under Article 21 [sic] of the

ordinary meaning of the terms', one should also take into account the 'context' and the 'object and purpose' of the treaty. In addition, a treaty should always be interpreted in 'good faith'.

36. That being said, I should emphasise here that while in any interpretive exercise all the means of interpretation will be taken into account, given the particular status of bilateral investment treaties, it is the text of the treaty which is the first point of reference and the most concrete means for understanding the parties' intention. To be sure, unlike other treaties, the contracting parties to a bilateral investment treaty do not usually create materials recording their subsequent agreement after the conclusion of the treaty. They also do not usually go about forming subsequent practices indicating their agreement regarding the interpretation of the treaty. In many cases, the preparatory work of the conclusion of bilateral investment treaties is unavailable or non-existent. As such, although there are certain exceptions, in most cases, investment treaty arbitrators cannot usually avail themselves of the other useful materials for treaty interpretation that adjudicators of disputes arising out of other treaties may have access to. Despite what was just said, when interpreting bilateral investment treaties, the text of the treaty is in many cases useful and should be set as the starting point. This is how other adjudicators start their analysis. Indeed, in *Territorial Dispute between Libya and Chad* case, the ICJ indicated that "interpretation must be based above all upon the text of the treaty".[49] Furthermore, and by the same token, the ICJ had already pronounced on an earlier occasion that "if the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".[50] Therefore, for any interpretation purpose, like determining the substantive scope of the legality requirement, the text of the investment treaty will be the starting point in the "search for the real intention of the contracting parties in using the language employed by them."[51]
37. The last observation to make in this regard is that the interpretations offered here are neither pro-state nor pro-investor. Rather, all interpretations in this Thesis seek to adopt a 'balanced approach' to the questions at issue.[52]

C. Sources

38. There are three main sources which have been relied upon in this Thesis to support the arguments put forward. These three sources will be briefly considered below. For the avoidance of doubt, I should mention that the order in which the sources are presented here does not reflect an opinion on the hierarchy of sources from a theoretical perspective, but

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Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.")

[49] *Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*), Judgment, I.C.J. Rep. 1994 (03 February 1994) p 6, pp 21-22 [41]. This statement was repeated in *Legality of Use of Force* (*Serbia and Montenegro v. Belgium*), Preliminary Objections, Judgment, I.C.J. Rep. 2004 (15 December 2004) p 279, p 318 [100]: ("Interpretation must be based above all upon the text of the treaty.")

[50] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Rep. 1950 (03 March 1950) p 4, p 8.

[51] Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 366.

[52] See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 [70]; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 May 2006 [300]. See also T Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 161, 163.

rather is based on the importance of these as material sources or sources *sensu lato* in the practice of international investment law. These sources are as follows: First, the practice of international courts and tribunals, especially that of investment treaty tribunals. Second, investment treaties or treaties with investment provisions. Third, doctrinal authorities and works and reports of international organisations like the United Nations Conference on Trade and Development ("UNCTAD").

39. Beginning with the first source, i.e., the jurisprudence of international courts and tribunals, it is clear that there is no doctrine of precedent or *stare decisis* in international investment law as it exists in common law. However, if one reviews the publicly-available investment treaty awards and decisions, one clearly sees that previous awards and decisions in the same field are vastly referred to by arbitrators. They rely on previous decisions and awards not because they are legally obliged to do so. Rather, there is some kind of a moral obligation to satisfy the vital needs of predictability and consistency – as the pillars of any legitimate dispute resolution system – in investment treaty arbitration and that is why investment tribunals follow previous cases. As such, investment treaty tribunals rely on past cases either to seek guidance from previous decisions and awards and/or to underpin the decision they have arrived on a point of law.[53] This has created 'a *de facto* doctrine of precedent'[54] or as others would have it 'a common law of investment protection'.[55] The current state of the law and practice in terms of relying on precedent is well summarised by the *El Paso* tribunal which held that: "ICSID arbitral tribunals are established *ad hoc*, … and the present Tribunal knows of no provision, … establishing an obligation of *stare decisis*. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals."[56]
40. Furthermore, there is an additional practical reason for the importance of precedent in investment treaty arbitrations. Taking into account the fact that in an investment treaty dispute, the host state and the investor did not have an opportunity to determine the applicable law to their dispute beforehand, certain investment treaty tribunals have inferred an agreement of the disputants on the applicable law on the basis of the rules of law invoked in their submissions during the proceedings, i.e., mutual choice of the applicable law after the emergence of the dispute.[57] It is no secret that in investment treaty cases, both sides of the dispute rely on previous cases "either to conclude that the same solution should be adopted in the case [at hand] or in an effort to explain why [the] [t]tribunal should depart

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[53] See G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' (2007) 23(3) Arb Int'l; C Schreuer & M Weiniger, 'Conversations Across Cases - Is there a Doctrine of Precedent in Investment Arbitration?' (2008) 3 TDM; JP Commission, 'Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) J Int'l Arb; G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2(1) Journal of International Dispute Settlement.

[54] See G Kaufmann-Kohler (n 53) 357-358.

[55] C McLachlan, L Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017) 20.

[56] *El Paso Energy International Company v. The Argentine Republic* (n 52) [39]. See also *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 [30]-[31]; *Saipem S.p.A. v. The People's Republic of Bangladesh* (n 13) [67].

[57] See *Asian Agricultural Products v. Democratic Republic of Sri Lanka* (n 16) [18]-[24].

from that solution."[58] Consequently, as a matter of practice, in the course of the proceedings, the disputants lead the arbitral tribunal to consider previous cases as a source of applicable law.[59]

41. First and foremost, the decisions and awards cited in this Thesis come from the ICSID jurisprudence. According to recent research, the cumulative number of known investor-state arbitrations pursuant to investment treaties was 855 by the end of 2017.[60] As the "dedicated framework for the arbitration of investor-state dispute",[61] ICSID has been host to over sixty percent of known investor-state arbitration cases.[62] Case law produced under other arbitral rules (in particular, cases under the UNCITRAL Arbitration Rules)[63] and other forums have also been extensively relied upon in this Thesis. I have vastly used the electronic database of ITALAW in order to access the publicly-available awards and decisions referred to in this Thesis.[64]
42. The practice of these arbitral tribunals interpreting the same or similar provisions of interest in investment treaties, like the legality requirement, or on other topics in question in this Thesis, e.g., the existence and creation of rights/interests underlying investments, is very assistive in recognising the right approach to the questions posed by this Thesis when such an arbitral practice is consistent with regard to a given question.[65] Obviously, when the practice of arbitral tribunals on a specific matter is inconsistent, I have tried to adopt the most persuasive approach amongst the diverged practice. On the other hand, if no clear or

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[58] See, e.g., *Saipem S.p.A. v. The People's Republic of Bangladesh* (n 13) [66]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 15) [45].

[59] *El Paso Energy International Company v. The Argentine Republic* (n 52) [39].

[60] UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' (United Nations 2018) 2.

[61] C McLachlan, L Shore & Matthew Weiniger (n 55) 4.

[62] According to a recent Report by UNCTAD, taking into account cases filed between 1987 and July 2017, 55% of the known investor-state arbitrations have been filed under the ICSID Convention and 6% of such disputes have been submitted under the ICSID Additional Facility Rules. UNCTAD, 'Special Update on Investor-State Dispute Settlement: Facts And Figures' (United Nations 2017) 5.

[63] According to the same report, of all the filed investor-state cases known in the above-mentioned period, 31% were filed under the UNCITRAL Arbitration Rules. See UNCTAD (n 62) 5.

[64] See <https://www.italaw.com/> 'accessed 31 May 2019'.

[65] In such circumstances, one can speak of some sort of *jurisprudence constante*: "a series of cases that resolve a particular issue in a certain way, which then acts as a guide in the future in resolving that same issue." See G Kaufmann-Kohler (n 53) 360. The late Thomas Wälde considered in his separate opinion in the *International Thunderbird Gaming* case that the consistent practice of investment treaty tribunals on a given issue may, after satisfaction of certain conditions, create rules of customary international law

> While individual arbitral awards by themselves do not as yet constitute a binding precedent […], a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected […] An increasingly continuous, uncontested and consistent modern arbitral jurisprudence is part of the authoritative source of international law embodied in "judicial decisions" (Art. 38 (1) (d)) and will develop, with an even greater legally binding effect, into "international custom" (Art. 38 (1) (b)) […]

International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde, 01 December 2005 [16].

convincing answer is given in the investor-state case law to a particular question, I have tried to pinpoint the flaws of the practice or jurisprudence concerned and have sought to offer the solution that I see appropriate.

43. In addition to the jurisprudence of investment treaty tribunals, where appropriate, I have also drawn on the practice of other international courts and tribunals, particularly the jurisprudence of the ICJ and PCIJ. Furthermore, due to the close subject-matter-wise relationship between international investment law and international human rights law on the one hand, and international investment law and international trade law on the other, references have also been made to the practice of the European Court of Human Rights ("ECtHR") and WTO Dispute Settlement Body ("DSB"). In addition, mostly for the purpose of explaining issues of conflict of laws, frequent references have also been made to domestic case law in the relevant sections pertaining to choice of law matters.
44. Another significant source used in this Thesis is investment treaties, including both bilateral investment treaties and multilateral investment treaties. According to the latest statistics circulated by UNCTAD, by the end of 2017, 2,946 bilateral investment treaties have been concluded. In addition, by the end of that year, 376 treaties entailing investment provisions (like Free Trade Agreements and Economic Partnership Agreements) have been signed. These two types of treaties when added make a total of 3,322 international investment agreements.[66] This level of density in treaty rulemaking has assisted distilling state practice in some areas. Indeed, whereas each treaty is a prime source of law in its own right between the relevant contracting parties, it can in some areas evidence consistent state practice. To be sure, international investment agreements entail "a sweeping pattern of common features" and "a striking degree of commonality of languages" which create "a common lexicon of investment treaty law".[67] Of course, the growing preparation of national model BITs has helped the harmonisation and standardisation of the terms of bilateral investment treaties not only for the country which has formulated the draft but also, in certain cases, for other countries.[68] Another element that has fostered the

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[66] UNCTAD, 'IIA Issues Note: Recent Developments in the International Investment Regime' (United Nations 2018) 2.

[67] C McLachlan, L Shore & Matthew Weiniger (n 55) 5, 16. See also C McLachlan, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 284 (describing this commonality as "akin to a continuous dialogue within an open-plan office.") In a different context, the *Mondev* tribunal referred to a concept of "a body of concordant practice" as a result of recurrence of certain terms in various investment treaties:

> the vast number of bilateral and regional investment treaties […] almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [117].

[68] Many countries in the world have drawn up draft bilateral investment treaties which, whenever possible, they use as a starting point in negotiating treaties with other countries, e.g., Austria Model BIT 2008, Brazil Model BIT 2015,

harmonisation of investment treaties is the existence of multilateral investment treaties.[69] This thriving conformity between the terms of investment treaties either in the form of recurrence of certain provisions, like repeated references to the legality requirement in various investment treaties, or the commonality in the language used for outlining certain requirements, like the language used to describe the temporal aspect of the legality requirement, has, in certain instances, been demonstrative of state practice, and, has, in any event, enlightened the path for finding generalised solutions to the topics under consideration. The Investment Policy Hub of UNCATD has been my first and foremost source for accessing investment treaties cited in this piece of work.[70]

45. Thirdly, doctrinal authorities, in particular, those from eminent practitioners and lecturers in the field, have also been a great source of inspiration in the formulation of my analyses in this Thesis.
46. Finally, I should mention that I have used Oxford University Standard for the Citation of Legal Authorities (OSCOLA) (2012) for the purpose of referring to the legal authorities and sources in the course of this Thesis.

Canada Model BIT 2004, France Model BIT 1999, Germany Model BIT 2008, India Model BIT 2015, Iran Model BIT 1994, Italy Model BIT 2003, Mexico Model BIT 2008, The Netherlands Model BIT 2018, Norway Model BIT 2015, Spain Model BIT 2008, Sweden Model BIT 2002, Switzerland Model BIT 1995, Thailand Model BIT 2002, Turkey Model BIT 2016, United Kingdom Model BIT 2008, and the United States Model BIT 2012.

[69] For instance, The Energy Charter Treaty ("ECT"), The North American Free Trade Agreement ("NAFTA") (Chapter 11), Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, ASEAN Comprehensive Investment Agreement, Common Market for Eastern and Southern Africa ("COMESA") Treaty, etc.

[70] < https://investmentpolicyhub.unctad.org/> 'accessed 31 May 2019'.