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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Part I: The Role of the Domestic Law of the Host State in Determining the *ratione materiae* Jurisdiction of An Investment Treaty Tribunal

Chapter 1: The Role of Domestic Law in Investment Treaty Arbitrations in General

Introduction

1. One of the nuances of understanding international law is discerning its relation and the modality of its co-existence with domestic law in seemingly overlapping and communal areas.[1] Such nicety is more outstanding in fields in which private entities and individuals, as well as private rights and interests, as creatures of domestic laws,[2] are at stake. One of such domains is the international law of investment.[3]
2. In international investment relations, states function, quite inevitably, in both public and private capacities. On the one hand, states offer international substantive standards of protection and procedural prerogatives to access international arbitration to investors under public international law treaties that they conclude with other sovereigns on the international plane. On the other hand, they enter into private law investment contracts with foreign private individuals or entities, or public entities acting in a private capacity.
3. The other side of the deal, i.e. the investors, as the direct beneficiaries of such treaties, are in most cases corporations that are the creations of municipal laws of their home state. Investors deal with recipient states mostly either based on a contract with a state entity or an investment authorisation issued by the host state,[4] both of which have their legal roots, principally, in the internal laws of the host state. Besides, the rights and interests arising from an investment contract or an investment authorisation are 'institutions' of domestic law. Thus, for an investment to be eligible for protection under international investment agreements, the investor needs to prove that the rights/interests in question are binding and enforceable under the domestic laws of the host state, and in some cases, are moreover vested in the investor. In addition, in order to be deemed lawful and deserve international protection under investment treaties, the investment of the investor should have been made in accordance with host state law.

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[1] M Dixon, *Textbook on International Law* (OUP 2013) 90; M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2017) 102.

[2] See, for instance, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)* (*Belgium v. Spain*), Judgment, Merits, Second Phase, I.C.J. Rep. 1970 (05 February 1970) p 3, pp 33-34 [37]-[38] (stating that a 'corporate entity' is an 'institution of municipal law').

[3] In one of his earlier articles on investment treaty arbitration, Schreuer makes the point that it has proven very difficult to strike the right balance between the application of national law and international law in investment treaty arbitrations. See C Schreuer, 'Investment Arbitration - A Voyage of Discovery' (2005) 2(5) TDM 7 (stating that: "The applicable law in investment disputes has turned out to be a dangerous area. It takes great nautical skill to keep the proper balance between the Scylla and Charybdis of the two legal systems. A number of cases have actually foundered on the rocks of the proper or rather the improper law. Some awards have been annulled or set aside for failure to apply the proper law. Others were attacked but salvaged." See also *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 [97] (explaining the unsettled issue of the relationship between national law and international law in the context of Article 42(1) of the ICSID Convention); VC Igbokwe, 'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (2006) 23(4) J Int'l Arb 285 (saying that: "foreign investment always implicates the national law of the host state, and the line between the private and public international law dimensions of [foreign investment treaty] arbitrations may be more difficult to draw in many instances.")

[4] For the various forms of foreign investors' legal engagements with host states, see *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 [343].

4. Accordingly, both bodies of law, i.e., international law and domestic law, have a role to play in the settlement of disputes arising out of or in connection with such 'hybrid' legal relationships.[5] Generally speaking, international law applies to the allegations of violation of the substantive standards of protection, international responsibility, and reparation,[6] whereas domestic law supplies the 'substantive aspects' of the rights underlying investments. The substantive aspects include the existence as well as the legality of a property right.[7]
5. To be sure, it is now increasingly being accepted that the proper question is how the two bodies of law should 'interact', rather than 'counteract'. From the viewpoint of public international law, as aptly noted by 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 realm.[8] That is all the same in the field of international law of investment. As Monique Sasson puts it: "The key issue in

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[5] See Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151. In this respect, see also the ICSID tribunal's instructive statement in *El Paso v. Argentina*, which explains one facet of the interaction between the laws of the recipient state and international law in an investment treaty arbitration context:

> The fact that the BIT and international law govern the issue of Argentina's responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina's law. However, whether a modification or cancellation of such rights, even if legally valid under Argentina's law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law.

El Paso Energy International Company v. The Argentine Republic, ICSID Case No ARB/03/15, Award, 31 October 2011 [135]. See also *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."); E De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 122, 126-128; A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 86.

[6] *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]; *El Paso Energy International Company v. The Argentine Republic* (n 5) [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.")

[7] M Sasson (n 1) 147.

[8] 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").

this context is not which law – municipal law or international – prevails, since there is normally no direct conflict. Rather, the issue is how these rules of law should interact."[9]

6. However, one should note that unlike disputes arising out of alleged breaches of international investment contracts which are principally governed by the municipal laws,[10] investment treaty arbitrations, which deal with alleged violations of international treaties, are, from a substantive point of view, governed by such investment treaties themselves in the first place, supplemented by applicable rules and principles of international law.[11] Nevertheless, as will be demonstrated in this Chapter and the ensuing Chapters, application of domestic law in investment treaty arbitrations is by no means negligible or incidental. If one runs through all the investment treaties concluded so far, one hardly comes across a treaty with no reference to domestic law. Similarly, if one considers the whole body of investment treaty arbitration practice, one is rarely faced with an award or decision in which no reference is made to domestic laws. It is

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[9] M Sasson (n 1) 9. See also in this respect, O Spiermann, 'Applicable Law' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 108 (stating that in investment treaty cases, "international and national law gain their own and exclusive fields of application"); *CMS Gas Transmission Company v. Argentine Republic* (n 5) [115]-[122]; *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.")

[10] See *Payment of Various Serbian Loans Issued in France* (*France v. Yugoslavia*), Judgment, P.C.I.J. Rep. Series A, No. 20, 1929 (12 July 1929) p 41 (stating: "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country"); *Wintershall AG v. The Government of Qatar* (Ad hoc tribunal), Partial Award, 05 February 1988 (1989) 28(4) ILM 800, 802, 821-823; *Van Zyl and Others v. Government of Republic of South Africa and Others* (170/06), 20 September 2007, [2007] ZASCA 109 [64], available on the SAFLII website: <www.saflii.org/za/cases/ZASCA/2007/109.html.> 'accessed 31 December 2018'. (stating that: "Contracts concluded between states and aliens, are also governed by municipal law."); SKB Asante, 'The Stability of Contractual Relations in the Transnational Investment Process' (1979) 28(3) ICLQ 406 (opining that "an agreement between a host State and a private corporation … does not enjoy the status of an international agreement and on well settled principles of private international law, such an agreement should be governed by the law of the host state and not public international law.")

[11] *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."); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 [78].

submitted that with the passage of time, references to domestic law in investment treaties as well as in investment treaty decisions and awards have become much more frequent.

7. That being said, one needs to comprehend the nature of such reference to domestic law in each case. In fact, based on a proper characterisation of each single legal issue, it should be analysed whether internal laws are being referenced and/or applied as a source of governing 'law', or as 'facts' which need to be established prior to rendering an award on the basis of the governing international law. If applied as 'law', rather than as 'fact', another question which still hangs in the air is the legal ground pursuant to which domestic law applies: is it applied because the contracting state parties have expressly or impliedly referred to the application of domestic law in the relevant international investment agreement? or is it applied because the matter under consideration is in nature something related to the sovereignty of the host, or the home state for that matter, as to which international law has no legal rules to apply? Can one arrive at such a conclusion, i.e., application of domestic law as 'law', pursuant to a conflict of law analysis or, more generally, by virtue of general principles of law?
8. With this in mind, there are several legal matters in the distinct phases of jurisdiction, merits, and reparation in investment treaty arbitrations which behove the adjudicating forum to analyse the application of domestic law to related particular issues. Based on the questions dealt with in the previous paragraph, in so doing, an adjudicatory forum should necessarily examine: (i) the capacity and nature in which domestic laws apply in each jurisdictional and/or responsibility/remedy sphere (is it applied as 'law' or is it applied as 'fact'?). (ii) the reason or the legal ground for such an application.
9. On a related note, many international investment agreements do not contain specific provisions on applicable law.[12] Those investment agreements that do have governing law clauses often list both international law and domestic law as applicable laws, without determining which is pre-eminent or how they are to be combined.[13] It is submitted that such generic references to the application of domestic and international law in investment treaties do not help an arbitral tribunal in answering the above-mentioned questions. In addition, Article 42(1) of the ICSID Convention[14] in the context of investment treaty arbitrations under the aegis of ICISD is not also constructive for an investment treaty tribunal when trying to identify the law applicable to specific jurisdictional issues or matters concerning the merits of the case. As will be

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[12] See Y Banifatemi 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed) *Arbitration under International Investment Agreements* (OUP 2010) 200, fn 27 (conducting research on bilateral investment treaties concluded by the United States, the United Kingdom, France, and Germany). See also C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill Journal of Dispute Resolution 12 (saying that "the majority of BITs do not contain rules on applicable law"); A Parra, 'Applicable Law in Investor-State Arbitration' in M Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers 2007) 3, 7-8; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations 2007) 115-116.

[13] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 [402]; *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; JC Thomas & HK Dhillon, 'Applicable Law under International Investment Treaties' (2014) 26 SAcLJ, 975, 988; Z Douglas, *International Law of Investment Claims* (CUP 2009) 42, 44.

[14] Article 42(1) of the ICSID Convention provides:

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

illustrated later on in this Chapter, a typical provision on 'applicable law' in investment treaties and Article 42(1) of the ICSID Convention come close to 'redundancies' in investment treaty arbitrations when it comes to the actual application of these provisions by arbitrators. It is submitted that the answer to the above-referenced questions regarding the application of domestic law in investment treaty arbitrations is more appropriately found in other provisions of a given investment treaty – provisions other than the 'applicable law' provision – general principles of law (including general principles of conflict of laws), decisions of international judicial *fora* (particularly ICJ and PCIJ), and consistent and persuasive jurisprudence of investment treaty arbitrations. The idea is that proper cycling through these sources would lead one to robust answers regarding the application of domestic law in an investment treaty arbitration context.

10. In the following pages, I will embark upon offering proper responses to the foregoing questions. As a point of departure, in Section One, I will analyse the reasons for the significance of domestic laws in investment treaty arbitrations. Next, I will identify the guise under which such laws apply and will see whether they apply as 'laws' or as 'facts'. Thereafter, it will be demonstrated that when applied as law, domestic laws are applied on the basis of one of the following grounds: (i) the parties have expressly or impliedly chosen domestic law as applicable law to a particular issue; (ii) the issue concerns the sovereignty of the state and thus the nature of the issue necessitates the application of domestic law. As will be demonstrated, if the parties have not come to an agreement regarding these sovereignty-related issues in the pertinent investment treaty or through subsequent agreement or subsequent practice, customary international law does not usually fill the lacunae since it usually does not have a rule to solve such problems which fall within the province of domestic law.[15] In such circumstances, the application of general principles of law (including general principles of conflict of laws) usually leads to the application of domestic law to such sovereignty-related issues. Finally, in this context, I will also elucidate that the 'applicable law' clause of international investment agreements as well as Article 42(1) of the ICSID Convention offer no meaningful assistance to an arbitrator for the recognition of the role of domestic law in each specific and distinct domain of an investment treaty dispute.
11. In Section Two, the survey reviews specific areas in both jurisdictional and merits phases of an investment treaty arbitration where internal laws may be called upon to play a role. In analysing the jurisdictional stage, the inquiry will be made in both areas of personal and subject-matter jurisdiction. As to the merits, the main focus will be on discerning the 'nature' in which domestic law is applied in different substantive issues in general. As I will show, in principle, domestic law functions as 'fact' in the merits phase of an investment treaty arbitration. The discussion will be followed by identifying the limited and specific spheres in which domestic law is implemented as 'law' at the merits stage of an investment treaty case.
12. At the end of this Chapter, certain interim concluding remarks will be made, summarising the observations made herein.

Section One: General Remarks with Regard to the Application of Domestic Law in Investment Treaty Arbitrations

13. As a point of departure, in this introductory Section, I will discuss the following general topics concerning the application of domestic law in investment treaty arbitrations in turn: (A) The Reason for Significance of Host State Law in Investment Treaty Arbitrations; (B) The Guise

[15] See subsection C.b *infra*.

in Which Domestic Law Applies in Investment Treaty Arbitrations; (C) The Legal Grounds for Application of Domestic Law as 'Law' in Investment Treaty Arbitrations; and (D) The Irrelevance of the Applicable Law Provision in Investment Treaties and the ICSID Convention.

A. The Reason for the Importance of Host State Law in Investment Treaty Arbitrations

14. A proper consideration and analysis of the scheme, structure, and the content of international investment treaties and the legal relations arising therefrom makes clear that the idea that investment treaty arbitrations are solely governed by international law, with no role to be played by domestic law is too simplistic. There are three principal reasons for this proposition.

15. **Firstly**, in many parts of an investment treaty arbitration decision or award, there is a need to refer to the laws of the host or, less frequently, the home state. In most cases, such consideration is due to the citation of such laws in the underlying investment agreement. In order to demonstrate this, a proper case-study is warranted. As an example, I will recall certain provisions of the BIT between Germany and Philippines where reference to domestic law is explicit: Article 1(1) of the BIT defines the term 'investment' in the following way: "the term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State …". Article 1(2) of the same Agreement defines 'nationals' of Philippines as follows: "citizens of the Philippines within the meaning of its Constitution" and 'nationals' of Germany in this way: "Germans within the meaning of the Basic Law of the Federal Republic of Germany". Article 1 then determines the meaning of 'companies' in its paragraph 3, providing that: "with respect to the Republic of the Philippines: corporations, partnerships or other associations, incorporated or constituted and actually doing business under the laws in force in any part of the territory of that Contracting State wherein a place of effective management is situated …"[16] Article 1(4) then specifies the meaning of the term 'investor' by referral to paragraphs (2) and (3) of the same Article quoted above. Opening the substantive standards of protection of the BIT, Article 2(1) on 'Promotion and Acceptance' reads: "Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1 …"[17] Article 9(4) of the BIT which deals with enforcement of awards of ICSID in case of an investor-state arbitration stipulates that: "… The award shall be enforced in accordance with domestic law." The Agreement also contains a Protocol in which at least 5 other references are made to domestic law. To give just one example, Article 2(a) of the Protocol provides: "As provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines…"[18] With this case-study in mind,

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[16] With respect to German "companies", the paragraph states: "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit."

[17] Another substantive provision in the BIT which reemphasises the requirement for an investment to be made in accordance with host state law is Article 3(3) of the Agreement, which reads: "Each Contracting State shall apply in its territory to investments and to investors of the other Contracting State, with respect to their investments which are made in accordance with the legislation of that Contracting State and activities related to such investments, a treatment not less favorable than that granted to its own investments and investors, or the treatment granted to the investments and investors of the most favoured nation, if the latter is more favorable."

[18] See Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, signed on 18 April 1997, entered into force on 01 February 2000. This BIT was the basis for an eminent investment treaty case, namely, *Fraport AG Frankfurt Airport Services Worldwide v.*

it is fairly unsurprising to suggest that domestic law is an integral and indispensable element of governing law scheme of an investment treaty arbitration. Indeed, respecting the parties' choice of law in accordance with the principle of 'autonomy of the parties', an investment treaty arbitral tribunal has to apply domestic law as and when a legal question arises as to the matters regulated in the above-mentioned (or the like) provisions of the investment treaty.

16. **Secondly**, it is a widely accepted principle of international law that in an international investment relation, the investor has to take the host state law as he finds it, that it has a duty to diligently acquaint itself with the laws of the host state, that it has to respect the law of the recipient country, and that it has to comply with such laws when perfecting and operating its investment.[19]
17. **Thirdly**, as will be explained more fully below, rules and norms of international law are not capable of addressing all the legal questions that arise in the course of an investment treaty arbitration.[20] Indeed, the nature of the legal relations between the host state and the investor is such that, in many instances, the laws of the host state answer questions pertinent to the disputes arising out of such legal relationships. In this regard, McLachlan commendably depicts the modality of application, co-existence, and interaction of international law and domestic host state law in the context of international investment arbitration:

> International law does not purport to regulate numerous aspects of the ongoing relationship between the investor and the host state, which will probably be regulated by host state law. For ordinary working purposes, the investor's relationship with host state law will inevitably be primarily determined by host state law. The function of the international law standards enshrined in investment treaties is not to replace host state law. Rather it is to provide the fundamental protections of international law, in cases where the host state legal system has failed to secure such protection itself.[21]

The Republic of the Philippines, ICSID Case No. ARB/03/25. The tribunal's award was later subject to an annulment proceeding. The Decision on the Application for Annulment was made on 23 December 2010.

[19] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 [197]-[206]; *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRA, Final Award, 15 November 2004 [91]; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 [164]; *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 [58] (observing that "prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law."); C McLachlan, L Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017) 309-310.

[20] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)* (*Belgium v. Spain*), Judgment, Merits, Second Phase, I.C.J. Rep. 1970 (05 February 1970) p 3, pp 33-34, 37 [38], [50]; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 09 September 2003 [316]; *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 [162]; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 [522] (stating that "[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law…"); Z Douglas, *International Law of Investment Claims* (n 13) 52; M Sasson (n 1) 10.

[21] 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) 107.

18. Principally for these three cardinal reasons, domestic laws are of prime significance in investment treaty arbitrations. These three reasons will be further dissected in this present Chapter as well as in Chapters 2 and 3.

B. The Guise in Which Domestic Law Applies in Investment Treaty Arbitrations: As 'Fact' or as 'Law'?

19. Domestic law appears in two distinct guises in investment treaty arbitrations: (i) as 'governing law'; and (ii) as 'facts' which should be established before responsibility is found on the part of the state. In fact, in the latter situation, domestic laws are referred to since they relate to 'factual' issues and pieces of evidence which should be decided upon by the adjudicating forum before ruling on state responsibility.[22]
20. It is argued by some jurists, commentators, and sometimes, prominent adjudicatory bodies, that in public international law disputes, tribunals usually apply domestic law merely as 'facts'. In *Certain German Interests in Polish Upper Silesia*, for instance, the PCIJ held that:

> [f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[23]

21. Based on such a pronouncement, international tribunals take account of domestic laws only as 'facts'. Along the same lines, Judge Gros, in his Separate Opinion in *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) stated:

> In the present case, the rules of municipal law are nothing more than facts in evidence, and they deserve the same attention as the other facts, and the same rigour in their interpretation, but no more. The Court does not have to apply the rules of municipal law, as a municipal court of last instance would, to the relationships between the company and the shareholder; it takes account of them as being facts for the purpose of its appraisal of the legal situation laid before it by Parties and in order to see whether that situation as a whole is in conformity with the rules of international law or not. It is the latter rules which for an international tribunal go to constitute the reasons of its decision. It is therefore not enough to say that since a given municipal legal system creates a certain legal relationship, an international tribunal is obliged, on account of *renvoi* to municipal law, to accept that relationship as possessing the same legal cogency. The international tribunal takes this legal relationship as an established fact and tests it against the rules of international law…[24]

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[22] Dressed as 'facts', national laws can play multiple functions in international law such as evincing general or specific state practice in a particular subject, specifying the scope of a state's claim over maritime territory, and evidencing the compliance or non-compliance of the state with its international obligations. See M Dixon (n 1) 96. It is in this latter 'factual' guise that the municipal laws are being examined here.

[23] See *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.

[24] *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (*Belgium v. Spain*), Judgment, Merits, Second Phase, I.C.J. Rep. 1970 (05 February 1970) p 3, Separate Opinion of Judge Gros, pp 272-274. See also R Jennings & A Watts (eds), *Oppenheim's International Law* (Vol. 1, 9th edn, Longman 1992) 83 (stating that: "From

22. However, this opinion does not seem to withstand scrutiny even in a public international law context. In the *Serbians Loans Case*, the PCIJ considered itself as "having to decide as to the meaning and scope of a municipal law".[25] Furthermore, in the *Brazilian Loans Case*, the PCIJ considered itself as "bound to apply municipal law when circumstances so require."[26] To be sure, in certain situations, domestic laws have their own independent existence in public international law disputes as 'law' rather than as 'fact'.[27] As Judge Anzilotti opined in his Individual Opinion in *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, domestic law can play two kinds of roles in international disputes: "[T]he Court, in performing its function as an organ of international law, may have to consider municipal laws from two entirely distinct standpoints. In the first place, it may have to examine municipal laws from the standpoint of their consistency with international law. (…) Secondly, the Court may find it necessary to interpret a municipal law, quite apart from any question of its consistency or inconsistency with international law, simply as a law which governs certain facts, the legal import of which the Court is called upon to appraise."[28]
23. Moreover, the fact that the PCIJ in *Certain German Interests in Polish Upper Silesia* seemingly confined the role of domestic law to establishing 'facts' needs more scrutiny. In his treatise on "The Prospects of International Adjudication", Wilfred Jenks made three observations regarding the PCIJ's statement in the *Certain German Interests in Polish Upper Silesia* case: (i) "There appears to be no later case in which the Court *per curiam* has reaffirmed this early view, which was expressed before the varied elements in the problem [i.e., the role of municipal laws in international adjudications] had been brought into proper focus." (ii) the PCIJ's statement is "not an exclusive indication of the manner in which the Court must regard municipal laws but merely an indication of the manner in which it should regard them in certain types of case which does not prejudice the possibility that it may be proper to regard them in a quite different manner in other types of case." (iii) "the use of the term 'facts' as a description of municipal laws [does not] necessarily affect materially the extent to which the Court may be called upon to interpret and apply such laws."[29]
24. In the context of investment treaty arbitrations, in principle, domestic law is applied as 'facts' "[w]hen the issue becomes the international validity of certain acts of the host state that have prejudiced the investor's legal entitlements under municipal law". In such circumstances, "international law is applied exclusively" as governing law.[30] To give one example, an investment treaty tribunal may consider, from a factual point of view, promises made to an investor in a domestic regulation at the time of undertaking his investment to find whether the

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the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law; and insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court").

[25] *Payment of Various Serbian Loans Issued in France* (n 10) p 46.

[26] *Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v. Brazil*), Judgment, P.C.I.J. Rep. Series A, No. 21, 1929 (12 July 1929), p 124.

[27] See *Barcelona Traction, Light and Power Company, Limited* (n 2) p 3, pp 33-34, 37 [38], [50].

[28] *Consistency of Certain Danzig Legislative Decrees with Constitution of Free City*, Advisory Opinion, P.C.I.J. Rep. Series A/B, No. 65, 1935 (04 December 1935) p 63.

[29] CW Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 548-549.

[30] Z Douglas, *International Law of Investment Claims* (n 13) 70.

legitimate expectations of the investor in question have been frustrated by a subsequent change in the laws of the host state, and as such, whether the fair and equitable treatment standard of the investment treaty at issue has been violated.

25. That being said, there are, however, many occasions in investment treaty arbitrations in which investment treaty tribunals apply domestic law as 'law' rather than as 'fact'. In *National Grid v. Argentina*, it was held by the tribunal that both in its decision on jurisdiction and in its final award, which concerned the merits of the case, "the Tribunal dealt with the law of the host State as a matter of law, dispelling the notion that Argentine law may be considered a mere matter of fact."[31]
26. One prominent consequence of being applied as 'law' rather than as 'fact' in an investment treaty arbitration is that if the arbitral tribunal fails to apply the applicable domestic law, there could be a ground for the annulment of the award or decision, since the tribunal has failed to apply the proper law and as such exceeded its powers.[32]
27. It deserves mention that in investment treaty arbitrations, domestic laws are usually applied as 'law' when the issue in question concerns the 'legal entitlements' or the 'legal standing and status' of an investor.[33]

C. The Legal Grounds for the Application of Domestic Law as 'Law' in Investment Treaty Arbitrations

28. In some cases, the application of domestic law in an investment treaty arbitration as 'law' is because such laws are applicable pursuant to the parties' express or implied agreement. In addition, in certain instances, the issue at stake concerns the sovereignty of a state and this issue, by nature, requires the application of the domestic – mostly mandatory – laws of the respective state. Usually, in such sovereignty-related areas, general international law has no rule to solve the legal problem when it arises.[34]
29. In the following pages, I will explain these two legal grounds for the application of domestic law in investment treaty arbitrations in turn.

a. The Parties Have Expressly or Impliedly Chosen Domestic Law to Govern a Particular Issue

30. There are usually specific provisions in international investment agreements, embodying the contracting parties' accord as to the application of municipal law of either of the contracting

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[31] *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 03 November 2008 [84]. See also *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 [39]; Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (n 5) 273. Cf. *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 [96]: "The Vienna Convention provides no role for the domestic law of contracting states in the interpretation of international treaties. Therefore, in the instant case, it is clear that Russian national law is of no relevance in this regard. While Russian law may be relevant in establishing certain factual circumstances involved in the merits of the case, it has no role to play in determining the jurisdiction of the Tribunal."

[32] See Introduction *supra* [27].

[33] Z Douglas, *International Law of Investment Claims* (n 13) 70.

[34] It is needless to recall that there are situations in which the domestic law applies because of both legal grounds. In fact, there are certain issues in investment treaty arbitrations as to which a tribunal needs to apply domestic law both because the state contracting parties to an investment treaty have agreed as to the application of that body of law and also because the issue is something that is related to the sovereignty of the host or the home state to which general international law has no proper response.

parties to certain legal issues. As a result of such an agreement between the contracting parties in the investment treaty (which grants jurisdiction to the tribunal),[35] such matters are exclusively dealt with by domestic law.[36] For instance, Article I(g) of the BIT between Canada and Costa Rica defines 'investment' as "any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws . . . ."[37] Subsequently, in order to ascertain subject-matter jurisdiction, a tribunal deciding a case based on this BIT should in the first place verify that the alleged investment was made in accordance with the laws of the host state.[38]

31. Respecting the contracting parties' will is consistent with the principle of 'party autonomy' which is, almost always, recognised by rules of arbitration,[39] as well as national arbitration laws of the arbitration seat, where the seat of the arbitration matters, like in 'territorialised' non-ICSID arbitrations.[40]

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[35] It deserves mention here that the agreement between the contracting parties to an investment treaty is actually deemed as the agreement of the state party to the dispute with the investor who avails itself of the relevant treaty and files a claim against the state. In this regard, in *Antoine Goetz v. Burundi* , the arbitral tribunal held that:

> Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty.

Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999 [39]. The English translation of the Award can be found in (2001) XXVI Yearbook Commercial Arbitration 24, 36.

[36] See C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 4.

[37] See Article I(g) of the Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed on 18 March 1998, entered into force on 29 September 1999. This BIT was the basis for the dispute and the consequent arbitral award in *Alasdair Ross Anderson et al. v. Republic of Costa Rica* (n 19).

[38] This is what the tribunal in *Alasdair Ross Anderson et al. v. Republic of Costa Rica* actually did. See *Alasdair Ross Anderson et al. v. Republic of Costa Rica* (n 19) [53]-[59]. For a full discussion of this Award, see Chapter 2.

[39] According to recent research by UNCTAD, 55% of all known investment treaty cases have been filed under the ICSID Convention, 31% under UNCITRAL Arbitration Rules, 6% under ICSID Additional Facility Rules, and 5% under Stockholm Chamber of Commerce ("SCC") Rules. See UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures* (United Nations 2017) 5. Since these are the arbitration rules that are mostly referred to in practice, throughout this whole Thesis, when analytical references need to be given to arbitral rules, I will mostly query the above-mentioned arbitration rules.

Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties." Article 35(1) of the UNCITRAL Arbitration Rules reads: "The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." Article 54(1) of the ICSID Additional Facility Rules provides that: "The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." Finally, Article 22(1) of the Arbitration Rules of the SCC provides that: "The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties."

[40] See Y Banifatemi (n 12) 192 (saying that "[b]eing an arbitral process, investment treaty arbitration in no way differs from international commercial arbitration in that the principle of party autonomy is the primary rule governing the arbitration, including as regards the law applicable to the substance of the dispute. When the applicable law has been chosen by the parties, the arbitrators have a duty to apply such law and nothing but such law.")

32. Furthermore, when a treaty plainly refers to the application of the laws of the host state to a given question, an investment treaty tribunal should, as instructed by Article 31 of the VCLT, interpret the treaty in accordance with the 'ordinary meaning' of the terms of the treaty, thereby, giving effect to the *renvoi* contained therein. To be sure, in situations in which the parties refer to the domestic laws of either state, there is, in effect, a *renvoi* to the laws of the state parties. Referring to certain references to the laws of the host state in the underlying investment treaty, the tribunal in *Fraport v. Philippines* explained that:

> 335. Article 1(1) of the BIT provides that for the purpose of this Agreement "[t]he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...]". The qualification "accepted in accordance with the respective laws and regulations of either Contracting State" applies to every form of investment covered by the BIT. Article 2(1) provides: "Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to Article 1, paragraph 1. [...]"
> [...]
> 394. The Tribunal cannot agree, as a matter of law, with the Claimant's contention that "[e]ven if there could be said to be an issue as to whether the Philippine laws were complied with [...], it could be of only municipal, not international legal significance". This interpretation, if accepted, would deprive a significant part of the ordinary words of a treaty of any meaning and effect. The BIT is, to be sure, an international instrument, but its Articles 1 and 2 and ad Article 2 of the Protocol effect a *renvoi* to national law, a mechanism which is hardly unusual in treaties and, indeed, occurs in the Washington Convention. A failure to comply with the national law to which a treaty refers will have an international legal effect.[41]

33. Therefore, when there is a *renvoi* to domestic law in an investment treaty, it is this body of law which conclusively determines the fate of the legal issue under consideration as a matter of law.[42]

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[41] *Fraport v. Republic of Philippines* (n 4) [335], [394].

[42] 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"); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 04 October 2013 [121]; *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

b. The Nature of the Legal Issue

34. In certain situations in investment treaty arbitrations, the application of domestic law is necessitated by considerations of sovereignty. Sovereignty means "the supreme and independent authority of the nation state within its own territory."[43] It follows from such authority that the state has exclusive jurisdiction to enact and enforce laws for its territory and the population living there.[44] For instance, in relation to international investment arrangements, it is well-settled in international law that the state has an exclusive right to control the movement of capital into its territory. Therefore, unless there is a specific treaty commitment to the contrary, the state may prohibit or set conditions on the movement of capital into its territory.[45]
35. This 'sovereignty' factor has found its way in the universally-applied choice of law rules. For instance, unless otherwise agreed by the state contracting parties, it is the law of the *situs* of a given tangible property comprising an investment that determines whether a property right has been created. The same law also specifies the nature and scope of such right and also identifies the person to whom the right in question vests.[46] It is usually the law of the host state, as the place of making and operating an investment, which determines the creation and existence of

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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 (n 1) 1-3; C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 2-3. Cf *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005 [57] (stating that: "Even though particular aspects relating to the meaning and scope of the rights relating to the assets are governed by the law and regulations of the Argentine Republic, it must be borne in mind … that as regards jurisdiction the applicable law is that of the Convention and the Treaty …"); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 [217]-[218] (where the tribunal holds that reference to domestic law in certain jurisdictional areas is for the purpose of determining 'a question of fact'.)

[43] TR van Dervort, *International Law and Organization* (Sage Publications 1998) 12. Brierly also explains the principle of 'sovereignty' in the following terms: "At the basis of international law lies the notion that a state occupies a definite part of this surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory." JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1963) 162.

[44] JW Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 76.

[45] See ibid. Salacuse believes that a 'true open-door policy', which is a self-proclaimed label used by some countries, probably does not exist in reality. See ibid 87. In the same vein, in the context of international monetary regulations, by virtue of Article 6 of the IMF Articles of Agreement, IMF member states have the sovereign right to limit the inflow of capital. Article VI, Section 3 of IMF Articles of Agreement reads: "Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2."

[46] Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (n 5) 282, 284; C Staker, 'Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations' (1987) 58 BYBIL 151, 163-169; E Rabel, *The Conflict of Laws: A Comparative Study* (Vol. IV, University of Michigan Law School 1958) 30 (opining that: "It is at present the universal principle, manifested in abundant decisions and recognised by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated").

property rights underlying investment, thereby giving the host state the 'sovereignty' privilege to regulate this crucial matter within its territory.[47]

36. That being said, if an issue concerns the 'sovereignty' of the host state, it does not matter whether the investment treaty expressly requires the application of domestic law or not. The ruling in *Encana v. Ecuador* with respect to the law applicable to the creation and existence of property rights underlying investment is worthwhile in this connection:

> 184. The second preliminary question concerns the applicable law. The relevant clause, Article XIII(7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.[48]

37. With that in mind, it deserves mention that in matters related to the domestic jurisdiction of states general international law does not usually have rules to apply.[49] For instance, as alluded to above, customary international law does not have any rule regarding property law and

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[47] As alluded to above, this privilege emanates from the principle of 'territorial sovereignty' allowing each state to regulate property in its territory and under its effective control. See BA Wortley, 'Observations on the Public and Private International Law Relating to Expropriation' (1956) 5(4) The American Journal of Comparative Law 589 (quoting translations from Pufendorff's observations with respect to the rights of the sovereign: "The first right consists in this, that the rulers can prescribe laws for the citizens, with regard to the use of their property, in conformity with the interest of the state, or concerning the amount and quality of their possessions, as also the method of transfer to others, and other matters of the kind ...")

[48] *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 [184].

[49] The most classic authority for this proposition is the ICJ Decision in the *Barcelona Traction Case*. The threshold question in *Barcelona Traction Case* concerned the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which was a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian nationals but to the company itself. See *Barcelona Traction, Light and Power Company, Limited* (n 2) [32]. Referring to the PCIJ Judgment in *Panevezys-Saldutiskis Railway*, the Court held that in the absence of a special agreement, this right is necessarily limited to intervention by a state on behalf of its own nationals. See *Barcelona Traction, Light and Power Company, Limited* (n 2) [36]. The Court then concluded that: "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law… " ibid [38]. With respect to the latter point, the Court explained that: "If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it…" ibid [50]. See also *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (n 20) [522] (stating that "[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law…").

property rights.[50] Criticising the failure of the tribunal in *CME v. Czech Republic* to apply domestic Czech law to the question of property rights, Douglas provided the following interesting analogy:

> [t]o answer this question by reference to international law is tantamount to deciding *ex aequo et bono* for there are no principles or rules in the corpus of international law that could be of assistance. And just as the International Court of Justice might attract the opprobrium of international lawyers should it decide an international maritime boundary dispute by reference to Czech law, the failure of investment treaty tribunals to take notice of applicable municipal laws cannot escape criticism either.[51]

38. In fact, since customary international law contains no rules defining certain 'rights' and 'statuses', an adjudicating forum has no leeway to invent or devise definitions for certain concepts, which are exclusively defined and specified in national law. Unless the contracting parties to an international treaty have agreed to a definition, *inter alia*, by virtue of agreeing to a 'special meaning' in the sense of Article 31(4) of the VCLT or through subsequent agreement or subsequent practice, referring to international law to determine certain sovereignty-related matters would be unfounded under international law.[52]
39. In conclusion, in an investment treaty context, when an issue concerns the sovereignty of a state, it is usually the law of that state which applies to the issue.[53] This is because general international law does not have a corresponding rule with respect to the matter at stake to regulate the issue. Therefore, the issue has to be resolved by reference to domestic law. In such a case, conflict of laws rules determine the applicable domestic law to the matter at stake.

D. Irrelevance of the Applicable Law Provision in Investment Treaties and the ICSID Convention

40. As was discussed above, in investment treaty arbitrations, courts and tribunals apply domestic law in companion with international law. The question that arises here is to what extent does an applicable law provision in an investment treaty or Article 42(1) of the ICSID Convention in ICSID arbitrations guide an arbitral tribunal in the actual application of these two bodies of law in different jurisdiction and merits phases of an investment treaty case.
41. To begin with, many investment treaties do not contain provisions on applicable law.[54] However, a good deal of such treaties includes 'applicable law' or 'governing law'

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[50] *William Nagel v. The Czech Republic* (n 20) [316]; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 20) [162]; Z Douglas, *International Law of Investment Claims* (n 13) 52; M Sasson (n 1) 10.

[51] Z Douglas, *International Law of Investment Claims* (n 13) 67.

[52] M Sasson (n 1) 8.

[53] This is always subject to the caveat that the parties to the treaty have not already defined or determined the matter in the treaty itself or through subsequent agreement or subsequent practice.

[54] See Y Banifatemi (n 12) 200, fn 27 (conducting a research on bilateral investment treaties concluded by the United States, the United Kingdom, France, and Germany); C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 12 (saying that "the majority of BITs do not contain rules on applicable law"); A Parra (n 12) 3, 7-8; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (n 12) 115-116; O Spiermann, (n 9) 107; MN Kinnear, 'Treaties as Agreements to Arbitrate: International Law as the Governing Law' in AJ van den Berg (ed) *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 407

provisions.[55] Such provisions often direct the competent court or tribunal to apply the terms of the investment treaty at hand, international law, and domestic law of the host state to an investment treaty dispute.[56] For example, Article 30(1) of the BIT between China and Canada provides: "A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party."[57] Similarly, Article 9(7) of the BIT between Costa Rica and Switzerland provides: "The arbitral tribunal shall decide on the basis of the present Agreement and other relevant agreements between the Contracting Parties; the terms of any particular agreement that has been concluded with respect to the investment; the law of the Contracting Party which is a party to the dispute; including its rules on the conflict of laws; such principles and rules of international law as may be applicable."[58]

42. It is submitted that, in practice, such investment treaties which do have applicable law clauses do not differ from the former array of treaties which lack any governing law provisions in terms of giving proper guidance to an investment treaty tribunal regarding the choice of the applicable law to a given question. In fact, such 'applicable law' provisions do not necessarily

(indicating that: "Numerous treaties fail to state a governing law. Treaties in this category are often older treaties; those concluded more recently tend to state the governing law expressly." [references omitted])

[55] See A Newcombe & L Paradell (n 5) 79-83 (enumerating six (6) different approaches regarding items listed in an applicable law provision in investment treaties that do contain applicable law clauses).

[56] ibid 79. VC Igbokwe, 'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (n 3) 269 (characterising such applicable law clauses as ""multipolar" choice of law provisions", i.e., three or more sources of applicable law).

[57] See Article 30(1) of the Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, signed on 09 September 2012, entered into force on 01 October 2014.

[58] See Article 9(7) of the Agreement between the Swiss Confederation and the Republic of Costa Rica on the Promotion and the Reciprocal Protection of Investments, signed on 01 August 2000, entered into force on 19 November 2002. See also Article 8(6) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 01 October 1992. This Agreement was the basis in the famous case of *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL.

offer any guidance as to the priority of one body of law over another.[59] In other words, they just "state the problem without resolving it."[60]

43. Additionally, Article 42(1) of the ICSID Convention,[61] which has similar prescriptions regarding the applicable bodies of law in an investment dispute, is more meaningful in investment contract disputes rather than investment treaty disputes. As McLachlan explains: "... when the Convention was prepared, the dominant paradigm for investment arbitration was the concession contract claim."[62] Similarly, the Annulment Committee in *Duke Energy v. Peru* stated that: "… [W]hen the ICSID Convention was formulated, the Convention's framers envisaged that the first basis for consent to the jurisdiction of the Centre would be by contract between the host state and the investor…"[63] In addition, Article 42(1) of the ICSID Convention suffers from the same undesired generality that do applicable law provisions in investment treaties. Douglas makes a plausible observation regarding the usefulness of applicable law provisions in investment treaties and Article 42 of the ICSID Convention:

> These provisions are open-textured and serve only to confirm that the tribunal is competent to apply the stipulated sources of law, rather than prescribe the connecting factors necessary to determine the applicable laws in any given case.[64]

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[59] Commenting on Article 8(6) of the Netherlands-Czech Republic BIT mentioned above, the tribunal in *CME v. Czech Republic* remarked that: "[T]he choice-of-law clause in the (Dutch) Treaty is broad and grants to the Tribunal a discretion, without giving precedence to the systems of law referred to. […] There is no ranking in the application of the national law of the host state, the Treaty provisions or the general principles of international law …" *CME Czech Republic B.V. v. The Czech Republic* (n 13) [402]. Expressing an opinion on the same provision pursuant to the Czech Republic's application for annulment, the Svea Court of Appeal opined that: "The four sources of law are not numbered, nor are they otherwise marked in such a manner that governing law in the relevant contracting state should primarily be applied and general principles of international law applied thereafter." See *The Czech Republic v. CME Czech Republic B.V.*, Challenge of Arbitral Award, Judgement of Svea Court of Appeal (n 13) 919. See also *National Grid plc v. The Argentine Republic* (n 31) 2008 [82] (stating that: "This provision points to the application of the Treaty itself, Argentine law (including its rules on conflict of laws), and "the applicable principles of international law." Although the Parties do not disagree that these are the relevant sources of law applicable to this dispute, they note the absence of specific guidelines under the Treaty as to which aspect of the dispute is governed by one source or the other and how those sources interact in case of conflict *inter se*"; JC Thomas & HK Dhillon (n 13) 988; VC Igbokwe, 'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (n 3) 287, 289.

[60] M Sasson (n 1) 10.

[61] Article 42(1) of the ICSID Convention reads: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[62] C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' (n 21) 109.

[63] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 01 March 2011 [129]. See also N Blackaby & C Partasides (eds), *Redfern and Hunter on International Arbitration* (OUP 2015) 466-467; JC Thomas & HK Dhillon, (n 13) 985; O Spiermann (n 9) 107.

[64] Z Douglas (n 13) 42, 44. See also Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (n 5) 195. Moreover, one should bear in mind that, in the context of ICSID arbitrations, Article 42 of the ICSID Convention is not helpful in determining the applicable law to questions of 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 contained

44. If one takes into account the sources of law enumerated in Article 42 of the ICSID Convention and the sample applicable law clauses mentioned above,[65] one sees that the listing of these sources does not help a tribunal in the correct application of each body of law in its right place. For instance, the inclusion of the BIT itself in the list of applicable laws is stating the obvious and is not helpful in understanding the applicable legal regime to each specific question before the tribunal. In *AAPL v. Sri Lanka*, in the very the first award rendered in a BIT case, the ICSID Tribunal stated:

> [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 ….[66]

45. With that in mind, it is equally true that the failure of the provision on 'applicable law' to refer to international law, domestic law or the BIT, does not preclude a tribunal to apply such bodies of law when the circumstances so require. For example, Article 1131 of the North American Free Trade Agreement ("NAFTA") on 'Governing Law'[67] and Article 26(6) of the Energy

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express or implied *renvoi* to the national law of either of the contracting states with regard to certain jurisdictional matters. See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 [88]. By the same token, the tribunal in *Noble Energy v. Ecuador* 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*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 05 March 2008 [57]; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/1, Decision on Jurisdiction, 08 December 2003 [48] (stating that: "As pointed out by both parties, the relevant provision for determining the law applicable to this dispute is Article 42(1) of the Convention. However, the rules applying to the dispute under Article 42(1) address the resolution of disputes on the merits, and so will not necessarily be those which apply to the Tribunal's determination of its jurisdiction under Article 41 at this stage of the proceedings.") See also *Camuzzi International S.A. v. The Argentine Republic* (n 42) [15]-[17]; *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]; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, Decision on Jurisdiction, 08 March 2010 [54]; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16; Award, 08 November 2010 [225]-[227]; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 08 February 2013 [233]-[246]; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 [85]; C Schreuer *et al*, *The ICSID Convention: A Commentary* (CUP 2009) 550-552; E De Brabandere (n 5) 123.

[65] See footnotes 57-58 *supra* with the accompanying texts.

[66] *Asian Agricultural Products v. Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990 [19]-[21]. See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 08 December 2000 [79]: (saying 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…".

[67] Article 1131(1) of NAFTA reads: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

Charter Treaty "ECT"[68] do not include domestic law in their inventory of applicable sources of law. In spite of this absence, tribunals acting under these treaties apply domestic law to issues like the existence of property rights, the legality of investment, and nationality of investors.[69]

46. As results from this analysis, irrespective of the content of the provision on 'applicable law', a tribunal needs to go through the whole text of the investment treaty and see whether there is an agreement with respect to applicable law to the matter under consideration, and if not, then properly characterise the issue and discern its applicable law, *inter alia*, by reference to proper conflict of laws rules. The result of such an enquiry would either be applying international or domestic law.[70] In *EnCana v. Ecuador*, the tribunal noted that the applicable law clause of the underlying BIT (the Canada-Ecuador BIT) provided that the dispute should be decided in accordance with the BIT itself and applicable rules of international law. It stated that "[u]nlike many BITs there is no express reference to the law of the host State." This, however, did not dissuade the tribunal from applying domestic law. It held that "for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador." To buttress its reasoning regarding the applicable law to the question of the existence of property rights, the tribunal went on to invoke another provision of the BIT on 'Taxation Measures'.[71]
47. On the whole, the provision on 'applicable law' in an investment treaty and Article 42(1) of the ICSID Convention do not assist a tribunal in detecting the proper applicable law to a particular issue, especially, when the issue in question is that of jurisdiction. An arbitral tribunal should look for the applicable law to a given question elsewhere in the treaty and should in certain cases query general principles of law by conducting a 'case-by-case' analysis.[72]

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[68] Article 26(6) of the ECT provides: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

[69] For instance, in *Libananco v. Turkey*, the claimant had alleged a violation of the ECT. Although Article 26(6) of the Treaty does not refer to domestic law in the index of applicable sources of law, the tribunal had no doubt that it had to apply the host state's domestic law to the issue of whether the disputed property rights existed: "[I]t is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an "Investment"." See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 02 September 2011 [385 *et seq*]. See C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 20. On a related note, Schreuer points out that a provision like the applicable law clause of NAFTA, which excludes any reference to the domestic laws of the host state, 'is not advisable' and is 'impractical' since there exist numerous contacts between the investment activity and 'various technical provisions of the host State's law'. See C Schreuer *et al*, *The ICSID Convention: A Commentary* (n 64) 562.

[70] In this connection see R Dolzer & C Schreuer, *Principles of International Investment Law* (OUP 2012) 293; A Parra (n 12) 8, 11.

[71] *EnCana Corporation v. Republic of Ecuador* (n 48) [184] (deciding a case under the Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed on 29 April 1996, entered into force on 06 June 1997 (subsequently terminated)).

[72] As the Svea Court of Appeal indicated in its Judgment on the Czech Republic's annulment application as to the arbitral award in *CME v. Czech Republic*: "The un-numbered list [in Article 8(6) of the Netherlands-Czech BIT] almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied." *The Czech Republic v. CME Czech Republic B.V.*, Challenge of Arbitral Award, Judgement of Svea Court of Appeal (n 13) 919. See also HE Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP 2013) 235; VC Igbokwe,

Section Two: The Situations in Which an Investment Treaty Adjudicating Forum Needs to Refer to Domestic Laws

48. Having discussed the general role of domestic law in investment treaty arbitrations, in this Section, I am going to identify the specific areas in which domestic law is applicable in an investment treaty arbitration proceeding. For the purposes of the present Thesis, the discussion will be pursued in two specific areas: (i) applicability of domestic law to jurisdictional issues; (ii) applicability of domestic law to issues concerning the merits.[73] It should also be noted that this survey is not intended to be exhaustive. The idea is that the ensuing discussions (whether concerning jurisdiction or merits) cover the most important subjects in investment treaty arbitrations which are affected by the laws of the home or the host state.

A. The Role of Domestic Law in Jurisdictional Issues

49. In a great majority of investment treaty cases, there are jurisdictional objections raised by respondents, compelling the tribunal to address the issue of jurisdiction, and, in so doing, inevitably, expressly or impliedly, to decide the issue of the applicable law of jurisdiction.[74]
50. As was discussed above, in order to ascertain jurisdiction, an arbitral tribunal has to refer to the laws of either the home or the host state in various situations. This reference is mainly because of the express *renvoi* in the investment treaty in question. For example, a majority of

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'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (n 3) 284.

[73] Of course, there are other particular areas in investment treaty arbitrations that are not addressed here, like attribution, remedies, and dispute settlement. In each of these topics, domestic law has certain functions. However, as the role of domestic law is relatively less extensive in these areas, and since the character of these issues is such that they have much less trace in the ensuing Chapters, these topics are not dealt with in this Chapter. For the role of domestic law in 'attribution', see M Sasson (n 1) 15-44; R Dolzer & C Schreuer (n 70) 216-227. As to the issue of 'dispute settlement', certain observations will be made as to the role of domestic law and national courts of the host state in Chapter 7 of this Thesis. As to issue of remedies and determination of damages, the role of domestic law is usually limited to a handful of issues. As Newcombe and Paradell observe, "the legal consequences of the IIA breach, such as reparation and compensation, [are] governed by international law. This is because the breach of an IIA standard by the host state creates a new obligation (a so-called secondary obligation) upon that state (i.e., essentially the obligation to provide reparation). That obligation arises in the international plane; it stems from the principle that a state's breach of an international obligation engages its international responsibility. Domestic law plays no part in any of these respects." See A Newcombe & L Paradell (n 5) 99. However, domestic law is relevant in a few issues regarding compensation, in particular, when the contracting parties have so provided in the relevant investment treaty. For instance, Article 4(3) of the BIT between Cyprus and Hungary, which by the way was the basis of the dispute in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (n 10), provides that: "The amount of […] compensation may be estimated according to the laws and regulations of the country where the expropriation is made." See Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments, signed on 25 May 1989, entered into force on 25 May 1990. Furthermore, there are certain BITs which determine the rate of interest by reference to the laws of the host state. For instance, Article 4(2) of the BIT between Thailand and Russia reads: "In case of delay the interest shall be paid from the date the payment was due until the date of actual payment at the following rate: a) in Thailand … (ii) in the case of movable property, as determined by the Civil and Commercial Code". See the Agreement between the Government of the Kingdom of Thailand and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, signed on 17 October 2002, not yet entered into force. In one case, the tribunal used the Czech statutory rate of interest without the investment treaty contracting parties specifically referring to the application of host state law to the determination of the rate of interest. See *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 [373]-[374].

[74] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 2; M Sornarajah, *the International Law on Foreign Investment* (4th edn, CUP 2017) 359-360.

BITs stipulate that they only protect 'investments' that are made 'in accordance with the laws of the host state.'[75] In fact, in resolving issues of jurisdiction, an investment treaty tribunal should in the first place refer to the relevant investment treaty, and when applicable, the ICSID Convention.[76] In certain respects, the investment treaty or the Convention will refer to the domestic laws of the contracting parties as applicable law (*renvoi*).[77] In such areas, the applicable law would be the domestic law, rather than the investment treaty itself, as it is the former which regulates the issue under consideration.

51. Moreover, even absent an explicit reference to internal laws, domestic law will be applied in specific areas where the jurisdictional issue concerns the 'sovereignty' of the state. For instance, it is widely-accepted in investment treaty arbitrations that nationality of an individual should be determined by reference to the law of the country whose nationality is being claimed, i.e. the home state of the investor.[78]
52. In the following pages, I will focus on the two cardinal and more debated spheres of jurisdiction, namely *ratione materiae* and *ratione personae*, and will see in which specific situations should an investment treaty arbitral tribunal apply domestic law.

a. *Ratione Materiae*

53. When the issue under consideration is that of *ratione materiae*, most investment treaty tribunals, although with different approaches, have resorted to internal laws of host states, in one or several of the following situations: (i) determining the legality of an investment; (ii) verifying the creation and the existence of rights underlying an investment; and (iii) the

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[75] See, for instance, Article 1(2) of the Agreement between the Kingdom of Spain and the Republic of Albania on the Promotion and Reciprocal Protection of Investments, signed on 05 June 2003, entered into force on 14 January 2004: "The term "investment" means every kind of asset invested by investors of one Party in the territory of the other Party in accordance with the laws and regulations of the latter Party …".

[76] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 02 August 2004 [38]; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (n 64) [88]; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 [50].

[77] In this regard, see *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 42) [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"; *Metal-Tech Ltd. v. Republic of Uzbekistan* (n 42) [121]; *Churchill Mining PLC v. Republic of Indonesia* (n 42) & *Planet Mining Pty Ltd v. Republic of Indonesia* (n 42) 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 (n 1) 1-3; C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 2-3.

[78] See, for instance, the arbitral award in *Soufraki v. UAE*, where the tribunal held that: "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality." *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 07 July 2004 [55].

existence of the required approval for the investment. The role of the domestic law in these three areas will be subject to brief analysis in the following pages.

i. The Legality Requirement

54. A majority of investment treaties expressly or impliedly indicate that 'investments' should be made 'in accordance' with the laws of the contracting party in whose territory the investment is made, i.e. the host state.[79] As an illustration, Article (1)1 of the BIT between Sweden and Kazakhstan provides: "The term "investment" shall mean any kind of asset owned or controlled directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party …"[80] This so-called 'legality requirement' is a prime 'gateway' for the application of domestic law as governing law in investment treaty arbitrations.[81] The above example epitomises a treaty expressly referring to the application of the host state law to the legality requirement. However, as will be explained in Chapter 2 of this Thesis, this requirement still counts, and so does the application of host state law, even if there is no such stipulation in the treaty.
55. Since in such a situation, domestic law is applied as 'law', rather than as 'fact', the outcome would be that if an investment is not made in accordance with the laws of the host state, it is not considered as an 'investment' protected by the investment treaty. That being so, the tribunal would have no jurisdiction *ratione materiae* to decide the case.[82]
56. To sum up this brief discussion, as a matter of legal determination, an arbitral tribunal which is charged with deciding an investment treaty case should analyse whether an investment is made legally in accordance with the laws and regulations of the host state. This application of host state law is mandatory, in most cases, because there is a *renvoi* to host state law in the investment treaty at issue. In addition, the legality requirement, and consequently, the application of the host state law, is still persistent even if the treaty does not expressly provide for it.

ii. Creation and Existence of Rights Constituting Investments

57. As the tribunal in *Tidewater v. Venezuela* has indicated, reference to host state law in determining the existence of rights capable of protection under investment treaties is beyond

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[79] For instance, a comprehensive survey that I did on 60 of the bilateral investment treaties signed by Iran shows that a great majority of these treaties (more than 90%) contain express legality requirements. Furthermore, the rest of the Iranian BITs under consideration entail implicit references to the legality requirement. As such, there is no BIT, amongst the 60 agreements I could access, that does not contain an express or at least an implied reference to the legality requirement. Furthermore, another research that I did shows that all the bilateral investment treaties concluded by Australia, without one single exception, have express and/or implied legality requirements.

[80] Article 1(1) of the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments, signed on 25 October 2004, entered into force on 01 August 2006. It is also noteworthy that certain BITs stipulate that a change in the form in which assets are invested does not affect their character as investments, provided such change is not contrary to the laws of the contracting party in whose territory the investment has been made. See, e.g., Article 1(2) of the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Ghana for the Promotion and Reciprocal Protection of Investments, signed on 18 May 2001, not yet entered into force.

[81] C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 5.

[82] See *Fraport v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award (n 4) [396]-[404]; C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 4.

doubt.[83] In fact, it is the law of the host state which determines the creation, existence, scope, and nature of specific rights over a piece of property.[84] As has been put forward by the tribunal in *Emmis v. Hungary*, "the existence and nature of any such rights must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments …"[85] Therefore, it is the law of the host state which determines whether, for example, title to an immovable property is perfected, whether the investor has acquired binding and enforceable contractual rights to a concession agreement, or more generally, whether the right alleged by the investor can be considered and recognised as 'property' protected by the treaty.[86]

58. In the absence of a definition of rights/interests and/or properties in the underlying investment treaty (either in the text of the treaty or through subsequent agreement or subsequent practice), there are two principal explanations for the application of the host state law to the issue of the existence of rights/interests over properties: (i) the application of the *lex situs* choice of law rule as a general principle of conflict of laws;[87] (ii) the need for a territorial nexus between the investment and the host state.[88] I will delve into these two reasons in a comprehensive way in Chapter 3 of this Thesis.
59. Keeping this in mind, it should be noted that although the fact that a property right or interest must exist under the law of host state in order to be protected under the investment treaty needs no stipulation in the relevant treaty itself, as this is a matter of host state sovereignty to which general international law has no rule to apply (unless the state contracting parties to the treaty agree otherwise in the treaty itself or through subsequent agreement or subsequent practice), still certain international investment agreements refer to the application of the host state law to the creation of property rights when enumerating different categories of 'investments' protected by the instrument. For example, Article 15.1(13) and 15-3 of the United States-Singapore Free Trade Agreement includes in its definition of 'investment' "licenses, authorizations, permits, and similar rights" with the important qualifier that they are "conferred pursuant to domestic law". The footnote to this provision notes that whether these rights hold the characteristics of an investment "depends upon such factors as the nature and extent of the rights that the holder has under the domestic law of the Party".[89] In addition, a small minority

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[83] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015 [116].

[84] Z Douglas, *International Law of Investment Claims* (n 13) 52 *et seq*; E De Brabandere (n 5) 127. As will be seen in Chapter 3, the issue of the existence of rights over properties as a jurisdictional matter has a fellow traveller in expropriation cases, which is whether there exists a property right which is capable of expropriation.

[85] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 20) [149]. See also *William Nagel v. The Czech Republic* (n 20) [316] (stating that "the terms "investment" and "asset" in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under Czech law.")

[86] *EnCana Corporation v. Republic of Ecuador* (n 48) [184], [188]; Z Douglas, *International Law of Investment Claims* (n 13) 52 *et seq*.

[87] Regarding the meaning and application of the rule see: E Rabel (n 46) 30; L Collins *et al* (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 1112–13. See also *George Rodney Burt (USA v. UK)* 6 RIAA 93; *Rio Grande Irrigation and Land Company (UK v. USA)* 6 RIAA 131; *Bank of New York and Trust Company et al. (USA v. Germany)* 8 RIAA 43.

[88] Z Douglas, *International Law of Investment Claims* (n 13) 52, 54-55.

[89] In this respect see JC Thomas & HK Dhillon (n 13) 976 (referring to United States – Singapore Free Trade Agreement, signed on 06 May 2003, entered into force 01 January 2004).

of BITs define intellectual properties covered by such instruments as those recognised by national laws of the host state.[90]

60. Therefore, for the reasons briefly discussed above, to constitute property rights protected by an investment treaty, such rights must exist under a domestic law, which law, in almost all cases, is the domestic law of the host state.

iii. Approval of investments

61. In addition to the legality requirement, certain investment treaties require that an investment must be approved in accordance with the laws and regulations of the host state. For example, the Protocol of the BIT between Iran and Italy provides with reference to Article 1 of the Agreement that: "In the territory of the Islamic Republic of Iran[,] this Agreement shall apply to investments, reinvestments and any modification in the form of investments approved by the competent authority. ..."[91]
62. In the famous case of *Gruslin v. Malaysia*, the tribunal had before it Article 1(3)(i) of the BIT between Malaysia and Belgium-Luxembourg Union, providing that the agreement covers defined investments in Malaysia on the condition that such assets "… are invested in a project classified as an 'approved project' by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon…"[92] Giving effect to this provision, the ICSID tribunal decided that no approval had been given by the competent authority in Malaysia for Gruslin's alleged investment and, consequently, held that it did not have jurisdiction to hear the case.[93]
63. Unlike the 'legality requirement' and the necessity of acquiring valid and enforceable property rights under the laws of the host state, the existence of the 'approval' condition and, subsequently, the application of the host state law to that requirement does need an expression in the relevant investment treaty. In other words, in the absence of a provision requiring the 'approval' of investments in accordance with the laws and regulations of the host state in the relevant investment treaty, the adjudicating forum has no reason and basis to check the investment approval mechanisms of the host state law in order to ascertain subject-matter jurisdiction.

b. *Ratione Personae*

64. In addition to subject-matter jurisdiction, in order to ascertain jurisdiction to decide the case on its merits, an investment treaty tribunal needs to make sure that it has jurisdiction *ratione personae*. In this connection, it is for the tribunal to verify whether the claimant who has appeared before the tribunal falls within the definition of 'investor' in the relevant investment treaty vesting the tribunal with jurisdiction. To qualify as an 'investor', one needs to prove, to the satisfaction of the tribunal, that he/she is a 'national' of one of the contracting parties.

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[90] See, for instance, Article 1(2)(iv) of the Agreement between the Government of the Republic of India and the Government of the Republic of Ghana for the Reciprocal Promotion and Protection of Investments, signed on 05 August 2002, did not enter into force (terminated).

[91] Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Italian Republic and the Government of the Islamic Republic of Iran, signed on 10 March 1999, entered into force on 08 August 2003.

[92] Article 1(3)(i) of the Investment Guarantee Agreement between Malaysia and the Belgo-Luxemburg Union, signed on 22 November 1979, entered into force on 08 February 1982.

[93] *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000 [25.5]–[25.7].

65. To begin with, it is well-known that international law does not determine how nationality is acquired or lost. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930 provides in Article 1 that: "It is for each State to determine under its own law who are its nationals…"[94] In the same vein, the ICJ held in the *Nottebohm Case* that "it is for every sovereign state, to settle by its own legislation the rules relating to acquisition of nationality."[95] Similarly, in *Soufraki v. UAE*, the tribunal said that: "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality."[96]
66. Accordingly, questions of nationality are answered by reference to domestic law. It is noteworthy that determining the nationality of an investor is one of the handful of instances where reference is made to the domestic laws of the home state, rather than the municipal laws of the host state.[97]
67. As was explained, a state has the sovereign right to set the benchmark for acquisition (or loss) of nationality. This goes without any stipulation in the relevant investment treaty. However, most investment treaties do express that nationality should be determined by reference to the laws of the home state. As to natural persons, there are two approaches in investment treaties: (i) a great majority of international investment agreements protect natural persons who are recognised as 'national' or 'citizen' by the home state's internal laws;[98] (ii) a small minority of investment treaties protect not only citizens but also individuals who qualify as permanent residents under domestic laws of the home state.[99] Almost the same observations made with respect to natural persons apply with regard to juridical persons. It is the law of the home state which determines whether a company, an incorporation, or more generally, an undertaking is a national of that country. This is again the result of the implementation of 'sovereignty' rights. However, investment agreements still express the role of home state law in the identification of the nationality of companies: A great majority of BITs use the place of 'incorporation',

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[94] See Convention on Certain Questions Relating to the Conflict of Nationality Law, signed on 13 April 1930, entered into force on 01 July 1937. See also Article 3 of the European Convention on Nationality, signed on 06 November 1997 in Strasbourg, entered into force on 01 March 2000.

[95] *Nottebohm* (*Liechtenstein v. Guatemala*), 2nd Phase Judgment, I.C.J. Rep. 1955 (06 April 1955) p 4, p 23.

[96] *Hussein Nuaman Soufraki v. The United Arab Emirates* (n 78) [55]. See also *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (n 20) [522] (stating that "[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law…"); N Blackaby & C Partasides (n 63) 448.

[97] See *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, Section 2.2.1 (ii) & (iii) (denying BIT protection to companies constituted under the laws of the host state, rather than the home state).

[98] As an example, the BIT between Iraq and Kuwait provides in Article 1(3) defining natural persons: "a) As regards the Republic of Iraq, Iraqis under the Iraqi Nationality and Naturalisation Law. b) As regards Kuwait, Kuwaitis under the Kuwaiti Nationality Law." See the Protocol between the Governments of the State of Kuwait and the Republic of Iraq on the Promotion of the Movement of Capital and Investments between the Two Countries, signed on 25 October 1964, entered into force on 07 June 1966.

[99] For instance, Article 1(e) of the BIT between Canada and Croatia defining the term 'investor', provides with regard to natural persons: "… in the case of The Republic of Croatia: (i) any natural person possessing the citizenship of or permanently residing in The Republic of Croatia in accordance with its laws … in the case of Canada: (i) any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws …" See Agreement between the Government of the Republic of Croatia and the Government of Canada for the Promotion and Protection of Investments, signed on 03 February 1997, entered into force on 30 January 2001.

'registration' or 'constitution' test, alone,[100] or in combination with other tests, such as 'seat' and/or 'control',[101] to ascribe nationality to a legal entity. The incorporation (registration) of a company is then determined by reference to the laws of the home state.[102] For example, the BIT between Belgium-Luxembourg Economic Union and Montenegro, defining the term 'companies', provides in Article 1(1)(b): "… [T]he "companies", i.e. any legal person constituted in accordance with the legislation of the Kingdom of Belgium, of the Grand Duchy of Luxembourg or of Montenegro and having its registered office in the territory of the Kingdom of Belgium of the Grand Duchy of Luxembourg or of Montenegro respectively."[103]

68. Having discussed the role of domestic law in the two cardinal jurisdictional thresholds described above, i.e., jurisdiction *ratione materiae* and jurisdiction *ratione personae*, I will now turn to the role of domestic law in issues concerning merits.

B. The Role of Domestic Law in Issues Concerning Merits

69. Generally speaking, absent explicit treaty provisions, domestic laws have much less to say as 'law' in matters concerning the substantive rights of investors and obligations of the host states under international investment agreements. In this connection, it is a well-established prism of international law that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[104] and that "[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[105] As early as 1932, the PCIJ held in *Treatment of Polish Nationals in the Danzig Territory*,

> [a] state cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules

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[100] See, for instance, Article 1(1)(b) of the Agreement between the Government of the Lebanese Republic and the Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments, signed on 19 June 2001, entered into force on 29 December 2002.

[101] See, for instance, Article 1(5)(b) of the Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, signed on 28 July 2014, not yet entered into force.

[102] In addition, it should be noted that the law applicable to the capacity and standing of a company to bring and pursue an investment treaty claim is the *lex societatis*, which is usually the law of the place of incorporation. See Z Douglas, *International Law of Investment Claims* (n 13) 78-79.

[103] Agreement between The Belgium-Luxembourg Economic Union, on the one hand, and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments, signed on 16 February 2010, not yet in force.

[104] See Article 27 of the Vienna Convention on the Law of Treaties ("VCLT"), adopted and opened for signature on 23 May 1969, entered into force on 27 January 1980. Put differently, since domestic laws are not usually applied as 'law' in issues concerning the merits of the case on an international plane, a state cannot use provisions of its own law as a defence to a claim against it for alleged breaches of international law. See also Article 32 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles") by the International Law Commission ("ILC") adopted in August 2001 (providing that: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.")

[105] See Article 3 of the ILC Draft Articles. See also *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 11) [95]-[96] (relying on Article 3 of the ILC Draft Articles).

> of international law and the treaty provisions in force between Poland and Danzig.[106]

70. Similarly, the Annulment Committee in the *Vivendi* case held that:

> [I]n respect of a claim based upon a substantive provision of that BIT … the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law …[107]

71. In fact, substantive investment treaty standards have an independent operation as international law standards. To be sure, international law defines and circumscribes the substantive treaty standards and it is against this definition and circumscription that the legality of the conduct of the host state and its international responsibility is to be assessed.[108]
72. However, this is not to propose that national laws have no role to play with respect to substantive issues. This matter requires more in-depth scrutiny. In the words of McLachlan,

> [t]ribunals may owe their jurisdiction to the terms of a particular bilateral investment treaty. But that does not mean that the law applicable to the determination of the merits is so limited. Treaty rights are located within a matrix of applicable law, which includes a role for host state law, as well as a broader set of international law principles beyond the specific terms of the treaty. The question of the law applicable to the substance turns out, on examination, to require a more sophisticated legal reasoning approach, which combines choice of law analysis with techniques of interpretation.[109]

73. In my opinion, domestic law has two different principal functions in matters concerning the merits of the case: (i) as 'facts' or 'evidence', which should be analysed and/or considered before a determination is made as to compliance with a treaty standard in accordance with international law; (ii) as part of the 'applicable law', either governing the basis of a claim like

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[106] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion, P.C.I.J. Rep. Series B, No. 44, 1932 (04 February 1932) p 24. In the *Free Zones Case*, it was decided by the PCIJ that "France cannot rely on its own legislation to limit the scope of its international obligations". See *Free Zones of Upper Savoy and the District of Gex* (*France v. Switzerland*), Judgment, P.C.I.J. Rep. Series B, No. 46, 1932 (07 June 1932) p 167. Furthermore, in the Advisory Opinion in the *Greco-Bulgarian Communities Case*, it was stated that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty". See *Greco-Bulgarian Communities*, Advisory Opinion, P.C.I.J. Rep. Series B, No. 17, 1930 (31 July 1930) p 32.

[107] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 11) [102]. See also *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 [72]; Kjos (n 72) 77-78 (stating that: "Where the investor bases its claim on a provision of an investment treaty, it would […] be both legally impossible and contrary to the intentions of the states parties to the treaty for the tribunal to apply national law to establish an international wrongful act on the part of the host state. Indeed, an international claim requires the application of international law.")

[108] C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' (n 21) 114; N Blackaby & C Partasides (n 63) 465, 467; E De Brabandere (n 5) 125-126. For the relevant case law, see, for example, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (n 9) [67].

[109] C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' (n 21) 103.

a contractual claim considered in the framework of an investment treaty dispute or governing a particular issue of substance when a treaty explicitly provides for its application. In the following pages, I will briefly touch upon these two functions.

a. Domestic Law as 'Fact' in Issues Concerning Merits

74. As was stated above, domestic law is usually applied as 'facts' in issues concerning merits in investor-state arbitrations. In such circumstances, domestic law is possible 'evidence' of a state's compliance or non-compliance with an international obligation.[110] A couple of examples of such application of domestic law (as 'facts' or 'evidence') in matters of substance is given by the tribunal in *Alps Finance v. Czech Republic*. The tribunal exemplifies certain situations in which an arbitral tribunal needs to factually analyse domestic laws to see whether the international obligation in question has been violated:

> This may for instance be the case of a miscarriage or denial of justice committed in patent disregard of the investor's procedural or substantive rights under domestic law, or of an intolerable abuse in the administration of a public contract between the investor and a State entity governed by municipal law, or of any other behaviour of State organs amounting to an intolerable impropriety in the way they apply internal law provisions against a foreign investor. In all above cases, reference to internal law is necessary to establish whether the host State is also liable for a violation of an international obligation under the applicable treaty or general international law.[111]

Zachary Douglas also provides us with another tangible example of domestic law being applied as 'fact' and/or 'evidence' in considering a matter of merits in an investment arbitration, this time from the perspective of a host state's defence:

> For instance, where the host state defends its alleged expropriatory conduct as 'non-discriminatory' and refers to other legislative enactments that treat different investors in the same way, these enactments are 'facts' for the investment treaty tribunal's judgment as to whether the test for expropriation has been satisfied in the particular instance.[112]

75. As noted above, one consequence of being applied as 'fact' in a substantive issue of merits is that compliance with domestic law does not necessarily translate to compliance with the international obligation in question. Equally, the tribunal deciding the investment treaty claim

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[110] *Gami Investments, Inc. v. The Government of the United Mexican States* (n 19) [91]; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 [78]. See also J Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 13-40 (discussing and reviewing jurisprudence with respect to the possible application of domestic law as 'fact' when considering claims of fair and equitable treatment).

[111] *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 05 March 2011 [197].

[112] Z Douglas, *International Law of Investment Claims* (n 13) 70. There are further examples to be given: for instance, in order to examine whether the national treatment standard is breached or not, a tribunal might be asked to assess either an alleged discriminatory measure (*de facto discrimination*) or an alleged discriminatory law or regulation of the host state (*de iure discrimination*). In the latter case, the tribunal needs to take into account such laws as 'facts' for its comparative analysis, and then decide whether the standard of national treatment is breached according to the terms of the investment treaty and the principles of international investment law.

will not find the recipient state in breach of the investment treaty simply due to the violation of the latter's domestic law. In the *ELSI Case*, the ICJ pinpointed this rule, expressing that:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. 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 …

The Court further explained,

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness… Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[113]

b. Domestic Law as 'Law' in Issues Concerning Merits

76. As was alluded to above, domestic law functions as "law" in issues concerning merits in either of the two following scenarios: (i) the treaty expressly refers to the application of the domestic law to the substantive matter at issue; (ii) the issue in question is in nature governed by a domestic law, like a contractual dispute. These two situations will be examined briefly in the ensuing pages.

i. Express Treaty Reference to the Application of Domestic Law as 'Law'

77. Commentary to Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts considers that domestic laws can also form part of a treaty standard of protection in certain circumstances. In the words of the ILC:

> [I]n the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually

[113] *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] and p 74 [124]. By the same token, in *Alps Finance v. Slovak Republic*, it was held that: "… [M]unicipal law and the way it is enforced by State organs may well be relevant to the merits. Even in such a contest [sic] municipal law is not the "governing" law, but it constitutes a factual circumstance to be considered for ascertaining whether the host State committed a breach of its international duties in the enforcement of its own law… [A] possible breach by the state of its own law is not *per se* sufficient to constitute a breach of its international duties, which only occurs in the specific cases where the former gives inevitably rise to the latter …" *Alps Finance and Trade AG v. The Slovak Republic* (n 111) [197]-[198].

> incorporated in some form, conditionally or unconditionally, into that standard.[114]

78. Therefore, when the relevant investment treaty explicitly provides that in order to assess compliance with a treaty standard, the tribunal needs to refer to the laws of the host state, domestic law would act as 'law'. An example of this approach is Article IV of the Cooperation Agreement between the countries of the Caribbean Common Market ("CARICOM") and Cuba which provides: "Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations."[115] Another example is the BIT between India and Indonesia, which provides in Article 4(3): "Each Contracting Party shall, subject to its laws and regulations, accord to investment of investors of the other Contracting Party treatment no less favorable than that which is accorded to investments of its investors."[116]
79. Faced with such wording and formulation, an investment treaty tribunal should comply with the express treaty terms, respect the parties' choice, and apply the laws of the host state to the merits of the case. In such circumstances, the panel of arbitrators should decide whether the host state should be held internationally responsible by reference to the laws of the host state. The *Bogdanov v. Moldova* case is a good illustration in this respect: the claimants had argued that the respondent had violated Article 2(2) on 'full protection' and Article 3 on 'fair and equitable treatment' of the BIT between Russia and Moldova. Article 2(2) of the BIT contained the obligation of the host country to guarantee, in accordance with its own legislation, full and unconditional legal protection of the investments made by investors of the other contracting state. The question before the tribunal was whether this standard was violated by the introduction of a cap on the stock ownership by the Government of Moldova. Having noted that the language of Article 2(2) of the BIT was clear to the effect that the standard was not to be considered as 'corrective' of the host state's legislation, but had to be applied in accordance with Moldovan law, the tribunal found that as long as the restrictive measure adopted by the respondent did not contravene the law of Moldova, the full protection standard of the BIT had not been violated.[117] In contrast, Article 3 of the same BIT provided for the host state's commitment to grant investors of the other contracting party fair and equitable treatment. In the absence of any reference to host state law as the gauge for the application of the fair and equitable treatment standard in the pertinent treaty, the tribunal came to the conclusion that this time the standard "must be interpreted in accordance with the ordinary meaning of the terms, as well as the object and purpose of the BIT" and that the standard of treatment provided under Article 3 "must be interpreted to cover also any conduct that, even if it is in compliance with the national law of the host country … has unjust or unreasonable results …" As a corollary, the tribunal tested the same government measure (restriction on stock ownership)

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[114] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UN Doc. A/56/10 [7].

[115] Article IV of the Trade and Economic Co-Operation Agreement between the Caribbean Community ("CARICOM") and the Government of the Republic of Cuba, signed on 05 July 2000, entered into force on 01 January 2001.

[116] Agreement between the Government of The Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments, signed on 10 February 1999, entered into force on 22 January 2004.

[117] *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova* (n 97) Section 4.2.3.

against fair and equitable treatment as an international standard of investment protection and found Moldova in breach of this standard.[118]

80. To give another example, in an expropriation context, some treaties expressly provide that the condition of 'due process', one of the frequently stated conditions for lawful expropriations in investment treaties, shall be examined by reference to the laws of the host state. Thus, in *Tenaris v. Venezuela*, the tribunal, *inter alia*, focused on the language of Article 4(a) of the Venezuela-Portugal BIT[119] which, for the tribunal, had "an explicit *renvoi* to Venezuelan domestic law". The tribunal found the expropriation by Venezuela in that case to be unlawful, amongst others, in the light of the fact that Venezuela had failed to observe the requirements of its own nationalisation legislation in carrying out the expropriation.[120]
81. To sum up, when a treaty expressly requires the application of domestic law as 'law' to a matter of merits and as the yardstick for finding 'international responsibility', an investment treaty tribunal should apply domestic law as 'law'. However, it should be noted that absent a clear legal definition or conclusive jurisprudence in host state law with respect to such international standards, like the fair and equitable treatment standard, when applying host state law to such matters, difficulties might arise in practice.[121]

ii. Contractual Claims

82. An investment treaty tribunal would be competent to decide contractual claims in two instances: (i) when the treaty expressly provides for the jurisdiction of the tribunal to decide contractual disputes; and (ii) when the determination of whether a treaty obligation has been violated requires a primary analysis of whether the underlying investment contract has been breached. The latter analysis might be necessary in case the alleged treaty violation in question concerns the so-called 'umbrella clause'.[122]
83. It seems to be a settled issue that the law applicable to contractual claims is different from the law applicable to treaty claims. Generally speaking, whereas contractual claims are governed by the proper law of the contract, treaty claims are subject to international law.[123] The very well-known statement of the ICSID Annulment Committee in *Vivendi v. Argentina* explicates this point:

> [W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be

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[118] ibid, Section 4.2.4.

[119] The BIT between the Portuguese Republic and the Government of the Republic of Venezuela, signed on 17 June 1994, entered into force on 07 October 1995. For a similar provision, see Article 4(1) of the Agreement between the Government of the Kingdom of Thailand and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (n 73).

[120] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 [493]-[495].

[121] In this respect, see E De Brabandere (n 5) 5 (explaining the difference between the substantive standards of protection in investment treaty arbitrations and domestic law standards in public/administrative law disputes in the context of showing that the two fields of law, although have much in common, are not intrinsically the same.)

[122] ibid 127; PB Stephan, 'International Investment Law and Municipal Law: Substitutes or Complements?' (2014) 9(4) CMLJ 358-359.

[123] In *Mobil Oil Iran v. Iran*, the Iran-US Tribunal held that "allegations of breach [of contract] and allegations of expropriation raise different and distinct legal issues which thus must be considered separately". *Mobil Oil et al v. Iran et al*, IUSCT Case No. 74, 76, 81 & 150, Award No. 311-74/76/81/150-3, 14 July 1987, 16 Iran-USCTR, p 3, p 20 [58].

> determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.[124]

Indeed, as is plain from the Annulment Committee's statement, generally speaking, it is the law of the host state which governs the merits of a contractual dispute.[125] In this connection, Article 9.25(2) of Trans-Pacific Partnership ("TPP"),[126] provides that in cases where the dispute is in relation to an alleged violation of an investment authorisation or an investment agreement [contract], the tribunal should apply:

> (a) the rules of law applicable to the pertinent investment authorisation or specified in the pertinent investment authorisation or investment agreement, or as the disputing parties may agree otherwise; or
>
> (b) if, in the pertinent investment agreement the rules of law have not been specified or otherwise agreed:
>
> (i) the law of the respondent, including its rules on the conflict of laws; and
>
> (ii) such rules of international law as may be applicable.[127] [footnotes omitted]

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[124] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 11) [96]. See also *Payment of Various Serbian Loans Issued in France* (n 10) p 41 (stating: "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country"); *Wintershall AG v. The Government of Qatar* (n 10) 821-823; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (n 9) [67]; *Van Zyl and Others v. Government of Republic of South Africa and Others* (n 10) [64] (stating that: "Contracts concluded between states and aliens, are also governed by municipal law."); SKB Asante (n 10) 406 (opining that "an agreement between a host State and a private corporation … does not enjoy the status of an international agreement and on well settled principles of private international law, such an agreement should be governed by the law of the host state and not public international law.")

[125] Whereas, in most instances, the domestic law of the host state is applicable to the contractual dispute, there are still cases in which the parties' agreement or a conflict of laws analysis might lead to the application of another domestic law. See A Parra (n 12) 5-6. Parra exemplifies his opinion with 'commercial loan' arrangements as a sort of contract in which another domestic law (other than that of the host state) might apply to the contractual dispute in question.

[126] The Trans-Pacific Partnership ("TPP") is a trade and investment agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States which was signed on 04 February 2016 but was not ratified as required and did not come into force. Indeed, after the United States withdrew its signature, the agreement could not enter into force as structured and planned. All original TPP signatories, except the United States, agreed in May 2017 to revive the TPP and reached agreement in January 2018 to conclude the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP" or TPP11 (with number 11 representing the number of the member states of the Partnership)). The formal signing ceremony was held on 08 March 2018 in Santiago, Chile. See J Hepburn, 'Revived Trans-Pacific Partnership (TPP) Treaty Text Is Released, With A Few Tweaks to The Previously-Negotiated Investment Chapter; Australia And New Zealand Continue to Disapply ISDS Between Them', 21 February 2018, See <https://proxy.ppl.nl:2094/articles/revived-trans-pacific-partnership-tpp-treaty-text-is-released-with-a-few-tweaks-to-the-previously-negotiated-investment-chapter-australia-and-new-zealand-continue-to-disapply-isds-between-them/> 'accessed 31 May 2018'.

[127] This provision is in contrast to paragraph 1 of the same Article, which concerns the 'governing law' of disputes based on alleged violations of the investment chapter of the Agreement itself, i.e., disputes arising out of the alleged treaty breaches. In such circumstances, the tribunal should apply the TPP and applicable rules of international law. A footnote to this latter provision notes: "For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact." ibid. See also C Schreuer,

84. According to this provision, absent an agreement by the contractual parties regarding the governing law, the dispute will be decided in accordance with the law of the host state and such rules of international law as may be applicable.
85. In this context, one may reasonably point to the possibility of a contract being subject to international law according to the explicit or implicit choice of the parties,[128] and, thus, deny the application of the host state law to an investment contract dispute. While it is theoretically possible for the parties to an investment contract to make such a choice, however, the choice would not be meaningfully helpful in deciding an actual investment contract claim since international law does not contain plenty of rules governing and regulating the specifics of contractual disputes.[129] Considering that a contract cannot exist in a vacuum,[130] even under such circumstances, the otherwise applicable domestic law will inevitably step in to fill the gaps in regulating the merits of an investment contractual relationship.[131]

Conclusion

86. It was shown in this Chapter that national law is sometimes 'relevant' and sometimes 'conclusive' in investment treaty arbitrations. Its application is 'relevant' when it is used in the form of a set of 'facts' which are necessary to deal with before deciding the issue on the basis of applicable international law. However, municipal law is also applied in the form and as a matter of 'law' in certain circumstances, and in this capacity it is 'conclusive' on the legal matters before an investment treaty tribunal. Bearing these discussions in mind, it is plainly wrong, or at least inaccurate, to argue, as some have,[132] that since investment treaty tribunals

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'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (n 12) 15-16 (analysing Article 24(1) of the US Model BIT (2012), which has a similar formulation).

[128] HE Kjos (n 72) 213 *et seq*.

[129] As an instance, see the ICSID tribunal's statement in *Adriano Gardella v. Ivory Coast* to the effect that public international law does not have plenty of rules governing specifics of contractual issues, except for the very generic rule of '*pacta sunt servanda*' and the principle of 'good faith'. See *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977, 1 ICSID Rep 283, 287 [4.3]. See also HE Kjos (n 72) 221.

[130] 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 "[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.") See also Lord McNair, 'The General Principle of Law Recognized by Civilized Nations' (1957) 33 BYIL 7; N Blackaby & C Partasides (n 63) 156-157.

[131] See *Adriano Gardella S.p.A. v. Côte d'Ivoire* (n 129) 287 [4.3].

[132] See *EnCana Corporation v. Republic of Ecuador* (n 48) Partial Dissenting Opinion of Horacio A. Grigera Naon, 30 December 2005 [12] (disagreeing with the application of domestic law to the question of the existence of investment and stating that "[…] the local laws, administrative acts and practices and other conduct attributable to the host State at the moment they had the effect of operating the deprivation of property, are *facts* to be freely evaluated by the arbitrators to determine if the foreign investor's entitlement to protection under international law has been infringed at a specific moment in time or not."); *Vladimir Berschader and Moïse Berschader v. The Russian Federation* (n 31) [96] (stating that: "The Vienna Convention provides no role for the domestic law of contracting states in the interpretation of international treaties. Therefore, in the instant case, it is clear that Russian national law is of no relevance in this regard. While Russian law may be relevant in establishing certain factual circumstances involved in the merits of the case, it has no role to play in determining the jurisdiction of the Tribunal."); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (n 42) [217]-[218]

are international tribunals applying rights under a treaty, international law must always prevail and municipal laws are merely 'facts' to be ascertained.

87. When applied as governing law, domestic law plays a role either because; (i) the parties have expressly referred to that body of law in the relevant investment treaty; or (ii) the question is in relation to the sovereignty of the state and has a national nature to which customary international law fails to provide a proper response.[133]
88. It was also submitted in this Chapter that in finding the applicable law to each question before an investment treaty tribunal, in particular, questions of jurisdiction, the possible applicable law provision of the pertinent investment treaty, and in case of ICSID arbitrations, Article 42(1) of the Convention, are of very little help, and in most situations border redundancy, as they do not guide the tribunal as to the sequence and priority of the possible applicable laws and their proper application in distinct jurisdictional and substantive issues.
89. According to the analysis done in this Chapter, domestic law is applied as 'law' in both jurisdiction *ratione materiae*, and jurisdiction *ratione personae* spheres. In both areas, domestic law of either the home or, more frequently, the host state has the last say on certain specific matters. In addition, it was shown that whereas domestic law is usually applied as 'fact' and 'evidence' in issues concerning merits, there are windows of opportunity for such laws to also cast as 'laws' in such circumstances, namely, (i) where the parties to the treaty have expressly provided so; and (ii) where the issue in question is governed by domestic law by its nature, like a contractual claim.
90. Having all these discussions in mind, a number of conclusions are in order: (1) in investment treaty arbitrations, domestic law can appear both as 'facts' and as 'laws' in matters of jurisdiction and merits. (2) In contrast to responsibility issues, domestic law is more frequently applied as 'law' in jurisdictional issues. This is partly because the applicable law regime of jurisdiction is different from and independent of the applicable law regime of merits. (3) In certain situations, the application of domestic law as 'law' is because of the stipulation in the treaty, like reference to domestic law with respect to 'approval' of investments. In other situations, such application is due to the nature of the issue, like the creation and existence of property rights underlying an investment. There are also communal areas in which domestic law is applied as 'law', both because the treaty has so provided and also because the nature of the issue necessitates the application of domestic law, like the 'legality requirement' or determining the nationality of a natural person.

(where the tribunal holds that reference to domestic law in certain jurisdictional areas is for the purpose of determining "a question of fact"). See also G Sacerdoti, 'Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19(1) ICSID Rev-FILJ 25-26

[133] HE Kjos (n 72) 157.