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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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Chapter 3: Application of Domestic Law to the Question Regarding the Creation/Existence of Rights/Interests Constituting Investments

Introduction

1. As was indicated earlier, terms like ‘property’ and ‘asset’ frequently appear in introductory provisions of investment treaties which purport to define ‘investment’. These core concepts (‘property’ and ‘asset’) are not usually defined in the text of the investment treaty itself. The determination of the meaning, scope, and legal consequences of these terms is central to the scope of application of investment treaties, and, therefore, to the jurisdiction of an arbitral tribunal owing its jurisdiction to such treaties. In other words, the very core object of protection in investment treaties is a property right or a bundle of property rights and/or interests. These property rights or interests, when coupled with necessary economic features, will form investments which are the subject-matter of investment treaties.¹ As a result, before inquiring about the legality of an investment, in order to ascertain jurisdiction *ratione materiae*, a tribunal should verify whether there exist property rights/interests capable of constituting investments.
2. Due to this obvious centrality of the concepts of ‘property’ and ‘asset’ for the investor’s investment treaty case, respondent states are seen nowadays to object to the existence of property rights/interests constituting investments more frequently. Through such jurisdictional defences, the recipient states argue before the adjudicating forum that the investor has acquired no rights and/or interests over properties or assets under its legal system. One reason for deploying such a defence is that, if successfully pleaded, as recent case-law has proven, the respondent would have all of the investor’s substantive claims dismissed based on and due to the inexistence of rights and/or interests over properties and assets allegedly constituting investment, and, as a result, for want of subject-matter jurisdiction.
3. For an arbitral tribunal to decide such an issue, it should answer three critical questions: first, why such matters should be resolved by reference to the laws of the host state? second, if the laws of the host state are applicable to such issues, how is the tribunal supposed to ascertain the contents of such law? and third, if it finds, based on a proper analysis of the host state law, that the state party to the dispute is right that there are no rights and/or interests recognised under the laws of the host state, how does that finding of law influence the jurisdiction of an investment treaty tribunal? Relevant in this respect is also the application of host state law to specific contract and property law questions in a jurisdictional equation. Whereas the second question will be addressed in Chapter 4 of this Thesis which focuses on the methods for ascertaining the contents of host state law, the other questions will be dealt with in the present Chapter.
4. In order to answer the questions subject to this Chapter, the discussion will be followed in two Sections: **(One)** the legal basis for referring to the laws of the host state; **(Two)** The actual application of the domestic law to particular questions regarding the creation and existence of rights/interests. Section Two will be divided into two subsections: **(A)** The general function of the host state law in determining the jurisdiction *ratione materiae* of an investment treaty tribunal; and **(B)** the application of domestic law of the host state to the specific relevant

¹ If one considers ‘investment’ as a tree sapling planted by a gardener to benefit from its fruits later, the root of the sapling would be the existence of valid and legal rights over properties and assets.

property and contract law questions before an investment treaty tribunal in a jurisdictional context.

Section One: The Legal Bases for Referring to the Laws of the Host State

5. When faced with a defence according to which there are no rights and/or interests over properties or assets raised by a respondent state, the first question that should be answered by an arbitral tribunal called on to decide an investment treaty dispute is the basis and the legal footing for the application of the laws of the host state in an international arbitration proceeding. Indeed, an international tribunal applying and interpreting an international investment treaty in an international dispute naturally expects to apply international law to the issues before it, including to the matters regarding jurisdiction,² unless there is a plausible reason, like a *renvoi*, which validates reference to and application of another body of law.
6. It is submitted that customary international law has no rule to define ‘property’ and/or ‘asset’. As a corollary, unless the contracting parties to the investment treaty have defined ‘property’ and/or ‘asset’ for the purpose of their investment treaty relations,³ in most cases, it is the law of the host state that governs the issue of the existence of rights/interests over properties/assets underlying investment. This phenomenon of referring to the laws of the host state for ascertaining the existence of rights/interests underlying investments is so generally accepted that in one leading investment treaty case, both parties to the dispute practically affirmed the application of host state municipal law to the questions of existence and nature of the rights which were the essence of the alleged investment:

[T]he 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 capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the ICSID Convention. That is the basis upon which Claimants plead their case. Respondent submits the same. The Tribunal agrees.⁴

7. As will be discussed below, there are two legal grounds which warrant the application of the laws of the recipient state to the jurisdictional question of the existence of rights/interests over properties and/or assets. Considering the nature of the issue, it is submitted that it is exclusively

² O Spiermann, ‘Applicable Law’ in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 94. See also VC Igbokwe, ‘Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations’ (2006) 23(4) *J Int’l Arb* 268 (stating that the role of international law has arguably been put to rest in the foreign investment treaty regime of dispute resolution.)

³ Indeed, although customary international law has no rules defining the concepts of ‘rights’ and ‘property’, the contracting parties to an investment treaty are free to define the content of property rights for the purpose of a particular treaty. See M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2017) 104-110. See also C Lévesque, ‘Investment and Water Resources: Limits to NAFTA’ in MC Cordonier Segger, M Gehring, A Newcombe, R Buckley, A Zieglerstating (eds) *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 425 (stating that: “Of course, if the Treaty itself or customary international law recognizes the existence of the alleged ‘right’ in international law, it is a different situation.”)

⁴ *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 [149].

the host state law which is determinative of the existence of rights over properties and assets **(A)**. Indeed, unless the parties have agreed otherwise in the treaty or through subsequent agreement or practice, since general international law does not, in principle, have rules to regulate this matter, this issue should be resolved by reference to host state law. By engaging in a conflict of law analysis in the context of finding the applicable law to the question of the existence of rights and interests over assets and properties, in most cases, one will end up with the outcome of the application of host state law to the question of creation and existence of properties. Finally, it has been observed that some investment treaties contain express or implicit language to the effect that these core private law issues are governed by the domestic law of the host state **(B)**. These two legal bases for referring to the laws of the host state for determining the existence and creation of rights over properties and assets will be analysed below in sequence.

A. The Nature of the Legal Issue

8. Although it is possible for state parties to an investment treaty to define the terms ‘rights’, ‘interests’, ‘properties’ or ‘assets’ in the treaty itself, or to do so by way of subsequent agreement, or subsequent practice,⁵ however, this is not usually the practice of investment treaties. In fact, an overwhelming majority of investment treaties do not define the terms ‘rights’, ‘properties’ or ‘assets’ and do not specify the legal regime governing the definition of these concepts. What they do instead is to refer to these terms in a general and unqualified manner.
9. According to Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”), treaty terms should be given their ‘ordinary meaning’. The question is which legal system defines such concepts and determines their ‘ordinary meaning’? As the following discussion will show, it is, in most cases, the law of the host state which supplies the substantive content of the alleged ‘right’ and/or ‘interest’ in question.

a. Lack of a Response by General International Law in Principle

10. To be sure, several international instruments (mostly draft conventions) have tried to define the term ‘property’ of aliens for the purpose of international protection against unlawful measures of host states. They include very broad classifications of the term ‘property’. Some of such instruments are as follows: the 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens (at Article 10(7))⁶ and the 1967 OECD Draft Convention on Protection of Foreign Property (at Article 9(c)).⁷ Indeed, these instruments set out the classification of rights protected by international law, like ‘tangible’ and ‘intangible’

⁵ M Sasson (n 3) 104-110; C Lévesque (n 3) 425 (stating that: “Of course, if the Treaty itself or customary international law recognizes the existence of the alleged ‘right’ in international law, it is a different situation.”)

⁶ Article 10(7) of this Draft Convention reads:

The term “property” as used in this Convention comprises all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property.

⁷ Article 9 (c) of this Draft Convention provides:

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properties. However, the problem is that they neither define such rights nor delineate their substantive regime and content. Put differently, these are, in effect, enumerations of rights rather than definitions. Indeed, there is no definition of ‘property’ or ‘asset’ in customary international law as these concepts are not created by this body of law.⁸ Even assuming that customary international law has a principled definition of property or asset, which as explained above is not the case, customary international law has no rules to deal with the nuances of ‘legal entitlements’ alleged by investors in various investment treaty cases. For instance, “[t]here is no general international law on the privatisation of insurance companies [...], nor is there an international law of television licensing agreements, nor is there an international law of zoning regulations.”⁹

11. In addition, most investment treaties do not also define the terms ‘property’ and ‘assets’. What they do instead is categorising different types of assets, which in no way is equivalent to defining the terms ‘assets’ and ‘properties’. For instance, Article 1(1) of the BIT between Germany and Bosnia and Herzegovina provides with respect to the term ‘investment’ that:

The term “investments” shall comprise every kind of asset, in particular:

- (a) Movable and immovable property as well as any other rights *in rem*, such as mortgages, liens and pledges;
- (b) Shares of companies and other kinds of interest;
- (c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;
- (d) Copyrights, industrial property rights, technical processes, trade marks, trade names, know-how and goodwill;
- (e) Business concessions under public law, including concessions to search for, extract and exploit natural resources.¹⁰

12. This provision symptomises an open-ended listing of different arrays of properties and assets covered by investment treaties without defining the terms ‘assets’ or ‘properties’ themselves.
13. Being mindful of this, one scholar has opined that: “Investment treaties do not contain substantive rules of property law. There must be a *renvoi* to a municipal property law.”¹¹ It is actually municipal law which has the required apparatuses for defining ‘property’ and/or ‘asset’. This understanding of the applicable law to the questions of creation and existence of rights over properties and assets is shared by awards and decisions of international and national courts and tribunals. Below, I will review some examples from investment treaty arbitrations in this regard.
14. In *Nagel v. Czech Republic* case, the claimant had brought a claim against Czech Republic arising out of the respondent’s failure to grant a public tender for mobile phone contracts to

⁸ See *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* (n 4) [162]. See also Z Douglas, ‘Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureka and Methanex*’ (2006) 22(1) *Arbitration International* 43-46; Z Douglas, *International Law of Investment Claims* (CUP 2009) 52; M Sasson (n 3) 104-110.

⁹ Z Douglas, ‘Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureka and Methanex*’ (n 8) 45.

¹⁰ Treaty between the Federal Republic of Germany and Bosnia and Herzegovina Concerning the Encouragement and Reciprocal Protection of Investments, signed on 18 October 2001, entered into force on 11 November 2007.

¹¹ Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *BYIL* 198.

the investor, despite the signature of a cooperation agreement with a state telecommunications company wholly owned by the respondent under which the parties would seek to obtain, through a consortium, the necessary licenses and permits to establish, own, and operate a GSM mobile telephone network in the Czech Republic. The case was submitted on the basis of the BIT between the United Kingdom and Czech Republic.¹² Article 8(3) of that BIT on governing law briefly provided that: “The arbitrator or arbitral tribunal to which the dispute is referred [...] shall, in particular, base its decision on the provisions of this Agreement.” The central question before the tribunal was whether the cooperation agreement mentioned above constituted an investment protected by the BIT. The claimant asserted that ‘assets’ are defined by the investment treaty and international law, and not by Czech law as the law of the host state.¹³ This argument did not succeed. According to the tribunal, the requirement for the underlying ‘right’ or ‘claim’ to have financial value created a link with domestic law. It observed that:

[W]hen read in their context, the terms “asset” and “investment” in Article 1 shall be considered to refer to rights and claims which have a financial value for the holder. This creates a link with domestic law, since it is to a large extent the rules of domestic law that determine whether or not there is a financial value. In other words, value is not a quality deriving from natural causes but the effect of legal rules which create rights and give protection to them.¹⁴

Shedding more light on the relation between host state law and rights forming the investment, the tribunal further noted that:

[T]he basis of Mr Nagel’s claims in this case is the Investment Treaty and that that Treaty should be interpreted in accordance with the rules of public international law. However, Czech domestic law will be of some relevance, since the terms “investment” and “asset” in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under Czech law. It is therefore necessary to determine what is the legal significance of that Cooperation Agreement under Czech law.¹⁵

Having made these comments, the tribunal analysed Czech law and concluded that the cooperation agreement was only of a preparatory nature and, hence, the rights derived therefrom had no financial value.¹⁶ The tribunal, thus, came to the conclusion that Mr. Nagel’s rights under the cooperation agreement were not such as to constitute an ‘asset’, and,

¹² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, signed on 10 July 1990, entered into force on 26 October 1992.

¹³ *William Nagel v. The Czech Republic* (n 8) [82]. See also *ibid* [127].

¹⁴ *ibid* [300].

¹⁵ *ibid* [316].

¹⁶ *ibid* [328].

subsequently, an ‘investment’ within the meaning of Article 1 of the United Kingdom-Czech Republic BIT.¹⁷

15. In *Emmis et al v. Hungary*, the claimants had brought claims against the respondent arising out of the alleged expropriation of claimants’ investments in nationwide FM-frequency radio-broadcasting licenses in Hungary, through the Government’s decision to award the radio-broadcasting frequencies formerly held by claimants to a third party. The tribunal considered, as a threshold issue, whether the investors had property rights capable of expropriation in 2009. For such determination, it turned to the law of the host state, Hungary. The tribunal evaluated the evidence presented by the parties, including the opinion of Hungarian law experts, and attached weight to the determinations of domestic courts on how Hungarian law should be understood and applied. As to the applicable law to the question of the existence of rights capable of being expropriated, the tribunal pointed out that:

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.¹⁸

Based on such analysis of Hungarian municipal law, the tribunal considered that, after the expiration of the Hungarian broadcasting license they held from 1997 until 2009, the investors no longer had any valuable assets that Hungary could have taken.

16. This very concept, i.e. referring to the laws of the host state to ascertain the creation and existence of rights over properties and assets, was confirmed by the tribunal in *EnCana v. Ecuador* which stated that:

[F]or 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.^{19 20}

¹⁷ *ibid* [329].

¹⁸ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [162].

¹⁹ *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]. It is noteworthy that Article XIII(7) of the underlying BIT provided that a tribunal exercising jurisdiction under the BIT “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. 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). Unlike many BITs that contain applicable law provisions, there was no express reference to the law of the host state in the applicable law provision. The tribunal nevertheless deemed it necessary to refer to such law for the above-mentioned purpose.

²⁰ In another case lodged against the Government of Ecuador, the investment treaty tribunal relied upon tax law regulations of Ecuador to decide that the claimant was entitled to VAT refunds under the laws of Ecuador. *Occidental*

17. By the same token, the tribunal in *Total v. Argentina* held that it is the law of the host state, in that case Argentina, that applied to the question of determining the content and the extent of Total's economic rights. It specifically indicated that: "... Argentine law has a broader role than that of just determining factual matters. The content and the scope of Total's economic rights (in Total's words, "Argentina's commitments to Total") [...] must be determined by the Tribunal in light of Argentina's legal principles and provisions."²¹
18. The principle of referring to domestic law for determining the private law entitlements has also been recognised by both PCIJ and ICJ. In one of its famous decisions, the PCIJ considered that: "In principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals."²² Furthermore, in 2007, in *Diallo* case, the ICJ stated that where an internationally wrongful act is represented by a violation of shareholders' rights, such rights are "defined by the domestic law of that State".²³
19. In addition, certain decisions of some mixed claims commissions endorse the view that existence and creation of rights on a private plane are, naturally speaking, governed by domestic law. In *George W Cook (USA) v. United Mexican States*, Commissioner Nielsen noted that:

Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 01 July 2004 [136]-[143].

²¹ *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 [39]. The tribunal found further support for its holding by referring to the substantial reliance by Total on Argentina's acts of a legislative and administrative nature governing the gas, electricity, and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, which it deemed to be a recognition that Argentina's domestic law plays a prominent role. *ibid.* Furthermore, in explicating its position, the tribunal went on to refer to two paragraphs of the Award in *Enron v. Argentina*. One of the paragraphs invoked by the tribunal was paragraph 206, which reconfirms that the role of the domestic law of the host state goes beyond settling factual issues. It also explains that such law governs the creation and existence of the rights underlying the investment:

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

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007 [206].

²² *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, Judgment, P.C.I.J. Rep. Series A/B, No. 76, 1939 (28 February 1939) p 18. Although the present author agrees with the first limb of this statement, however, the second limb (i.e. jurisdiction of the municipal courts to issues of property law) is subject to certain important reservations and discussions in investment treaty arbitrations which will be touched upon in Chapters 5 and 7 of this Thesis.

²³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Rep. 2007 (24 May 2007) p 582, p 606 [64].

When questions are raised before an international tribunal, as they have been in the present case, with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent Government is determined solely by international law.²⁴

20. The same proposition is also accepted by certain municipal courts. To give one prominent example, in a famous judgment in the dispute between *Van Zyl and Others and Government of Republic of South Africa and Others*, the South African Supreme Court of Appeal considered it as a trite principle of international law that “[p]roperty rights are determined by municipal law. The questions whether any rights have been granted, exist or whether they have terminated are all questions that have to be determined according to local law.” It further approved the reality that “[t]here is no universally acceptable concept of property rights”.²⁵
21. Therefore, as the practice of international courts and tribunals indicates, general international law has no rule to regulate questions of creation and existence of rights over properties and assets. As a review of the above-mentioned examples shows, it is the domestic law of the host state that settles the questions regarding proprietary and contractual rights/interests underlying investments.²⁶

b. Conflict of Laws Rules

22. Considering the fact that general international law does not have an answer to the question of creation and existence of rights/interests underlying investments, the matter should be resolved by domestic law. In such a case, the arbitrator should step into the conflict of laws realm to find the domestic law applicable to the question of creation and existence of rights constituting investments. A proper conflict of law analysis indicates that questions regarding creation and existence of rights underlying investments are governed by the municipal law of the host state, whether such rights are of proprietary or contractual nature or are other types of tangible and intangible rights.
23. It deserves mention at the outset that, whereas, as explained above, the scholarship and the jurisprudence of international courts and tribunals commendably point to the application of domestic law, rather than international law, to such questions, there does not seem to be so many commentators and/or arbitrators to have approached the question based on a proper analysis of conflict of laws, which is the sound approach to identify the governing law to a particular legal issue.
24. When faced with a legal question that it needs to resolve – in this case, the existence of rights and interests constituting investments – the tribunal has to determine the applicable law to that

²⁴ *George W Cook (USA) v. United Mexican States* (1927) IV RIAA 213, 215 [7].

²⁵ *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>.

²⁶ However, as was mentioned above, the parties to the treaty remain free to define ‘property’ and/or ‘asset’ in the treaty itself or through subsequent agreement or subsequent practice.

question in the first place. This requires a conflict of laws analysis. The starting point for a conflict of law analysis would be for the adjudicating forum to refer to its applicable rules regarding the determination of governing law. Thus, an ICSID tribunal has to refer to Article 42(1) of the ICSID Convention,²⁷ an ICC tribunal should refer to Article 21(1) of the ICC Arbitration Rules of 2017,²⁸ Article 22(3) of LCIA Arbitration Rules (2014) would be applied by an LCIA arbitral panel,²⁹ an SCC tribunal should refer to Article 22(1) of the 2010 Rules,³⁰ finally, an *ad hoc* tribunal working under the 2010 UNCITRAL Arbitration Rules must begin its analysis with Article 35(1) of those Rules.³¹

25. The common feature of all these rules is respecting party autonomy, meaning that the arbitral panel should begin with the agreement of the parties as to the applicable law. Therefore, if the parties expressly refer to a particular law for determining the meaning of the terms ‘asset’ and ‘property’, that choice is usually conclusive for the tribunal.³² However, if the parties have not made such a choice, which is usually the case in investment treaties, four out of five of the arbitration rules mentioned above indicate that the arbitral tribunal shall apply the law which it determines to be ‘appropriate’.³³ Several commentators have opined that the effect of this

²⁷ Article 42(1) of the ICSID Convention provides that:

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.

²⁸ Article 21(1) of the 2017 ICC Arbitration Rules provides:

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

²⁹ Article 22(3) of the 2014 LCIA Arbitration Rules provides that:

The Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.

³⁰ Article 22(1) of the 2010 SCC Arbitration Rules provides:

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. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.

³¹ Article 35(1) of the 2010 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. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

³² As noted above, it goes without saying that if the parties define the terms ‘assets’ and/or ‘properties’ and/or set benchmarks for determining the scope of such terms for the purpose of their bilateral relations, the tribunal should respect their agreement.

³³ As to the ICSID Convention, it is recalled that Article 42(1) provides that in the absence of an agreement of the parties on the applicable rules of law, an ICSID 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. A direct application of the law of the state party to the dispute by the tribunal plainly culminates in the application of the law of the host state to the question of the existence of rights and interests. In case the tribunal brings into the equation the conflict of laws of the host state, the result would probably be the same. Finally, with respect to this question, i.e. the existence of rights and interests, there are no ‘applicable’ ‘rules of international law’ to be considered by an ICSID tribunal.

rule is that arbitral tribunals are not obliged to determine the applicable law by engaging in an analysis of a set of national conflict of law rules of a specific country. Formulated differently, they have the authority to identify the applicable law directly, by choosing the law that they deem most appropriate (*voie directe*).³⁴ However, this direct selection of law cannot be done arbitrarily. As Heiskanen explains: “the *voie directe* approach remains a conflict-of-laws approach in the sense that it results in a choice of law and accordingly the arbitrators must provide reasons for their (contextual) choice of law.”³⁵ The same observation is made by Derains and Schwartz: “[...] arbitrators may devise their own rule of conflict. However, whatever method is employed, the arbitrators must provide a reasoned explanation for their choice in accordance with the legitimate expectations of the parties.”³⁶ For instance, under the 1998 ICC Arbitration Rules – which had a similar provision on applicable law, i.e., Article 17(1)³⁷ – the applicable law provision is reinforced by Article 25(2) of those Rules,³⁸ which requires an ICC tribunal to state the reasons for its award and which, therefore, prompts the tribunal to state why it found the rules of law it chose to be appropriate. Indeed, with respect to the authority of an arbitral tribunal to choose rules of law directly and without reference to any system of conflict of laws, or some particular conflict of law rule, the commentators note that although such authority is, indeed, granted to an arbitral tribunal, it will presumably seek to justify its choice of the applicable law by reference to some choice of law criteria in practice.³⁹

26. In stating reasons for its choice of the most appropriate law, an arbitral tribunal acting under either of the foregoing arbitration rules might explain that it is only the domestic law that provides an answer to the question of the definition of ‘property’ and ‘asset’. However, to identify the relevant domestic law, among all possible legal systems, the arbitral tribunal would issue a reasoned award only if it enters into a proper conflict of law analysis. In so doing, it should choose the proper set of choice of law rules. In this respect, several methods have been applied, some of which have proven to be much more sought-after.⁴⁰

³⁴ N Blackaby & C Partasides (eds), *Redfern and Hunter on International Arbitration* (OUP 2015) 224; GB Born, *International Arbitration: Law and Practice* (Wolters Kluwer 2012) 242; WL Craig, WW Park and J Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules with Commentary* (Ocean Publication Inc. 1998) 112; T Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005) 8-9.

³⁵ V Heiskanen, ‘And/Or: The Problem of Qualification in International Arbitration’ (2010) 26(4) *Arb Int’l* 451, fn 27.

³⁶ Y Derains and EA Schwartz, *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International 2005) 242.

³⁷ Article 17(1) of the 1998 ICC Arbitration Rules reads as follows:

The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

³⁸ This provision of the 1998 Rules reads: “The Award shall state the reasons upon which it is based.”

³⁹ See M Blessing, ‘Regulations in Arbitration Rules on Choice of Law’ in AJ van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (Kluwer Law International 1996) 413; B Wortmann, ‘Choice of Law by Arbitrators: The Applicable Conflict of Laws System’ (1998) 14(2) *Arb Int’l* 101.

⁴⁰ Gary Born refers to the most popular range of choice-of-law options to be the following: (1) “Choice-of-Law Rules of Arbitral Seat”. (2) “Choice-of-Law Rules That Arbitral Tribunal Considers “Appropriate””. (3) ““Cumulative” Application of Choice-of-Law Rules”. (4) “Choice-of-Law Rules of State With Closest Connection to Underlying Dispute”. (5) ““International” Choice-of-Law Rules”. GB Born, *International Arbitration: Law and Practice* (Wolters Kluwer 2016) 233-259. He also refers to two other choice of law methods, which appear to be the result of the application of choice of law rules, rather than the methods themselves. These two options are: (1) “Application of

27. If an investment treaty tribunal opts for the choice of law rules of the arbitration seat or international choice of law rules, the conflict of laws rules of almost all popular seats of arbitration for investment treaty disputes go for the application of the law of the *situs* of the property in matters of acquisition and transfer of property rights. As Rabel put it more than sixty years ago:

It is at present the universal principle, manifested in abundant decisions and recognized 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.⁴¹

28. Another leading private international law authority has commented that rights over immovable properties are determined by the law of the *situs*.⁴²

29. In fact, it has been accepted in numerous legal systems that acquisition of title and property rights in both moveable and immovable properties, the validity of such acquisition, the nature, content, and scope of the rights, their classification, and their termination (whether by way of transfer or extinction) is determined by the laws of a country in which the tangible asset in question is situated (*lex situs* or the law of the *situs*).⁴³ In other words, the *lex situs* conflicts rule enjoys universal support and application. Bearing in mind the universality of the rule, opting for other conflict of laws methods enumerated above would not, in all likelihood, generate a different result.

30. Given that in most cases, the foreign investment in question is situated in the soil of the host state, the *lex situs*, i.e., the law of the host state, governs the acquisition and termination of rights and interests constituting investments.

31. One should note, however, that investment treaties extend their protection not only to tangible properties (corporeal moveable and immovable assets) but also to intangible properties or incorporeal property. Thus, for instance, Article 1(a) of the 2008 UK Model BIT, expressly includes shares in and stocks and debentures of a company (at sub-section (ii)), claims to money (at sub-section (iii)), and intellectual property rights (at sub-section (iv)) within the safe protected zone of the investment treaty.⁴⁴

32. Intangible property is something of individual value that cannot be touched, held, or pointed at. In other words, intangible property can include any item of worth that is not physical in

Substantive Law of State With Closest Connection to Dispute”. (2) “Application of Non-National Legal System in Absence of Parties’ Choice-of-Law Agreement”. *ibid.*

⁴¹ E Rabel, *The Conflict of Laws: A Comparative Study* (Vol. IV, University of Michigan Law School 1958) 30.

⁴² PM North & JJ Fawcett (eds), *Cheshire and North’s Private International Law* (13th edn, Butterworths 1999) 924, 929-930. Some commentators believe that the determination of rights to immoveables according to the law of *situs* is because of the close control the authorities of the situation of the property have over such assets. See J Hill & MN Shuilleabhain (eds), *Clarkson & Hill’s Conflict of Laws* (OUP 2016) 471, 473.

⁴³ In this respect, see Austrian’s International Private Law Act (IPRG) of 1978, Articles 31-32; Belgian Code of Private International Law of 2004, Articles 87 and 94; Dutch Civil Code of 1838, Article 10:127; French Civil Code of 1803, Articles 3(2); German Introductory Act to the Civil Code of 1994, Article 43; Iranian Civil Code of 1928, Article 966; Italian Law on Private International Law of 1995, Article 51; Spanish Civil Code of 1889, Article 10; Swiss Federal Act on Private International Law of 1987, Articles 99-100; US Restatement (Second) on Conflict of Laws, Sections 244 & 246.

⁴⁴ The 2008 Model BIT of the Government of the United Kingdom of Great Britain and Northern Ireland.

nature. Therefore, such rights have no physical substance, and, thus, no actual location could be occupied by them. That being said, upon embarking upon a proper conflict of law analysis, in most instances, the same law, i.e. the law of the host state, would apply to the creation and existence of intangible properties. In fact, although intangible properties occupy no space, and, therefore, have no physical location, commentators have suggested that such properties should be artificially located by law.⁴⁵

33. It is submitted that in most cases, the *situs* of intangible properties constituting investments is also the host state. In *Encana v. Ecuador*, the alleged entitlement at stake was the right to VAT refunds which is obviously an intangible right. In determining the applicable law to the question of the existence of legal rights, the majority of the tribunal had no doubt or difficulty to refer to the laws of the host state as the right point of reference. It said 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.”⁴⁶
34. Indeed, with respect to some types of intangible properties protected by investment treaties, the *situs* of the properties is usually the country of the recipient state. In this regard, it is useful to study the relevant *situs* for three kinds of intangible properties frequently subject to investment treaty arbitrations: (i) shares and stocks of a company. (ii) intellectual property rights. (iii) debts and loans.
35. The *situs* of stocks of a company, as a type of intangible personal property, has been held to be at the domicile of the owner⁴⁷ or to be at the place where the certificate is found.⁴⁸ However, the more authoritative rule would seem to be that the domicile of the corporation is the basis of *situs*.⁴⁹ In *Macmillan Inc v. Bishopsgate Investment Trust plc (No 3)*, the case involved competing claims to shares in a company which was incorporated in New York, although the transaction on which the parties’ claims were based had been effected in London. The English Court of Appeal ruled that the matter as to the owner of the shares should be disposed of in accordance with *lex situs*.

[T]here is authority and much to be said for treating issues of priority of ownership of shares in a corporation according to the *lex situs* of those shares. That will normally be the country where the register is kept, usually but not always the country of incorporation.⁵⁰

The *situs* of a company whose shares and stocks have been purchased and is supposed to be protected by an investment treaty is in all likelihood the country of the recipient state. In the

⁴⁵ See JG Collier, *Conflict of Laws* (CUP 2001) 251; St. John’s Law Review, ‘Situs of Intangible Property in Conflict of Laws’ (2013) 30(2) St. John’s Law Review 225. As Cheshire puts it, “[i]t is of course necessary for certain purposes, such as jurisdiction or probate, to assign a *situs* not only to good will, but to choses in action generally.” PM North & JJ Fawcett (eds) (n 42) 927. See also J Hill & MN Shuilleabhain (eds) (n 42) 480.

⁴⁶ *EnCana Corporation v. Republic of Ecuador* (n 19) [184].

⁴⁷ See *Kilgour v. New Orleans Gas Light Co.*, 14 Fed. Cas. 468, No. 7764 (C.C.D. La. 1875); *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604 (Fla. 1953) (dictum), cert. denied, 348 U.S. 816 (1954).

⁴⁸ See *Bowles v. R.G. Dun-Bradstreet Corp.*, 25 Del. Ch. 32, 12 A.2d 392 (Ch. 1940).

⁴⁹ See, e.g., *Lockwood v. United States Steel Corp.*, 209 N.Y. 375, 103 N.E. 697 (1913); *Doherty v. McDowell*, 276 Fed. 728 (D. Me. 1921); *Iron City Say. Bank v. Isaacsen*, 158 Va. 609, 164 S.E. 520 (1932).

⁵⁰ *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 at 411.

same vein, in 2007, in *Diallo* case, the ICJ stated that where an internationally wrongful act is represented by a violation of shareholders' rights, such rights are "defined by the domestic law of that State".⁵¹

36. Similarly, the *situs* of intellectual property rights is the place where protection is sought, i.e. host state.⁵² Finally, the *situs* of a debt is where the debtor resides. In cases of banking loans, for instance, the creditor is the bank, and the debtor is, more often than not, the host state. The residence of the host state is the host state with the result that the applicable law to the existence of such an intangible right is the law of the host state.⁵³
37. Moreover, since the acquisition of contractual rights in international investment takes place through contracts, especially investment contracts, it should be noted that, in the absence of a choice of law by the parties, the universally-supported conflict of law rule is that the applicable law to such contracts is the law of the place which has the closest connection to the contract. This is pursuant to the application of the 'centre of gravity test' or the 'most significant connection test'.⁵⁴ It goes without saying that in most investment cases, it is the host state which has the closest connection to the investment contract. As such, the *lex contractus*, more often than not, coincides with the *lex situs*, i.e. the law of the host state.⁵⁵
38. Having said that, it is worth observing that investment treaty tribunals do not usually enter into a conflict of law analysis in applying host state law to the definition of 'property', 'assets' or 'rights'. In fact, they tend to apply domestic law to this issue without going through a conflict of laws path. The same ignorance can also be traced in doctrinal authorities.

⁵¹ *Ahmadou Sadio Diallo* (n 23) p 582, p 606 [64].

⁵² In this respect, see, for instance, Article 93 of Belgian Code of Private International Law of 2004 providing that "Intellectual property rights are governed by the law of the State for the territory of which the protection of the intellectual property is sought." See also St. John's Law Review (n 45) 228-229. With respect to goodwill, Cheshire touches upon an English Court of Appeal case which indicates that goodwill is deemed to be situated in a country in which the business to which it is attached is carried on. Thus, in the context of an investment treaty dispute, the *situs* of a goodwill would be the host country, where the investment operation was being carried out. See PM North & JJ Fawcett (n 42) 927 (citing *Reuter (RJ) Co Ltd v Mulhens* [1954] Ch 50 at 95, 96, [1953] 2 All ER 1160 at 1183).

⁵³ See J Hill & MN Shuilleabhain (eds) (n 42) 480, 483-484.

⁵⁴ In *Economy Forms Corp. v. Iran*, the Iran-United States Claims Tribunal identified the 'centre of gravity' as the prevailing test for the choice of applicable law to contractual relations under general principles of conflicts of law. *Economy Forms Corp. v. Iran et al*, IUSCT Case No. 165, Award No. 55-165-1, 13 June 1983, 3 Iran-USCTR p 42, pp 47-48. See also *Harnischfeger Corp. v. Ministry of Roads & Transportation*, IUSCT Case No. 180, Award No. 144-180-3, Partial Award, 13 July 1984, 7 Iran-USCTR p 90, p 99; *ICC Award No. 5717* (1990) ICC Bull. No. 2, at 22 *et seq* (stating that: "In complex international relationships such as that under review, a widely accepted choice of law principle in most jurisdictions, including England, Liechtenstein and France, is the center of gravity, or the connection, test. Under this test, the arbitrator selects the substantive law of the jurisdiction that has the greatest connection with the dispute.")

⁵⁵ See PM North & JJ Fawcett (eds) (n 42) 936. Article 4(c) of the Rome I Regulation on the applicable law in the absence of choice in contracts for the transfer of rights and interests in immovables reads:

[A] contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated.

See also *Bank of New York and Trust Company et al. (USA v. Germany)* 8 RIAA 42, at 43 (indicating that an investment contract of partnership was governed by the law of its *situs*, in that case, the law of Germany); *Rio Grande Irrigation and Land Company (UK v. USA)* 6 RIAA 131, 136 (stating that the applicable law to the validity of a lease agreement is the country of *situs*, in that case, the United States of America).

39. However, a handful of awards, as well as certain seminal academic works in the field of investment treaty arbitration, contain discussions on the relevance of a conflict of laws approach to the determination of the existence of private rights constituting investments. One such award was rendered in the *Nagel v. Czech Republic* case. In that case, the claimant, countering reference to host state law in order to define the term ‘asset’, asserted that “[t]he doctrine of *renvoi* is widely limited and excluded and cannot be used to refer matters from public international law to a domestic law system.”⁵⁶ On the other hand, the respondent state posited that although the underlying transaction did not specify the controlling law, under the general conflict of law principles, Czech law was the only logical law to apply because that transaction was entered into and would have been performed primarily in the Czech Republic.⁵⁷ In deciding this dispute, the tribunal entered into a brief conflict of law analysis to determine the applicable law to the cooperation agreement in order to see whether this agreement created binding and enforceable rights for the investor vis-à-vis the state. It stated that:

The Cooperation Agreement had strong links with the Government of the Czech Republic. One of the parties was a Czech State enterprise and the Agreement concerned cooperation in order to obtain rights to operate a GSM system in the Czech Republic. The Arbitral Tribunal therefore considers that Czech law should be regarded as the applicable law of the contract ...⁵⁸

40. In another case, the arbitral tribunal applied host state law to the whole case because it applied Article 24 of the SCC Arbitration Rules (the 1999 version) which authorised arbitral tribunals to “apply the law or rules of law which it considers to be most appropriate” in the absence of an agreement between the parties and because the law of the host state was mandatorily applicable to the questions of privatisation of state assets:

[t]he law of the Republic of Moldova is applicable on the basis of the BIT, is pleaded by the Claimant and is considered applicable by the Arbitral Tribunal on the basis of the choice of law rule contained in article 24 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (it being the law of the host country of the investment and mandatorily applicable to questions regarding the privatization of state assets).⁵⁹

41. Zachary Douglas describes the need to refer to conflict of laws rules to be more ‘acute’ in investment treaty arbitrations in comparison to public international disputes. He explains that in the absence of conflict of laws rules in investment treaties, the tribunals should articulate such rules and analysis by having recourse to general principles of private international law

⁵⁶ *William Nagel v. The Czech Republic* (n 8) [127].

⁵⁷ *ibid* [152].

⁵⁸ *ibid* [303]. In fact, the tribunal’s view was that in that specific case, it is *lex contractus* which determined the existence of rights under the contract.

⁵⁹ *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005 [3.2].

and principles derived from the particular architecture of investment treaties. He then goes on to point out that:

Some choice of law rules have attained such universal application that their transplant into the investment treaty regime cannot generate controversy. Such is the case with the *lex situs* rule for tangible property, which is universally applied by municipal courts [...] and must be the appropriate choice of law rule for determining the existence or scope of property rights that comprise an investment. There is considerable authority for the proposition that the application of the *lex situs* rule is even required by general international law ...⁶⁰

42. In short, the application of the universal choice of law rules of *lex situs* and *lex contractus* in most cases culminates in the application of the laws of the host state to the questions of existence of rights and interests over properties and assets. This approach to determining the applicable law to the questions of private rights comprising investments has not been duly noted by the scholarship and jurisprudence though some doctrinal authorities and arbitrators have touched upon the relevance and the importance of a conflict of laws analysis in this area.

B. Reference by the Contracting Parties in the Underlying Investment Treaty

43. As was indicated above, due to the nature of the issue, and also pursuant to a proper conflict of laws analysis, the application of the host state law to issues regarding creation and existence of rights over properties and assets comprising investment is quite obvious. On top of these grounds for the application of host state local law, there are a limited number of investment treaties which explicitly provide that questions regarding creation and existence of rights over properties and assets are determined by reference to host state law. For instance, Article 1(a) of the BIT between the Netherlands and Argentina, after enumerating different categorisations of investments, stipulates that:

[t]he meaning and scope of the different assets shall be determined by the laws and regulations of the Contracting Party in the territory of which the investment has been made.⁶¹

44. One of the other most explicit references to the application of host state law was made in the BIT between the United Kingdom and the Government of the Czech and Slovak Federal

⁶⁰ Z Douglas, *The International Law of Investment Claims* (n 8) 44-45. On this point, see also C McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in AJ van den Berg (ed), *50 Years of the New York Convention, ICCA International Arbitration Conference* (Kluwer Law International 2009) 143 (stating with regard to the appropriate choice of law approach in investment treaty arbitrations that: "... [T]his choice of law process may be distinguished from that undertaken in private international litigation or arbitration, since national and international law stand in a vertical, and not horizontal, relationship to each other.")

⁶¹ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic, signed on 20 October 1992, entered into force on 01 October 1994. See also Article 1(a) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993.

Republic, which was the underlying BIT in the case *Nagel v. Czech Republic*.⁶² Article 1(a) of that treaty provided:

[T]he term “investment” means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity ...⁶³

45. This definition makes clear that in order to be characterised as an ‘investment’, an ‘asset’ should, in the first place, belong to the investor under the laws in force of the host state. In *Nagel v. Czech Republic*, the claimant had argued that “[i]nternational law, and not domestic law, is the residual source of governing law... The reference to the host State law in Article 1(a) is irrelevant here because it permits only the exclusion of categories of investment which the host State regards as illegal. It does not permit Czech law to define “asset” or “investment”...”⁶⁴ Conversely, Czech Republic relied on this provision to argue that it is the law of the host state which determines whether an investor has made an investment.⁶⁵ In applying the host state law to the question of the existence of rights, the tribunal did not specifically grapple with this provision. However, the wording of the provision gives more credit to the respondent’s argument. In fact, the provision stipulates that the ‘belonging’ of an investment to an investor, i.e., the acquisition of the asset underlying the investment and the subsequent ownership rights, should be determined under and in accordance with the law of the host state. So, according to this provision, to determine the proprietary relation between the asset and the person, one has to refer to the law of the host state. Thus, this clause is not merely confined to saying that an investment should be made in accordance with the law of the host state. In other words, it is not merely a stipulation of the legality requirement, although this is also clearly inferred from this provision. This provision also clearly says that the acquisition of the asset underlying the investment should be in accordance with the enforceable laws of the recipient state.

46. Some other investment treaties have such a stipulation with respect to a limited array of assets mentioned in investment treaties. For instance, in certain BITs using an asset-based approach to the term ‘investment’, intellectual property rights are only accepted as investments if they are recognised by the laws of the host state (and, in some instances, also the home state). For instance, Article 1(iv) of the BIT between Ghana and Guinea solely covers the following array of intellectual property rights:

Intellectual property rights, goodwill, technical processes and know-how and all similar rights *recognized by the national laws of both Contracting Parties* ...⁶⁶ (emphasis added)

⁶² *William Nagel v. The Czech Republic*, SCC Case No. 049/2002.

⁶³ See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol (n 12)

⁶⁴ *William Nagel v. The Czech Republic* (n 8) [77].

⁶⁵ *ibid* [180], [182], [185].

⁶⁶ Article 1(iv) of the Agreement between the Government of the Republic of Ghana and The Government the Republic of Guinea for the Promotion and Protection of Investments, signed on 18 May 2001, not yet entered into force.

47. Other investment treaties contain the same qualification, although with varying degrees of expression, with respect to business concessions. Such reference to the law of the host state can be found in myriads of investment treaties, including Article 1 of the BIT between Iran and China, which protects in its sub-section (e), “special rights *conferred by law* including rights to search for, extract and exploit natural resources ...”⁶⁷ [emphasis added] One example of a more explicit nature is Article 1(a)(v) of the United Kingdom-Czech Slovakia BIT mentioned above, which includes as one type of investment: “[B]usiness concessions conferred by law or, *where appropriate under the law of the Contracting Party concerned*, under contract, including concessions to search for, cultivate, extract or exploit natural resources.”⁶⁸ (emphasis added)
48. Although it is not strictly necessary, reliance on a provision in the treaty, containing the express or implied agreement of the parties regarding the applicable law to the question of existence and creation of rights and/or interests can give more comfort to an international arbitral tribunal, which otherwise needs to engage in a conflict of law analysis and delimit the contours of international law as far as the life and death of the creatures of private law is concerned.

C. Conclusion

49. As was explained above, questions regarding the creation and existence of rights and/or interests over properties and assets are determined by the law of the host state. This is mainly because the nature of the issue necessitates the application of host state law. Indeed, customary international law does not, in principle, have rules to define the terms ‘property’ and ‘asset’. Therefore, unless the parties have defined these terms in the treaty itself or through subsequent agreement or subsequent practice, an investment treaty tribunal needs to refer to domestic law to resolve such matters. A proper conflict of law analysis usually leads us to the application of the law of the recipient state to these matters. This would be either because the contracting parties to the relevant investment treaty have made a choice (party autonomy), or because of choice of law rules like *lex situs* and ‘centre of gravity’ which call for the application of host state law. The issue is so clear that sometimes the parties to an investment treaty case even do not dispute it. For instance, in *Emmis v. Hungary*, the disputing parties had agreed that the nature of any rights that might form the basis of claimants’ expropriation claim was to be determined under Hungarian law.⁶⁹

Section Two: The Actual Application of Domestic Law to Particular Questions Regarding the Creation and Existence of Rights/Interests underlying Investments

50. Having gone through the legal bases for the application of host state law to the question of the creation and existence of rights/interests underlying investments, I now turn to the application of domestic law to particular practical questions regarding matters of property and contract law that require determination in a jurisdictional analysis. Generally speaking, there are two main

⁶⁷ Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People’s Republic of China and the Government of the Islamic Republic of Iran, signed on 22 June 2000, entered into force on 01 July 2005.

⁶⁸ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol (n 12)

⁶⁹ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [48].

questions concerning the creation and existence of rights which should be addressed by reference to the laws of the host state: first, the general consequences of the application of host state law to this matter, and, second, the specific consequences of the application of host state law to the matters concerning the existence and creation of private rights and interests constituting investments. These two questions will be addressed below in-depth.

A. The General Function of the Host State Law in Determining the Creation and Existence of Rights/Interests Underlying Investments

51. Having discussed the legal bases for relying on the internal laws of the host state for the purpose of determining the existence of rights underlying investments, at this juncture, I will turn to the critical role that this body of law plays in the jurisdiction *ratione materiae* of an investment treaty tribunal regarding the definition of ‘property’ and the determination of the scope of rights, assets, and properties which form the root of a tribunal’s subject-matter jurisdiction. In this subsection, I will briefly touch upon the effect of existence or non-existence of rights over properties and assets on the jurisdiction *ratione materiae* of an investment treaty tribunal.
52. In case an arbitral tribunal finds that the investor had acquired rights under the laws of the host state at the relevant time, it has advanced one step in ascertaining jurisdiction *ratione materiae*.⁷⁰ Stated differently, the existence of rights under the laws of the host state is the core of an investment treaty tribunal’s subject-matter jurisdiction. However, this should not be the end of the *ratione materiae* inquiry. The tribunal should then check the possible exclusions and limitations that might be placed by the contracting parties in the investment treaty on the subject-matter jurisdiction of an investment treaty tribunal, including but not limited to the legality requirement. Furthermore, some treaties expressly exclude certain categories of assets from the treaty’s scope of application.⁷¹ Upon fulfilling this task, the tribunal should proceed to verify that the right so acquired under the domestic law of the host state, and not otherwise limited or excluded by the investment treaty, satisfies the economic definition of ‘investment’,⁷² and, thus, is an ‘investment’ protected by the relevant investment treaty.⁷³

⁷⁰ Strangely, the tribunal in *Nagel v. Czech Republic* noted that it treated the issue of whether Mr. Nagel made an investment as an issue of merits, rather than jurisdiction. The reason put forward by the tribunal was because the issue could not be “easily decided as a preliminary question of jurisdiction but one which requires a more detailed analysis both of the Treaty and of the facts of the case.” See *William Nagel v. The Czech Republic* (n 8) [268].

⁷¹ The inquiry into these subject-matter jurisdictional requirements was recognised by the tribunal in *Alasdair Ross Anderson et al v. Republic of Costa Rica*. In order to ascertain subject-matter jurisdiction in that case, the tribunal felt necessary for the claimants to make the following showings:

- 1) that the deposits constituted “assets” under the BIT; 2) that the Claimants owned or controlled those assets in the territory of Costa Rica in accordance with Costa Rica law; and 3) that if the deposits satisfied these two characteristics they did not fall within those categories of assets that the BIT expressly excludes from the definition of investment.

Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 [47].

⁷² Sasson believes that the term ‘investment’ was originally a feature of economic analysis rather than an issue in international treaties protecting the rights and properties of aliens. See M Sasson (n 3) 101-102. Dolzer and Schreuer also opine that, in contrast to terms like ‘rights’, ‘property’, and ‘interests’, which have acquired legal meanings, the term ‘investment’ has its origin in economic terminology. See R Dolzer & C Schreuer, *Principles of International Investment Law* (OUP 2012) 60.

⁷³ Obviously, every asset acquired cannot be considered as an investment. For instance, if “A” buys a house in the Hague for the exclusive purpose of spending the summer holidays there, he cannot be deemed to have made an investment in the Netherlands. See UNCTAD, *Scope and Definitions* (United Nations 2011) 33.

Under some treaties, this is the end of the matter for subject-matter jurisdiction inquiry. However, some investment treaties go on to provide a further qualification for investments so acquired: obtaining an investment license or approval from official organs of the host state.⁷⁴ Therefore, under such treaties, there is a fourth level of inquiry that the tribunal should step in to finalise its subject-matter jurisdiction examination. Hence, depending on the terms and provisions of the treaty, the existence of rights under the laws of the host state is either one of the three or one of the four requirements that the tribunal should verify their presence before asserting jurisdiction *ratione materiae*. However, under both scenarios, the existence of rights or interests is always the first level and the root of the subject-matter inquiry.

53. On the other hand, and as the above discussion implies, if pursuant to an analysis of the host state law, the tribunal faces the situation of inexistence of rights over properties or assets at the relevant time, this would culminate in the absence of any basis for the alleged investment since there would be no ground to place the investment on it (i.e., no underlying right or property constituting the investment). Therefore, in such situations, the case should be dismissed on a jurisdictional basis as long as the contested right at stake is the only basis of the claimant's claim. Under such a scenario, the tribunal does not need to enquire about the legality of the investment, its objective definition or, as the case may be, approval of the investment by relevant authorities of the host state since the finding that there are no rights capable of forming an investment suffices to dismiss the case for lack of jurisdiction *ratione materiae*.
54. Having discussed the jurisdictional consequences of the existence or inexistence of rights over properties or assets, it is notable to mention that the issue of the existence of rights over properties and assets has a twin in the substantive law of expropriation which is closely connected and sometimes overlaps with the question of the existence of rights as a matter of jurisdiction *ratione materiae*. According to this twin rule, there cannot be an expropriation unless the complaint demonstrates the existence of proprietary rights, i.e., property rights susceptible to expropriation.⁷⁵ In *Generation Ukraine v. Ukraine*, the tribunal noted that since "expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the alleged expropriation occurred."⁷⁶ Therefore, it pointed out that "[a] logical starting point would be to establish the investor's contribution of capital. One would then go on to examine the legal rights acquired by such capital Expenditure."⁷⁷ The tribunal also stated that in respect of a claimed right to use land, there "cannot be an expropriation of something to which the Claimant

⁷⁴ See, for instance, Article 2 of the Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Turkey and the Government of the Republic of Iran, signed on 21 December 1996, entered into force on 13 April 2005; Article 1(3)(i) of the Agreement between the Republic of Austria and Malaysia for the Promotion and Protection of Investments, signed on 12 April 1985, entered into force on 01 January 1987. For more explanations on this treaty requirement see (Chapter 1, Section Two (A)(a)(iii)).

⁷⁵ In this regard, the tribunal in *Bayindir v. Pakistan* noted that: "The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated." *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 [442]. In the same vein, the tribunal in *Chemtura v. Canada* remarked that "in assessing an expropriation claim, the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) have been satisfied." *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Award, 02 August 2010 [242]. See also R Dolzer and C Schreuer (n 72) 99.

⁷⁶ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 [6.2].

⁷⁷ *ibid* [18.4].

never had a legitimate claim.”⁷⁸ Therefore, it is not only for the purpose of verifying the existence of an investment, and, as a result, for establishing subject-matter jurisdiction, that an investment treaty tribunal needs to ascertain the existence of rights underlying investments. In expropriation cases also, an investment treaty tribunal should verify the existence of private rights capable of being expropriated. It is submitted that in both situations, it is the law of the host state that determines the existence of rights underlying investments or rights capable of being expropriated.

55. Under certain investment treaties, the jurisdiction of the tribunal is limited to deciding expropriation cases.⁷⁹ In such cases, the non-existence of property rights capable of being expropriated could culminate in the dismissal of the case on a jurisdictional basis, both because the root of jurisdiction *ratione materiae* of the tribunal is missing and because the tribunal was not chosen to decide non-expropriation claims. In such cases, it is also possible for the tribunal to skip the jurisdictional discussion and directly enter into an expropriation analysis, beginning with the question of the existence of expropriable property.
56. These twins are not, however, totally identical. In the case of expropriation, the right should always be vested in the claimant so that the property in question be capable of expropriation. In this respect, the tribunal in *Emmis v. Hungary*, whose jurisdiction was limited to deciding expropriation claims, noted that in order to decide a fair and equitable treatment claim, in contrast to an expropriation claim, “[i]t would not be so crucial for the Claimants to prove the existence of a proprietary right pertaining to the 2009 tender under Hungarian law”.⁸⁰ Observing, however, that its jurisdiction is limited to expropriation claims, the tribunal indicated that: “...the only way that the expropriation claim can be held to be within the Tribunal’s jurisdiction is if Sláger had a proprietary right that survived the expiry of its broadcasting right under that Agreement.”⁸¹ Therefore, even if the claimant had proven that he had rights below the level of ownership, the tribunal could not have had ascertained jurisdiction, since its jurisdiction was limited to expropriation claims, and expropriation, as a preliminary point requires rights vested in the claimant capable of being expropriated. Consequently, whereas in expropriation claims, the right in question should be vested in the claimant in accordance with the host state law, in case of the verification of rights underlying investment for jurisdictional purposes, the cardinal point is establishing the existence of the right, and not necessarily its proprietary nature.

B. The Specific Function of the Host State Law in Determining the Creation and Existence of Rights/Interests Underlying Investments

57. By now, it is quite clear that it is the law of the host state that on most occasions determines the creation and existence of rights and/or interests over assets or properties and contractual

⁷⁸ *ibid* [22.1].

⁷⁹ See, for instance, Article 10 of the Agreement between the Kingdom of the Netherlands and the Hungarian People’s Republic for the Encouragement and Reciprocal Protection of Investments, signed on 02 September 1987, entered into force on 01 June 1988. The Albanian Law on Foreign Investment also limits Albania’s consent to ICSID arbitration to the following types of disputes: “... expropriation, compensation for expropriation, or discrimination and also ... the transfers in accordance with Article 7 ...” See *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 (1999) 14(1) ICSID Rev-FILJ 174.

⁸⁰ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [144].

⁸¹ *ibid*.

rights. I showed that the applicability of the laws of the host state to the creation and existence of property and contractual rights and/or interests is principally because of the nature of the issue that requires determination by the local law that creates such legal rights. In fact, international law has no substantive rules regarding the creation and existence of rights on a private plane. In addition, I pointed out above that a proper conflict of law analysis, in most cases, culminates in the application of the laws of the host state to the question of the creation and existence of property rights. Furthermore, as was reviewed above, certain investment treaties stipulate that the laws of the recipient state determine the creation and existence of rights.

58. However, specifying the applicable law to the question of creation and existence of rights is the first step that an arbitral tribunal seized of an investment treaty case has to take. The second phase of the enquiry is the actual application of that body of law to the specific questions before a court or tribunal. One such aspect was discussed above. As was discussed in the previous subsection, the consequence of the application of the host state local law to the questions regarding the existence of rights underlying investments culminates in two possible results: one, that there is a right under the laws of the host state, in which case the tribunal can proceed and check the existence of other conditions of *ratione materiae* jurisdiction, and, two, that the laws of the host state do not recognise the alleged right, meaning that the case should be dismissed to the extent that the claimant's case solely rests upon the existence of such a right.
59. This is not the end of the inquiry. In a real case, one should also deal with the specific function of the host state law in determining the jurisdiction *ratione materiae* of an investment treaty tribunal. Indeed, when called on to decide an investment treaty case, an investment treaty tribunal may quite easily come to the conclusion that the host state law is applicable to the specification of private rights underlying investments. The consequence of the application of the host state law may also be readily known to the tribunal in general. The predicament for a tribunal may, in such circumstances, be the actual application of the host state law to the specific property and contractual law questions. For instance, assume that the threshold question before an investment treaty tribunal is whether the claimant, a road-building company, acquired title to a set of second-hand asphalt mixing plants previously owned by the host state and sold to the investor pursuant to a sale agreement that is a side agreement to the main BOT contract. These plants were seriously damaged and effectively demolished before the commencement of the work by local people who claimed that the road that the investor had contracted to build would destroy the grasslands they used as pastures for their livestock. With the machinery destroyed, the investor files a BIT case against the host state claiming that the respondent has failed to accord its investment full physical protection and security. The host state, on the other hand, claims that the investor had no rights in the equipment because it failed to abide by a local law requiring the registration of heavy machinery in the public register for transfer of title to be consummated. Now, in order to ascertain subject-matter jurisdiction, after determining the applicable law in general terms, the investment treaty tribunal needs in the first place to identify the legal entitlement of the investor to the asphalt mixing plants and determine the scope of such entitlement. In so doing, the tribunal should grapple with the details of the law of the host state and ascertain whether title to the machinery had been transferred to the investor at the time the alleged breach occurred or, if title has not been transferred, whether the investor has any other interest in the property in question. This is, of course, a more difficult task to embark upon than determining the applicable law to the question of the existence of rights/interests in general.

60. It is submitted that many different legal facets and specifications of contractual and property rights and/or interests underlying investments are governed and determined by the laws of the host state. In most cases, the domestic law of the host state contains detailed legal norms and rules regulating the creation and existence of rights to properties and contractual rights. This view is confirmed both by a proper conflict of laws analysis and by a review of the relevant investment treaty jurisprudence.
61. As was discussed above, rights and interests are the core of the subject-matter jurisdiction of an investment treaty tribunal. The question, however, is whether the acquisition of any right or interest satisfies this test, or whether such right should have certain specifications under the law of the host state in order to be protected. As will be shown below, not every right in general, and not even every right to a property or every contractual right passes the test of protectability under an investment treaty. Rather, depending on the nature of the claim or the investment at issue, the right should have certain specifications under the laws of the host state. An analysis of these requirements pinpoints the specific property and contractual issues that should be determined by reference to the laws of the recipient state in an investment treaty arbitration context. The analysis in this part of the discussion will be largely based on the practice of investment treaty tribunals and conflict of laws analysis. The question is how and to what extent the host state law would help a tribunal in very specific property or contract law questions that arise in practice when trying to determine the creation and/or existence of rights underlying investments.
62. There are plenty of issues regarding the creation and existence of rights underlying investment that should be addressed by reference to the laws of the host state. To begin with, it is the law of the host state which determines what property is, i.e., the conditions for a right to be characterised as a property right. Secondly, the laws of the host state set forth the conditions for the transfer of title in property. Thirdly, since in modern international law, contractual rights are also protected, it is the task of the laws of the host state to dictate the conditions for the protection of such rights. These conditions may encompass conditions for the validity and enforceability of contracts. In the following pages, I will begin with analysing the role of the laws of the host state in the definition of property and property rights (a). Next, I will turn to the function of the internal laws of the capital-importing country in setting the legal requirements for the transfer of title (b). Finally, the analysis will turn its attention to the task of the recipient state's laws in regulating the conditions for the protection of contractual rights (c).

a. Definition of Property

63. In order to gain protection under an investment treaty, there is no question that the investor must prove that he/she has a legal right or interest in the first place.⁸² In fact, when no legal right/interest exists, there could be no investment, with the result that there will be no case for the investor. It is important to note that only legal rights and/or entitlements are protected by

⁸² *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*), Award, 16 December 2002 [118]. The tribunal had already found that no expropriation had occurred in that case, *inter alia*, because “at no relevant time has the IEPS law, as written, afforded Mexican cigarette resellers such as CEMSA a “right” to export cigarettes.” See *ibid* [111] See also *Generation Ukraine, Inc. v. Ukraine* (n 76) [22.1] (where after concluding that the claimant had no contractual right to the relevant property, the tribunal stated that “there cannot be an expropriation of something to which the Claimant never had a legitimate claim.”)

investment treaties and mere economic interests or expectations which have no root in the legal system of the host state are not protected by investment treaties.⁸³ In this regard, one commentator has opined that:

To equate property rights with any interest with an economic value would render property a subjective concept and attribute relevance to interests that fall short of being legally protected interests.⁸⁴

64. Having said that, it should be pointed out, however, that a review of investment treaty jurisprudence would indicate that in order to be protected by the investment treaty, the legal right in question should concern a property, and therefore, have economic value. Thus, to gain protection, the legal right in question should still have an economic connection. Indeed, under the laws of many countries, one indispensable characteristic of property is having economic value. In other words, not every legal right recognised under the laws of the host state is protected by investment treaties. For instance, the right to free speech or to freedom of religion do not constitute assets protected by investment treaties since they do not have financial or economic value, i.e. they cannot be sold and purchased. The fact that a right should have economic value in order to be protected by an investment treaty was confirmed in *Emmis v. Hungary* where the tribunal said that: “[T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed [...]”⁸⁵ A right has economic value when it can be the subject of a commercial contract i.e. that could be sold, bought, transferred in any way, and rented for monetary value. The Iran-US Claims Tribunal held in *Amoco*:

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value. [...] It is because Amoco's interests under the Khemco Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization.⁸⁶

⁸³ M Sasson (n 3) 113-114 (criticising the *Pope & Talbot* tribunal for blurring “the distinction between legal interest and commercial interest and [elevating] the latter to a property right that can be expropriated.” She also takes issue with the fact that in this Award, the “definition of property right is remitted to the “true interest at stake” without attributing any relevance to whether the interest is a legal one governed by a municipal law.” Furthermore, she also takes issue with Mr. Horacio Grigera Naon’ dissenting opinion in *EnCana Corporation v. Republic of Ecuador* for his disagreement with the application of domestic law to the question of whether intangible rights to VAT refund were acquired by the investor and for his broad-brush approach to the existence of interests capable of protection under an investment treaty.) *ibid* 114-115.

⁸⁴ M Sasson (n 3) 115. See also *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Separate Opinion on the issues at the quantum phases of *CME v. Czech Republic* by Ian Brownlie, C.B.E., Q.C., 14 March 2003 [20] (referring to the list of assets mentioned in the relevant BIT and stating that: “These provisions relate exclusively to assets ‘invested’ and, whilst the list of types of asset is extensive, the concept has certain limitations. In the first place, the genus consists of legal entitlements and does not extend to mere expectations ...”)

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 4) [169].

⁸⁶ *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Award No. 310-56-3, 14 July 1987, 15 Iran-USCTR, p 189, p 220 [108].

65. To be sure, it is submitted that the reason why many investment treaty tribunals indicate that for a right to be characterised as property it should have economic value is because the law of the host state provides for such a requirement. Indeed, as was brilliantly put by Schreuer, for verifying the very existence of legal property rights, the laws of the municipal state have to be queried:

[...] in cases where jurisdiction is limited to claims alleging the violation of a treaty's substantive standards an incidental application of domestic law is often called for. The most obvious situation of this kind arises where there is a dispute about the existence of rights that the investor seeks to protect. Whether these rights are property rights, rights arising from contracts or other intangible rights, they typically exist by virtue of a domestic legal system. Therefore, the preliminary question of the existence of the rights in dispute cannot be answered without resort to a domestic system of law, most often the host state's law. Therefore, even if a claim is based on the violation of a BIT or other treaty, domestic law is likely to be relevant.⁸⁷

66. Furthermore, an investment treaty tribunal has to refer to the laws of the host state in order to see whether the right in question has economic value. The tribunal in *Nagel v. Czech Republic* made a reasoned and significant observation in connection with the relation between the domestic law of the host State and having economic value:

It follows that, when read in their context, the terms "asset" and "investment" in Article 1 shall be considered to refer to rights and claims which have a financial value for the holder. This creates a link with domestic law, since it is to a large extent the rules of domestic law that determine whether or not there is a financial value. In other words, value is not a quality deriving from natural causes but the effect of legal rules which create rights and give protection to them.⁸⁸

67. In short, in order to be protected by the investment treaty, an investor has to prove that it has a legal right protected by the laws of the host state. That legal right should be attributed to a tangible or intangible property which has economic value. The very requirement that a legal right has to have economic value in order to be characterised as a 'property' and the assessment as to whether any given right has the attribute of 'monetary value' are issues to be determined by the laws of the host state.

b. Conditions for Transfer of Title

68. In certain situations, investors seek to establish that the host state is liable for the expropriation of their property. In such circumstances, the threshold goes higher for the investor who must prove that the alleged right to property was vested in the investor. In other words, in order to

⁸⁷ C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill Journal of Dispute Resolution 17-18.

⁸⁸ *William Nagel v. The Czech Republic* (n 8) [300].

make a viable expropriation claim, the investor must, as a preliminary step, establish that he has a proprietary right or interest. Being called upon to decide an expropriation claim, the tribunal in *Emmis v. Hungary* considered whether the nature of the alleged rights held by the claimants as to the new license was proprietary or not.⁸⁹ It concluded that rights capable of being expropriated should stand one step higher than other legal rights having economic value:

[T]he existence of such rights is not sufficient to answer the question whether this Tribunal had jurisdiction to vindicate such rights on the international plane. For that purpose, it is necessary to determine whether the rights constitute valuable proprietary assets of the Claimants.⁹⁰

69. A right is proprietary and is vested in an investor if it is special to it, and belongs to him/her to the exclusion of the others. In other words, the investor should exclusively own the asset or property in question. Thus, the investor's rights should be proprietary, in the sense that it could be owned, transferred, and inherited. Therefore, procedural rights in a tender cannot be vested in an investor since such rights are usually claimable by all participants. In this connection, the *Emmis* tribunal pointed out that:

[T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.

[...]

[A] property right is something quite different. It constitutes a right held by its owner to the exclusion of others. It is no answer to say that the rights acquired by bidders in the 2009 Tender were acquired for valuable consideration. That may have created a contractual relationship between each bidder and the ORTT. But each bidder did not thereby acquire a valuable asset, capable of being alienated. If that were so, it would mean that each bidder had, by virtue of its participation in the bid, acquired the same asset. But this makes no sense in the context of a tender, the very purpose of which is to determine which of a number of bidders is to acquire the asset in question, namely the 2009 Broadcasting Right... In the second place, none of the rights alleged to arise directly from participation in the 2009 Tender could be said to be assets or property owned or controlled by Claimants. On the contrary, Sláger's rights in the 2009 Tender were rights

⁸⁹ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [144], [165].

⁹⁰ *ibid* [252]. See also *ibid* [168].

concerning participation in a process that would determine whether it could acquire ownership of an asset.⁹¹

70. In addition, in order to be considered owned by the investor, the rights concerned should not be potential but rather definitive rights that are vested in the Claimant. The *Merrill & Ring* tribunal held in this regard that: “The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the Feldman tribunal’s conclusion that an investor cannot recover damages for the expropriation of a right it never had ... Expropriation cannot affect potential interests.”⁹²
71. In short, when raising a claim of expropriation, the investor must prove that the alleged property was capable of being expropriated. A property can be expropriated when it is substantively and definitively owned by somebody to the exclusion of others.
72. To answer the question of whether the allegedly expropriated rights were vested in the investor at the time of expropriation is a task which should be performed by the law of the host state as the law of the *situs* of the property. Thus, in order to see whether any expropriation has occurred, the *Emmis* tribunal, as a preliminary matter, analysed and then relied upon the evidence presented to it on Hungarian law to verify whether the rights in question were proprietary in nature or not.⁹³ Similarly, in *Bayview v. Mexico*, the claimants contended that they had an investment in Mexico in the form of their rights to water located in Mexico which was allegedly wrongfully seized by the respondent.⁹⁴ The tribunal considered three pieces of Mexican legislation (namely, the Mexican Constitution, the Mexican Law of National Waters, and Mexico’s General Law of National Assets) to find that the claimants could have no such property rights in water in Mexican rivers.⁹⁵
73. Indeed, embarking upon a conflict of laws analysis, it is the law of the *situs* that determines whether the buyer has acquired title to the goods subject to the contract, and determines the nature and scope of the title.⁹⁶ In other words, it is the law of the place where the properties are situated at the time of transfer which determines whether proprietary rights in the assets were transferred. This rule applies to both moveable⁹⁷ and immovable properties.⁹⁸ *Lex situs* remains the applicable law to the questions regarding transfer of title even if title is intended to be transferred via a contract. In fact, in such situations, it is the *lex situs*, rather than the

⁹¹ *ibid* [169], [253]-[254].

⁹² *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 [142].

⁹³ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [178].

⁹⁴ *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007 [109].

⁹⁵ *ibid* [118].

⁹⁶ J Hill & MN Shuilleabhain (eds) (n 42) 473; E Rabel (n 41) 49-50.

⁹⁷ See *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd’s Rep 284 (holding that under English conflicts of laws rules, the transfer of title to movable property is governed by the law of the place where the property is situated); *Bonhams 1793 Ltd v. Lawson et al* [2015] EWHC (Comm) [40] (stating that “[a]t the time when that agreement transferred title, the chassis was in Belgium. On normal conflicts of laws principles, Belgian law as the *lex situs* governs whether good title to the chassis was transferred to Mr Swaters ...”); *Air Foyle Ltd v Center Capital Ltd* [2003] 2 Lloyd’s Rep 753.

⁹⁸ *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129.

governing law of the contract which determines whether proprietary interests in a moveable or immovable property are transferred.⁹⁹ The same is true with respect to intangible properties. Indeed, as Auld J expressed in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, “[i]n general, disputes about the ownership of land and of tangible and intangible movables are governed by *lex situs*”.¹⁰⁰ In addition, it is the law of the host state as the law of *situs* which determines whether certain formal steps should be exhausted after the exchange of offer and acceptance for the transfer of title to be finalised pursuant to a contract, for instance, execution of a deed or registration of the transfer in a public register.¹⁰¹

74. In summary, when a tribunal needs to ascertain whether title of the property had been transferred to the investor at the time of the alleged expropriation or that contractual rights allegedly confiscated were vested in the investor, it has to refer to the laws of the host state. This applies to both the substantive and the formal validity of the transfer of title to the allegedly expropriated property.

c. Conditions for Protection of Contractual Rights

75. It is generally accepted in international law that intangible rights including contractual rights may amount to investments for the purpose of protection under investment treaties.¹⁰² The *SPP* tribunal spells out the position of international law with respect to the protection of contractual rights: “... there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.”¹⁰³ Indeed, it has been acknowledged by myriads of international arbitral tribunals that taking of intangible rights including contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect.¹⁰⁴ Additionally and as pointed out by the *White Industries* tribunal, many investment treaties

⁹⁹ J Hill & MN Shuilleabhain (eds) (n 42) 476. See in this respect, *The WD Fairway* (No 3) [2009] 2 Lloyd’s Rep 420.

¹⁰⁰ *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1996] 1 WLR 387 at 410.

¹⁰¹ J Hill & MN Shuilleabhain (eds) (n 42) 473; E Rabel (n 41) 46-48. It is precisely because of the relevance of the law of the *situs* in determining the formal validity of transfer of title that Article 11(5) of the Rome I Regulation prescribes that overriding mandatory provisions of the *situs* regarding formal validity cannot be condoned by the applicable law to the substance of the contract or the law governing the formal validity of the contract:

Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law: (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and (b) those requirements cannot be derogated from by agreement.

In this respect, see J Hill & MN Shuilleabhain (eds) (n 42) 258.

¹⁰² C Schreuer, L Malintoppi, A Reinisch & A Sinclair, *The ICSID Convention: A Commentary* (CUP 2009) 126.

¹⁰³ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 [164].

¹⁰⁴ See *Norwegian Shipowner’s Claims (Norway v. USA)*, (1922) RIAA 307; *SeaCo Inc. v. The Islamic Republic of Iran, The Iranian Meat Organization and others*, IUSCT Case No. 260, Award No. 531-260-2, 25 June 1992, 28 Iran-USCTR, p 198 [45]; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction [274]; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 [241]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 [255]; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 [12.3.1]-[12.3.3].

expressly include in their definition of ‘investment’ what can only be *in personam* or intangible rights, namely: the “right to money or to any performance under a contract having a financial value”.¹⁰⁵

76. That being said, not every right arising from a contract gives rise to rights protected by investment treaties. Indeed, if the investment in question is formed by contractual rights, in order to be protected by the investment treaty, the underlying contract should be both binding and enforceable. In fact, there would no substantive right to protect before a contract is formed and becomes effective.¹⁰⁶
77. It is submitted that the binding nature of a given contract and its enforceability should be determined by reference to the laws of the host state. It was discussed earlier in this Chapter that, in most cases, the law of the host state is the *lex contractus*. It will be shown below that different questions regarding the creation and existence of contractual rights are determined by the *lex contractus* (which in most cases is host state law).
78. Indeed, a first question that an arbitral tribunal has to deal with when faced with an investment which has a contractual right nature is ascertaining the validity and existence of the contract in question. According to Article 10(1) of the Rome I Regulation, “[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.” In addition, according to Articles 11(1), 11(2), and 11(3) of the same Regulations, the law that governs the substance of the contract also would govern the formal validity of the contract¹⁰⁷ as well as the formal validity of an act having legal effect to an existing contract (like a termination notice) or a contemplated contract (like formal conditions for a contractual offer in certain instances), whether the parties were in the same country at the time of the conclusion of the contract or not.¹⁰⁸ The same rule is followed by English jurisprudence. In a quite recent case before the English Court of Appeal, it was stated that it is now a “well established principle of English private international law that questions relating to the existence and terms of a contract are governed by the putative proper law.”¹⁰⁹

¹⁰⁵ *White Industries Australia Limited v. The Republic of India* (n 104) [7.3.8].

¹⁰⁶ As expressed by Spiermann, “[a] contract would not be a contract if not binding”. See O Spiermann (n 2) 94.

¹⁰⁷ The concept of formal validity of a contract has been defined by the famous Giuliano-Lagarde Report: “every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective.” M Giuliano & P Lagarde, ‘Report on the Convention on the Law Applicable to Contractual Obligations’ (1980) No. C 282/1 Official Journal 29. McParland defines formal validity in the following way: “‘Formal validity’ is concerned with rules which require certain attributes as a matter of form for contracts or documents of that particular type, whether it be that they be in writing, signed, executed as a deed, or that they must comply with some requirement of form or procedure in execution.” See M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP 2015) 724. In contrast, material validity has been defined to concern “matters which are intrinsic to the contract ...” See *ibid.* See also J Hill & MN Shuilleabhain (eds) (n 42) 257-258.

¹⁰⁸ According to the Giuliano-Lagarde Report, this same solution was adopted in Germany, Italy, France, and under the Benelux Treaty. See M Giuliano & P Lagarde (n 107) 30.

¹⁰⁹ *Midgulf International Ltd v. Groupe Chimique Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd’s Rep 543 (CA), [56]. For a classic case example in this respect see, *In Re Bonacina* [1912] 2 Ch 394 (CA), 402 (declaring a contract valid under the applicable law, in that case, the law of Italy, which was otherwise invalid under English law as the *lex fori*.)

79. It was analysed earlier in this Chapter that the law governing the contract, or more appropriately in this context, ‘the putative proper law’,¹¹⁰ would, in most instances, be the law of the host state. Therefore, the law of the recipient state would determine whether the contract in question is formally and materially valid and exists. In other words, such law determines many questions regarding the formation of the contract, including offer and acceptance, the validity of the consent (including matters vitiating consent, like mistake, duress, misrepresentation, non-disclosure and undue influence), legality, and consideration.¹¹¹
80. Considering the issue in an investment treaty arbitration context, in order to ascertain whether a contract is binding, the tribunal should verify whether the contract in question is validly formed according to the laws of the host state. In other words, whether the conditions for the validity of the contract under the laws of the host state have been satisfied. Therefore, if an EPC contract is signed with no intention to create legal relations or the contract is signed with a person on the government’s side having no capacity to contract, the contract in question is not binding, and, thus, no contractual rights could be said to exist. This is what the tribunal in *Nagel v. Czech Republic* did when analysing the validity of the Cooperation Agreement at issue in that case. The tribunal considered the laws of the Czech Republic, as the host state, to verify the validity of the Cooperation Agreement and found that the agreement was binding and was validly concluded.¹¹²
81. That being said, it goes without saying that the contract underlying the alleged investment should continue to be binding up until the time of the alleged breach. In fact, in certain cases, the central question is whether the contractual rights allegedly forming the investment existed at the time of the alleged breach. To give an example, assume that investor “A” concludes a contract with the Ministry of Agriculture of state “B” to perform supervisory functions over the production and processing of pesticides in Province “C” for a period of five years. Assume further that approximately after five (5) years from the commencement of the contract, the Ministry of Agriculture unilaterally terminates the contract on the basis that: (i) the term of the contract had expired; and (ii) the investor has failed to observe the environmental standards in carrying out its contractual obligations. The starting question for such a case would be whether

¹¹⁰ M McParland (n 107) 717-718.

¹¹¹ *ibid* 719-720. J Hill & MN Shuilleabhain (eds) (n 42) 255, 262. An exception to this rule is the capacity to contract which, in the case of a company, is determined by the law of its place of incorporation. See *ibid* 259 (referring to *Integral Petroleum SA v. SCU-Finanz AG* [2015] ILPr 50). In *George W Cook (USA) v. United Mexican States*, Commissioner Nielsen noted that: “When questions are raised before an international tribunal, as they have been in the present case, with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights...” See *George W Cook (USA) v. United Mexican States* (n 24) 213, 215 [7]. Similarly, Schreuer has opined that: “The protection of property through an investment treaty or general international law is contingent upon the existence and extent of property rights as determined by the applicable domestic law. Similarly, if an investor claims that its rights, arising from a contract, have been expropriated or have been subjected to treatment that is contrary to a treaty’s fair and equitable standards, domestic law will also be relevant. It will be necessary to look at the existence of the contract and the rights arising under it in terms of the applicable domestic law. Only after clarifying these preliminary issues under domestic law is it possible to determine whether a breach of the international standards has actually occurred.” [footnotes omitted] C Schreuer, ‘The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes’ 21 online: <www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf>.

¹¹² *William Nagel v. The Czech Republic* (n 8) [317]-[320].

the investor had contractual rights at the time of the alleged breach, in this case, at the time of the alleged unlawful termination. In other words, it should be considered whether the contractual rights still existed and not lapsed and extinguished at the time of the alleged breach. Once again it is the law of the host state which determines whether such rights were extinguished at the time of the alleged breach. According to Article 12(1)(d) of the Rome Regulations I, the law applicable to the contract shall also govern “the various ways of extinguishing obligations ...”. Thus, it is the law of the recipient state which determines whether an act of the state (like national legislation or an executive decree), a mutual or unilateral termination, lapse of time or a novation would extinguish contractual rights.¹¹³ In *Emmis v. Hungary*, the tribunal was seized, *inter alia*, of the task to determine whether the claimants’ alleged contractual rights at the time of the breach were enforceable. In so doing, it referred to the Civil Code of Hungary and the position of Hungarian courts in related litigation proceedings.¹¹⁴ The tribunal eventually dismissed the claims because, according to the laws of Hungary, the rights acquired by the claimants were not binding any more at the time when the alleged wrongdoing took place. In fact, the claimants had a fixed-term contract that had already expired when Hungary took the alleged expropriatory measure. In *Azinian et al v. The United Mexican States*, the tribunal was considering whether the annulment of a concession contract constituted an expropriation under Article 1110 of NAFTA. In finding whether an expropriation had occurred, the tribunal noted that the concession contract was subject to the Mexican law governing public service concessions. It then found that the concession contract had been declared invalid under the above-mentioned law. This conclusion had been affirmed by three levels of Mexican courts, whose decisions were not challenged in the arbitration.¹¹⁵ Therefore, the tribunal came to the conclusion that since no binding contractual rights existed any longer under host state law, thus, no expropriation had occurred. In contrast, if at the time the alleged breach occurs, the rights and/or interests relied upon by the investor still exist under the laws of the host state, like in case of open-ended businesses, such rights would pass the ‘continuing binding force’ test.¹¹⁶

82. In addition to being binding, a contract must be enforceable under the laws of the host state for the investor to be able to claim a protected investment. Since many of the investment contracts, in particular, infrastructure contracts, are public contracts, they cannot be characterised as freely negotiated contracts and mere offer and acceptance do not suffice. Therefore, usually, certain formalities and conditions precedent should be observed and satisfied for the contract to be deemed enforceable. The exhaustion of such formalities should be checked against the laws of the host state. The test for enforceability is usually protectability before the courts of the host state. In other words, the rights in question should be claimable before the national courts of the recipient state. Therefore, if what is acquired by the investor after the exchange of offer and acceptance in an administrative contract is speculative, a mere

¹¹³ See M McParland (n 107) 763-764; J Hill & MN Shuilleabhain (eds) (n 42) 262.

¹¹⁴ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (n 4) [185]-[190].

¹¹⁵ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 01 November 1999 [96], [105]. This seems to be the first case in the history of NAFTA in which an award was rendered. Similarly, the case seems to be the first one under the aegis of the ICSID Additional Facility Rules in which a final award was rendered

¹¹⁶ See FN Pagani, JIG Cueto, ‘Tidewater v. Venezuela: Property Rights Capable of Expropriation in a Company Operating under Short-Term Contracts’ (2015) 32(4) J Int’l Arb 449.

hope, a contingent expectation subject to satisfaction of a condition or occurrence of an event, a simple permission to proceed to fulfil further remaining steps or a mere procedural entitlement to complete a process, the alleged acquired right usually does not constitute an ‘asset’ under the domestic laws of the host state, and, thus, does not fall within the scope of application of investment treaties. In *PSEG v. Turkey*, the tribunal rejected Professor Dolzer’s Rejoinder Opinion to the effect that the treaty definition of investment refers to any right, even one that can be exercised at any time in the future, for being unpersuasive. In contrast, it considered the respondent’s argument that the definition of investment does not include an option “persuasive as a general approach”.¹¹⁷ In the same vein, the *Merrill & Ring* tribunal held that “a potential interest that may or not materialize under contracts the [i]nvestor might enter into with its foreign customers” is not protected by NAFTA.¹¹⁸ The tribunal also said that “the right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument.”¹¹⁹

83. Following the same logic, a bidder in a tender before being announced as the bid winner has no concrete right to constitute an asset protected by an investment treaty. Even when announced as the bid winner, depending on the laws and regulations in place in the host country, the investor may still need to fulfil certain conditions before being awarded the pertinent license, authorisation, permit, or concession. Put differently, it is only when all the formalities are satisfied, or the conditions precedent fulfilled, that the contract in question is enforceable and effective.¹²⁰ In *Apotex v. the United States*, the claimant had asserted that but for the respondent’s alleged breach of its legal obligations, Apotex would have been granted final, not tentative, approval because no other impediments to approval existed at that time. The tribunal remarked that it was “unpersuaded by this submission. Whether or not each of Apotex’s ANDAs^[121] would have been granted final approval is by no means certain on the evidence. But in any event, the critical enquiry must be as to the nature of the alleged “property” as at the date of the alleged breach – not at some future point.”¹²² Similarly, it was for this reason that the tribunal in *Nagel v. Czech Republic* held that in order to have financial value, the intangible rights in question should be more than mere hopes to acquire the license. The tribunal noted that “a claim can normally have a financial value only if it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future.”¹²³ It also stated that a mere prospect to acquire a license does not equate with a right having financial value:

[T]he basic undertaking in the Cooperation Agreement was that the parties should work together for the purpose of obtaining a GSM licence. There

¹¹⁷ *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 [189]-[190].

¹¹⁸ *Merrill and Ring Forestry L.P. v. Canada* (n 92) [140].

¹¹⁹ *ibid* [142].

¹²⁰ The same is true with regard to a licensee’s claim to the renewal of its license. It can only claim for the renewal when all the required conditions are fulfilled. See *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [199].

¹²¹ Abbreviated New Drug Application.

¹²² *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 [215].

¹²³ *William Nagel v. The Czech Republic* (n 8) [301].

was not, and could not be, a guarantee that a licence would in fact be obtained. That would depend on the Government, and the Government had made no undertaking in this regard. Mr Nagel could do no more than hope that his cooperation with the State-owned Czech company SRa would increase his chances to become involved in the operation of GSM in the Czech Republic, but he could not be certain of getting a licence. Although he may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a "legitimate expectation" with a financial value.¹²⁴

84. Therefore, although the tribunal recognised that Mr. Nagel had certain rights under the Cooperation Agreement, in view of the members of the panel, such rights were not sufficient to constitute an 'asset' under the treaty.¹²⁵ In addition, in the same case, the tribunal reasoned that for the Cooperation Agreement to be enforceable against the state, the tribunal took into account the legal requirement under Czech law that there should have been an approval or some other binding commitment by the state made in a form to make the Czech Government responsible for the implementation of the Agreement. Upon examining the file and the evidence before it, the arbitral panel did not find such formal commitments on the part of the Government.¹²⁶
85. In summary, it is the law of the host state that determines whether the contract underlying the alleged contractual rights is binding and enforceable.

Conclusion

86. It was shown in this Chapter that domestic law of the host state has a determinative role in another significant *ratione materiae* issue in investment treaty arbitrations. As I demonstrated in this Chapter, it is in most cases, the law of the host state that determines whether a right/interest exists over a piece of property/asset which is said to constitute the alleged investment.
87. As framed, there are two grounds for the application of the laws of the host state to the question of the existence of rights/interests underlying investments. **Firstly**, I established that the nature of the issue requires, in principle, the application of domestic law. In fact, although it is always open to the contracting parties to an investment treaty to define the terms 'property', 'asset', 'property interest', etc. for the purposes of their overseas investment relations by way of express or implied agreements or by way of subsequent agreement or subsequent practice, they do not usually do so in investment treaties. Furthermore, customary international law does not have a set of default rules for determining the substantive contents of rights/interests underlying investments. It is actually domestic law that does have the apparatus for defining 'property' constituting investment. As stated by one commentator: "Investments disputes are about investments, investments are about property, and property is about specific rights over

¹²⁴ *ibid* [326].

¹²⁵ *ibid* [329].

¹²⁶ *ibid* [321]-[325].

things cognisable by the municipal law of the host state.”¹²⁷ Having come to the conclusion that it is domestic law that can answer questions concerning private law aspects of property and contract, it was shown in this Chapter that the application of conflict of laws rules of *lex situs* and *lex contractus*, in most occasions, leads to the application of the laws of the host state to the question of the creation and existence of rights/interests forming the investment. **Secondly**, certain investment treaties expressly mention that the creation and existence of rights/interests with regard to all or a number of assets enumerated by the investment treaty is governed by the laws of the receiving state.

88. For these two reasons, it is the law of the host state that governs the questions regarding the creation and existence of rights/interests underlying investments, and as such, it is the municipal law of the recipient state that furnishes a core component of the tribunal’s *ratione materiae* jurisdiction. In fact, as was pointed out above, the consequence of the application of the host state local law to the questions regarding the existence of rights underlying investments culminates in two possible results: one, that there is a right under the laws of the host state, in which case the tribunal can proceed and check the existence of other conditions of *ratione materiae* jurisdiction, and, two, that the laws of the host state do not recognise the alleged right, meaning that the case should be dismissed to the extent that the claimant’s case solely rests upon the existence of such an alleged right.
89. Furthermore, when considered in more depth, laws of the host state regulate and determine very detailed practical questions concerning the creation and existence of rights underlying investments, including but not limited to matters concerning the definition of ‘property’, legal conditions of transfer of title in tangible and intangible property, and the binding force and enforceability of alleged contractual rights underlying investments.

¹²⁷ Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (n 11) 197.