THE HYBRID FOUNDATIONS OF INVESTMENT TREATY ARBITRATION

By ZACHARY DOUGLAS*

* BA, LLM (Hons) (UniMelb), BCL (Oxon). Associate, Freshfields Bruckhaus Deringer, Paris. The opinions expressed in this article are those of the author and do not necessarily reflect the views of Freshfields Bruckhaus Deringer or its clients.

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I. Introduction

The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalised either as a form of public international or private transnational dispute resolution.[1] Investment treaties are international instruments between states governed by the public international law of treaties. The principal beneficiary of the investment treaty regime is most often a corporate entity established under a municipal law, while the legal interests protected by the regime are a bundle of rights in an investment arising under a different municipal law. The standards of protection are fixed by an international treaty, but liability for their breach is said to give rise to a 'civil or commercial' award for enforcement purposes.[2]

Even this superficial appraisal of the different legal relationships and categories arising out of the investment treaty regime is sufficient to

[1] See, *eg*: J. Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Rev—Foreign Investment LJ* 232, 256, '[T]his is not a sub genre of an existing discipline. It is dramatically different from anything previously know in the international sphere.'

[2] See Part V(D) below.

disclose its hybrid or *sui generis* character.[3] Nonetheless, the present tendency is for states to see elements of the international law of diplomatic protection lurking in the shadows cast by investment treaties,[4] whereas investors are often convinced of a striking resemblance to international commercial arbitration.[5] The *lex arbitri* created by the investment treaty regime, as this study will demonstrate, is a long way from both these legal institutions for the resolution of disputes.

There is nothing new in abandoning the simple dichotomy between public and private international law conceptions of dispute resolution. Modern international society and commerce are characterised by a complex and sometimes disordered web of interrelationships between sovereign states, individuals, international organisations, and multinational corporations. As this web grows in density and coverage, traversing territorial and jurisdictional frontiers, the challenges for the international or transnational legal order become more and more critical. The response to these challenges has often been in the form of innovative international treaties that introduce a bundle of substantive norms and a distinct dispute resolution mechanism. In the sphere of legal relationships between private entities and sovereign states, there are many parallels between

[3] A definition of investment treatment arbitration is offered by: G. Sacerdoti, 'Bilateral Investment Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Hague Recueil* 251, 423, 'Arbitration of a private law character, but guaranteed by an international procedure sanctioned by a treaty . . .'. Although the present writer does not adopt this definition, it does reveal a tension between the public and private international law elements of investment treaty arbitration.

[4] The US submitted in *Loewen Group, Inc. & Raymond L. Loewen v United States of America* (Award, 26 June 2003) Case No. ARB(AF)/98/3, (2003) 42 ILM 811 (hereinafter 'Loewen'): 'The reality is that investment-protection cases . . . have often been decided in the context of claims espoused by States. "Diplomatic espousal" and "investment protection" cases are not mutually exclusive categories, just as "claims in intervention" and "claims in contract" are not mutually exclusive under municipal law. There is no reason of principle why legal rules applicable to one category should not be applicable to the other'; Reply of the United States of America to the Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence (26 April 2002) 38, available at <http://www.state.gov/documents/organization/9947.pdf>.

Sir Robert Jennings, in his Fifth Opinion submitted on behalf of the Claimant in *Loewen*, noted the 'surprising regressive tendency of the United States' argument' which relies on cases 'stem[ming] from the period between the two world wars when solely States were the "subjects" of international law and there was no possibility for individuals or corporations to have direct rights in international law or to be parties to international litigation'; cited in Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence (29 March 2002) para. 65, available at <http://www.state.gov/documents/organization/9360.pdf>.

[5] Two eminent lawyers who were involved in the negotiations leading to the NAFTA and now act as counsel for investors subscribe to this view. See D. Price, 'Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?' (2000) 26 *Canadian US LJ* 107, 112, 'Chapter 11 of NAFTA removes investment disputes from the political realm and puts them into the realm of commercial arbitration'; H. Alvarez, 'Arbitration Under the North American Free Trade Agreement' (2000) 16 *Arbitration Int* 393, 393–4, '[NAFTA] provides guaranteed access to international commercial arbitration.'

The Claimant in *Loewen* was at pains to reject the diplomatic protection model for investment treaty arbitration: '. . . NAFTA Chapter 11 focuses not on wrongs done to States or claims of the State, but instead gives individual investors the absolute right to bring claims on their own behalf, without having to seek the intercession of their home States as a matter of diplomatic grace', Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence (29 March 2002) para. 66, available at <http://www.state.gov/documents/organization/9360.pdf>. This view will be endorsed below in in Part II(E).

the legal regime created by investment treaties on the one hand and those regimes established by the European Convention of Human Rights[6] and the Algiers Accords (creating the Iran/US Claims Tribunal) on the other.[7] Citizens of many European countries have the right to pursue remedies directly against a state for violations of international minimum standards of treatment, formulated as universal and inalienable human rights, before an international tribunal.[8] Citizens of Iran and the United States have the right to pursue remedies directly against the other state for violations of international minimum standards of treatment, such as the prohibition against uncompensated expropriation, before an international tribunal.[9] Recourse to the European Court of Human Rights, the Iran/US Claims Tribunal, and the international arbitral tribunals established pursuant to investment treaties has catapulted individuals and corporate entities into an international system of adjudication along-side states. In this respect also the traditional view of the international legal order that relegated individuals and corporate entities to the status of mere 'objects' of international law is no longer credible.[10]

An analysis of these different treaty regimes can be distorted if one adheres to a strict distinction between public and private international law conceptions of dispute resolution. Many of the awards of investment treaty tribunals—and the pleadings of parties to these disputes—proceed on the basis of a dogmatic distinction between 'international' or 'treaty'

[6] This link was made by G. Burdeau, 'Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant l'Etat' (1995) *Revue de l'arbitrage* 3, 16: '[L]a 'philosophie' des deux mécanismes paraît la même: il s'agit dans l'un et l'autre cas d'ouvrir à des particuliers non identifiés à l'avance un droit de recours direct contre un Etat en vue de sanctionner le respect de l'engagement pris par ce dernier dans un traité international d'accorder un certain traitement à des personnes privées.'

[7] Investment treaty tribunals, and counsel pleading before them, cite precedents of the Iran/US Claims Tribunal with great frequency. However, the UNCITRAL Tribunal in the NAFTA case of *Pope & Talbot Inc v Government of Canada* (Interim Award, 26 June 2000), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf>, appeared to reject the significance of the precedents of the Iran/US Claims Tribunal in relation to the prohibition against expropriation in Art. 1110 of NAFTA. *Ibid.* paras. 94, 104. For a critique of this approach, see: M. Brunetti, 'The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation' (2001) *2 Chicago J of Int L* 203.

[8] See generally: J. Fawcett, *The Application of the European Convention on Human Rights* (1987); P. Van Dijk & G. Van Hoof, *Theory and Practice of the European Convention of Human Rights* (1990); D. Harris, M. O'Boyle, & A. Warbick, *Law of the European Convention on Human Rights* (1995); D. Shelton, *Remedies in International Human Rights Law* (1999) 147; M. Janis, R. Kay, & A. Bradley, *European Human Rights Law* (2000, 2nd edn).

[9] See generally: G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996); R. Lillich, D. Magraw, & D. Bederman, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1997); C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* (1998); M. Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (1999).

[10] The 'father' of the positivist conception of the subjects of international law was arguably Bentham, who in 1789 defined international law as 'the mutual transactions between sovereigns'. See J. Bentham, *Introduction to the Principles of Morals and Legislation* (1789) 296. Janis has pointed out the irony that in the same year as Bentham propounded this thesis, the First United States Congress authorised suits by individuals to address grievances under the law of nations before the Federal District Courts pursuant to the Judiciary Act. See M. Janis, 'Subjects of International Law' (1984) 17 *Cornell Int L J* 61.

versus 'municipal' or 'contractual' spheres, as if the two can be strictly dissociated one from the other.[11] Thus, by characterising the status of an investment treaty tribunal as 'international', arbitrators have professed to occupy a position of supremacy in a 'hierarchy' of legal orders, and thereby have dismissed the relevance of any competing law or jurisdiction. The principle of international law that is used to buttress this approach, whether expressly or implicitly, is the rule of state responsibility that a state cannot invoke provisions of its own law to justify a derogation from an international obligation. Article 3 of the ILC's Articles on the Responsibility of States for International Wrongs, titled 'Characterization of the act of a State as internationally wrongful' is a codification of this rule, which provides: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'[12] But investment disputes are only partly concerned with the compliance of acts attributable to a state with its treaty obligations; and the principle stated in Article 3 of the ILC Articles only comes into play when there is actual conflict between the two legal orders—orders which nonetheless coexist in principle (and in fact), in relation to any investment situation. In other words, investment disputes are significantly concerned with issues pertaining to the existence, nature, and scope of the private interests comprising the investment. These issues go beyond the purview of international law and the rule of state responsibility just recalled. To treat international law as a self-sufficient legal order in the sphere of foreign investment is plainly untenable. Within this domain of private or commercial interests, problems relating to overlapping adjudicative competence and the application of municipal law cannot be resolved by playing the simple 'international trump card' of Article 3.

This study will confront the problem of jurisdictional conflicts between arbitral tribunals established pursuant to investment treaties to decide investor/state disputes ('treaty tribunals') on the one hand, and municipal courts or arbitral tribunals constituted pursuant to an arbitration clause in a contract between the investor and the host state ('contractual tribunals') on the other, in some detail, together with conflicts of law problems pertaining to various aspects of the investment dispute. These problems have been particularised as the choice of law issues pertaining to different substantive aspects of the investment dispute (examined in Part IV of this study), the applicable procedural law and its significance to the arbitral procedure (Part V), the applicable regime for the challenge and enforcement of investment treaty awards (Part VI), and the jurisdictional conflicts that arise when different courts or tribunals are seized of different elements of

[11] See the cases analysed in Parts IV(C), VII(C) and VII(E) below.

[12] The ILC's Articles and official commentary thereto are reproduced in: J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002) 61.

the investment dispute (Part VII), whether pursuant to a forum selection clause in a contract between the investor and the host state or otherwise.

None of these problems, however, can be properly addressed in a theoretical void. Hence Parts II and III will lay the conceptual foundation with a discussion of two crucial threshold questions. First, to whom are the primary investment protection obligations in an investment treaty owed? Although investors are clearly beneficiaries of those obligations, the spectre of diplomatic protection is often summoned in investment treaty awards and pleadings in support of the idea that investors are stepping into the shoes of their national states in bringing an investment treaty claim.[13] Does, then, the modern investment treaty create a procedural device for triggering the legal rights and obligations of diplomatic protection? Or are investors the true 'owners' of rights under investment treaties? If the rights invoked by investors are not ultimately their own, then this must have consequences, for example, on their ability to waive or otherwise qualify these rights.

The second threshold question, which follows directly from the first, concerns the nature of the legal consequences that follow a breach of an investment treaty obligation. Do the secondary rules of state responsibility for international wrongful acts apply in this situation? Formulated differently, is a breach of an investment treaty in relation to a particular investor actionable by the national state of the investor so that the latter has corresponding rights to a remedy for that breach? If it is, then the resulting liability has a truly international character. This has consequences, for instance, in determining the applicable regime for the challenge and enforcement of investment treaty awards.

Bilateral investment treaties ('BITs') for the reciprocal encouragement of investment, predominantly between capital importing and exporting states, numbered 2,181 at the end of 2002.[14] Multilateral investment treaties such as the North Atlantic Free Trade Agreement ('NAFTA')[15] and the Energy Charter Treaty[16] create reciprocal investment protection obligations across the same divide but are also notable for extending the regime to investment relations between developed economies as well.[17] Investment treaties usually create two distinct dispute resolution

[13] See Part II(B) below.

[14] UNCTAD, *World Investment Report 2003* (2003) 17, available at <http://www.unctad.org/en/docs//wir2003overview_en.pdf>. Interestingly, only 7% of the world's foreign direct investment is covered by the bilateral investment treaty network, although the proportion of foreign direct investment in developing and Central and Eastern European countries covered by the network is 22%. *Ibid.*

[15] Reprinted at: (1993) 32 ILM 605.

[16] Reprinted at: (1995) 35 ILM 509.

[17] See generally the following studies on the NAFTA and Energy Charter Treaty: T. Wälde (ed.) *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996); M. Omalu, *NAFTA and the Energy Charter Treaty: Compliance with, Implementation, and Effectiveness of International Investment Agreements* (1999); T. Wälde, 'International Investment under the 1994 Energy Charter Treaty' (1995) 29 *J of World Trade L* 5; T. Wälde, 'Investment Arbitration under the Energy Charter Treaty' (1996) *Arbitration Int* 429; T. Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (2004).

mechanisms: one for disputes between a qualifying investor and the host state in relation to its investment ('investor/state disputes') and another for disputes between the contracting state parties to the treaty ('state/state disputes'). Investment treaties generally provide that the state/state mechanism covers disputes 'concerning the interpretation or application' of the treaty,[18] whereas disputes relating to a specific investment of a particular investor (which may of course give rise to interpretative questions) are encompassed by the investor/state dispute resolution procedure.[19] This study focuses almost exclusively on the resolution of investor/state disputes through recourse to international arbitration, which is by far the most utilised dispute resolution mechanism that is available under investment treaties.[20] Nevertheless it is useful to set the stage with a brief appraisal of each type of mechanism.

The judicial forums prescribed for the resolution of investor/state disputes generally include one or more of the following at the option of the investor:

—municipal courts of the host state;[21]
—ICSID arbitration pursuant to the ICSID Arbitration Rules or the Additional Facility Rules;[22]

[18] Asian-African Legal Consultative Committee Model BIT, Art. 11(i), UNCTAD, *International Investment Instruments: A Compendium* (hereinafter 'UNCTAD Compendium') (Vol. III, 1996) 122; Chile Model BIT, Art. 9(1), *ibid.* 148; China Model BIT, Art. 8(1), *ibid.* 154; Switzerland Model BIT, Art. 9(1), *ibid.* 181; UK Model BIT, Art. 9(1), *ibid.* 190; Egypt Model BIT, Art. 9(1), *ibid.* (Vol. V, 2000) 297; France Model BIT, Art. 11(1), *ibid.* 306; Jamaica Model BIT, Art. 9(1), *ibid.* 321; Malaysia Model BIT, Art. 8(1), *ibid.* 329; Netherlands Model BIT, Art. 12(1), *ibid.* 337; Sri Lanka Model BIT, Art. 9(1), *ibid.* 344; Cambodia Model BIT, Art. 9(1), *ibid.* (Vol. VI, 2002) 467; Croatia Model BIT, Art. 11(1), *ibid.* 477; Iran Model BIT, Art. 13(1), *ibid.* 483; Peru Model BIT, Art. 9(1), *ibid.* 498; US Model BIT, Art. 10(1), *ibid.* 508; Austria Model BIT, Art. 18, *ibid.* (Vol. VII) 267; Belgo-Luxemburg Economic Union Model BIT, Art. 11(1), *ibid.* 276; Denmark Model BIT, Art. 10(1), *ibid.* 284; Finland Model BIT, Art. 10(1), *ibid.* 293; Germany Model BIT, Art. 10(1), *ibid.* 300; South Africa Model BIT, Art. 8(1), *ibid.* (Vol. VIII) 277; Turkey Model BIT, Art. 8(1), *ibid.* 284; Benin Model BIT, Art. 8(1), *ibid.* (Vol. IX) 282; Burundi Model BIT, Art. 9(1), *ibid.* 292; Maurice Model BIT, Art. 9(1), *ibid.* 300; Mongolia Model BIT, Art. 9(1), *ibid.* 306; Sweden Model BIT, Art. 9(1), *ibid.* 314; Energy Charter Treaty, Art. 27(1).

[19] See the discussion of the *ratione materiae* of investment disputes at the text accompanying nn. 438–443 below.

[20] The only example of a state/state arbitration to date has arisen under the Peru/Chile BIT, where Peru invoked the state/state dispute mechanism against Chile after being served with a notice of arbitration by a Chilean investor under the same BIT (*Lucchetti SA v Peru* (ICSID Case No. ARB/03/4)). Peru appears to be seeking a favourable interpretation of the BIT in the state/state arbitration to assist its case in the investor/state arbitration.

[21] Chile Model BIT, Art. 8(2)(a), *UNCTAD Compendium* (Vol. III, 1996) 147; China Model BIT, Art. 9(2), *ibid.* 155; Egypt Model BIT, Art. 8(2)(a), *ibid.* (Vol. V, 2000) 297; Jamaica Model BIT, Art. 8(2)(a), *ibid.* 322; Sri Lanka Model BIT, Art. 8(2)(a), *ibid.* 343; Croatia Model BIT, Art. 10(2)(a), *ibid.* (Vol. VI, 2002) 476; Iran Model BIT, Art. 12(2), *ibid.* 483; Peru Model BIT, Art. 8(2)(a), *ibid.* 497; US Model BIT, Art. 9(2)(a), *ibid.* 507; Austria Model BIT, Art. 12(1)(a), *ibid.* (Vol. VII) 264; Finland Model BIT, Art. 9(2)(a), *ibid.* 292; Benin Model BIT, Art. 9(2)(a), *ibid.* (Vol. IX) 283; Energy Charter Treaty, Art. 26(2)(a).

[22] Asian-African Legal Consultative Committee Model 'A' BIT, Art. 10(v), *UNCTAD Compendium* (Vol. III, 1996) 122; Asian-African Legal Consultative Committee Model 'B' BIT, Art. 10(v), *ibid.* 133; Chile Model BIT, Art. 8(2)(b), *ibid.* 147; Switzerland Model BIT, Art. 8(2), *ibid.* 181; UK Model BIT, Art. 8, *ibid.* 189; Egypt Model BIT, Art. 8(2)(b), *ibid.* (Vol. V, 2000) 297; France Model BIT, Art. 8,

—*ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules;[23]
—International Chamber of Commerce arbitration;[24]
—Stockholm Chamber of Commerce arbitration;[25] or
—a settlement procedure previously agreed to between the investor and host state.[26]

In relation to state/state disputes, investment treaties almost without exception refer such disputes to *ad hoc* arbitration with the President of the International Court of Justice nominated as the appointing authority.[27] Also, in the vast majority of cases, investment treaties prescribe that the arbitral tribunal shall determine its own rules of procedure, but in the rare instances that a model set of rules is specified, a set of rules

ibid. 305; Indonesia Model BIT, Art. 8(3)(a), *ibid.* 313; Jamaica Model BIT, Art. 10, *ibid.* 322; Malaysia Model BIT, Art. 7(3), *ibid.* 329; Netherlands Model BIT, Art. 9, *ibid.* 336; Sri Lanka Model BIT, Art. 8(2)(b), *ibid.* 343; Cambodia Model BIT, Art. 8(3)(a), *ibid.* (Vol. VI, 2002) 467; Croatia Model BIT, Art. 10(2)(b), *ibid.* 476; Peru Model BIT, Art. 8(2)(b), *ibid.* 497; US Model BIT, Art. 9(3)(a), *ibid.* 507; Austria Model BIT, Art. 12(1)(c), *ibid.* (Vol. VII) 264; Belgo-Luxemburg Economic Union Model BIT, Art. 10(3), *ibid.* 275; Denmark Model BIT, Art. 9(2)(a), *ibid.* 283; Finland Model BIT, Art. 9(2)(b), *ibid.* 292; Germany Model BIT, Art. 11, *ibid.* 301; South Africa Model BIT, Art. 7(2), *ibid.* (Vol. VIII) 276; Turkey Model BIT, Art. 7(2)(a), *ibid.* 284; Benin Model BIT, Art. 9(3), *ibid.* (Vol. IX) 283; Burundi Model BIT, Art. 8(3), *ibid.* 292; Mongolia Model BIT, Art. 8(2)(a), *ibid.* 306; Sweden Model BIT, Art. 8(2), *ibid.* 313; Energy Charter Treaty, Art. 26(4); NAFTA, Art. 1120(1).

[23] Asian-African Legal Consultative Committee Model 'A' BIT, Art. 10(v), *UNCTAD Compendium* (Vol. III, 1996) 122; Asian-African Legal Consultative Committee Model 'B' BIT, Art. 10(v), *ibid.* 133; UK 'Alternative' Model BIT, Art. 8, *ibid.* 189; Egypt Model BIT, Art. 8(2)(c), *ibid.* (Vol. V, 2000) 297; Indonesia Model BIT, Art. 8(3)(b), *ibid.* 313; Sri Lanka Model BIT, Art. 8(2)(f), *ibid.* 343; Cambodia Model BIT, Art. 8(3)(b), *ibid.* (Vol. VI, 2002) 467; Iran Model BIT, Art. 12(6), *ibid.* 483; US Model BIT, Art. 9(3)(a)(iii), *ibid.* 507; Austria Model BIT, Art. 12(1)(c), *ibid.* (Vol. VII) 265; Belgo-Luxemburg Economic Union Model BIT, Art. 10(3), *ibid.* 275; Denmark Model BIT, Art. 9(2)(c), *ibid.* 283; Finland Model BIT, Art. 9(2)(d), *ibid.* 292; Turkey Model BIT, Art. 7(2)(b), *ibid.* 284; Benin Model BIT, Art. 9(3)(b), *ibid.* (Vol. IX) 284; Mongolia Model BIT, Art. 8(2)(b), *ibid.* 306; Sweden Model BIT, Art. 8(2), *ibid.* 313; Energy Charter Treaty, Art. 26(4); NAFTA, Art. 1120(1). In relation to the nature of a unilateral offer of ICSID arbitration, see: P. Muchlinski, *Multinational Enterprises and the Law* (1999) 558; C. Schreuer, *The ICSID Convention: A Commentary* (2001) 212–13.

[24] UK 'Alternative' Model BIT, Art. 8(2)(b), *UNCTAD Compendium* (Vol. III, 1996) 190; Austria Model BIT, Art. 12(1)(c), *ibid.* (Vol. VII) 265; Belgo-Luxemburg Economic Union Model BIT, Art. 10(3), *ibid.* 275; Denmark Model BIT, Art. 9(2)(d), *ibid.* 283; Germany Model BIT, Art. 11, *ibid.* 301.

[25] Sri Lanka Model BIT, Art. 8(2)(e), *UNCTAD Compendium* (Vol. V, 2000) 343; Belgo-Luxemburg Economic Union Model BIT, Art. 10(3), *ibid.* (Vol. VII, 2002) 275; Energy Charter Treaty, Art. 26(4).

[26] US Model BIT, Art. 9(3)(a)(iv), *UNCTAD Compendium* (Vol. VI, 2002) 507; Austria Model BIT, Art. 12(1)(b), *ibid.* (Vol. VII) 264; Energy Charter Treaty, Art. 26(2)(6).

[27] Asian-African Legal Consultative Committee Model BIT, Art. 11(iii), *UNCTAD Compendium* (Vol. III, 1996) 122; Chile Model BIT, Art. 9(4), *ibid.* 148; China Model BIT, Art. 8(4), *ibid.* 154; Switzerland Model BIT, Art. 9(4), *ibid.* 182; UK Model BIT, Art. 9(4), *ibid.* 191; Egypt Model BIT, Art. 9(4), *ibid.* (Vol. V, 2000) 298; Jamaica Model BIT, Art. 9(4), *ibid.* 321; Malaysia Model BIT, Art. 8(4), *ibid.* 330; Netherlands Model BIT, Art. 12(4), *ibid.* 337; Sri Lanka Model BIT, Art. 9(4), *ibid.* 344; Croatia Model BIT, Art. 11, *ibid.* (Vol. VI, 2002) 477; Iran Model BIT, Art. 13, *ibid.* 483–4; Peru Model BIT, Art. 9, *ibid.* 498; Austria Model BIT, Art. 20, *ibid.* (Vol. VII) 267; Belgo-Luxemburg Economic Union Model BIT, Art. 11, *ibid.* 276; Denmark Model BIT, Art. 10, *ibid.* 284–5; Finland Model BIT, Art. 10, *ibid.* 293; Germany Model BIT, Art. 10, *ibid.* 300–1; South Africa Model BIT, Art. 8, *ibid.* (Vol. VIII) 277; Turkey Model BIT, Art. 8, *ibid.* 284–5; Benin Model BIT, Art. 8, *ibid.* (Vol. IX) 282–3; Burundi Model BIT, Art. 9, *ibid.* 292–3; Maurice Model BIT, Art. 9, *ibid.* 300; Mongolia Model BIT, Art. 9, *ibid.* 306–7; Sweden Model BIT, Art. 9, *ibid.* 314. The US Model BIT nominates the Secretary-General of ICSID as the appointing authority, Art. 10, *ibid.* (Vol. VI) 508. The France Model BIT nominates the Secretary General of the UN, Art. 11, *ibid.* (Vol. V) 307. The Energy Charter Treaty nominates the Secretary-General of the Permanent Court of Arbitration, Art. 27.

designed for public international law arbitrations between states is generally preferred.[28]

The hybrid or *sui generis* nature of the legal relationship between the investor and host state that arises out of the investment treaty regime does not prejudice a different characterisation of the legal relationship between the contracting state parties. State/state disputes under investment treaties easily fit into the familiar paradigm of arbitrations between states governed by public international law. In contradistinction, it will be demonstrated in Part II that the public international law paradigm for international claims for harm to individuals or private entities, the customary law of diplomatic protection, is inadequate and inappropriate as a basis for rationalising investor/state disputes.

A final introductory point needs to be made about the use in this study of the model BITs of certain states as evidence of state practice. These model BITs are not relied upon by the present writer as an evidentiary component for the formation of customary international law,[29] but instead as a representative sample of the types of treaty provisions that feature in the approximately 2,000 BITs in existence. The volumes of model BITs collected and published by the United Nations Conference on Trade and Development ('UNCTAD') and cited extensively in this study come from a diverse range of both capital exporting and importing states. The striking feature of this collection of model BITs is that their formal layout and substantive content are very similar, often practically identical, in spite of the different economic or cultural reality prevailing in the states in question. A suggestion that the familiar substantive obligations in treaties such as the standard of fair and equitable treatment and most-favoured nation treatment, or indeed the procedural right to submit investor/state disputes to international arbitration, are somehow thrust upon capital importing or developing states by more powerful nations with developed economies is seriously undermined by the evidence presented by this collection of model BITs. A model BIT represents the set of norms that the relevant state holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy.[30] That there appears to

[28] The Austria Model BIT selects the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes, Art. 21(2), *UNCTAD Compendium* (Vol. VII, 2002) 267. The NAFTA Parties have enacted a very detailed set of 'Model Rules of Procedure for Chapter 20 of the NAFTA' (relating to state/state disputes) in accordance with Art. 2012 of the NAFTA. Conversely, the Energy Charter Treaty makes no distinction between the procedural rules for investor/state and state/state arbitrations by selecting the UNCITRAL Arbitration Rules for state/state disputes in Art. 27(3)(f).

[29] The extent to which these bilateral investment treaties do generate customary international law was an issue debated at some length in two NAFTA cases, see: *Pope & Talbot Inc v Government of Canada* (Award in Respect of Damages, 31 May 2002), (2002) 41 ILM 1347, para. 55 *et seq.*; *United Parcel Service of America Inc v Government of Canada* (Award on Jurisdiction, 22 November 2002), para. 86 *et seq.*, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf>. See generally: B. Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1994) 14 *Northwestern Int L and Business* 327.

[30] It is certainly possible that economic globalisation is a coercive force in the sense that developing states are under pressure to subscribe to rules and standards to compete for foreign direct investment. This form of 'coercion' does not, however, constitute a legal form of duress that could be relevant to the binding force of the treaty.

be a strong consensus on this matter among the states that have submitted model BITs to UNCTAD cannot be ignored; and this insight would be relevant to a discussion of BITs and customary international law.

II. To Whom are Investment Treaty Obligations Owed?

A. Introduction: The Iran/US Claims Tribunal

Before examining the legal nature of the investor/state regime for the settlement of disputes in investment treaties, it is important to recognise that the problem of 'pigeonholing' an international treaty regime for the settlement of disputes between states and individuals and private entities has arisen before. The precise legal status of the Iran/US Claims Tribunal remains a subject of controversy even as its mandate draws to a close after more than twenty years of activity.

The literature on this subject testifies to a complete lack of consensus. A judge of the Tribunal, Judge Brower, asserts that 'there can be little doubt that the Tribunal is an international institution established by two sovereign States and subject to public international law.'[31] Similarly, Fox regards the Tribunal as an example of 'private claims taken up by the State and presented through an inter-State arbitration.'[32] The Iranian writer, Seifi, emphasizes the Tribunal's 'exclusively international character',[33] while the US writer, Caron, takes the view that, at least in relation to claims involving nationals, 'the Accords established a clear presumption that the legal system of the Netherlands would govern the Tribunal's arbitral process.'[34] Two eminent Dutch lawyers, Hardenberg and van den Berg, reach contrary conclusions on the applicability of Dutch law as the *lex loci arbitri*.[35] Other commentators have perhaps sought the middle ground in describing the procedural regime for the Iran/US Claims Tribunal as 'denationalised':

> [I]t appears truer to the Accords to recognize the Tribunal as a denationalized body subject to its organic treaty and its rules, but not to national arbitral law.[36]

[31] C. Brower & J. Brueschke, above n. 9, 16.

[32] H. Fox, 'States and the Undertaking to Arbitrate' (1988) 37 *ICLQ* 1, 3.

[33] J. Seifi, 'State Responsibility for Failure to Enforce Iran-United States Claims Tribunal Awards by the Respective National Courts: International Character and Non-Reviewability of the Awards Reconfirmed' (1999) 16 *J of Int Arbitration* 5, 17.

[34] D. Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 *AJIL* 104, 146.

[35] L. Hardenberg, 'The Awards of the Iran-US Claims Tribunal Seen in Connection with the Law of the Netherlands' (1984) *Int Business Lawyer* 337 (concluding that Dutch law does not apply as the *lex loci arbitri*); A. van den Berg, 'Proposed Dutch Law on the Iran-United States Claims Settlement Declaration, A Reaction to Mr. Hardenberg's Article' (1984) *Int Business Lawyer* 341 (concluding that Dutch law does apply).

[36] W. Lake & J. Dana, 'Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?' (1984) 16 *Law & Policy in Int Business* 755, 811. Sacerdoti also avoids the public/private dichotomy simply by characterising the awards as commercial arbitral

Another Iranian writer, Avanessian, agrees with this analysis, but adds:

> [The Tribunal] somehow exists and operates on the borderline of public and private international law, sometimes falling in the domain of one and sometimes in that of the other.[37]

A complete spectrum of views can thus be distilled from the literature on the juridical status of the Iran/US Claims Tribunal. That the authors just mentioned can reach very divergent conclusions on this subject should at least put those dealing with investment treaty arbitration on notice of the complexity of the issues at hand. Any single-sentence proclamations about the true nature of the legal regime for the settlement of investor/state disputes must be viewed with scepticism.

The Iran/US Claims Tribunal, established by the Algiers Accords,[38] has jurisdiction over (i) claims by American and Iranian nationals against Iran and the United States respectively that 'arise out of debts, contracts . . . expropriations or other measures affecting property rights';[39] (ii) 'official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purpose and sale of goods and services';[40] and (iii) disputes between Iran and the United States concerning the interpretation or performance of the General Declaration or the Claims Settlement Declaration.[41]

There is an important difference between the three types of jurisdiction vested in the Iran/US Claims Tribunal.[42] Investor/state disputes under investment treaties most closely resemble the first of the three heads of jurisdiction of the Iran/US Claims Tribunal because private interests are clearly at stake. Therefore it is valuable to examine how the Tribunal itself has rationalised the nature of the claimant's cause of action. Is this example of a private claimant stepping into the shoes of its national state?

The issue arose most directly in the *Dual Nationality Case*.[43] Iran challenged the admissibility of claims brought against it by persons who were both citizens of the United States and Iran by relying on a rule of customary international law prohibiting the exercise of diplomatic protection on behalf of a national who also has the nationality of the respondent state.

awards: G. Sacerdoti, above n. 3, 423, '[J]udgments issued by the Tribunal on private claims can be equated to those of international commercial arbitral tribunals and [. . .] can be enforced accordingly.'

[37] A. Avanessian, 'The New York Convention and Denationalised Arbitral Awards (With Emphasis on the Iran-United States Claims Tribunal)' (1991) *J of Int Arbitration* 5, 8.

[38] The Iran/US Claims Tribunal was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria ('General Declaration') and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ('Claims Settlement Declaration'), collectively referred to as the 'Algiers Accords'. The Algiers Accords are reproduced at: (1981) 75 *AJIL* 418.

[39] Article II(1) of the Claims Settlement Declaration. [40] *Ibid.* Art. II(2).

[41] *Ibid.* Art. II(3).

[42] Only a few studies emphasize this distinction, including: D. Lloyd Jones, 'The Iran-United States Claims Tribunal: Private Rights and State Responsibility' (1984) 24 *Victoria J of Int L* 259, 261–2; H. Fox, above n. 32, 21.

[43] *Islamic Republic of Iran and United States (Case A/18) (Dual Nationality)* (6 April 1984) DEC 32-A18-FT, (1984) 5 Iran-US CTR 251.

Iran justified its reliance on this rule on the basis that the Algiers Accords 'intended the function of the Tribunal to be the adjudication of international claims on the basis of the exercise of diplomatic protection.'[44]

The Full Tribunal rejected Iran's argument emphatically, clearly distinguishing its jurisdiction over *inter*-state disputes from its jurisdiction extending to private claimants:

While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. In such cases it is rights of the claimant, not of his nation, that are to be determined by the Tribunal.[45]

The Full Tribunal later reiterated in Case A/21, when confronted again with Iran's submission that the claims of nationals are in reality the claims of their governments, that 'Tribunal awards uniformly recognize that no espousal of claims by the United States is involved in the cases before it.'[46]

B. THE INVESTMENT TREATY REGIME FOR INVESTOR/STATE DISPUTES

Whereas the pronouncements of the Iran/US Claims Tribunal on the threshold problem of its own juridical status are not definitive, in the investment treaty context they are virtually non-existent. One of the few tribunals to consider the problem was the ICSID Tribunal in *Loewen Group, Inc. & Raymond L. Loewen v United States of America*[47] ('Loewen'). The Tribunal first endorsed a sharp distinction between the 'municipal' and 'international' legal orders in its description of the rights and obligations existing under NAFTA:

Rights of action under private law arise from personal obligations . . . brought into existence by domestic law and enforceable through domestic tribunals and

[44] *Ibid.* 254.

[45] *Ibid.* 261. See also: Concurring Opinion of Willem Riphagen, *ibid.* 273–4; *Esphanian (Nasser) v Bank Tejarat* (29 March 1983) 31–157–2, (1983) 2 Iran-US CTR 157, 165, '[T]he agreement of the two Governments to create this Tribunal was not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the same claims where it acts as counsel for these nationals.'

[46] *Islamic Republic of Iran and United States (State Party Responsibility for Awards Rendered Against its Nationals)* (4 May 1987) DEC 62-A21-FT, (1987) 14 Iran-US CTR 324, 330, para. 12. The position was different in relation to the small claims. See Art. III(3) of the Claims Settlement Declaration: 'Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.'

[47] (Award, 26 June 2003) Case No. ARB(AF)/98/3, (2003) 42 ILM 811 (hereinafter 'Loewen Award').

courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation.[48]

Upon this foundation, the Tribunal then articulated a 'derivative' scheme for understanding the investor's cause of action:

> There is no warrant for transferring rules derived from private law into a field of international law where *claimants are permitted for convenience to enforce what are in origin the rights of Party states*.[49]

The direct consequence of this theoretical approach in *Loewen* was the application of a (controversial) rule governing the presentation of an international claim by one state to another through the mechanism of diplomatic protection.[50]

At the heart of the 'derivative' theory is the idea that investment treaties 'institutionalise and reinforce'[51] the system of diplomatic protection.[52] In accordance with this model, the obligations of minimum treatment are owed to the contracting states just as in customary international law, however, those states confer standing upon their national investors to enforce such obligations before an international tribunal. Investors therefore procedurally step into the shoes of their national state, without thereby becoming privy to their *inter*-state legal relationship. This was the procedural regime adopted by the Mixed Claims Commissions established to hear US and British claims against Latin American States including Mexico, Chile, Venezuela, and Peru as well as claims against Germany after the First World War.[53]

The 'derivative theory' is popular among respondent states to investment treaty claims. Canada recently endorsed this position in its pleadings before the courts in Ottawa challenging the NAFTA award in *S.D. Myers Inc. v Government of Canada*:[54]

> The obligations listed in Section A of NAFTA Chapter Eleven are not owed directly to individual investors. Rather, the disputing investor must prove that the NAFTA Party claimed against has breached an obligation owed to another

[48] *Ibid.* para. 233.

[49] *Ibid.* para. 233 (emphasis added). Elsewhere in its award, the *Loewen* Tribunal appears to contradict this 'derivative' approach by stating that 'Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration . . .', *ibid.* para. 223.

[50] See Part III(C) below.

[51] J. Crawford, 'The ILC's Articles on Responsibility of States for International Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 888.

[52] *Mavrommatis Palestine Concessions Case* (1924) PCIJ Rep Series A No. 2. See the discussion at Section C of this Part II below.

[53] J. Simpson & H. Fox, *International Arbitration, Law and Practice* (1959) Chs. 1–4.

[54] (Partial Award, 12 November 2000), (2001) 40 ILM 1408.

NAFTA Party under Section A and that the investor had incurred loss or damage by reason of or arising out of that breach.[55]

In the NAFTA context, similar positions have been taken by the United States[56] and Mexico.[57] Writers such as Sornarajah also support this conception of the beneficiary of rights under an investment treaty.[58]

The 'derivative theory' can be contrasted with the 'direct theory', whereby investors are recognised to be in a direct legal relationship with the host state and given procedural means to enforce their own substantive rights. This juxtaposition of 'derivative' and 'direct' models for the presentation of claims against states is implicit in several investment treaty arbitration awards, most prominently in *CMS Gas Transmission Company v The Republic of Argentina*:[59]

> To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognising the direct right of action by individuals.[60]

Before considering the compatibility of the 'derivative' model with the distinct features of the investment treaty regime that have emerged from the cases, it is necessary to consider in more detail the *Mavrommatis* formula[61] of diplomatic protection, which underlies the derivative model.

C. THE *MAVROMMATIS* FORMULA OF DIPLOMATIC PROTECTION

The institution of diplomatic protection is conceived of as concerning rights and obligations existing exclusively between sovereign states. The injured foreign national is not privy to this legal relationship and is thus impotent to enforce the obligations of customary international law in its own right. This has been the orthodox view of diplomatic protection

[55] Amended Memorandum of Fact and Law of the Applicant, the Attorney General of Canada, *The Attorney General of Canada v S. D. Myers, Inc*, Court File No. T-225–01, para. 67, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Myersamend.pdf>.

[56] See, in particular, the US Government's arguments to the effect that 'direct claims' are no different, and subject to the same rules, as 'espoused claims' in its Reply to the Counter-Memorial of the Loewen Group, Inc on Matters of Jurisdiction and Competence (26 April 2002) 33 *et seq.*, available at <http://www.state.gov/documents/organization/9947.pdf>.

[57] See below n. 362.

[58] M. Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 *J of World Trade L* 79, 93: '[T]he breach of the treaty creates an international obligation between state parties to the treaty and no benefits or rights flow directly to the affected individual.'

[59] (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) Case No. ARB/01/8, (2003) 42 ILM 788.

[60] *Ibid.* para. 45. The Tribunal cited the ICSID Convention as one such arrangement, but clearly had in mind other treaties dealing with foreign investment as well. The investor was described as the 'beneficiary' of substantive BIT rights in *American Manufacturing and Trading, Inc. v Republic of Zaire*, (Award, 21 February 1997) Case No. ARB/93/1, 5 ICSID Rep 14, para. 6.06. Writers supporting the 'direct' theory, at least in relation to the procedural right of an investor to bring arbitration proceedings against the host state, include: G. Burdeau, above n. 6, 12 *et seq.*; J. Paulsson, above n. 1, 256; T. Wälde, 'Investment Arbitration under the Energy Charter Treaty', above n. 17, 435–7.

[61] *Mavrommatis Palestine Concessions Case* (1924) PCIJ Rep Series A No. 2.

since it was first rationalised by Vattel in the middle of the eighteenth century:

> Anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security.[62]

Borchard, in his influential treatise on diplomatic protection in 1913, noted a consistent line of judicial authority supporting Vattel's premise that the rights and obligations of diplomatic protection exist only between sovereign states, and on this basis articulated his own restatement of the principle:

> Diplomatic protection is in its nature an international proceeding, constituting an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties.[63]

It was some years later that the Permanent Court of International Justice made its pronouncement in the *Mavrommatis Palestine Concessions Case*[64] in line with these earlier authorities:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.[65]

The dispute in the *Mavrommatis Palestine Concession Case* originated in the British Government's decision, as Mandatory of Palestine, to grant concessions for the provision of public services which duplicated earlier concessions obtained by a Greek national (Mr Mavrommatis) from the previous ruler of Palestine (the Ottoman Empire). The Permanent Court found that upon the election by the Government of Greece to espouse a diplomatic protection claim to redress the wrong to its national, the dispute became a dispute between the Mandatory (United Kingdom) and a member of the League of Nations, Greece, for the purposes of the dispute resolution provision contained in the British Mandate over Palestine.[66]

The *Mavrommatis* 'formula' was applied in several other cases before the Permanent Court[67] and found its way into the judgments of the

[62] E. de Vattel, *Le droit des gens ou les principes de la loi naturelle* (Vol. I, 1758) 309. The context of Vattel's formulation of diplomatic protection, as an alternative to the private right of reprisal, is explained by R. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' in R. Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (1983) 2–3.

[63] E. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1915) 354. See also: J. Brierly, 'Implied State Complicity in International Claims' (1928) 9 *BYBIL* 48.

[64] (1924) PCIJ Rep Series A No. 2. [65] *Ibid.* 12. [66] *Ibid.*

[67] *Panecezys-Saldutiskis Railway Case* (1938) PCIJ Rep Series A/B No 76; *Serbian Loans Case* (1929) PCIJ Rep Series A No. 20; *Chorzów Factory Case* (Indemnity) (Merits) (Jurisdiction), (1928) PCIJ Rep Series A No. 17.

International Court of Justice[68] and several other international tribunals[69] so that its continued validity is beyond doubt.[70] This is not to say that the modalities of diplomatic protection have not come under criticism as out of step with the modern system of international law, which elevates the rights of individuals and private entities to a more prominent place. But deviations from the orthodox position articulated in the *Mavrommatis Palestine Concessions Case* have been few and unpersuasive. García Amador argued that developments in international human rights law have rendered the device whereby a state asserts its own right when it acts on behalf of its national an 'outdated fiction' that should be discarded.[71] O'Connell likewise rejected the *Mavrommatis* formula as 'a survival of the nineteenth-century thesis of a world composed of absolute sovereignties unwilling to limit their sovereign freedom of action except in their own interests'.[72] These critiques may be fair, but far from providing an analytical rationale for rejecting the received orthodoxy in customary international law, they simply anticipate the reason that human rights conventions and investment treaties now overshadow recourse to diplomatic protection. Attempts to equate the traditional institution of diplomatic protection to the new treaty regimes that provide direct rights of recourse are counterproductive because they ultimately undermine the possibility of diplomatic protection assuming even a residual role in the resolution of international disputes.[73]

The notion of a vicarious injury caused to the state of the national is essential to the rationalisation of diplomatic protection because it transforms damage done to private interests into an international delict opposable by one sovereign state to another. This transformation is not a procedural quirk or 'fiction' as is sometimes maintained,[74] but is instead fundamental to the compatibility of diplomatic protection with

[68] *Reparations for Injuries Suffered in the Service of the United Nations Case* (Advisory Opinion), [1949] ICJ Rep 181, '. . . [T]he defendant State has broken an obligation towards the national State in respect of its nationals'; *Nottebohm Case* (Liechtenstein v Guatemala) [1955] ICJ Rep 4; *Barcelona Traction, Light and Power Co. Case* (Belgium v Spain) [1970] ICJ Rep 3.

[69] *Administrative Decision No. V* (USA v Germany), (1924) 7 UN Rep 140 *per* Umpire Parker: '[T]he nation is injured through injury to its national and it alone may demand reparation as no other nation is injured.' See also the cases cited by: C. Amerasinghe, *Local Remedies in International Law* (1990) 57 at note 15; C. Parry, 'Some considerations upon the protection of individuals in international law' (1956) *Hague Recueil* 672, 676–680.

[70] J. Dugard, 'First Report on Diplomatic Protection' (2000) UN Doc A/CN.4/506, paras. 10–32.

[71] F. García Amador, 'State Responsibility. Some New Problems' (Vol. II, 1958) 94 *Hague Recueil* 421, 437–9, 472.

[72] D. O'Connell, *International Law* (Vol. 2, 1970, 2nd edn) 1030.

[73] In her report to the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Kokott raised two possible approaches to the law of diplomatic protection. The first is to 'call for a change of the rules governing diplomatic protection with the aim of meeting the demands of investors.' The second option, which the author endorsed as more 'realistic', is 'to accept that, in the context of foreign investment, the traditional law of diplomatic protection has been to a large extent replaced by a number of treaty-based dispute settlement procedures.' It is submitted that Kokott's conclusion is correct. J. Kokott, 'Interim Report on the Role of Diplomatic Protection in the Field of the Protection of Foreign Investment' in International Law Association, *Report of the Seventieth Conference, New Delhi* (2002) 31.

[74] J. Dugard, 'First Report on Diplomatic Protection', above n. 70, paras. 19–21.

the traditional principles of state responsibility for international wrongs. It would be a mistake, therefore, to postulate that the international law of diplomatic protection could somehow do without this transformation if push came to shove. A state bringing a diplomatic protection claim is not an agent of its national who has a legally protected interest at the international level; the state is rather seeking redress for the breach of an obligation owed to itself.[75]

D. THE INVESTMENT TREATY REGIME AND DIPLOMATIC PROTECTION DISTINGUISHED

In accordance with Article 31 of the Vienna Convention on the Law of Treaties:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Investment treaties do not identify the actual beneficiary of the substantive rights expressly or address the status of treaty tribunals hearing investor/state claims. The stated object and purpose of investment treaties is inconclusive as an interpretive aid to these complex problems, for the general objective of encouraging direct foreign investment is too crude as a guide through the subtle variations on the possible solutions. Finally, given the dearth of *travaux préparatoires* signalling the contracting state parties' intentions during the drafting process,[76] the interpretive focus must necessarily shift to the common intention of the parties that can be discerned from the general architecture of the treaties and the additional evidentiary sources set out in Article 31(3) of the Vienna Convention:

> There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

Of primary importance to the question of the beneficiary of the treaty rights and the status of the treaty tribunal, along with all the other issues

[75] *Contra*: C. de Visscher, 'Cours général de principes de droit international public' (1954 II) 86 *Hague Recueil*, 507, '[Diplomatic protection is] a procedure by which States assert the right of their citizens to a treatment in accordance with international law.'

[76] Article 32 of the Vienna Convention on the Law of Treaties provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

to be examined in this study, is subsequent practice in the application of the treaty.[77] This practice across a network of similar investment treaties, manifest in arbitral awards, municipal court decisions, and the parties' pleadings in investor/state cases, is generating an uncodified set of rules for resolving problems such as the admissibility of claims and conflicts of jurisdiction. In this sense, the field of subsequent practice for the interpretation of a specific treaty needs to be cast wider than envisaged by Article 31 of the Vienna Convention, limited as it is to subsequent practice between the actual contracting state parties. The reality is that a treaty tribunal will be influenced significantly, sometimes decisively, by that wider practice in resolving interpretative difficulties. In relation to the two other sources mentioned in Article 31(3), applicable rules of international law must also play a major part in resolving these issues. There have been instances of subsequent agreements between the state parties concerning the interpretation of investment treaties, the notorious example being the Free Trade Commission's 'interpretation' of Article 1105 of the NAFTA,[78] however none to date deal directly with the problems under consideration.

In deciding between the competing 'derivative' and 'direct' theories, the starting point must be that international legal theory allows for both possibilities. There is no impediment to states in effect delegating their procedural right to bring a diplomatic protection type claim to enforce substantive rights of the states concerned within a special treaty framework. On the other hand, there is also no reason why an international treaty cannot create rights for individuals and private entities, whether or not such rights fall to be classified as 'human rights', as confirmed by the International Court of Justice in the *LaGrand Case*.[79]

The following analysis of the practice of investment treaty arbitration suggests that investment treaties do not give legislative effect to the 'derivative' model based on the *Mavrommatis* formula for the presentation of international claims against a sovereign state, but rather encapsulate a 'direct model'.

[77] See G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Certain Other Treaty Points' (1957) 33 *BYBIL* 203, 223–5, who recommends subsequent practice as the most reliable interpretative tool.

[78] NAFTA, Free Trade Commission, Interpretation, 31 July 2001, reprinted at: 6 ICSID Rep 567. The Netherlands and the Czech Republic also issued a joint interpretation of their BIT in accordance with Art. 9 thereof in the 'Agreed Minutes' dated 1 July 2002. See *CME Czech Republic B. V. (The Netherlands) v The Czech Republic*, (Final Award, 14 March 2003), paras. 87–93, available at <http://www.cetvnet.com/ne/articlefiles/439-Final_Award_Quantum.pdf>.

[79] (Germany v US) (judgment on Merits, 27 June 2001), (2001) 40 ILM 1069, paras. 77–8. The Court reasoned: 'At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right, but has today assumed the character of a human right. In consequence, Germany added, "the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative". The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.' *Ibid.* para. 78.

(1) *Functional control of the claim*

In the context of diplomatic protection, the state of the injured national has full discretion as to whether to take up the claim on behalf of its injured national at all.[80] It may waive, compromise, or discontinue the presentation of the claim irrespective of the wishes of the injured national.[81] In exercising this discretion, the state often gives paramount consideration to the wider ramifications of the espousal of a diplomatic protection claim so far as it concerns the conduct of its foreign policy vis-à-vis the host state.[82] If the state does elect to pursue such a claim then it is master of the claim in the sense that it is not obliged to consult with its national on the conduct of the proceedings. If liability is established then damages are awarded to the state and not to the national, and there is no international rule to compel any form of distribution of the monetary award to the *de cujus*.[83] Moreover, the national state is entitled to compromise the award of full compensatory damages by settling the claim for a reduced amount with the host state. It may enter into a general lump sum agreement for the partial compensation of multiple claims.[84] It may abandon the claim entirely, in effect waiving the right in question.

The International Court of Justice gave a stark appraisal of these features of a diplomatic protection claim in the *Barcelona Traction Case*:[85]

> . . . within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting . . .
>
> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.[86]

The situation with an investment treaty claim is very different. In pursuing its own claim, the investor is under no obligation to inform its national state of the existence of proceedings against the host state, nor to consult with the state on the substantive and procedural issues that arise in the proceedings. The investor is guided in the prosecution of its claim solely by the dictates of self-interest without necessary regard for any consequences to the diplomatic relationship between its national

[80] See the state practice on the regulation of this discretion under municipal law: J. Dugard, 'First Report on Diplomatic Protection', above n. 70, paras. 80–7. [81] E. Borchard, above n. 63, 366.

[82] *Barcelona Traction, Light and Power Co. Case* (Belgium v Spain) [1970] ICJ Rep 44, paras. 78–79; G. Berlia, 'Contribution à l'étude de la nature de la protection diplomatique' (1957) *Annuaire français de droit international* 63; A. Lowenfeld, 'Diplomatic Intervention in Investment Disputes' (1967) 61 *American Society Int Law Proceedings* 97.

[83] *Administrative Decision No. V* (USA v Germany) (1924) 7 UN Rep 119, 152–3. See also the precedents cited by: C. Amerasinghe, above n. 69, 60 at note 24. The same rule applies in relation to lump sum agreements; see: D. Bederman, 'Interim Report on Lump Sum Agreements and Diplomatic Protection' in International Law Association, *Report of the Seventieth Conference, New Delhi* (2002) 7.

[84] M. Bennouna, 'Preliminary Report on Diplomatic Protection' (1998) UN Doc A/CN.4/484, para. 20; [85] *Barcelona Traction, Light and Power Co. Case* (Belgium v Spain) [1970] ICJ Rep 3.

[86] *Ibid.* paras. 78–79.

state and the host state. The financial burden of presenting an investment treaty claim falls exclusively on the investor. Damages recovered in the award are to the account of the investor and the national state has no legal interest in the compensation fixed by the arbitral tribunal.

Although by no means conclusive, one would expect that if the investor was merely stepping into the shoes of its national state to enforce that state's treaty rights, the national state would retain a residual interest in the investment treaty arbitration. The precedent of the American-Turkish Claims Commission is instructive on this point. Many claims were dismissed summarily by the Commission because they were presented directly by counsel retained by the injured nationals. This was found to be incompatible with the diplomatic protection model incorporated into the American-Turkish Claims Settlement of 1937:

> It would, of course, be monstrous to suggest that a government would through some subterfuge pretend to support a claim without having any knowledge of what, if anything, had in some way come before the Commission.[87]

The conclusion must be that, in the absence of some specific provision in the BIT, the national state of the investor retains no interest in an investment treaty arbitration instituted against another contracting state. It would no doubt be open to states to regulate their nationals' conduct of arbitration proceedings under investment treaties, *eg*, by imposing an obligation to keep the relevant government ministry informed of the existence and progress of such arbitrations. Such a development is not reflected in BIT practice and this is consistent with the perception that an investor is invoking its own right in instituting an investment treaty arbitration.

This conclusion is reinforced by the instances when the national state of the investor has actually *opposed* the investor's claim before a treaty tribunal. In the NAFTA case of *GAMI Inc. v United States of Mexico*,[88] the national state of the investor, the United States of America, intervened pursuant to Article 1128 to contend that the Tribunal had no jurisdiction to hear GAMI's claim.[89] Likewise, in *Mondev International Ltd v United States of America*,[90] Canada (the national state of Mondev) made submissions to the Tribunal, which, without claiming to address the specific facts, tended to the conclusion that Mondev's claims should be dismissed on the merits.[91] This practice contradicts the view that investors are bringing derivative claims on behalf of their own national state. There may be no community of interest between them in the prosecution of investment treaty arbitrations; indeed their interests may be adverse.

[87] J. Moore, *A Digest of International Law* (1906) 616.

[88] Ongoing NAFTA arbitration under the UNCITRAL Arbitration Rules.

[89] See Submission of the United States of America, 30 June 2003, available at <http://www.state.gov/documents/organization/22212.pdf>.

[90] (Award, 11 October 2002) Case No. ARB(AF)/99/2, 7 ICSID Rep 192.

[91] See Second Submission of Canada Pursuant to NAFTA Art. 1128, 6 July 2001, available at <http://www.state.gov/documents/organization/18271.pdf>.

(2) The nationality of claims rule

The nationality of claims rule in diplomatic protection prescribes that the injured national must have the nationality of the claimant state at the time of injury through to when notice of the claim is presented or the date of the award or judgment.[92]

The doctrine of continuous nationality developed in response to the frictions caused by individuals shifting allegiances to powerful states for the purposes of espousing a diplomatic protection claim.[93] This concern is obviously not applicable to investment treaty arbitration because the procedural right of recourse vests directly in the investor and remains with that investor; hence there is less to be gained by the investor in contriving to 'swap' investment treaties with a change of nationality.[94] One would not necessarily expect, therefore, identity in the tests for nationality in the context of diplomatic protection claims in customary international law and claims advanced pursuant to investment treaties.

In relation to natural persons, the International Court of Justice in the *Nottebohm Case*[95] imposed a requirement for the admissibility of diplomatic protection claims that there must be an 'effective' or 'genuine link' between the individual who has suffered the injury and the national state prosecuting the claim. The Court thereby rejected the conferral of nationality under municipal law as definitive for this purpose.[96] The Court was concerned to ensure that only one state could have standing to bring a diplomatic protection claim on the basis that the individual 'is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'[97]

The International Court in the *Barcelona Traction Case*[98] did not follow the *Nottebohm Case* with respect to corporations and declined to adopt a 'genuine link' criterion for identifying the national state eligible to bring a diplomatic protection claim on behalf of the corporation.[99] Instead the

[92] One of the major controversies in *Loewen* was whether the doctrine of continuous nationality only required the relevant nationality at the time of the presentation of the claim or through to the date of the award. The authorities are divided on this issue. The 'limited' requirement is favoured by: D. O'Connell, above n. 72, 1033; J. Dugard, 'Fourth Report on Diplomatic Protection' (2003) UN Doc A/CN.4/530, para. 93 (Draft Art. 20). The majority of lump sum agreements favour the test of nationality at the date of claim accrual, see: D. Bederman, above n. 83, 10. A majority of writers nevertheless appear to support the more 'expansive requirement': E. Borchard, 'The Protection of Citizens Abroad and Change of Original Nationality' (1933–4) 43 *Yale LJ* 359, 372; Sohn & Baxter, Harvard Draft Convention, Art. 22(8) at 186–7; *Oppenheim's International Law* (Vol. I, 1992, 9th edn by R. Jennings & A. Watts) 512–3; I. Brownlie, *Principles of Public International Law* (2003, 6th edn) 460.

[93] E. Borchard, *ibid.* 377–80.

[94] This is not to deny that the substantive provisions on the minimum standards of investment protection do differ from one investment treaty to the next.

[95] [1955] ICJ Rep 4.

[96] *Ibid.* 23. [97] *Ibid.* [98] [1970] ICJ Rep 3.

[99] *Ibid.* 42, para. 70. The ICJ did, nevertheless, determine *in casu* that there was 'a close and permanent' link between Barcelona Traction and Canada as it had its registered office there with its accounts, share registers and listing with the Canadian tax authorities and board meetings had been held in Canada for many years. *Ibid.* para. 71. Brownlie has argued that the authority of the Court's rejection of the *Nottebohm* principle is diluted considerably by, *inter alia*, the fact that the Court did set out the 'manifold' links of the company with Canada: I. Brownlie, above n. 92, 467. See further:

Court relied on a 'place of incorporation' test[100] that achieved the same objective of channelling the interests of an aggrieved foreign entity into a single rubric of nationality for the purposes of a diplomatic protection claim. The Court therefore ruled that Canada, as the state of incorporation of Belgium Traction Co., would have had standing against Spain for the latter's alleged expropriatory acts vis-à-vis the company; however, a claim by Belgium, whose nationals owned 88 percent of the shares in Barcelona Traction Co., was held to be inadmissible.

The *Barcelona Traction Case* has been criticised because, in practice, states will not exercise diplomatic protection merely on the basis of incorporation. In deciding whether or not to take up claims based on the corporate interests of their nationals, states are naturally preoccupied with the extent to which their own economy has been affected by the alleged violation of the host state.[101] Thus it is common for states to insist that the corporate interest comprises a dominant shareholding or beneficial ownership or a connection based on the *siège social* of the company.[102] By failing to recognise this state practice, the International Court's stipulation of a 'place of incorporation' test has been described as 'unworkable'.[103]

It is notable that the majority of investment treaties concluded after the *Barcelona Traction Case* adopt the test of mere incorporation,[104] thereby refuting the national state's interest that is recognised by the requirement that the corporation in question has significant connections to that state in order to qualify as a 'national' for the purposes of the dispute resolution mechanism. Investment treaties do not usually require a 'genuine link' between the individual investor or corporate entity and the national state.[105] The case in which the formal requirement of incorporation can

A. Watts, 'Nationality of Claims: Some Relevant Concepts' in V. Lowe & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996) 424.

[100] [1970] ICJ Rep 42, para. 70.

[101] In a separate opinion to the ICJ's judgment in the *Barcelona Traction Case*, Judge Gros criticised the Court's reliance on the place of incorporation test for the very reason that it failed to take into account the economic realities behind a state's interest in pursuing a diplomatic protection claim. Judge Gross stated that: 'The company's link of bare nationality may not reflect any substantial economic bond . . . [I]t is the State whose national economy is in fact adversely affected that possesses the right to take legal action.' *Ibid.* 279.

[102] See, *eg*, the official commentary to Rule IV of the applicable rules for the United Kingdom: 'In determining whether to exercise its right of protection, Her Majesty's Government may consider whether the company has in fact a real and substantial connection with the United Kingdom.' Reproduced at: (1988) 37 *ICLQ* 1006, 1007.

[103] S. Metzger, 'Nationality of Corporate Investment under Investment Guarantee Schemes—The Relevance of Barcelona Traction' (1971) 65 *AJIL* 532, 541.

[104] Energy Charter Treaty, Art. 1(7); UK Model BIT, Art. 1(d), *UNCTAD Compendium* (Vol, III, 1998) 186; Egypt Model BIT, Art. 2(b), *ibid.* (Vol. V, 2000) 294; Indonesia Model BIT, Art. 1(2)(ii), *ibid.* 310; Malaysia Model BIT, Art. 1(b)(ii), *ibid.* 326; Netherlands Model BIT, Art. 1(b)(iii), *ibid.* 334; Cambodia Model BIT, Art. 1(2)(ii), *ibid.* (Vol. VI, 2002) 464; Peru Model BIT, Art. 1, *ibid.* 494; United States Model BIT, Art. 1, *ibid.* 501; Austria Model BIT, Art. 1, *ibid.* (Vol. VII) 259; Belgo-Luxemburg Economic Union Model BIT, Art. 1, *ibid.* 271; Denmark Model BIT, Art. 1(5)(b), *ibid.* 280; Finland Model BIT, Art. 1(3)(b), *ibid.* 288; South Africa Model BIT, Art. 1, *ibid.* (Vol. VIII) 274; Maurice Model BIT, Art. 1(1), *ibid.* (Vol. IX) 296; Sweden Model BIT, Art. 1(2), *ibid.* 310.

[105] There are examples of BITs that require incorporation in the host state *and* the presence of the company's 'siége' or 'seat' or 'headquarters' in the host state as well, inspired by French Civil Law.

be discharged has led to the growing practice of establishing investment vehicles in a jurisdiction which is 'covered' by an investment treaty with the host state of the investment. These investment vehicles may be corporate shells in a tax friendly jurisdiction that are bound to transfer any commercial returns from the investment enterprise to the parent company in a different jurisdiction. The national state of the investor does not, in such circumstances, have a strong interest in the investment treaty claim of such an entity.

State parties to investment treaties have, furthermore, left the door wide open for claims relating to a single loss by investors with multiple nationalities. For instance, investment treaties sometimes define an investment as the ownership of *either* a company incorporated in the host state or the shares in such a company.[106] This exposes states to claims by different national investors under different investment treaties with either type of legal interest in the same underlying investment.

This possibility of competing claims over the same investment was considered in *CMS Gas Transmission Company v The Republic of Argentina*.[107] The claimant, CMS, had a 29.42 percent stake in a local Argentinean company, Transportadora de Gas del Norte ('TGN'), which had obtained a licence for the transportation of gas.[108] CMS alleged that measures adopted by the Government of Argentina following the financial crisis in 1999, and in particular a law that brought an end to the parity of the Argentine peso with the US dollar, had adversely affected its investment in TGN in breach of the Argentina/US BIT.[109] Argentina contested CMS's standing to bring this claim by relying on the *Barcelona Traction Case* for the proposition that a foreign shareholder cannot bring a derivative claim for damage suffered by a local company.[110] In the words of the International Court, 'although two separate entities may have

Thus, in the France Model BIT, Art. 1(3) reads: 'Le terme de 'sociétés' désigne toute personne morale constituée sur le territoire de l'une des Parties contractantes, conformément à la législation de celle-ci et y possédant son siège social, ou contrôlée directement ou indirectement par des nationaux de l'une de Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l'une des Parties contractantes et constituées conformément à la législation de celle-ci.' *UNCTAD Compendium* (Vol. V, 2000) 302. See also: China Model BIT, Art. 1(2), 'domiciled', *ibid.* 152; Jamaica Model BIT, Art. 1(3)(b), *ibid.* 318; Iran Model BIT, Art. 1(2)(b), *ibid.* (Vol. VI, 2002) 280; Germany Model BIT, Art. 1(3)(a), *ibid.* (Vol. VII) 298; Turkey Model BIT, Art. 1(1), *ibid.* (Vol. VIII) 281; Benin Model BIT, Art. 1(2), *ibid.* (Vol. IX) 280; Burundi Model BIT, Art. 1(1), *ibid.* 287. There are also some exceptional cases of BITs that, in addition to these two requirements, also demand that the company performs 'real business activity' in the host state: Chile Model BIT, Art. 1(1)(b), seat and 'effective economic activities', *ibid.* (Vol. III, 1998) 144; Switzerland Model BIT, Art. 1(1)(b), seat and 'real economic activities', *ibid.* 177; Sri Lanka Model BIT, Art. 1(2)(b), seat and 'substantial business activities', *ibid.* (Vol. V, 2000) 340; Croatia Model BIT, Art. 1(2)(b), *ibid.* (Vol. VI) 472; Mongolia Model BIT, Art. 1(1)(b), *ibid.* (Vol. IX) 303.

[106] US Model BIT, Art. 1(d), *UNCTAD Compendium* (Vol. VI, 2002) 502; Austria Model BIT, Art. 1(2), *ibid.* (Vol. VII) 259; Denmark Model BIT, Art. 1(1)(b), *ibid.* 283; Sweden Model BIT, Art. 1(b), *ibid.* (Vol. IX) 309; Energy Charter Treaty, Art. 1(6)(b); NAFTA, Art. 1139. See further: UNCTAD, *Series on Issues in International Investment Agreements: Scope and Definition* (1999) 10.

[107] (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) Case No. ARB/01/8, (2003) 42 ILM 788.

[108] *Ibid.* para. 19.

[109] *Ibid.* para. 20.

[110] *Ibid.* para. 43.

suffered from the same wrong, it is only one entity whose rights have been infringed.'[111] The ICSID Tribunal rejected this analysis and found that, in the absence of any impediment under international law[112] or the ICSID Convention, the fact that CMS's interest in TGN fell within the definition of an 'investment' for the purposes of the BIT was sufficient to confer *jus standi* upon the Claimant in relation to its cause of action.[113] Although recognising that its finding might open the door to investors of different nationalities bringing claims under different treaties in relation to damages suffered by a single company, the ICSID Tribunal stated that '[. . .] it is not possible to foreclose rights that different investors might have under different arrangements.'[114]

Another potential source of overlapping national claims over the same underlying investment is the acceptance of an 'indirect' interest in an investment as sufficient to qualify for investment protection.[115] Thus, in *CME Czech Republic B.V. (The Netherlands) v Czech Republic*[116] ('CME') and *Ronald S. Lauder v Czech Republic*[117] ('Lauder'), two UNCITRAL tribunals established pursuant to different BITs considered the conduct of the same executive organ of the Czech Republic in relation to the same investment and came to quite different results on liability. The existence of these two proceedings was possible because the *CME* Tribunal recognised CME's 99 percent shareholding in a local Czech company with rights to operate a television licence as an investment for the purposes of the Netherlands/Czech Republic BIT,[118] whereas the *Lauder* Tribunal

[111] [1970] ICJ Rep 35, para. 44.

[112] The Tribunal referred to 'contemporary' state practice, as evidenced by lump sum agreements, the Iran/US Claims Tribunal and the United Nations Compensation Commission, and stated that '[it] finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.' (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) Case No. ARB/01/8, (2003) 42 ILM 788, paras. 47–8. This pronouncement is controversial, because it is doubtful whether one can extract general principles of customary international law from the *sui generis* arrangements cited by the Tribunal. In any event, it was unnecessary for the Tribunal to make an affirmative ruling upon the state of general international law because the cause of action was based on the BIT. Its later comment in relation to the *jus standi* of minority shareholders is thus more measured: 'To the extent that customary international law or generally the traditional law of international claims might have followed a different approach—a proposition that is open to debate—then that approach can be considered the exception.' *Ibid.* para. 48. [113] *Ibid.* para. 65.

[114] *Ibid.* para. 86. The *CMS Gas Transmission Company v The Republic of Argentina* decision was cited with approval in *Azurix Corp. v The Argentine Republic* (Decision on Jurisdiction, 8 December 2003) Case No. ARB/01/12, (2004) ILM 262, paras. 64, 73.

[115] The most 'indirect' investment to date, in terms of corporate layers between the claimant investor and the covered investment, was perhaps that which was recognised in *Azurix Corp. v The Argentine Republic, ibid.* Here, a local investment vehicle registered in Argentina 'Z' had concessionary rights to provide sewerage services in an Argentine Province. Z was in turn owned by two other Argentine companies, 'X' and 'Y'. The Claimant (a Delaware company qualifying under the Argentina/US BIT) ultimately owned and controlled X through another Argentine company, and Y through two levels of Cayman Island companies.

[116] (Partial Award, 13 September 2001) available at <http://www.cetv-net.com/ne/articlefiles/439-cme-cr_eng.pdf>, hereinafter 'CME Partial Award'.

[117] (Final Award, 3 September 2001) available at: <http://www.cetv-net.com/ne/articlefiles/439-lauder-cr_eng.pdf>, hereinafter 'Lauder Final Award'. [118] *CME* Partial Award, para. 376.

deemed that Mr Lauder's (a US citizen) shareholding in the parent company of CME fell within the definition of an investment under the US/Czech Republic BIT.[119] This illustrates the point that, unlike the nationality of claims rule for diplomatic protection, the investment treaty regime is not overly concerned with the task of channelling the various interests of private entities arising from unlawful conduct attributable to a state into a single rubric of nationality with a single claimant state representing the affected interests.

Contrary to these precedents evidencing a less prominent concern with the nationality of claims, the ICSID Tribunal's decision on admissibility in the NAFTA case of *Loewen* points the other way. In the absence of a specific provision of NAFTA dealing with the temporal requirements for the nationality of claims, the Tribunal imported what it took to be the rule of customary international law requiring continuous nationality from the date of the events giving rise to the claim through the date of the award, and applied it strictly.[120] The claimant company, Loewen, was incorporated in Canada at the time of the events giving rise to the claim, but had subsequently reorganised as a US corporation after notice of the claim had been filed; it assigned its NAFTA claim to a Canadian company established for the sole purpose of retaining legal title to the claim.[121] The Tribunal attached primary significance to the fact that the beneficiary of the claim (in the sense of the ultimate recipient of a damages award) would be the reorganised US company and thus the Canadian special purpose vehicle could not 'qualify as a continuing national for the purposes of this proceeding'.[122]

The Tribunal in *Loewen* recognised that other international treaties had made special provision for the 'amelioration of the strict requirement of continuous nationality',[123] such as the Algiers Accord establishing the Iran/US Claims Tribunal and several BITs. Furthermore, the ICSID Convention, which governs the procedure of many investment treaty arbitrations upon an election of this option by the investor as permitted by the relevant BIT, expressly provides that the nationality requirement is to be tested at the time the notice of claim is filed.[124] And yet, in

[119] *Lauder* Award, para. 154. For discussion on this provision, see: P. Muchlinski, above n. 23, 623.

[120] This was highly controversial. See n. 92 above.

[121] *Loewen* Award, para. 220.

[122] *Ibid.* para. 237.

[123] *Ibid.* para. 229.

[124] Article 25(2)(b) of the ICSID Convention defines a 'National of another Contracting State' as 'any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration . . .' *In Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic* (Decision on Objections to Jurisdiction, 24 May 1999) Case No. ARB/97/4, 5 ICSID Rep 300, paras. 31–2, the date-of-submission rule was upheld to dismiss the relevance of the Respondent's objection to the Claimant's standing due to the latter's assignment of the rights to the subject matter of the dispute. See also: *Société Ouest Africaine des Bétons Industriels [SOABI] v State of Senegal* (Decision on Jurisdiction, 1 August 1984) 2 ICSID Rep 175, para. 29; *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo* (Award, 1 September 2000) Case No. ARB/98/7, 17 ICSID Rev—Foreign Investment LJ 3. See further: C. Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation' (1976) 9 *Vanderbilt J of Transnational L* 793, 809–10, '[T]he relevant time for the fulfilment of the nationality requirement is that date when the consent to jurisdiction is

the absence of a specific provision in Chapter Eleven of NAFTA, the *Loewen* Tribunal saw no reason to depart from what it perceived to be a strict rule of customary international law requiring continuous nationality.[125] Most significantly, the Tribunal implicitly rejected the argument advanced by Sir Robert Jennings as expert witness testifying on behalf of Loewen that 'the rule of the nationality of claims was never a free-standing general rule of international law; it was a concomitant, and of the very essence, of diplomatic protection.'[126]

(3) Forum selection clauses

An exclusive jurisdiction clause in favour of the municipal courts of the host state in an investment agreement between a foreign investor and the host state cannot prejudice the standing of the national state of the investor to bring a diplomatic protection claim against the host state. The right to bring a diplomatic protection claim vests in the national state of the investor and hence no agreement concluded by the investor can encumber this right.[127] By parity of reasoning, the foreign investor's acceptance of a 'Calvo Clause' in the investment agreement that purports to effect an express waiver of any potential diplomatic protection claim is also ineffective to diminish the right of the national state of the investor to seek redress on this basis.[128] At most, the investor's consent to a Calvo Clause raises a presumption in diplomatic protection proceedings that the rule on the exhaustion of local remedies should be applied strictly.[129]

The limited effect given by international tribunals to a Calvo Clause is naturally predicated upon the national state's own interest and right in pursuing a diplomatic protection claim to enforce the minimum standards for the protection of aliens in customary international law.[130] The status of forum selection clauses in investment agreements between the investor and host state on the jurisdiction of an international treaty tribunal is a controversial subject that will be dealt with in detail in Part VII. Less controversial, however, is the possibility that an investor can waive its

effective for both parties. It also means that any change in the nationality of a juridical person after that date is immaterial for the purposes of ICSID's jurisdiction, regardless of how inappropriate such an alignment would have been initially.' *Contra*: G. Delaume, 'Le Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI)' (1982) 109 *Journal du droit international* 797.

[125] *Loewen* Award, paras. 220–40. Referring to the specific rule in Art. 25(2)(b) of the ICSID Convention, Loewen argued that the standing requirements of NAFTA Ch. 11 should be the same regardless of whether a claimant proceeds under the ICSID Convention (currently not possible because neither Mexico or Canada are signatories), the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. This contention was rejected by the Tribunal. *Ibid.* para. 235.

[126] Fifth Opinion of Sir Robert Jennings, cited at Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence (29 March 2002) para. 69, available at <http://www.state.gov/documents/organization/9360.pdf>.

[127] E. Borchard, above n. 63, 372, 799.

[128] *North American Dredging Co. Case* (USA v Mexico), (1926) 4 UN Rep 26, 29; D. Shea, *The Calvo Clause* (1955) 217; D. O'Connell, above n. 72, 1061; *Oppenheim's International Law*, above n. 92, 930–1; K. Lipstein, 'The Place of the Calvo Clause in International Law' (1945) 22 *BYBIL* 130, 139 and cases cited at note 4; E. Borchard, *ibid.* 809–10.

[129] D. O'Connell, *ibid.* 1062.

[130] C. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) 60.

procedural right to have its treaty claims heard by an international arbitral tribunal by instituting proceedings with respect to those claims before a municipal court of the host state. This is the effect of the so called 'fork in the road' provision in many BITs, which affords the investor the option of selecting between several different judicial *fora* in the presentation of its claims based on the minimum standards of protection in the treaty.[131] By choosing to litigate in a municipal court, for instance, the investor takes a positive step down one of the paths leading from this junction with no right of return. This does not exclude the possibility that a new claim for denial of justice may ripen if the investor is denied a minimum standard of procedural fairness before the municipal court. In this instance, the investor would simply return to the same fork in the road but now in a different vehicle (perhaps relying on a breach of the fair and equitable standard of treatment to ground its cause of action for a denial of justice), and this time would predictably select the path to a hearing before an international arbitral tribunal. The point is, however, that upon the initial election by the investor to institute proceedings before a municipal court, there is no residual interest in the claim as pleaded that survives on an international level for the national state.[132] If the primary obligations in the investment treaty regime were owed to the national state rather than to the investor, this would be a curious result.

(4) The applicable procedural law

The law applicable to questions of procedure in arbitrations between sovereign states is generally public international law.[133] This is certainly the case for a diplomatic protection claim submitted to arbitration by a special agreement or *compromis*.[134] It is possible to assert more generally that public international law always governs arbitrations or other judicial proceedings involving two states when the cause of action is based on rights under an international treaty or customary international law. As will be considered further in Part V, this principle is likely to have its roots in the immunity of foreign states from the jurisdiction of national courts insofar as an arbitration governed by public international law remains outside the legal order of the state that provides the territorial seat of the arbitration.

Investment treaty arbitrations, in contrast, are ultimately governed by the *lex loci arbitri, viz.* the municipal law of the seat of the arbitration.[135] This is also a principle of general application but subject to the exceptional instance of investment treaty arbitrations conducted under the ICSID Convention, where the procedural rules set out in the

[131] See Part VII(G) below.

[132] Furthermore, if the treaty obligation is owed directly to the national state of the investor, the investor should not be able to compromise its national state's corresponding right by a forum selection in the first place.

[133] J. Simpson & H. Fox, above n. 53, 128–30; F. Mann, 'State Contracts and International Arbitration' (1967) 42 *BYBIL* 1, 2.

[134] F. Mann, *ibid.*

[135] See Part V(E) below.

Convention govern the conduct of the arbitration to the exclusion of any municipal law.[136]

If an investor was in essence bringing a claim on behalf of its national state, the logical consequence would be that public international law would govern the arbitration by default as the rights of two states under an international treaty would be the *ratione materiae* of the dispute. Put differently, if the chose in action belonged to the national state of the investor, the municipal courts at the seat of the arbitration arguably could not sit in judgment in respect to a challenge to the validity of the treaty tribunal's award. Hence the general application of the municipal law of the seat of the arbitration to investment treaty arbitrations once again refutes the derivative theory for investment treaty claims.

(5) The exhaustion of local remedies

The defendant state has the primary interest in compliance with the rule that the injured national must exhaust local remedies available in the host state before a diplomatic protection claim is made on its behalf.[137] This interest was described by the International Court of Justice in the *Interhandel Case*[138] in the following terms:

> Before resort may be made to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.[139]

The local remedies rule is thus a concession to the sovereign independence of the host state, which must be presumed in the first instance to be capable of rendering justice by its own courts.[140] It also gives effect to the principle that foreign nationals or entities going abroad are subject to the municipal law of the host state and the means of redress available under this law for any injury to their person or property.[141]

[136] The ICSID Convention creates, according to Broches, 'a complete, exclusive and closed jurisdictional system, insulated from national law'. A. Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID Rev—*Foreign Investment LJ* 287, 288. *Concord*: I. Shihata & A. Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' (1994) 9 *ICSID Rev—Foreign Investment LJ* 183, 186; A. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 *ICSID Rev—Foreign Investment LJ* 287, 301. This 'insulation' from national law is achieved as follows. Article 44 of the ICSID Convention, which exhaustively prescribes the sources of procedural rules for ICSID arbitration, makes no reference to domestic law. Article 53 excludes any remedies in relation to ICSID awards save those speficied in Arts. 50–2. The exclusivity of these remedies was confirmed by the French *Cour de cassation: Guinea v Atlantic Triton Co.*, Cass Civ 1re, 11 June 1991 (1991) 118 *Journal du droit international* 1005. Article 54 obliges Contracting States to recognise and enforce ICSID awards. The execution of ICSID awards is, however, governed by national law at the place of execution pursuant to Art. 54(3).

[137] C. Amerasinghe, above n. 69, 69–72.

[138] (Switzerland v USA) [1956] ICJ Rep 6.

[139] *Ibid.* 27.

[140] C. Amerasinghe, above n. 69, 71, citing C. de Visscher, 'Denial of Justice in International Law' (1935) 52 *Hague Recueil* 422; *Ambatielos Claim* (Greece v United Kingdom), (1956) 12 UN Rep 119.

[141] E. Borchard, above n. 63, 817–8.

Several commentators have latched onto the local remedies rule as evidence that diplomatic protection obligations are owed to the individual rather than the national state. If the rights of the national state were infringed directly, then its remedy could not, as the argument goes, be conditional upon exhaustion of local remedies by the individual.[142] But this contention ignores the reality that the national state also has a strong interest in the observance of the local remedies rule itself because it acts as a 'sieve' to prevent any grievance of its national from being transformed into an international dispute with the host state.[143] States are often vigilant about insisting on the observance of the rule by their own nationals to limit the burden of international litigation as far as possible and the concomitant political ramifications on the bilateral relationship with the host state concerned.

In the absence of a specific provision in the investment treaty,[144] investment tribunals have uniformly dispensed with the local remedies rule as a procedural impediment to proceedings before an international arbitral tribunal otherwise with jurisdiction over the investor's claims.[145] This conclusion is without prejudice to the situation where the host state's conduct only attains the requisite threshold for a breach of a treaty standard upon a denial of justice in the judicial system of the host state. In this sense, the local remedies rule is a *substantive* requirement for liability rather than a *procedural* precondition for the presentation of claims to an international court or tribunal.[146] By dispensing with the local remedies rule as a procedural requirement for the investor's treaty claims, the contracting states have also abandoned their interests that are protected by the rule. If they had a legal interest at stake in an investment treaty claim then this would be a surprising concession.

(6) The assessment of damages

Whilst it is true that damages are most often assessed on the basis of the loss suffered by the national in a diplomatic protection claim, other considerations can play a part such as the nature of the international obligation that has been breached. The Permanent Court of International Justice stated the position succinctly in the *Chorzów Factory Case*:[147]

> The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of

[142] D. O'Connell, above n. 72, 1031.

[143] A. McNair, *International Law Opinions* (Vol. 2, 1956) 197; C. Amerasinghe, above n. 69, 68.

[144] A provision requiring the exhaustion of local remedies in the Argentina/Spain BIT was considered in *Maffezini v Kingdom of Spain* (Decision on Objections to Jurisdiction, 25 January 2000) Case No. ARB/97/7, 5 ICSID Rep 396.

[145] See the arbitral awards cited below at n.195.

[146] The debate as to whether the rule on the exhaustion of local remedies is a procedural precondition to the admissibility of an international claim, or a substantive precondition with the result that no breach of international law is committed until local remedies have been exhausted, has been summarised with extensive citation of authorities by J. Dugard, 'Second Report on Diplomatic Protection' (2001) UN Doc A/CN.4/514, paras. 32–62.

[147] *Chorzów Factory Case* (Germany v Poland) (Indemnity) (Merits) (Jurisdiction), (1928) PCIJ Rep Series A No. 17.

which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered the damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.[148]

As far as investment treaty claims are concerned, damages awarded to an investor do not take into account any independent interest of the national state which may have been prejudiced by the breach. For instance, it would be inconceivable that an investment treaty tribunal would increase the amount of damages to account for the fact that the host state had breached its obligations under a BIT on several occasions in relation to different investors of the same nationality. Damages in an investment treaty claim are assessed purely on the basis of the harm caused to the economic interests of the investor by the host state, without regard for any factors in the relationship between the host state and the national state of the investor.[149] This supports the conclusion that the investor is not vindicating 'public' or 'international' interests by bringing an investment treaty claim.

(7) The challenge to and enforcement of awards

A truly international judgment or award, such as a judgment of the International Court of Justice, owes its existence and binding force to the international legal order and is impervious to any challenge or review before a municipal court.[150] Only an international court or tribunal is competent to hear applications pertaining to the validity of a truly international judgment or award that has settled a public controversy between states. Thus, for instance, Nicaragua challenged the validity of an award

[148] *Chorzów Factory Case* (Germany v Poland) (Indemnity) (Merits) (Jurisdiction), (1928) PCIJ Rep Series A No. 17, 28.

[149] In *S. D. Myers, Inc. v Government of Canada* (Partial Award, 12 November 2000), (2001) 40 ILM 1408, the UNCITRAL Tribunal hearing a NAFTA claim distinguished 'lawful' expropriations pursuant to Art. 1110 from 'unlawful' breaches of the NAFTA under other provisions of the NAFTA. The Tribunal found that: 'The standard of compensation than an arbitral tribunal should apply may in some cases be influenced by the distinction between compensating for a lawful, as opposed to an unlawful, act. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor.' (*Ibid.* para. 308). This distinction is problematic because the loss suffered by the investor is a private loss and compensation must be strictly determined on the basis of causation and foreseeability. So long as the host state's act gives rise to a secondary obligation to compensate the investor, the legal character of that act on the *inter*-state plane (*ie* the distinction, for instance, between lawful and unlawful expropriations) should have no bearing on the assessment of damages.

[150] *Chorzów Factory Case* (Germany v Poland) (Indemnity) (Merits) (Jurisdiction), (1928) PCIJ Rep Series A No. 17, 33. See O. Schachter 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 *AJIL* 1, 12–5.

rendered in favour of Honduras on the demarcation of their maritime boundary before the International Court,[151] as did Guinea-Bissau in relation to an award that favoured Senegal's position in a maritime boundary dispute.[152]

Awards rendered by international arbitral tribunals in investor/state disputes are not truly international awards and as a result they are subject to challenge and review in accordance with municipal and international legislative instruments dealing with international commercial arbitral awards. Municipal courts have been seised of challenges to investment treaty awards pursuant to legislation on international commercial arbitration,[153] and the drafters of investment treaties have expressly recognised that investor/state awards fall within the purview of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration.[154]

If the investor was vindicating the rights of its national state in bringing an investment treaty claim, one would expect that the resulting decision of the tribunal could be properly characterised as a public international award and binding as between the national state and the host state on the *inter*-state plane. The fact that investor/state awards are capable of being classified as 'commercial' is not consistent with them having a truly public international law status because it suggests that the primary relationship between the disputing parties is private rather than public or sovereign. Furthermore, the evidence suggests that investor/state awards are not binding on the national state of the investor.[155]

E. CONCLUSIONS ON THE NATURE OF THE INVESTOR'S RIGHTS: TWO ALTERNATIVE 'DIRECT' MODELS

In what has proven to be a prescient article on investment treaty arbitration, Paulsson contrasted diplomatic protection, which 'has proved itself unworkable as a way of protecting business interests in the context of contemporary international economic life',[156] with a new mechanism established by investment treaties that he termed 'arbitration without privity':

> The possibility of direct action—international arbitration without privity—allows the true complainant to face the true defendant. This has the immense merit of clarity and realism; these virtues, and not eloquent proclamations, are the prerequisites of confidence in the legal process.[157]

[151] *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v Nicaragua), [1960] ICJ Rep 192. [152] *Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal), [1991] ICJ Rep 53.

[153] See Part V(D) below. [154] *Ibid.*

[155] Article 1136(7) of NAFTA is explicit: 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.'

[156] J. Paulsson, above n. 1, 255. [157] *Ibid.* 256.

The novelty of the investor's cause of action under investment treaties was recently emphasised by Justice Kelen of the Federal Court in Ottawa, on this occasion in relation to NAFTA:

> NAFTA provides, unlike its predecessor, the Canada-U.S. Free Trade Agreement, a mechanism which allows individual investors to settle disputes with respect to alleged discriminatory treatment. This creates a powerful and significant new cause of action to protect investors . . .[158]

The foregoing analysis of the principal features of diplomatic protection under customary international law and investment treaty arbitration reveals their fundamental divergence. Given that the *raison d'être* of the investment treaty mechanism for the presentation of international claims may well be a response to the inadequacies of diplomatic protection,[159] this should come as no surprise. The functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state. In these circumstances it is untenable to superimpose the *Mavrommatis* formula of diplomatic protection over a triangular relationship between investor, its national state and the host state of the investment in order to rationalise 'arbitration without privity' under investment treaties. In this respect, the treatment by the Special Rapporteur to the ILC, Dugard, on the relationship between diplomatic protection and 'special regimes for the protection of foreign investors provided for in bilateral and multilateral investment treaties'[160] is highly relevant. The Special Rapporteur proposed a *lex specialis* exception to the application of rules of diplomatic protection for corporations or shareholders because:

> There is a clear inconsistency between the rules of customary international law on the diplomatic protection of corporate investment, which envisage protection only at the discretion of the national State and only, subject to limited exceptions, in respect of the corporation itself, and the special regime for foreign investment established by bilateral and multilateral investment treaties, which confers rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal.[161]

What, then, are the conceptual alternatives to the 'derivative model' based on the *Mavrommatis* formula? It was previously stated that there is no theoretical impediment in international law to the conferral of rights upon private entities by an international treaty instrument. The clearest support for this proposition is to be found in the seminal judgment of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig Case*.[162] A treaty between Poland and Danzig (called

[158] The context for this statement was a challenge to a NAFTA award in *Attorney General of Canada v S.D. Myers, Inc*, Decision, 13 January 2004 (2004 FC 38), para. 32, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf>. [159] J. Kokott, above n. 73, 27.
[160] J. Dugard, 'Fourth Report on Diplomatic Protection', above n. 92. [161] *Ibid.* para. 112.
[162] (Advisory Opinion), (1928) PCIJ Rep Series B No. 15.

the 'Beamtenabkommen') regulated the employment conditions for employees of the Danzig railways who had passed into the service of the Polish Railways Administration and an issue arose as to whether the Danzig employees could sue the Polish Railways directly in the Danzig Courts to recover compensation based on the provisions of the treaty. Poland's submission that the treaty only created rights and obligations as between the state parties was dismissed by the Permanent Court:

> [I]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*.[163]

Hersch Lauterpacht interpreted this passage as clear authority to the effect that 'there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties.'[164] More recently, the International Court of Justice in the *LaGrand Case*[165] decided that Article 36(1)(b) of the Vienna Convention on Consular Relations 'creates individual rights', whether or not these fall to be classified as human rights.[166] This treaty provision obliged the United States to inform Germany through the proper diplomatic channels that two of its nationals were committed to prison in the United States. The United States failed to do so and the German nationals were later executed. The Court attached significance to the final sentence of Article 36(1)(b) that the prison authorities 'shall inform the person concerned without delay of *his rights* under this subparagraph.'[167]

Investment treaties also adopt terminology consistent with the vesting of rights in foreign nationals and legal entities directly. The substantive obligations relating to minimum standards of investment protection are couched in terms of a legal relationship between the host state and the foreign investor. The United States Model BIT, for instance, prescribes that '[e]ach [state] Party shall accord a national most favoured nation treatment to covered investments . . .'[168] The Austria Model BIT is even more direct: 'An investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party *shall have the right* . . .'[169]

[163] *Ibid.* 17–19.

[164] H. Lauterpacht, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission' (1949) UN Doc A/CN.4/1/Rev.1, 19–20, reprinted in *Collected Papers of Hersch Lauterpacht* (Vol.1, 1970) 469. A concise and lucid critique of the 'positivist' conception of the subjects of international law is provided by: R. Higgins, *Problems & Process: International Law and How We Use It* (1994) 49 *et seq.*

[165] (Germany v US) (Judgment on Merits, 27 June 2001), (2001) 40 ILM 1069.

[166] *Ibid.* paras. 75–8. [167] *Ibid.* para. 77.

[168] United States Model BIT, Art. 4, *UNCTAD Compendium* (Vol. VI, 2002) 504.

[169] Austria Model BIT, Art. 5(3) (emphasis added). *Ibid.* (Vol. VII) 262.

A textual analysis of investment treaties thus appears to be consistent with the conclusion that the substantive investment protection obligations proclaimed by the state parties are owed to investors directly, who then have the means of enforcing their corresponding rights pursuant to the investor/state arbitral procedure stipulated in the treaty.

Another possible approach to a direct theory of rights under investment treaties is to distinguish between the substantive obligations of investment protection and the obligation to submit to investor/state arbitration upon the filing of a notice of claim by a qualified investor. The substantive obligations might be said to exist purely on the *inter*-state plane and as such opposable only by one contracting state to another. These obligations do not pertain to investments of specific investors, which often are not reasonably in the contemplation of host states,[170] but instead require states to establish a particular regime *in abstracto*. In contradistinction, the procedural obligation is owed directly to the investor. Upon the filing of a notice of arbitration by the investor, the investor perfects the host state's unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement. At the same time, the investor becomes a counterparty to the host state's obligation to submit to international arbitration for an assessment of its conduct towards that investment on the basis of the norms of investment protection set out in the treaty. This obligation encompasses the duty of the host state to pay compensation if the international tribunal adjudges its conduct to be violative of these norms. The minimum standards of investment protection could thus be characterised as the applicable adjudicative standards for the investor's cause of action rather than binding obligations owed directly to the investor.

Whichever rationalisation of the investor's direct rights under an investment treaty is to be preferred, it is manifest that a breach of a treaty obligation owed directly to an investor does not necessarily entail a liability on the *inter*-state plane governed by the secondary rules of state responsibility for international wrongs. This problem is addressed in the next Part III.

III. The Investment Treaty Regime in the System of State Responsibility

A. INTRODUCTION

The principal conclusion of Part II was that an investor does not bring a derivative claim for the enforcement of an obligation owed to its national state pursuant to the investment treaty. The investor's cause of action is grounded upon an obligation owed to it directly. It follows that the

[170] And thus perhaps distinguishable from human rights obligations.

liability created by a breach of this obligation is not necessarily a liability on the *inter*-state plane in the sense that it may be opposable by the national state of the investor to the host state. But equally, it would appear to be fallacious to suggest that this liability has the character of a simple civil wrong, insofar as the host state's obligation emanates from an undertaking in an international treaty instrument.

A close parallel is the liability arising upon a violation of a human rights obligation. It is difficult to conceptualise a judgment of the European Court of Human Rights in favour of a national of a contracting state to the European Convention of Human Rights as creating a new international obligation on the *inter*-state plane; equally, it is counter-intuitive to regard such a judgment as a remedy for the breach of a private or civil obligation owed to the individual applicant.

One solution to this conundrum is to discard the dichotomy between public and private international law and instead to investigate the different categories of state responsibility for a breach of an international treaty that directly confers rights upon non-state actors. Such treaties, it is submitted, create a 'sub-system' of state responsibility.[171] Although these sub-systems share many of the secondary rules contained in the *inter*-state system of responsibility, they nevertheless fall to be analysed independently.

B. THE NOTION OF A 'SUB-SYSTEM' OF STATE RESPONSIBILITY

There does not exist in international law a single body of secondary rules of state responsibility for all internationally wrongful acts.[172] To the contrary, a salient tendency in the contemporary evolution of international law is the fragmentation of the general law of international responsibility into various sub-systems created by treaties dealing with particular objects of international regulation. To complement what is often a

[171] 'Sub-system' is not an entirely adequate term because it imports a connotation of autonomy or independence. The alternative term in the literature on state responsibility, 'self-contained regime', is even less appropriate because it suggests complete autonomy from the *inter*-state system of international responsibility. See generally on 'sub-systems' of state responsibility: W. Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations' in R. Macdonald & D. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 581; W. Riphagen, 'Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)' (1983) 2 *Ybk Int L Commission* 22, UN Doc A/CN.4/354/Add. 1 & 2; B. Simma, 'Self-Contained Regimes' (1985) 16 *Netherlands Ybk of Int L* 111; P. Dupuy, 'The Danger of the Fragmentation of the Unification of the International Legal System and the International Court of Justice' (1999) 31 *New York University J of Int L & Politics* 791, 797; G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University J of Int L & Politics* 791, 796; C. Tomuschat, 'Some Reflections on the Consequences of a Breach of an Obligation under International Law' in Haller, Kölz, Müller & Thürer (eds), *Im Dienst an der Gesellschaft Festschrift für Dietrich Schindler zum 65 Geburtstag* (1989) 148.

[172] See the Introduction to the Commentary to the ILC's Articles on State Responsibility, above n. 12, 76 and the commentary to Article 55 (*lex specialis*), *ibid.* 306–8; International Law Commission (1976) 2 *Ybk Int L Commission* 117, para. 53, commentary to Art. 19 (international crimes and international delicts); W. Riphagen, 'Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)', *ibid.* para. 35; B. Simma, *ibid.*

sophisticated system of primary rights and obligations, modern treaty regimes also contain discrete secondary rules of state responsibility. The WTO Understanding on Dispute Settlement and the Treaty Establishing the European Economic Community are two leading examples, each creating a complex enforcement mechanism for the primary obligations arising under the treaty regime. But more important for the current analysis are the relatively new treaty regimes that confer rights directly upon non-state actors and create a dispute resolution procedure for the enforcement of such rights at the suit of non-state actors. In the human rights field, the European Convention on Human Rights is the outstanding example of such a treaty. The Algiers Accords establishing the Iran/US Claims Tribunal are also notable for creating a regime of international responsibility that appears to transcend the traditional public/private dichotomy.[173]

Like the European Convention on Human Rights and the Algiers Accords, investment treaties establish a distinct system of secondary rules of state responsibility in recognition of the independent legal interest conferred to investors by these treaties. The general principles of state responsibility for international wrongs cannot be presumed, in such a case, to apply without qualification to the invocation by a non-state actor of a state's liability for breach of a treaty obligation because the new legal relationship which arises upon the commission of the breach in this context is not between the contracting states to the treaty, but instead between the investor and the host state.

The sub-system created by treaties which confer rights directly upon non-state actors to be enforced at the suit of the non-state actors is without prejudice to the application of the general rules of state responsibility as between the state parties to the treaties.[174] Investment treaties have two separate dispute resolution procedures to deal with investor/state disputes on the one hand and state/state disputes on the other.[175] The general rules of state responsibility undoubtedly regulate the consequences of liability for international wrongs in the latter case.

It is useful to test these observations against the Articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission. The existence of sub-systems of international law with distinct secondary rules of state responsibility was recognised from an early stage of the ILC's codification project. Thus, with respect to the different consequences flowing from an international crime and delict, it was stated that:

> . . . The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only

[173] See Part II(A) above.

[174] See generally on the consequences of a breach of treaty: S. Rosenne, *Breach of Treaty* (1985); D. Bowett, 'Treaties and State Responsibility' in D. Bowett (ed.), *Le droit international au service de la paix, de la justice et du développement: mélanges Michael Virally* (1991) 137; A. Yahi, 'La violation d'un traité: l'articulation du droit des traités et du droit de la responsabilité internationale' (1993) 26 *Revue belge de droit internationale* 437.

[175] See Part I above.

one regime of responsibility applicable universally to every type of internationally wrongful act. . .[176]

The challenge of identifying and categorising the disparate regimes of international responsibility was taken up by Riphagen, the Third Special Rapporteur to the ILC, who introduced the relevant section of his Third Report in the following terms consistent with the previous statement of the Commission:

. . . international law as it stands today is not modelled on one system only, but on a variety of interrelated sub-systems, within each of which the so-called 'primary rules' and the so-called 'secondary rules' are closely intertwined—indeed, inseparable.[177]

Eventually, Riphagen's often complicated preoccupation with the interrelationship between the 'sub-systems' of international law gave way to a greater emphasis on a common denominator of secondary rules in the latter work of the ILC on the Articles. This was evidently the result of a certain pragmatism that crept into the drafting process about the realistic coverage of the ILC's project. In the subsequent drafts there is instead an implicit presumption of international law as a unified body of law.[178] Nevertheless, the problems identified by Riphagen were not ignored by the Fourth and Fifth Rapporteurs, and thus an important *lex specialis* reservation was made in Article 55 of the Articles on the Responsibility of States for Internationally Wrongful Acts to deal with, *inter alia*, sub-systems of international law:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[179]

As stated previously, modern treaty regimes with increasing frequency establish a mechanism whereby individuals and private entities can invoke the responsibility of the state party directly for a breach of an obligation contained in the treaty. Article 55 must apply in these circumstances. The Articles are preoccupied with the consequences flowing from the breach of international obligations *inter*-state. Riphagen

[176] (1976) 2 *Ybk Int L Commission* 117, para. 53, commentary to Art. 19 (international crimes and international delicts).

[177] W. Riphagen, above n. 171, para. 35. Later in his Report, Riphagen notes that 'there are subsystems of international law which govern a particular substratum of international situations, without necessarily creating "primary" rights and obligations in the strict sense of the word.' He cites the GATT and the International Air Transport Agreement as examples. *Ibid.* para. 102.

[178] See D. Bodansky & J. Crook, 'Symposium: The ILC's State Responsibility Articles; Introduction and Overview' (2002) 96 *AJIL* 773, 781, and the response of the Fifth Rapporteur, J. Crawford, above n. 51, 879.

[179] J. Crawford, above n. 12, 306. The ILC's commentary to Art. 55 gives the examples of the World Trade Organization Dispute Settlement Understanding and the European Convention on Human Rights as regimes which, in varying degrees, displace the rules contained in the Articles on State Responsibility, which nevertheless 'operate in a residual way'. *Ibid.* 307.

described this limitation of the Articles in the form of a rhetorical question which he answered in the negative:

> The question then again arises, whether these draft articles can be applied in respect of all types of rules of international law, in particular such types as are not simply based on the separation of states, and consequently not focused on the anti-parallel exercise of sovereignty by interference of one state in the sovereignty of another state . . .[180]

The Articles themselves carve out the problem of secondary obligations owed to non-state actors in the form of a reservation in Article 33 to the scope of obligations set out in Part 2 to the Articles:

> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
> 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.[181]

Investment treaties are mentioned explicitly in the ILC's commentary to Article 33(2) as giving rise to a situation where a 'primary obligation is owed to a non-State entity' and such entity has the possibility of invoking state responsibility 'on its own account and without the intermediation of any State'.[182] Hence Parts 2 and 3 of the Articles are not applicable, by virtue of the reservation in Article 33(2), to this legal relationship. Reference should also be made to the commentary to Article 28, where it is stated that Part 2 'does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State'.[183]

Some writers have criticised the paucity of any direct consideration by the Articles of the possibility of non-state actors invoking the international responsibility of states.[184] However, a cursory examination of this vast topic in a codification which, by its own terms, is almost exclusively concerned with international responsibility as between states, would more likely to have hindered rather than assisted the rapid development of this area of international law. As Judge Higgins reflected some years ago with respect to an earlier stage of the ILC's work on this project, 'less can be more'.[185]

[180] W. Riphagen, above n. 171, 593. The author continues: 'As a matter of fact, the whole construction of the draft articles is based on the international obligation of a state being a sort of middle-point on the line connecting the sovereignty of one state to that of another. The breach of such an obligation by one state is then reflected by the creation of "new" rights of the other state.' (Footnote omitted.) *Ibid.* 594.

[181] J. Crawford, above n. 12, 209.

[182] *Ibid.* 210.

[183] *Ibid.* 193.

[184] See E. Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *AJIL* 798, 799, 816; P. Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard Int LJ* 1, 1.

[185] R. Higgins, above n. 164, 168.

In summary, investment treaties create a sub-system of international law to regulate the relationship between states and private investors that arises upon a breach of the treaty, without prejudice to the general law of state responsibility that governs the relationship between the contracting states. The ILC's Articles on State Responsibility do not detract from this conclusion; to the contrary they provide the necessary conceptual framework to distinguish between the general system of state responsibility and sub-systems of responsibility. The sub-system created by investment treaties is by definition *sui generis*. An uncritical transplantation of secondary rules that govern, *inter alia*, the consequences of a diplomatic protection claim between two state parties is inappropriate.[186]

In order to develop and elaborate upon the sub-system established by investment treaties, it will be necessary to examine carefully the principal characteristics of the legal relationship between the host state and the investor.

C. PRINCIPAL FEATURES OF THE SUB-SYSTEM CREATED BY INVESTMENT TREATIES

Investment treaties envisage two distinct spheres of rights and obligations: one applicable to the legal relationship between the contracting state parties (the 'state/state sphere') and the other applicable to the legal relationship between investors of one contracting state and the contracting state hosting the investment (the 'investor/state sphere').

In relation to the state/state sphere, an investment treaty creates certain international obligations opposable by one contracting state to another, and the general rules of state responsibility for international wrongs regulate the consequences of any breach thereof. These obligations can generally be grouped into two categories: (i) adherence to the law of treaties in the interpretation and application of the investment treaty; (ii) the obligation not to frustrate an investor's recourse to international arbitration or the enforcement of any award against the host state. Thus, by way of example, one contracting state might seek a declaration from an international tribunal on the compatibility of domestic legislation enacted by another contracting state with the minimum standards of investment treatment in the BIT. Alternatively, if a contracting state issued a decree ordering state officials to seize and destroy all evidence relating to a investor/state dispute before an international

[186] A similar conclusion may have been reached by E. Lauterpacht in an early study of the ICSID Convention: 'Even in those situations in which individuals have had a direct right of access to international tribunals, the treaties which gave them direct access to remedial machinery, did so only in respect of rights directly conferred upon the individual by the particular treaty. Consequently, these situations do not constitute precedents for saying that, if an individual is given a direct right of access to an international tribunal, the rights conferred by customary international law upon his national State are automatically enforceable by him'. E. Lauterpacht, 'The World Bank Convention on the Settlement of International Investment Disputes' in *Recueil d'Etudes de Droit International en Hommage à Paul Guggenheim* (1968) 659.

tribunal, or enjoining state courts from giving effect to any award rendered by that tribunal, the contracting state of the investor would be able to bring a direct claim against the other contracting state for a breach of the obligation to submit investment disputes to international arbitration,[187] using the dispute resolution mechanism for *inter*-state disputes prescribed in the investment treaty.[188] Article 1136(5) of NAFTA expressly recognises that the host state's refusal to enforce an award of an international treaty tribunal on its territory may be the subject of a state/state arbitration pursuant to the procedure in Chapter 20.[189]

Under the general law of state responsibility, the commission of an internationally wrongful act by a state entails three broad consequences: (i) new obligations upon the state whose act is internationally wrongful; (ii) new rights of the injured state; and, in certain cases at least (iii) new rights and duties of third states in respect of the situation created by the internationally wrongful act.[190]

The contracting states to investment treaties have legislated for a new legal regime or sub-system to define the legal consequences that follow a violation of the minimum standards of treatment towards a qualified investment. In relation to the investor/state sphere, a breach of a treaty standard by the host state certainly creates new obligations upon that state. But these new obligations do not correspond to new rights of the national state of the investor because the injury is caused exclusively to the investor. This is so because the contracting states to investment treaties have opted out of the *inter*-state secondary rules of international responsibility in relation to a limited group of wrongs causing damage to a particular sphere of private interests. The national state of the investor

[187] Which imports the duty not to frustrate the arbitral process.

[188] *Concord*: A. Broches, 'Bilateral Investment Protection Treaties and Arbitration of Investment Disputes' in J. Schultz & A. van den Berg (eds) *The Art of Arbitration, Liber Amicorum Pieter Sanders* (1982) 66. Several writers support the proposition that a state's frustration of the arbitral process or repudiation of an arbitration clause with a foreign national constitutes denial of justice under customary international law: F. Mann, above n. 133, 27; P. Weil, 'Problèmes Relatifs aux Contrats passés entre un Etat et un Particulier' (1969) 128 *Hague Recueil* 222; S. Schwebel, *International Arbitration: Three Salient Problems* (1987) 65, 71–2; R. von Mehren & P. Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalisation Cases' (1981) 75 *AJIL* 476, 537. There would be no need for the investor to exhaust any other remedies before the resort to this form of diplomatic protection. *Concord*: S. Schwebel & J. Wetter, 'Arbitration and the Exhaustion of Local Remedies' (1966) 60 *AJIL* 484; S. Schwebel, *ibid.* 115 *et seq.*; C. Dominicé, 'La clause CIRDI dans les traités bilatéraux suisses de protection des invertissements' in Im Dienst an der Gemeinschaft, Festschrift für Dietrich Schindler zum 65 (1989) 457, 466.

[189] Article 1136(5) provides: 'If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings: (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and (b) a recommendation that the Party abide by or comply with the final award.' Model BITs often suspend the right of either Contracting State to pursue claims through diplomatic channels if an investor has instituted arbitration proceedings unless and until the host state fails to abide by the award; see, *eg*: Chile Model BIT, Art. 8(6), *UNCTAD Compendium* (Vol. III, 1996) 147; Switzerland Model BIT, Art. 4, *ibid.* 181; United Kingdom Model BIT, Art. 8, *ibid.* 190; Jamaica Model BIT, Art. 10(5), *ibid.* (Vol. V) 322; Malaysia Model BIT, Art. 7(4), *ibid.* 329; Cambodia Model BIT, Art. 8(3)(c), *ibid.* (Vol. VI) 467; Mongolia Model BIT, Art. 8(6), *ibid.* (Vol. IX) 306.

[190] W. Riphagen, above n. 171, para. 7.

thus has no immediate secondary rights within the investment treaty regime to challenge the commission of this breach of treaty; instead the new rights arising upon the breach of treaty vest directly in the investor.

The status of the investor's new right, and the corresponding liability of the host state, is not equivalent to the new rights and obligations which come into existence upon a breach of an international obligation within a bilateral relationship between states. Neither the host state's liability, nor the secondary rights accruing to the investor, arise immediately on the *inter*-state plane. This is a distinguishing feature of the sub-system of state responsibility created by the investment treaty regime.

This scheme for understanding the legal relationships that arise upon the host state's violation of an investment treaty obligation is indirectly supported by reference to the texts of more detailed investment treaties. For instance, Article 1136(1) of Chapter 11 of the NAFTA provides:

> An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

This provision suggests that no legal relationship arises between the host state and the national state of the investor upon the host state's breach of an investment treaty. (The term 'Parties' is used in the NAFTA text to designate the contracting states, whereas 'parties' refers to the disputants in a reference to arbitration.) If such a relationship did exist, then one might expect that the tribunal's award would settle the controversy at the *inter*-state level as well and thus be directly binding upon the national state.

Another crucial distinction between the investor/state sub-system of international responsibility and the *inter*-state system of international responsibility lies in the relevant rules for the invocation of state responsibility. The preconditions for the *mise en oeuvre* of responsibility in the *inter*-state system are codified in Part Three of the ILC's Articles on the Responsibility of States for International Wrongs and include Article 44 on the 'Admissibility of Claims':

> The responsibility of a State may not be invoked if:
>
> (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
> (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.[191]

The ILC's Commentary to Article 44 makes it clear that the rules on the nationality of claims and the exhaustion of local remedies are not merely relevant to the 'jurisdiction or admissibility of claims before judicial bodies'[192] but are of a 'more fundamental character'[193] insofar as '[t]hey are conditions for invoking the responsibility of a State in the first place.'[194]

[191] J. Crawford, above n. 12, 264. [192] *Ibid.* [193] *Ibid.*

[194] *Ibid.* The leading treatises on international law also consider the rules on the nationality of claims and the exhaustion of local remedies to be general preconditions to the invocation of state responsibility rather than just a part of the law on admissibility of *inter*-state claims before international courts and tribunals. See *Oppenheim's International Law*, above n. 92, 511, 522.

If a treaty creating a judicial body to hear claims between states arising out of injuries to their nationals is silent on relevant rules on the nationality of claims and the exhaustion of local remedies, it follows from the ILC's treatment of these rules as preconditions for the invocation of state responsibility that they must nevertheless apply in this instance. The rules on the nationality of claims or the exhaustion of local remedies are not, however, applicable to the investor/state sub-system of international responsibility in the absence of an express stipulation to the contrary in the treaty instrument itself. As was concluded in Part II, the investor is enforcing its own rights against the host state by resorting to the investor/state arbitral mechanism and hence there is no basis for importing rules for the invocation of state responsibility by a state on behalf of its national in this context.

Consistent with this thesis, treaty tribunals have uniformly dismissed the application of the rule on the exhaustion of local remedies in the absence of an express provision in the investment treaty.[195] This approach cannot be justified simply because a treaty is silent on the matter, as is assumed in these decisions. To the contrary, if investor/state disputes were subject to the *inter*-state rules of international responsibility, then the local remedies rule should be applied in the absence of a waiver in the treaty itself.[196] The International Court of Justice set a high threshold for any implicit waiver in a treaty text in the *Case Concerning Electronica Sicula SpA (ELSI)*.[197] The Court stated that it was 'unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.'[198] Hence there is a clear presumption in customary international law against implying a waiver of the local remedies rule.[199]

[195] Expressly in: *CME* Partial Award, paras. 411, 417. Implicitly in: *Waste Management Inc. v United Mexican States*, (Decision on Preliminary Objection, 26 June 2002) Case No. ARB(AF)/00/3, 6 ICSID Rep 549, para. 30; *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*, (Award, 21 November 2000) Case No. ARB/97/3, 5 ICSID Rep 299, para. 81; *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*, (Decision on Annulment, 3 July 2002) Case No. ARB/97/3, 6 ICSID Rep 340, para. 52; *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290, para. 151. Writers also adhere to this position: J. Paulsson, above n. 1, 239–40; C. Dominicé, above n. 188, 457, 472.

[196] For instance, in *Maffezini v Kingdom of Spain* (Decision on Objections to Jurisdiction, 25 January 2000) Case No. ARB/97/7, 5 ICSID Rep 396, the Tribunal noted that 'Article 26 [of the ICSID Convention] thus reverses the traditional international law rule, which implies the exhaustion requirement unless it is expressly or implicitly waived.' (*Ibid.* para. 22.)

[197] (United States v Italy) [1989] ICJ Rep 14. [198] *Ibid.* 42.

[199] Concord: C. Amerasinghe, above n. 69, 253: 'Where there is a bilateral or multilateral agreement between States to submit to arbitration or international judicial settlement disputes between their nationals and host States, there is generally no understanding that the rule of local remedies is waived by the very fact of such submission to arbitration or judicial settlement . . .' See further cases cited at: *ibid.* 255 at note 13. A survey of various international treaty regimes for the protection of private interests conducted by Trindade nevertheless revealed that the rule on the exhaustion of local remedies was often not applied when the treaty was silent on the matter; see: A. Trindade, 'Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century' (1977) 24 *Netherlands Int L Rev* 373.

Treaty tribunals have also generally dismissed the relevance of the international rules on the nationality of claims on the strength of an unarticulated presumption that such rules have no application to investor/state arbitration. Again, it is submitted that this conclusion is correct, however, the mere silence of the treaty is not sufficient to justify such an approach in light of Article 44 of the ILC's Articles on State Responsibility. If the *inter*-state regime of international responsibility applied to investor/state disputes then the decision of the *Loewen* Tribunal would be unimpeachable. It will be recalled that in *Loewen* the residual application of international law to the nationality of claims was affirmed in a sweeping statement of general principle:

> It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.[200]

It is curious that the *Loewen* Tribunal did not reflect on the experience of the Iran/US Claims Tribunal in this context. In the *Dual Nationality Case*,[201] Iran had contended that arbitrations before the Tribunal were an instance of diplomatic protection so that a solution to the admissibility of claims by dual nationals 'must be found in public international law and not disputes between one State and nationals of the other, which could be resolved by the application of private international law'.[202] The Tribunal rejected this contention because the object and purpose of the Algiers Accords was not to 'extend diplomatic protection in the normal sense'.[203] The rules of customary international law did not, therefore, prevent the Tribunal from exercising jurisdiction *ratione personae* over US claimants that simultaneously held Iranian citizenship.[204]

Regardless of whether the *Loewen* Tribunal's interpretation of the requirements of continuous nationality under customary international law was correct (*ie* by insisting upon continuous nationality of the claimant up until the award is rendered), its general approach of applying customary international law to questions of admissibility in the absence of an express provision in NAFTA is unpersuasive because it fails to acknowledge the distinct and independent nature of the investment treaty regime for the resolution of investor/state disputes.[205]

[200] *Ibid.* para. 226.

[201] Islamic Republic of Iran and United States (Case A/18) (Dual Nationality) (6 April 1984) DEC 32-A18-FT, (1984) 5 Iran-US CTR 251.

[202] Memorial of the Islamic Republic of Iran in Case A/18 (21 October 1983), 25–6, cited in D. Caron, above n. 34, 132.

[203] Islamic Republic of Iran and United States (Case A/18) (Dual Nationality) (6 April 1984) DEC 32-A18-FT, (1984) 5 Iran-US CTR 251, 261.

[204] In *Sedco, Inc, for itself and on behalf of Sedco International, S. A. and Sedíran Drilling Company v National Iranian Oil Company and The Islamic Republic of Iran* (28 October 1985) ITL 55–129–3, (1985) 9 Iran-US CTR 245, 256, the Tribunal once again emphasized that 'at least in the jurisdictional category of claim involved in this case, [a claim] does not involve diplomatic espousal.'

[205] Investment treaties that expressly address the nationality requirements for the presentation of claims do not require continuous nationality until the rendering of the award. This practice was declared *ipse dixit* by the *Loewen* Tribunal to evidence a purposeful derogation from customary international law

IV. The Law Applicable to the Substance of Investor/State Disputes

A. THE SOURCE OF THE CHOICE OF LAW RULE

Some investment treaties contain an express choice of law for the resolution of investment disputes. In this case, the origin of the choice of law rule is self-evident: the treaty itself. Otherwise, there are four possible sources for choice of law rules that may impact upon the treaty tribunal's determination of the law applicable to the investment dispute. First, where the investor and the host state have entered into direct contractual relations, their investment agreement may contain a choice of law provision. Second, the arbitral rules governing the reference to arbitration may contain a default choice of law (*eg* Article 42(1) of the ICSID Convention or Article 33(1) of the UNCITRAL Rules). Third, the *lex loci arbitri* might supply the choice of law rule if the arbitral rules are silent on this point (very unlikely) or if the choice of law rule under the *lex loci arbitri* has a mandatory quality (virtually unheard of).[206] Fourth, the choice of law rule might be derived from the legal system which gives effect to the international treaty—public international law.

B. THE LAWS APPLICABLE TO AN INVESTMENT DISPUTE

Whichever choice of law rule is ultimately applied by the arbitral tribunal, there are three sources of substantive legal rules that must figure in the resolution of any investment dispute: (i) the municipal law of the host state (including relevant international treaties that are binding upon the host state); (ii) the investment treaty itself; and (iii) general principles of international law. This is the common denominator of the majority of express choice of law provisions in investment treaties. The Belgo-Luxemburg Economic Union Model BIT, for example, provides:

> The arbitral tribunal shall decide on the basis of the national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made, as well as on the basis of the provisions of this Agreement, of the terms of the specific agreement which

(*Loewen* Award, para. 229). Nor did the Tribunal give weight to the fact that a significant number of investment treaties envisage the option of arbitration under the ICSID Convention, Art. 25(2)(b) of which unambiguously applies the nationality requirement solely at the time the investor's consent to arbitration is filed. It is difficult to imagine that the contracting states to investment treaties contemplated that there would be such fundamental differences between investment treaty arbitrations depending on the selection by the investor of ICSID Convention arbitration on the one hand, or *ad hoc* arbitration under the UNCITRAL Arbitration Rules or institutional arbitration pursuant to the ICSID Additional Facility Rules or Rules of Arbitration of the International Chamber of Commerce on the other. The *Loewen* Tribunal nevertheless dismissed the ICSID practice as irrelevant (*ibid.* para. 235).

[206] The premise of this second possibility is that the municipal law of the *situs* of the investment treaty arbitration is indeed the *lex loci arbitri*. This topic will be considered in Part V.

may have been entered into regarding the investment, and the principles of international law.[207]

It is important to emphasize that the substantive law governing investment disputes is necessarily a hybrid of international and municipal law[208] due to the private or commercial interests at the heart of this jurisdiction. This may be contrasted with state/state disputes arising out of the interpretation or application of the investment treaty which are governed purely by international law.[209]

An investment is an embodiment of property rights, whereas the minimum standards of investment protection in treaties are derived from international law.[210] These distinct aspects of an investment dispute require a different choice of law approach, as confirmed by the case law of the mixed arbitral tribunals that were established after the First World War to hear international reclamations for interference with alien property. The American-Turkish Claims Commission expressed the principle lucidly in the *Hoachoozo Palestine Land and Development Co. Case*:[211]

In a case in which complaint is made that governmental authorities have confiscated contractual property rights, the preliminary question is one of domestic

[207] Article 10(5), *UNCTAD Compendium* (Vol. VII, 2002) 276. Similar choice of law clauses can be found in the following model BITs: South Africa Model BIT, Art. 7(4), *ibid.* (Vol. VIII, 2002) 277; Benin Model BIT, Art. 9(4), *ibid.* (Vol. IX) 284; Burundi Model BIT, Art. 8(5), *ibid.* 292. Some investment treaties contain a choice of law provision that simply refers to the provisions of the treaty and 'applicable rules of international law': Energy Charter Treaty, Art. 26(6); Austria Model BIT, Art. 16, *ibid.* (Vol. VII) 256. It is, however, still incumbent upon the treaty tribunal to apply the municipal law of the host state in this situation because international law must necessarily resort to a *renvoi* to municipal law for the determination of issues relating to property rights. The general principles of international law include the *lex situs* conflicts of law rule for this purpose. *Concord*, in relation to the Energy Charter Treaty: T. Wälde, 'Investment Arbitration under the Energy Charter Treaty', above n. 17, 457–8.

[208] *Asian Agricultural Products Ltd [AAP] v Democratic Socialist Republic of Sri Lanka* (Award, 27 June 1990), 4 ICSID Rep 250, 257, '. . . [T]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature . . .'

[209] Examples of the sources of law to resolve state/state disputes included: Chile Model BIT, Art. 9(6), provisions of the BIT, 'principles of international law on this subject' and 'generally recognised principles of international law', *UNCTAD Compendium* (Vol. III, 1996) 148; China Model BIT, Art. 8(5), 'in accordance with the provisions of this Agreement and the principles of international law recognised by both Contracting Parties', *ibid.* 155; Egypt Model BIT, Art. 9(5), rules contained in the BIT and other agreements between the Contracting Parties and principles of international law, *ibid.* (Vol. V, 2000) 298; Netherlands Model BIT, Art. 12(5), 'on the basis of respect for the law', *ibid.* 337; Croatia Model BIT, Art. 11(6), 'pursuant to the rules of international law', *ibid.* (Vol. VI, 2002) 478; US Model BIT, Art. 10(1), 'applicable rules of international law', *ibid.* 508; South Africa Model BIT, Art. 8(5), 'according to this Agreement and the principles of international law', *ibid.* (Vol. VIII, 2002) 277.

[210] *Concord*: C. Schreuer, 'International and Domestic Law in Investment Disputes. The Case of ICSID.' (1996) 1 *Austrian Rev of Int and Eur L* 89, 89, 'Investment relationships typically involve domestic law as well as international law. The host State's domestic law regulates a multitude of technical questions such as admission, licensing, labour relations, tax, foreign exchange and real estate. International law is relevant for such questions as the international minimum standard for the treatment of aliens, protection of foreign owned property, especially against illegal expropriations, interpretation of treaties, especially bilateral investment treaties, State responsibility and, possibly, human rights.'

[211] F. Nielsen, *American-Turkish Claims Settlement under the Agreement of 24 December 1923* (1937) 254, cited in K. Lipstein, 'Conflict of Laws Before International Tribunals (ii)' (1949) 29 *Transactions of the Grotius Society* 51, 54.

law as to the rights of the claimant under a contract in the light of the domestic proper law governing the legal effect of the contract. The next question for determination is whether, in the light of principles or rules of international law, rights under the contract have been infringed.[212]

A similar articulation of the choice of law approach may be found in the precedents of the American-Mexican Claims Commission. In *George W. Cook v United Mexican States (No. 1)*,[213] Commissioner Nielsen stated:

> When questions are raised before an international tribunal . . . 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 . . .[214]

The clearest exposition of the governing law of investment treaty disputes is to be found in the ICSID *ad hoc* Committee's decision in *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*,[215] which is considered in detail in Part VII. Suffice to state here that the *ad hoc* Committee posited a clear distinction between the law applicable to the investment contract, adjudged to be municipal law, and the law applicable to an assessment of whether the *conduct* of the host state is violative of the treaty standards, which is the treaty and international law.[216] The *ad hoc* Committee's reference to the 'conduct' of the host state in this context, rather than each and every element of the investment dispute, is consistent with the approach of these earlier authorities.

Likewise, the ICSID Tribunal in *Goetz and Others v Republic of Burundi*[217] was careful to emphasize the enduring role of municipal law in investment disputes even where the choice of law clauses in investment treaties refer exclusively to international law (such as Article 1131 of the NAFTA):

> Il n'est pas sans intérêt à cet égard de noter que la référence assez fréquente dans des clauses de *choice of law* insérées dans des conventions de protection des investissements, aux dispositions de la convention elle-même—et, plus largement, aux principes et règles du droit international—provoque, après un certain reflux dans la pratique et la jurisprudence, un retour remarquable du droit international dans les relations juridiques entre les Etats d'accueil et les investisseurs étrangers. Cette internationalisation des rapports d'investissement—qu'ils

[212] *Ibid.* 259–60. See further: *Nicholas Marmaras Case* and *Ina Hoffman & Dulcie Steinhardt Case*, reported in F. Nielsen, *American-Turkish Claims Settlement under the Agreement of 24 December 1923* (1937) 286, 287–8, 473, 479–80.

[213] (1927) 4 UN Rep 213.

[214] *Ibid.* 215. The other members of the Commission did not endorse these remarks.

[215] (Decision on Annulment, 3 July 2002) Case No. ARB/97/3, 6 ICSID Rep 340.

[216] *Ibid.* paras. 96, 101.

[217] (Award, 10 February 1999) Case No. ARB/95/3, 6 ICSID Rep 5.

soient contractuels ou non—ne conduit certes pas à une «dénationalisation» radicale des relations juridiques nées de l'investissement étranger, au point que le droit national de l'Etat hôte serait privé de toute pertinence ou application au profit d'un rôle exclusive du droit international. Elle signifie seulement que ces relations relèvent simultanément—en parallèle—pourrait-on dire—de la maîtrise souveraine de l'Etat d'accueil sur son droit national et des engagements internationaux auxquels il a souscrit.[218]

The choice of law rule for the assessment of the host state's acts or omissions with respect to the investment of a qualified investor has been consistently upheld by treaty tribunals. Far more controversial has been the ignorance or disregard of the choice of law rule in relation to the existence, nature or extent of the investor's interests in its purported investment. The treatment of the applicable law to these issues will be the focus of this Part IV on the law governing the merits of the dispute.

C. THE ROLE OF THE MUNICIPAL LAW OF THE HOST STATE

Investment disputes are about investments, investments are about property, and property is about specific rights over things cognisable by the municipal law of the host state.[219] Customary international law contains no substantive rules of property law. They cannot be a source of rights in property. Nor do investment treaties purport to lay down rules for acquiring rights *in rem* that are exercisable against the world at large.[220]

[218] *Ibid.* para. 69. *Concord: Asian Agricultural Products Ltd [AAP] v Democratic Socialist Republic of Sri Lanka* (Award, 27 June 1990), 4 ICSID Rep 250, 257.

[219] Many BITs refer to 'contractual rights' among the recognised categories of 'investments' covered by the minimum standards of investment protection set out in the BITs. Consistent with the stated economic objective of BITs, which is to promote foreign direct investment, it is clear that 'contractual rights' in this context should be interpreted narrowly as those contracts that regulate the investor's rights to property in the host state. The United States Model BIT, for example, lists examples of 'contractual rights' as those 'under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts'. United States Model BIT, Art. 1(d), *UNCTAD Compendium* (Vol. VI, 2002) 502. The types of property encompassed by this provision are the objects of construction projects and natural resources. On the other hand, a simple sale of goods contract between the investor and the host state would not give rise to a protected investment, both for the reason just articulated and because it is not an investment in the territory of the host state (an express or implicit requirement of all BITs). Thus, Section C of Ch. 11 of NAFTA excludes from the definition of 'investment': '(i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) [concerning loans to enterprises]; or (j) any other claims to money.' This interpretation of 'contractual rights' is broadly consistent with the definition given to 'investment' for the purposes of Art. 25 of the ICSID Convention. The minimum characteristics of an 'investment' for the purposes of the ICSID Convention are analysed by C. Schreuer, above n. 23, 121–5, 138–41. UNCTAD suggests that investment 'includes not only property rights, but contractual rights as well' but then caveats this statement: 'However, it is not so clear whether even in a broad definition of investment all contracts would be included . . .' UNCTAD, above n. 106, 20.

[220] One example of an international treaty that does create and regulate rights *in rem* is the UNIDROIT Convention on International Interests in Mobile Equipment, available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

It is therefore the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognised by the municipal law is subject to the protection afforded by the investment treaty. This classification features in the first article of most BITs in the form of a definition, such as the following taken from the United States Model BIT:

'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of:

(i) a company;
(ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;
(iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
(iv) tangible property, including real property, and intangible property, including rights, such as leases, mortgages, liens and pledges;
(v) intellectual property, including:
copyrights and related rights,
rights in plant varieties,
industrial designs,
rights in semiconductor layout designs,
trade secrets, including know-how and confidential business information,
trade and service marks, and
trade names; and
(vi) rights conferred pursuant to law, such as licenses and permits.[221]

This enumeration of the types or categories of investments that fall within the domain of the treaty is essential to the efficacy of the international treaty regime. It could not be left to the municipal law of the contracting states to define investments. Otherwise the protection afforded by investment treaties to shares in companies, for example, could be subverted by a law or decree at the state where the company is incorporated declaring that shares do not constitute investments. 'Investments' are, therefore, given an 'objective' treaty definition. But this definition does not in some way detach the rights *in rem* that underlie those investments from the municipal law that creates and gives recognition to those rights. Investment treaties do not contain substantive rules of property law. There must be a *renvoi* to a municipal property law. Insofar as investment treaties require a territorial nexus between the investment and one of the contracting state parties, that property law is the municipal law of the state in which the investor alleges that it has an investment. Some treaties explicitly provide that investments must be duly made in

[221] United States Model BIT, Art. 1(d), *UNCTAD Compendium* (Vol. VI, 2002) 502.

accordance with the municipal law of the host state.[222] But this would be the case even in the absence of an express stipulation, because no other law could conceivably be applicable pursuant to the relevant choice of law rule.[223]

Returning to the example of an investment in shares, the protection of an investment treaty is contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated. If the investment in shares is made in England, legal ownership arises upon entry onto the share register.[224] Thus, in order for a Russian investor in England to perfect its investment in the shares of an English company and be covered by the UK/Russia BIT, it will not be sufficient to accept delivery of share certificates, as would be the case in other jurisdictions such as New York.[225]

Once a right *in rem* has been recognised by the municipal law of the host state, the treaty regime takes over. Subsequent changes in that municipal law, or other acts attributable to the host state that affect the bundle of rights *in rem* that constitute the investment, must be assessed against the minimum standards of protection in the investment treaty. This follows from the rule of state responsibility alluded to previously that:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[226]

The host state cannot, therefore, escape liability to an investor under the investment treaty regime by passing a law to the effect that title to shares obtained by the acceptance of shares certificates shall no longer be

[222] This was the case for the Greece/Egypt BIT in *Middle East Cement Shipping and Handling Co. S. A. v Arab Republic of Egypt* (Award, 12 April 2002) Case No. ARB/99/6, available at <http://www.worldbank.org/icsid/cases/me_cement-award.pdf>. See further: Chile Model BIT, Art. 1(2), *UNCTAD Compendium* (Vol. III, 1998) 144; China Model BIT, Art. 1(1), *ibid.* 151; Switzerland Model BIT, Art. 2, *ibid.* 178; Egypt Model BIT, Art. 1(1), *ibid.* (Vol. V, 2000) 293; France Model BIT, Art. 1(1), *ibid.* 302; Jamaica Model BIT, Art. 1(1), *ibid.* 321; Malaysia Model BIT, Art. 1(2)(a), *ibid.* 326; Sri Lanka Model BIT, Art. 1(1), *ibid.* 339; Cambodia Model BIT, Art. 1, *ibid.* (Vol. VI, 2002) 463; Croatia Model BIT, Art. 1, *ibid.* 471; Finland Model BIT, Art. 1(1), *ibid.* (Vol. VII) 287; Turkey Model BIT, Art. 1(2), *ibid.* (Vol. VIII) 281; Benin Model BIT, Art. 1(1), *ibid.* (Vol. IX) 279; Sweden Model BIT, Art. 1(1), *ibid.* 309.

[223] See further: *Salini Costrutorri SpA and Italstrade SpA v Kingdom of Morocco* (Decision on Jurisdiction, 23 July 2001) Case No. ARB/00/4, 6 ICSID Rep 400. The ICSID Tribunal interpreted such a provision in the Italy/Morocco BIT as follows: 'En visant "les catégories de biens investis (...) conformément aux lois et règlements de la dite partie", la disposition en cause se réfère à la régularité de l'investissement et non à sa définition.' *Ibid.* para. 46.

[224] *Gower's Principles of Modern Company Law* (1997, 6th edn by P. Davies) 328. This rule is subject to two exceptions which are not important in practice. *Ibid.* 328–30.

[225] The distinction between the English and New York rules on when title to shares is perfected was the focus of a well-known English case: *Colonial Bank v Cady* (1890) 15 App Cas 267. An investor in England without legal title to shares might nevertheless claim beneficial ownership and thus an equitable title. The question would then become whether or not an equitable title falls within the definition of an investment in the relevant investment treaty.

[226] Article 3 of the ILC's Articles on State Responsibility, above n. 12, 61.

recognised if an investor had previously acquired shares on that (lawful) basis. On the other hand, if the investor's title to the shares remains static pursuant to the municipal law of the host state but various acts taken by the host state have the *de facto* effect of rendering those shares worthless, it will be open to the treaty tribunal to find that the prohibition against *indirect* expropriation or other minimum standard of treatment in the investment treaty has been violated by the host state.

These observations point to an acquired rights paradigm[227] for understanding the object of protection under investment treaties. An eloquent expression of this theory in relation to customary international law on the protection of the property of foreign nationals is to be found in the opinion of Judge Morelli in the *Barcelona Traction Case*:[228]

> [T]he international rule postulates a certain attitude in the part of the State legal order, inasmuch as it has regard solely to interests which, within that legal order, have already received some degree of protection through the attribution of rights or other advantageous personal legal situations (faculties, legal powers or expectations): an attitude on the part of the State legal order which in itself is not obligatory in international law.
>
> It is on the hypothesis that this state of affairs has arisen in the municipal legal order that the international rule lays upon the State the obligation to observe a certain line of conduct with regard to the interests in question: with regard, one might thenceforward say, to the rights whereby the interests in question stand protected in the municipal legal order . . .
>
> [T]he fact that the rules of international law in question envisage solely such interests of foreigners as already constitute rights in the municipal order is but the necessary consequence of the very content of the obligations imposed by those rules; obligations which, precisely, presuppose rights conferred on foreigners by the legal order of the State in question.[229]

Judge Morelli's statement of principle for customary international law has been criticised because it fails to take into account the host state's international obligation to respect rights to tangible property acquired in a foreign legal system when that property comes within the territorial jurisdiction of the host state.[230] If the protection of customary international law were only to extend to rights acquired under the municipal law of the host state, the host state would be at liberty to pass legislation to the effect that any property with certain characteristics entering the territory of the host state shall be vested in the host state. For this reason, customary international law requires states to respect rights to tangible property

[227] O'Connell defines the term 'acquired rights' as follows: 'Acquired rights are any rights, corporeal or incorporeal, properly vested under municipal law in a natural or juristic person and of an assessable monetary value.' D. O'Connell, above n. 72, 764. For support of the acquired rights theory in the customary international law of expropriation, see: B. Wortley, *Expropriation in International Law* (1959) 125; G. White, *Nationalisation of Foreign Property* (1961) 226.

[228] [1970] ICJ Rep 3.

[229] *Ibid.* 233–4.

[230] C. Staker, 'Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations' (1987) 58 *BYBIL* 151, 159–161.

acquired at the previous *lex situs*,[231] save in cases where the acquisition contravenes international public policy or international law.

This criticism of the acquired rights approach is not, however, relevant to the investment treaty regime. The protection afforded by investment treaties is contingent upon an individual or legal entity making an investment in the host state. This is an indispensable prerequisite; the economic rationale of investment treaties is to promote and encourage direct foreign investment in the economies of the contracting states. Unlike the broader concerns of customary international law on the protection of the property rights of aliens, the objective of investment treaties is to protect rights *in rem* acquired in accordance with the municipal law of the host state that constitute an investment according to the definition in the relevant investment treaty. The statement of Judge Morelli in the *Barcelona Traction Case* is good law for the investment treaty regime.

A threshold question may arise as to whether the investor has discharged the territorial requirement by making a qualified investment in one of the state parties to the investment treaty (the host state). In relation to tangible property, the *situs* of that property is a simple question of fact: *eg* is the waste disposal site leased by the investor situated in the territory of the host state? It is not difficult to anticipate a problem in trying to identify the *situs* of intangible property. The municipal conflict of law rules of the host state may be of assistance in resolving this problem. A debt, for example, might be deemed to have a *situs* at the debtor's domicile by the conflict rules of State X. Thus, if the debtor is domiciled in State X, an investment has been made in the territory of State X if a debt is capable of falling within the relevant definition of an investment in the treaty. Similarly, if State Y's conflict rules determine the *situs* of shares as the place where the share register is maintained, and the company in question keeps its register in State Y, the acquisition of shares in that company is a qualified investment in State Y. But what if private international law does not create a fictional *situs* for other types of intangible property, such as intellectual property rights? In these circumstances one must proceed straight to the substantive property rules of the putative host state, and, applying these rules, determine whether the municipal law of the host state recognises the intangible rights in question or is compelled to do so by a relevant international convention. Investment treaties do not oblige the contracting states to protect intangible property rights that are not recognised in the legal order of the contracting state.

A review of the investment treaty arbitration precedents reveals that where the nature or existence of rights *in rem* making up the investment is a matter

[231] *Ibid.* 166–9. The *lex situs* rule has the status of a general principle of law recognised by civilised nations. See: E. Rabel, *The Conflict of Laws: A Comparative Study* (Vol. 4, 1958) 30, 'It is at present the universal principle, manifested in abundant decisions and recognised by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated.' See also P. Lalive, *The Transfer of Chattels in the Conflicts of Law* (1955).

of controversy between the parties, tribunals (and the disputing parties themselves) have either tended to ignore the relevant provisions of municipal law, or have proceeded on the assumption that such issues are only relevant to affirming their jurisdiction *ratione materiae (ie* by the identification of an investment duly made in accordance with the municipal law of the host state). The most striking example is the award of the UNCITRAL Tribunal in *CME Czech Republic B.V. (The Netherlands) v Czech Republic.*[232]

A public broadcasting licence was granted by the Czech Media Council in 1993 to CET 21, a Czech legal entity, which, together with a German company, formed a Czech television services company called ČNTS.[233] The Memorandum of Association of ČNTS recognised CET 21 as the licence holder and ČNTS as the operator of the broadcasting station, TV Nova.[234] The claimant, CME (a Dutch legal entity), eventually obtained a 99 percent shareholding in ČNTS and thus qualified as an investor under the Netherlands/Czech Republic BIT.[235]

The Czech Media Law was amended in 1996 with the effect that the Media Council lost its primary means of monitoring and regulating television licence holders.[236] In order to maintain some control over ČNTS outside the legislative framework, and to diffuse public concern over the foreign control of Czech broadcasting, the Media Council exerted pressure over ČNTS[237] to amend the characterisation of CET 21's contribution in its Memorandum of Association from 'use of the licence' to 'use of the know-how of the licence' and to enter into a Service Agreement with CET 21.[238] The UNCITRAL Tribunal in *CME* inferred that the purpose of this new wording was to sustain an interpretation of the investment structure whereby CET 21 did not make a contribution in kind to the share capital of ČNTS.[239]

In 1999, CET 21 terminated the Service Agreement, evidently in bad faith, on the basis that ČNTS had failed to deliver a programming daylog on the previous day.[240] This termination paved the way for ČNTS's former joint venture partner to pursue more lucrative contracts with other service providers.[241] CME's interest in ČNTS became worthless for want of a licence to operate the now highly profitable TV Nova.[242] Before the termination, Dr Železný, who had senior management positions in both CET 21 and ČNTS and was the principal beneficiary of CET 21's split from ČNTS, procured a letter from the Media Council that appeared to support his position in an ongoing conflict between CET 21 and ČNTS.[243] Nevertheless, as this letter contained no binding regulatory determination of any sort, it could not have provided a *legal* cause for CET 21's termination of the Service Agreement.[244]

[232] *CME* Partial Award. [233] *Ibid.* para. 8. [234] *Ibid.* para. 12. [235] *Ibid.* para. 5.
[236] *Ibid.* para. 15. [237] *Ibid.* para. 463. [238] *Ibid.* para. 16. [239] *Ibid.* para. 470.
[240] *Ibid.* para. 18. [241] *Ibid.* para. 18. [242] *Ibid.* para. 17. [243] *Ibid.* para. 544.
[244] The UNCITRAL Tribunal in the *Lauder* Final Award found that the letter 'does not constitute a "measure" within the meaning of the Treaty, but merely expresses the general opinion of a regulatory body regarding the proper interpretation which should be given to the Media Law' and hence the letter 'was not aimed at having, and could not have, any legal effect.' *Ibid.* paras. 282, 283.

The 1999 contractual termination appears to have been instigated by Dr Železný on behalf of CET 21 for reasons associated with personal financial gain. He was at no time an officer of the Czech State and hence his conduct could not be attributable to the Czech Republic under international law. Consequently, for the Czech Republic to be liable for the alleged 'destruction' of CME's investment in ČNTS, there had to be a causal link either back to the Media Council's conduct in procuring the 1996 modification of the investment structure or to the issuance of the letter by the Media Council in 1999. The UNCITRAL Tribunal held that both acts constituted a breach of the Netherlands/Czech Republic BIT.[245] The Tribunal was, however, careful to find that the causal basis for CME's loss was directly related to the 1996 modification rather that the 1999 letter, describing the latter as only 'compound[ing] and complet[ing] the [Media] Council's part in the destruction of CME's investment'[246] rather than the proximate cause of the 'destruction'.[247]

The Tribunal thus held that the Media Council had unlawfully coerced ČNTS to change the structure of the investment in 1996 and that this had the effect of leaving ČNTS vulnerable to the loss of its right over the television licence at the instigation of CET 21.[248] Of paramount importance to the Tribunal's reasoning was its finding, repeated on several occasions in the award, that the 'use of "know-how" of a broadcasting licence is meaningless and worthless'.[249] If, to the contrary, this change in wording in ČNTS's Memorandum of Association had no effect on ČNTS's rights, then the Media Council's coercion could not be the cause of CME's loss.[250]

The only law that could determine the status of ČNTS's interest in the licence at the time of its original investment in 1993 and immediately following the 1996 modification was Czech law. But there is no reference to any provision of Czech law, or indeed to any other law, in the Tribunal's reasoning on this issue. Any criticism of this omission must be tempered by the observation that the Czech Republic, inexplicably, did not tender any expert evidence on Czech law during the liability phase of the arbitration proceedings. This certainly created a real dilemma for the

[245] *CME* Partial Award, paras. 591 *et seq.* [246] *Ibid.* para. 601.

[247] It is unclear whether the Tribunal found that the issuance of the letter in 1999 was, in and of itself, an act of expropriation. In concluding its remarks on the letter itself, the Tribunal found that '[t]his interference by the Media Council in the economic and legal basis of CME's investment carries the stigma of a Treaty violation' (*ibid.* para. 551) without specifying which provision of the Treaty was thereby violated. On the other hand, the Tribunal concludes its section on expropriation by stating: '[t]his qualifies the Media Council's actions in 1996 and actions and inactions in 1999 as expropriation under the Treaty', thus suggesting that the expropriation consisted of composite acts (*ibid.* para. 609).

[248] *Ibid.* para. 469.

[249] *Ibid.* para. 470. See also: paras. 469, 535, 593, 595.

[250] The UNCITRAL Tribunal in the *Lauder* Final Award came to this precise conclusion: 'All property rights of the Claimant were actually fully maintained until the contractual relationship between CET 21 and ČNTS was terminated by the former. It is at that time, and at that time only, that Mr. Lauder's property rights, i.e. the use of the benefits of the License by ČNTS, were affected.' (*Ibid.* para. 202).

Tribunal, which was resolved by the majority in the form of several unsubstantial assertions on the 'legal' modification in 1996:

> The amendment of the MOA by replacing the licence-holder's contribution of the Licence by the worthless 'use of the know-how of the Licence' is nothing else than the destruction of the legal basis . . . of the Claimant's investment.[251]
> [. . .]
> The contribution of the use of the Licence under the MOA is legally substantially stronger than the Service Agreement . . .[252]
> [. . .]
> The Media Council violated the Treaty when dismantling the legal basis of the foreign investor's investments by forcing the foreign investor's joint venture company ČNTS to give up substantial accrued legal rights.[253]

This aspect of the Tribunal's decision was reviewed by the Svea Court of Appeals in Stockholm upon a challenge to the award by the Czech Republic,[254] relying on a particular ground in Section 34 of the Swedish Arbitration Act which provides that an award rendered in Sweden can be wholly or partially set aside at the request of a party if 'through no fault of the party, an irregularity has occurred in the course of the proceedings which probably has influenced the outcome of the case.'[255]

The Svea Court of Appeals formulated the test for 'irregularity' with respect to this choice of law issue as follows:

> [W]hether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal has not based its decision on any law at all but, rather, judged in accordance with general reasonableness.[256]

The Court found that the Tribunal complied with the choice of law clause in the Netherlands/Czech Republic BIT by applying relevant sources of law, 'primarily international law'.[257]

This ruling is unfortunate because it ignores the choice of law rule for questions pertaining to the existence, nature, and scope of the investment.

[251] The UNCITRAL Tribunal in the *Lauder* Final Award came to this precise conclusion: CME Partial Award, para. 593.

[252] *Ibid.* para. 473.

[253] *Ibid.* para. 520.

[254] *Czech Republic v CME Czech Republic B.V.* (Svea Court of Appeals, 15 May 2003), reproduced and translated in (2003) 42 ILM 919. The Czech Republic submitted that the following issues should have been determined by application of Czech law: the protection afforded the original investor pursuant to the 1993 MOA, the commencement of the administrative proceedings in 1996, and the alleged coercion in conjunction therewith, the relationship between the 1996 MOA and the 1993 MOA, the service agreement, what transpired when CME acquired the interests in ČNTS from CME Media Enterprises B.V. in 1997, the Media Council's letter of March 15, 1999 and the alleged collusion with Železný, the obligation of the Media Council to intervene, and the termination of the service agreement. *Ibid.* 931.

[255] Swedish Arbitration Act 1999 (SFS 1999:116), translation by K. Hobér, (2001) 17 *Arbitration Int* 425.

[256] *Czech Republic v CME Czech Republic B.V.* (Svea Court of Appeals, 15 May 2003), reproduced and translated in (2003) 42 ILM 919, 965.

[257] *Ibid.*

If the law of the host state is to have any role in an investment dispute, this is precisely the context in which it must do so. As previously stated, general international law cannot purport to regulate the complex problems of proprietary and contractual rights over a television licence. The Court's finding that the Tribunal discharged its mandate by applying 'primarily international law' exposes the weakness in its ruling because there simply is no international law of licence agreements and the UNCITRAL Tribunal made no effort to unearth one. Sympathize as one might with the Tribunal's plight in the absence of any expert evidence on Czech law, it is difficult to conclude that the Tribunal did anything else but adjudge according to general notions of reasonableness.

Another prominent failure to heed to the *lex situs* choice of law rule with respect to matters concerning the existence and extent of the investment occurred in the ICSID Tribunal's award in *Wena Hotels Ltd v Arab Republic of Egypt*.[258]

Wena alleged that Egypt breached several provisions of the UK/Egypt BIT when a state-owned company, the Egyptian Hotel Company ('EHC'), seized two hotels (the 'Luxor Hotel' and the 'Nile Hotel') which were the subject of separate lease agreements between Wena and EHC. In accordance with the investor/state dispute resolution provision in the BIT, Wena elected to bring its treaty claims to an international arbitral tribunal established pursuant to the ICSID Convention.

The lease agreements between Wena and EHC stipulated that disputes between the parties must be submitted to *ad hoc* arbitration in Cairo.[259]

Following the seizure, Wena had brought a contractual arbitration against EHC for breach of the Nile Hotel lease on 2 December 1993.[260] Wena was awarded EGP 1.5 million in damages as compensation for the seizure of the Nile Hotel; however, this *ad hoc* tribunal simultaneously ordered that Wena surrender the hotel to EHC due to its own breaches of the lease agreement.[261] Wena continued to operate the Nile hotel until 1995 when it was evicted pursuant to the Tribunal's decision.

Wena brought similar contractual arbitration proceedings against EHC with respect to the Luxor Hotel lease on 12 January 1994. The second *ad hoc* tribunal also found in favour of Wena and awarded EGP 9.06 million in damages and also ordered Wena to surrender the hotel to EHC.[262] The award was subsequently annulled by the Cairo Court of Appeal.[263] Wena remained in occupancy until 1999, when the Luxor Hotel was placed in judicial receivership on account of Wena's failure to pay rent.

The ICSID Tribunal ignored the findings of the contractual arbitral tribunals in its decision on the merits. This became one of the grounds for annulment alleged by Egypt in the subsequent annulment proceedings.

[258] (Award, 8 December 2000) Case No. ARB/98/4, 6 ICSID Rep 89. [259] *Ibid.* para. 17.
[260] *Ibid.* para. 60. [261] *Ibid.* para. 61. [262] *Ibid.* para. 62. [263] *Ibid.*

The *ad hoc* Committee upheld the Tribunal's award in full and also dismissed the relevance of the previous arbitral decisions for the following reasons:

> The dispute before the Tribunal involved different parties, namely the investor and the Egyptian State, and concerned a subject matter entirely different from the commercial aspects under the leases . . .[264]
> [. . .]
> The leases deal with questions that are by definition of a commercial nature. The [BIT] deals with questions that are essentially of a government nature, namely the standards of treatment accorded by the State to foreign investors.[265]

This simple dichotomy between 'commercial' and 'BIT' questions is an inaccurate over-simplification. Far from having an 'entirely different' subject matter, the contractual arbitrations and the treaty arbitration were about precisely the same thing, *viz*. Wena's investment in Egypt. That investment was in the form of leaseholds over two hotels. If Wena had breached its obligations under the lease agreements such that Egypt was entitled to terminate the leases in accordance with their governing law, then there would have been no investment to expropriate. In response to Egypt's submission to this effect, the Tribunal found opaquely that: '[i]t is sufficient for this proceeding simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases.'[266] With respect, this was not sufficient at all. The Tribunal was bound to analyse the existence and extent of Wena's investment under the lease agreements at the time of the seizure of the hotels. In conducting this analysis the Tribunal should have considered the previous determinations made by the contractual tribunals or made its own findings on the status of Wena's investment in accordance with the governing law of the lease agreements. Both the ICSID Tribunal and the *ad hoc* Committee dismissed the relevance of the lease agreements under Egyptian law to the question of Egypt's liability under the BIT, even though the lease agreements were the sole foundation of Wena's investment.[267] The Tribunal and the *ad hoc* Committee did, however, consider that the lease agreements were relevant to positively establishing the Tribunal's jurisdiction and the question of damages flowing from Egypt's substantive violation of the BIT. On the first point, the *ad hoc* Committee stated:

> This Committee cannot ignore of course that there is a connection between the leases and the [BIT] since the former were designed to operate under the

[264] (Decision on Annulment, 5 February 2002) Case No. ARB/98/4, 6 ICSID Rep 129, para. 29.
[265] *Ibid.* para. 31. [266] *Ibid.* para. 19.
[267] The *ad hoc* Committee stated with respect to the Tribunal's consideration of this issue: '[T]he Tribunal declared irrelevant to consider the rights and obligations of the parties to the leases for the purpose of reaching a decision on the dispute submitted to it. The Award confirms that Wena has been expropriated and lost its investment, and this irrespective of the particular contractual relationship between Wena and EHC. The explanation thus given for not determining the respective obligations of Wena and EHC under the leases is sufficient to understand the premises on which the Tribunal's decision is based in this respect.' *Ibid.* para. 86.

protection of the [BIT] as materialization of the investment. But this is simply a condition precedent to the operation of the [BIT].[268]

Thus, the *ad hoc* Committee in effect declared that the factual existence of the leases established Wena's credentials as a qualified investor under the terms of the BIT, but their significance ended here, only to re-emerge later in the quantum phase of the decision after bypassing the determination of liability. In considering Wena's previous recovery of damages in the contractual arbitration concerning the Nile Hotel, the *ad hoc* Committee reversed its previous position on the significance of the leases:

> It is here where the relationship between one dispute and the other becomes relevant. The ultimate purpose of the relief sought by Wena is to have its losses compensated. To the extent this relief was partially obtained in the domestic arbitration, the Tribunal in awarding damages under the [BIT] did take into account such partial indemnification so as to prevent a kind of double dipping in favour of the investor. The two disputes are still separate but the ultimate result is the compensation of the investor for the wrongdoings that have affected its business.[269]

The Tribunal and *ad hoc* Committee were therefore prepared to give effect to the damages component of the Nile Hotel award, but not the *ad hoc* Tribunal's finding that the lease had been validly terminated.

The ICSID Tribunal in *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*[270] appears to have arrived at the correct conclusion on an objection to its jurisdiction *ratione materiae*, but its reasoning is not entirely persuasive. The problem started with the Tribunal's characterisation of the issue as whether the definition of 'investment' covered pre-investment expenditures.[271] This formulation of the issue simply begs the question as to when an investment is consummated. Expenditures in an investment project in the host state become an investment if and only if the investor acquires a legal interest that falls within the definition of an investment in the relevant BIT. That legal interest must be acquired in accordance with the *lex situs*.

Contrary to these principles, the Tribunal purported to survey the 'sources of international law'[272] to determine whether 'pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as an "investment"'.[273] There is no analysis of various instruments between the putative investor and the Sri Lankan authorities to determine whether such transactions gave rise to a proprietary interest under Sri Lankan law cognisable as an investment pursuant to the definition of such in the US/Sri Lanka BIT (that key provision of the BIT is not even quoted in the Award). Nevertheless, the Tribunal did analyse the three relevant instruments (a Letter of Intent,

[268] *Ibid.* para. 35.
[269] *Ibid.* para. 49. See also: (Award, 8 December 2000) Case No. ARB/98/4, 6 ICSID Rep 89, para. 127.
[270] (Award, 15 March 2002) Case No. ARB/00/2, 6 ICSID Rep 310. [271] See, *eg*: para. 34.
[272] *Ibid.* para. 60. [273] *Ibid.*

a Letter of Agreement, and a Letter of Extension) and found that none of them created any contractual obligations with respect to the building, ownership and operation of the power station.[274] This conclusion appears to be correct due to the stipulations in the instruments that they were subject to a final contract. But this intuitive presumption was never tested against Sri Lankan law, or any other law. The only real question confronting the Tribunal was whether Sri Lankan law in some way recognised a right of the putative investor in the power plant project on the basis of the transactions between the parties so that the investor could be said to have 'any right conferred by law or contract' for the purposes of Article I(1)(a)(v) of the Sri Lanka/US BIT.[275] That question was never directly raised or addressed by the Tribunal.

The ICSID Tribunal in *Marvin Feldman v Mexico*,[276] also struggled with the application of the municipal law of the host state to questions pertaining to the claimant's investment. A US national, Feldman, owned a Mexican exporting business 'CEMSA'.[277] A significant part of CEMSA's business consisted of the purchase of cigarettes in Mexico from bulk suppliers for resale in third countries. Mexico imposed a tax on the production and sale of cigarettes in the domestic market, but in some circumstances a zero tax rate was applied to cigarettes that are exported.[278] In 1991, Mexico passed new legislation to ensure that only the exports of producers of cigarettes in Mexico qualified for the zero tax rate, rather than the exports of resellers such as CEMSA.[279] This legislation was challenged as contravening the principle of 'equity of taxpayers',[280] and was then amended to apply the zero tax rate to all exporters of cigarettes.[281] The amended tax legislation remained unchanged between 1992 and 1997, which was the relevant period for the claims advanced by Feldman (the 'Tax Legislation').

The zero tax rate operated as a tax rebate to be claimed by the exporters of cigarettes. The 85 percent tax on production was initially paid by the cigarette producers, and this was passed on to the purchasers in the sales price for the cigarettes.[282] The Tax Legislation provided that, in order for exporters to claim the tax rebate, the tax on production on the cigarettes must be stated 'separately and expressly on their invoices'.[283] The effect of this invoice requirement, which was a feature of the Tax Legislation from its inception,[284] was to discriminate between the exports of cigarette producers and resellers, despite the amendments to the legislation in 1992. Nevertheless, tax discrimination on this basis is consistent with international practice; the Tribunal noted that it was

[274] See, *eg*, para. 48.
[275] ICSID, *Investment Promotion and Protection Treaties* (Release 92–4, 1993).
[276] (Award, 16 December 2002) Case No. ARB(AF)/99/1, (2003) 42 ILM 625.
[277] The acronym for Corporación de Exportaciones Mexicanas, S. A. de C. V. *Ibid.* para. 1.
[278] *Ibid.* para. 7. [279] *Ibid.* para. 10. [280] *Ibid.* para. 11. [281] *Ibid.* para. 12.
[282] *Ibid.* para. 15. [283] *Ibid.*
[284] And four years before Feldman established CEMSA in Mexico, *ibid.* para. 128.

a 'rational tax policy and a reasonable legal requirement'[285] and could not constitute a violation of international law *per se*.[286]

Insofar as CEMSA purchased its cigarettes from volume retailers rather than producers, at a price that included the tax on production, the tax was not itemized separately on the invoice.[287] Therefore, in accordance with the tax regime prescribed by the Tax Legislation, CEMSA was not entitled to claim the tax rebate. Nevertheless, CEMSA was granted the tax rebates for a total of sixteen months between 1996 to 1997.[288]

Feldman claimed that Mexico's denial of tax rebates on cigarettes exported by CEMSA constituted an expropriation under Article 1110 of NAFTA. In its analysis of this claim, the ICSID Tribunal reasoned that the Tax Legislation never afforded CEMSA a right to export cigarettes and that neither customary international law or NAFTA required Mexico to do so.[289] Furthermore, according to the Tribunal, Feldman's investment, which consisted of the exporting business CEMSA, remained under the complete control of Feldman.[290] Finally, the Tribunal noted that the profitability of Feldman's 'gray market' export business (CEMSA was not an authorised reseller of cigarettes in Mexico)[291] was wholly dependent upon obtaining the tax rebate, because otherwise the combined cost to CEMSA of the Mexican tax on production and the excise taxes imposed by the importing country would price CEMSA out of the market.[292] The claim for expropriation was dismissed by the Tribunal.[293]

Feldman also invoked Article 1102 of NAFTA by pleading that certain *Mexican*-owned resellers of cigarettes had received the tax rebates from the Mexican authorities at various times when CEMSA was denied the rebate, despite the invoice requirements of the Tax Legislation, and that this constituted a failure by Mexico to accord CEMSA national treatment.[294]

The Tribunal found that: (i) there was one Mexican-owned company in like circumstances to CEMSA for the purposes of the national treatment analysis (the 'Poblano Group');[295] (ii) the Poblano Group was granted the tax rebates during a period when CEMSA was denied them;[296] (iii) CEMSA had been audited by the Mexican tax authorities and ordered to repay the tax rebates that it had received, whereas there was no clear evidence about the status of a similar audit of the Poblano Group;[297] and (iv) this discrimination was the result of Feldman's US nationality.[298] The majority of the ICSID Tribunal concluded that Mexico had violated Article 1102 of NAFTA.[299]

The main focus of the dissenting opinion rendered in *Marvin Feldman v Mexico*[300] was that the majority's finding of discrimination was unsupported by the evidence.[301] This controversy will be left aside. Instead the

[285] *Ibid.* para. 129. [286] *Ibid.* para. 118. [287] *Ibid.* para. 15. [288] *Ibid.* para. 19.
[289] *Ibid.* para. 111. [290] *Ibid.* [291] *Ibid.* para. 115. [292] *Ibid.* para. 117.
[293] *Ibid.* para. 153. [294] *Ibid.* para. 154. [295] *Ibid.* para. 172. [296] *Ibid.* para. 173.
[297] *Ibid.* para. 174. [298] *Ibid.* para. 182. [299] *Ibid.* para. 188.
[300] (Dissenting Opinion of J. Bravo, 3 December 2002), (2003) 42 ILM 673.
[301] *Ibid.* pp. 675–80.

analysis that follows concentrates on a contradiction between the Tribunal's findings on the nature of the investment in its consideration of Feldman's expropriation claim and the majority's conclusion on national treatment.

In relation to Feldman's investment, the Tribunal held:

> [T]he only significant asset of the investment, the enterprise known as CEMSA, is its alleged right to receive [. . .] tax rebates upon exportation of cigarettes, and to profit from that business.[302]

However, the Tribunal found:

> [T]he Claimant never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes . . .[303]

Hence the right to obtain tax rebates upon the exportation of cigarettes did not feature among the bundle of rights that made up Feldman's investment in CEMSA in accordance with Mexican law. As Mexico could not expropriate something that never belonged to the investor, the Tribunal correctly dismissed Feldman's Article 1110 claim. The Tribunal's analysis of the nature of Feldman's investment should not, however, have been discarded by the majority when it came to deal with national treatment under Article 1102. The essence of Feldman's complaint was that its *investment*, CEMSA, had been accorded less favourable treatment than that which Mexico accorded to investments of its own investors.[304]

If Feldman's investment in CEMSA did not include the right to a tax rebate, and yet the receipt of the rebate was essential to the commercial viability of CEMSA's cigarette export activities (and indeed the sole alleged 'asset' of CEMSA), it is difficult to fathom how Mexico's sporadic conferral of tax rebates to a Mexican-owned cigarette reseller constituted discrimination with respect to Feldman's *investment*.

Another cause for concern is the majority's assessment of the damages flowing from its finding of discrimination. The majority held that Feldman through CEMSA was entitled to certain tax rebates that it had been denied.[305] If this finding were to be generalised, the resulting proposition would be that where a tax authority has improperly assessed the tax liability of X, with the effect that a benefit is conferred upon X, then Y, a competitor of X, is able to claim damages based on non-receipt of the same benefit to itself. The effect of the majority's decision is thus to compel Mexico to breach its own legislation (legislation held by the Tribunal to be unimpeachable) and confer an unlawful benefit to an investor.

If Feldman did have an investment in Mexico (*ie* a business whose viability did not rest upon the misapplication of Mexican legislation) and

[302] (Award, 16 December 2002) Case No. ARB(AF)/99/1, (2003) 42 ILM 625, para. 118.
[303] *Ibid.* [304] *Ibid.* para. 155. [305] *Ibid.* paras. 202–5.

Mexico were found to have systematically derogated from its own legislation in favour of Feldman's Mexican competitors in like circumstances, then damages should be assessed on the basis of the harm caused to Feldman's business by such derogation. This might, for instance, include damages representing a loss of market share due to the competitive advantage obtained by Feldman's competitors.

D. CONCLUSION

Different choice of law rules apply to the different analytical stages for adjudging an investment treaty claim. At the first stage, the treaty tribunal must decide, if it is a matter of contention, whether particular rights *in rem* constituting the alleged investment exist, the scope of those rights, and in whom they vest. In relation to an investment composed of tangible property rights in the host state, the *lex situs* choice of law rule points to the application of the municipal law of the host state. For intangible property, it follows from the requirement that the investment must be in the territory of the host state that the intangible property rights underlying the alleged investment must be recognised by the municipal law of the host state, at least at the time the investment is consummated. Hence the requirement of a territorial connection also points to the application of the municipal law of the host state to questions relating to intangible property rights. At the first stage of the analysis, the treaty tribunal must also determine whether or not the rights *in rem* that have been identified in accordance with the municipal law of the host state constitute an investment as defined by the investment treaty itself. This is a question of treaty interpretation that is ultimately governed by principles of international law.

At the second analytical stage for an investment treaty claim, the conduct of the host state (alleged to have caused damage to the investment as defined at the first stage of analysis) is examined on the basis of the minimum standards of treatment set out in the treaty. Thus the treaty, as supplemented by general principles of international law, is the applicable law at the second stage of analysis.

Issues pertaining to the rights *in rem* underlying a covered investment may be relevant to establishing the treaty tribunal's jurisdiction *ratione materiae* and to liability and quantum. If, as is often the case, the treaty tribunal elects to bifurcate its consideration of any jurisdictional controversies between the parties and the merits of the investor's claims, then certain problems of timing and coordination may arise. At the jurisdictional phase, it is sufficient that the investor is able to demonstrate a *prima facie* case that it has rights *in rem* that fall within the definition of an investment. The treaty tribunal can reserve its definitive ruling on the precise scope of such rights until the merits and it may be prudent to do so if the pleadings reveal complex and contentious issues of fact and law on this point. It is, however, expedient for the tribunal to determine finally

whether the *prima facie* legal interests in property meet the definition of an investment pursuant to the investment treaty because this issue will not surface again at the merits or quantum phases of the arbitration. If, on the other hand, jurisdictional questions are joined to the merits, then it makes sense for the treaty tribunal to define questions relating to the alleged investment as preliminary issues (rather than as issues going to jurisdiction or the merits of the dispute) in a separate section of the award.

The ICSID Tribunal's award in *Technicas Medioambientales TECMED S.A. v United Mexican States*[306] illustrates the suggested approach to preliminary issues concerning the rights *in rem* that comprise the investment. The Claimant was the Spanish parent company of the Mexican company 'Tecmed', which in turn owned another Mexican company 'Cytrar'.[307] At an auction of public utilities by the Mexican municipal agency 'Promotora',[308] Tecmed purchased rights to a landfill for hazardous industrial waste.[309] These rights were later transferred from Tecmed to Cytrar with the consent of the relevant Mexican authority 'INE'.[310] When a new operating licence for the landfill was issued by INE in Cytrar's name, it was expressed to be valid only for a year and renewable thereafter on an annual basis.[311] This was in contrast with the operating licence that was originally granted to Tecmed for an unlimited duration. Cytrar's licence was renewed after the first year. INE refused to grant any further renewals thereafter.[312]

The Claimant's principal claim was that the failure to renew Cytrar's operating licence amounted to an expropriation of its investment under the Spain/Mexico BIT as it brought Cytrar's exploitation of the landfill facility to an end.[313]

If the Claimant (through Tecmed and Cytrar) had acquired its investment fully cognisant of a Mexican law to the effect that operating licences are issued for one year and may be terminated by the Mexican authorities at will thereafter, it is difficult to conceive how Mexico's exercise of its regulatory authority could amount to an expropriation. If, however, the Claimant had acquired, along with the tangible property interest in the landfill, certain intangible property rights including the right to the requisite licences to operate the landfill, the subsequent interference with the Claimant's intangible rights might also be protected.

The Claimant advanced its case on this basis and the ICSID Tribunal decided to consider the 'price and scope of the acquisition by Cytrar and Tecmed of assets relating to the Las Víboras landfill' as a 'preliminary

[306] (Award, 29 May 2003) Case No. ARB(AF)/00/2, (2004) 43 ILM 133. [307] *Ibid.* para. 4.
[308] Promotora Inmobiliaria del Ayuntamiento de Hermosillo, a decentralized municipal agency of the Municipality of Hermosillo located in the State of Sonora, Mexico. *Ibid.* para. 35.
[309] *Ibid.* para. 35.
[310] *Ibid.* para. 38. 'INE' is an acronym for the Hazardous Materials, Waste and Activities Division of the National Ecology Institute of Mexico, an agency of the Federal Government of the United Mexican States within the Ministry of the Environment. *Ibid.* para. 36. [311] *Ibid.* para. 38.
[312] *Ibid.* para. 39. [313] *Ibid.* para. 41.

matter'.[314] What then followed was a meticulous examination by the Tribunal of all the transactional documents relating to the acquisition of the landfill to ascertain whether part of the consideration provided by Tecmed was for intangible property rights of the type alleged. This question was ultimately decided in the affirmative,[315] and the Tribunal went on to rule in a separate section of the award dealing with the merits that Mexico had used its regulatory power to revoke Cytrar's licence (thereby depriving Cytrar of its right thereto) in a manner inconsistent with its obligations under the investment treaty.[316]

V. The Law Applicable to the Procedure of Investor/State Disputes

A. INTRODUCTION

The municipal legal system at the seat of the arbitration has jurisdiction under international law to adjudge the validity or scope of the arbitration agreement, to regulate the arbitral procedure and determine the ultimate validity of the arbitral award, subject to any international treaty obligations that are binding on the territorial sovereign.[317] This is best conceptualised as an aspect of civil jurisdictional competence under international law on the basis of a subject-matter interest of the forum state that arises due to the agreement of the parties to a particular seat.[318] The international law of jurisdiction gives effect to the parties' agreement due to considerations of the good administration of international justice, for it is essential that a single municipal system be identified in advance as having primary control over an international arbitral procedure.[319] The most important and generally accepted international obligation that is binding on the territorial

[314] *Ibid.* para. 52. [315] *Ibid.* para. 91. [316] *Ibid.* para. 151.

[317] This is a principle evidenced by the consistent practice of states that, it is submitted, would give rise to a norm of customary international law. Municipal court decisions have confirmed their jurisdiction on the basis of this principle, see: *American Diagnostica, Inc. v Gradipore Ltd et al.* (1998) 44 NSWLR 312; *Coop International Pty Ltd v Ebel SA* [1998] 3 SLR 670; *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 (CA); *The Bay Hotel and Resort Ltd v Cavalier Construction Ltd* [2001] UKPC 34.

[318] (Or the agreement of the parties to allow the arbitral tribunal to fix the seat of arbitration.) This is a more persuasive justification than civil adjudicatory competence on the basis of the temporary physical presence of the arbitrators and parties at the territorial seat of the arbitration, which is one of the jurisdictional factors listed by Mann, see: F. Mann, 'Lex Facit Arbitrum' in P. Sanders (ed), *International Arbitration Liber Amicorum for Martin Domke* (1967), reprinted in (1986) 2 *Arbitration Int* 241, 236. The simple reason for rejecting this factor as controlling is that many arbitrations are successfully conducted without the arbitrators and parties ever entering the territorial jurisdiction of the country of the seat of arbitration.

[319] See F. Mann, *ibid.* 238–9. This would also be consistent with the 'fairness theory' for allocating adjudicatory jurisdiction because the parties' choice of a seat of arbitration might be assumed to have taken into account a fair distribution of the litigational burdens associated with that choice. This is obviously less persuasive when the choice is left to the arbitral tribunal. The seminal work on the fairness theory (as opposed to the power theory) of adjudicatory jurisdiction is: A. von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University L Rev* 279, esp. 311–7.

sovereign with jurisdiction over an international arbitral procedure is Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which compels the contracting state parties to recognise arbitration agreements and desist from exercising jurisdiction over the substance of disputes covered by such agreements.

Although the doctrine of jurisdiction in international law generally recognises the adjudicative competence of the state providing the seat of the arbitration, this principle is subject to an important exception in relation to arbitrations involving state parties. To the extent that an arbitration involving states is subject to public international law, those arbitration proceedings and the resulting award are grounded in, and regulated by, the international legal order and thus remain detached from the municipal legal system at the seat of the arbitration or from any other municipal legal system.[320] From the absence of jurisdiction of the territorial sovereign over an arbitration subject to public international law follows the principle that the international responsibility of the territorial sovereign cannot be engaged in relation to any aspect of that arbitration.[321]

This phenomenon of detachment of an arbitration from the municipal legal system at the seat of the arbitration is by prescription of international law and thus should be distinguished from situations where the municipal legal system voluntarily relinquishes or curtails its adjudicative or supervisory competence over international commercial arbitrations conducted within its jurisdiction. There is indeed a growing trend for municipal laws on international arbitration to curtail the scope for municipal courts at the seat of the arbitration to interpret or adjudge the validity of the arbitration agreement, to regulate the arbitral procedure or determine the ultimate validity of the arbitral award.[322] Detachment by application of public international law should also be distinguished from the incidence of 'delocalised arbitral awards', the debate over which in essence concerns the possibility that acts taken by municipal courts under the *lex loci arbitri* with respect to an arbitral procedure and award might not be recognised by a third municipal legal system for the purposes of enforcing that award.[323]

[320] *Eg, X v Germany* (Application 235/56) (1958–9) 2 Ybk of the European Convention on Human Rights 256, 294: '[T]he Supreme Restitution Court [established under the 1954 Paris Settlement Convention in the Federal Republic of Germany] must be regarded as an international tribunal in respect of which the Federal Republic had no power of legislation or control.'

[321] *X v Germany, ibid.* 294: '[I]n general a State does not have international responsibility for acts or omissions of an international tribunal merely by reason that it has its seat and exercises its functions on the territory of that State.' See further: F. Mann, above n. 133, 3–4. The same principle has been applied to the Iran/US Claims Tribunal, see *Spaans v The Netherlands* (Application 12516/86) (1988) 58 DR 119, 120.

[322] See generally: J. Lew, L. Mistelis, & S. Kröll, *Comparative International Commercial Arbitration* (2003) 356–62.

[323] See J. Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 *ICLQ* 358; W. Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration: When and Why it Matters' (1983) 32 *ICLQ* 21; J. Paulsson, 'Delocalization of International Commercial Arbitration: When and Why it Matters' (1983) 32 *ICLQ* 53. For a useful update of the arguments for and against delocalisation, see: R. Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 *Arbitration Int* 19.

The exception to the adjudicative competence of states under international law over arbitrations conducted within their territory has been stated to apply *to the extent* that an arbitration involving states is subject to public international law. It is commonly assumed that arbitrations between states are always subject to public international law by force of an *a priori* rule, but this is doubtful as a general proposition.[324] States are at liberty to transact with one another on a commercial basis (say for the supply of goods for civilian consumption) and, in so doing, subject their contract to a municipal system of law or the *lex mercatoria* and refer disputes arising out of the contract to arbitration. In such a case, there is no reason in principle to assume that public international law would govern that arbitration simply because the two parties are sovereign states. It is clear, therefore, that the law applicable to arbitrations involving states may to some extent depend on the subject matter of the dispute or the status of the arbitral agreement or *compromis*.

The scope for public international law to govern arbitrations is ultimately reducible to the existence of an international obligation upon a municipal court to respect an express or implied choice of public international law and to uphold the consequences that follow from this choice (*eg* non-interference in the arbitral process). In view of the enormous latitude often granted to arbitral tribunals by municipal laws on international arbitration to settle their own procedure,[325] the parties' choice of public international law to govern their arbitration or an arbitral tribunal's determination to the same effect is likely to be of little or no consequence to the conduct of the arbitration or the rendering of an award, unless and until one of the parties invokes the jurisdiction of a municipal court with respect to that arbitration. At that moment, is the municipal court *bound* to decline jurisdiction under international law?

One source of an obligation upon a municipal court to desist from exercising jurisdiction over an arbitration involving a state party might derive from participation in a treaty on the settlement of disputes. For instance, Article 54 of the ICSID Convention requires that: 'Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' A municipal court of a Contracting State is therefore bound to recognise the *res judicata* effect of the award if a party to the ICSID arbitration attempts to relitigate matters decided in that award.

[324] F. Mann, above n. 133, 2.

[325] Article 182 of the Swiss Private International Law Act 1987 is representative in this sense:

> The parties, may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.
> When the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.
> Whatever procedure is chosen, the arbitral tribunal shall assure equal treatment of the parties and the rights of the parties to be heard in an adversarial procedure.

On the other hand, if an investor seizes a municipal court of a state not party to the ICSID Convention, then the court would not be bound by international treaty or customary law to decline jurisdiction over the merits of its claim.[326]

This very situation arose in the context of the Iran/US Claims Tribunal in *Dallal v Bank Mellat*,[327] where the US claimant instituted proceedings in the English courts after his claims were dismissed in an award rendered by the Iran/US Claims Tribunal.[328] As the United Kingdom is not a party to the Algiers Accords, its courts are not bound by the obligations with respect to the finality of awards thereunder. Moreover, Justice Hobhouse expressed the view that the New York Convention is not applicable to the Tribunal's awards.[329] He nevertheless gave effect to the award in question by relying on principles of international comity and the inherent jurisdiction of the English court to prevent an abuse of process. Justice Hobhouse was not, however, under any international obligation to do so.

The more common source of international obligations curtailing the competence of municipal courts over arbitrations with state parties is the law of sovereign immunity from jurisdiction as found in customary international law or international treaty and municipal laws giving effect to these international rules.[330]

B. SOVEREIGN IMMUNITY FROM JURISDICTION AND ARBITRATIONS INVOLVING STATES

If the forum state adheres to the absolute doctrine of sovereign immunity, then the respondent's status as a sovereign state will suffice to oblige the municipal court to decline jurisdiction.[331] Adherence to the restrictive doctrine of sovereign immunity, however, requires the municipal court to give controlling significance to the subject matter of the dispute.[332] The inquiry shifts to whether the legal relationship underlying the dispute arises out of acts *jure imperii* (acts of sovereign authority), to which sovereign immunity applies, or acts *jure gestionis* (acts of a private or commercial character), to which it does not.[333]

Sovereign immunity must, therefore, attach to arbitrations between states concerning differences arising out of an international legal relationship that exists between sovereign states, such as disputes about diplomatic

[326] If the state of the municipal court is a signatory to the New York Convention then it may be argued that this international treaty would compel the court to give *res judicata* effect to the ICSID award.

[327] [1986] 1 All ER 239.

[328] *Ibid.* 246.

[329] *Ibid.* 250.

[330] H. Lauterpacht was one of the first writers to conceive of sovereign immunity from jurisdiction as the negation of jurisdictional competence that would otherwise exist on the basis of the subject-matter of the dispute or transaction being governed by international law. See H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *BYBIL* 220, 236–40.

[331] R. Higgins, above n. 164, 79.

[332] *Ibid.* 80.

[333] H. Fox, *The Law of State Immunity* (2002) 36–9.

immunities, diplomatic protection claims, and territorial disputes. It follows that the law governing the procedure of such arbitrations must be public international law.

It may be expected that the instances in which the *lex arbitri* of state/state arbitrations will be anything other than public international law will be rare. Hence the test to determine the applicable procedural law assumes a greater functional importance in the case of mixed arbitrations between states and private entities.

It is customary in any discussion of the procedural law applicable to mixed arbitrations to pay homage to the major *ad hoc* oil arbitrations involving Middle-Eastern States and Western oil companies, including: *Saudi Arabia v Arabian American Oil Co.*[334] ('ARAMCO'), *Sapphire International Petroleums v National Iranian Oil Co.*,[335] *British Petroleum Exploration Co. v Libyan Arab Republic*,[336] *Texaco Overseas Petroleum & California Asiatic Oil Co. v Libya*[337] ('TOPCO'), and *Libyan American Oil Co. v Libyan Arab Republic*[338] ('LIAMCO'). No purpose would be served by providing yet another comprehensive review of these awards,[339] but it will be useful to extract a number of principles from them that are important to the present discussion.

The *ARAMCO* Tribunal found that international law governed the arbitration between a private party and a sovereign state, rather than Swiss law as the *lex loci arbitri*, in deference to Saudi Arabia's jurisdictional immunity before the Swiss courts:

> The jurisdictional immunity of States . . . excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases . . .
> [. . .]
> Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State.[340]

This precedent therefore clearly supports the suggested approach of giving primary weight to the availability or otherwise of sovereign immunity from jurisdiction in determining whether public international law applies to the arbitral procedure. The *ad hoc* Tribunal's decision to apply international law appears to have rested on a preference for the absolute

[334] (1958) 27 ILR 117. [335] (1963) 35 ILR 136.
[336] (Award on the Merits), (1973) 53 ILR 297. [337] (Award on the Merits), (1978) 17 ILM 1.
[338] (1978) 20 ILM 1.
[339] See R. von Mehren & P. Kourides, above n. 188; R. White, 'Expropriation of the Libyan Oil Concessions—Two Conflicting International Arbitrations' (1981) 30 *ICLQ* 1; C. Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations' (1982) 53 *BYBIL* 27; S. Toope, *Mixed International Arbitration* (1990) Ch. II; A. Fatouros, 'International Law and the Internationalized Contract' (1980) *AJIL* 134; G. Delaume, 'State Contracts and Transnational Arbitration' (1981) *AJIL* 784.
[340] (1958) 27 ILR 117, 155–6.

doctrine of sovereign immunity, despite the fact that Switzerland recognised the restrictive doctrine of sovereign immunity at that time:

> It is true that the practice of the Swiss Courts has limited the jurisdictional immunity of States and does not protect that immunity, in disputes of a private nature, when legal relations between the Parties have been created, or when their obligations have to be performed in Switzerland. The Arbitration Tribunal must, however, take that immunity into account when determining the law to be applied to an arbitration which will lead to a purely declaratory award. By agreeing to fix the seat of the Tribunal in Switzerland, the foreign State which is a Party to the arbitration is not presumed to have surrendered its jurisdictional immunity in case of disputes relating to the implementation of the 'compromis' itself.[341]

Whilst the Tribunal's approach to the problem in *ARAMCO* is correct, there is cause for doubting whether a review of state practice on sovereign immunity would yield the same response today. It was 15 years later that Judge Lagergren, the sole arbitrator in *BP v Libya*, referred to the *ARAMCO* award at length but could not 'share the view that the application of municipal procedural law to an international arbitration like the present one would infringe upon such prerogatives as a State party to the proceedings may have by virtue of its sovereign status'.[342] Hence for Judge Lagergren the restrictive doctrine of sovereign immunity was a more persuasive reflection of customary international law and he had no difficulty in applying Danish law as the *lex loci arbitri* to the arbitral proceedings rather than public international law.[343]

After *BP v Libya*, the pendulum swung back to the application of the international law of procedure in *TOPCO* by sole arbitrator Dupuy, who was impressed by the discussion of sovereign immunity in *ARAMCO*. He buttressed his choice of international law to govern the procedure by reference to the fact of his appointment as arbitrator by the President of the International Court of Justice, and that the parties to the arbitration had not objected to his formulation of the rules of procedure as excluding the *lex loci arbitri*.[344] Dupuy's analysis of the procedural law does not, however, address the crucial question as to whether the courts at the seat of the arbitration are bound to refrain from exercising jurisdiction over the arbitration.

The situation in *LIAMCO* is more interesting because the award rendered by the sole arbitrator, Mahmassani, featured in multiple enforcement proceedings before the municipal courts of several jurisdictions. Mahmassani had given contrary indications about the *lex arbitri* by expressly determining the seat of the arbitration to be Geneva but at the same time stating that he would 'be guided as much as possible by the general principles contained in the Draft Convention on Arbitral

[341] (1958) 27 ILR 117, 156. [342] (Award on the Merits), (1973) 53 ILR 297, 309.

[343] *Ibid.* In support of this finding, Judge Lagergren cited: *Sapphire International Petroleums Ltd. v The National Iranian Oil Co.* (1963) 35 ILR 136, and *Asling Trading Co. & Svenska Tändsticks Aktiebolaget v The Greek State* (1954) 23 ILR 633. [344] (1978) 17 ILM 1, 8–9.

Procedure elaborated by the International Law Commission of the United Nations in 1958.'[345] Most commentators have interpreted his remarks as indicating a choice of a-national or international law.[346] As an excellent illustration of how futile a tribunal's abstract inquiry into its own procedural law can be, the courts of Switzerland, the United States, France, and Sweden all nevertheless assumed that the arbitration was governed by Swiss law as the *lex loci arbitri*.[347]

C. SOVEREIGN IMMUNITY AND INVESTMENT TREATY ARBITRATION

One must begin by distinguishing ICSID arbitrations, which are subject to a self-contained regime of procedural rules established by an international treaty, from other types of investment treaty arbitrations. In the case of ICSID arbitrations, the municipal courts of Contracting States are bound to refrain from exercising jurisdiction over the interpretation of the arbitration agreement, the arbitral procedure and the challenge and enforcement of the award.[348] Hence there is no scope for the application of the *lex loci arbitri* because the procedural rules contained in the ICSID Convention and the other 'basic documents' promulgated by ICSID are designed to create a self-contained system with an internal supervisory mechanism that replicates this function of the municipal courts at the seat of the arbitration and at the place of enforcement.[349]

For investment treaty arbitrations outside the auspices of the ICSID Convention, the choice of law rule for procedural questions is influenced by whether the state party to the investment treaty dispute has a right to expect immunity from the jurisdiction of the municipal courts at the seat of the arbitration in relation to the conduct of that arbitration or the validity of the resulting award. If the state party does have such a right in international law, and the municipal court—a corresponding obligation to respect it, then there would be a strong presumption that the arbitration should be subject to international law and thereby be detached from the *lex loci arbitri*.

It will be assumed, in accordance with the prevailing view of writers based on the trends in state practice,[350] that the restrictive doctrine of sovereign immunity represents the current state of customary international law. The clearest exposition of the restrictive doctrine of sovereign immunity with

[345] (1981) 20 ILM 1, 42–3. [346] W. Lake & J. Dana, above n. 36, 804.

[347] In France: Trib. Gr. Inst. Paris, 5 March 1979, *Procureur de la Republique v Société LIAMCO*, reprinted in (1979) 106 *Journal du droit international* 857. In Sweden: CA Svea, 18 June 1980, *Libyan American Oil Co. v Socialist People's Arab Republic of Libya*, translated in (1981) 20 ILM 893. In the United States: *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980). [348] See above n. 136.

[349] *Ibid.*

[350] See the surveys of state practice in H. Fox, above n. 333, 124–5; I. Brownlie, above n. 92, 323–5. The writers emphasizing the trend towards adopting the restrictive doctrine of sovereign immunity are listed at *ibid.* 325 at note 40.

respect to arbitrations may be found in Article 12 of the European Convention on State Immunity:[351]

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
   a. the validity or interpretation of the arbitration agreement;
   b. the arbitration procedure;
   c. the setting aside of the award,
   unless the arbitration agreement otherwise provides.
2. Paragraph 1 shall not apply to an arbitration agreement between States.[352]

In applying the principles reflected in this test to investment treaty arbitrations, one must first anticipate and refute an argument to the effect that investment treaty arbitrations arise out of 'an arbitration agreement between States' for the purposes of Article 12(2) of the European Convention on State Immunity. The reference to the possibility of arbitrating disputes between the investor and the host state common to most investment treaties is an *offer* to arbitrate, not an *agreement* to arbitrate. The agreement to arbitrate is perfected upon the filing of a notice of arbitration by the investor, and at this juncture it is the host state and the investor that are privy to this agreement rather than the two contracting state parties to the treaty. As a further preliminary point, it should be noted that neither the investment treaties themselves, nor the arbitration agreement created upon the investor's acceptance of the state's offer to arbitrate, contain any express provisions on the issue of sovereign immunity. Hence the fundamental question to address, in accordance with Article 12(1) of the European Convention, is whether investment treaty arbitrations are capable of being described as disputes that 'arise out of a civil or commercial matter'.

D. STATE PRACTICE ON THE LEGAL NATURE OF INVESTMENT TREATY ARBITRATIONS

There is already sufficient state practice discernable from the texts of investment treaties and decisions of municipal courts to conclude that investment disputes should be considered to 'arise out of a civil or commercial matter' for the purposes of the law of sovereign immunity. From the review of this state practice that now follows, it will be clear that a

[351] The authors of a leading treatise on international law state that: 'The Convention may be regarded as reflecting with sufficient general accuracy the prevailing rules of international law and the current practice of states in the field of state immunity.' *Oppenheim's International Law*, above n. 92, 343.

[352] European Convention on State Immunity (1972) ETS No 74. A similar provision can be found in the legislation of many countries including the United States, see Foreign Sovereign Immunities Act, 1976, 28 USC § 1605(a)(6), and the United Kingdom, see State Immunity Act 1978, s. 9(1). A commentary on these provisions can be found in H. Fox, above n. 333, 166–7 (UK Act), 194–5 (US Act).

major concern of the treaty drafters has been to describe the status of investment arbitration awards for the purposes of their challenge and enforcement. It is perfectly legitimate to extrapolate from this definition a general categorisation of the investment treaty dispute as 'civil or commercial' rather than 'public international' because the status of an arbitration cannot fluctuate at different stages of the procedure. Thus, for example, an investment treaty arbitration cannot be categorised as a public international procedure detached from the *lex loci arbitri* for the purposes of a request for provisional measures, but at the same time be said to arise out of a civil or commercial matter and thereby fall within the scope of enforcement regimes for foreign arbitral awards.

Starting with the relevant provisions of investment treaties dealing with the enforcement of treaty awards, Article 1136(7) of NAFTA provides that a claim under Chapter 11 'shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention and Article 1 of the Inter-American Convention'. A near identical provision is contained in Article 26(5)(b) of the Energy Charter Treaty and in several model BITs.[353] Other evidence that the New York Convention applies to investment treaty awards[354] is the common provision in BITs that consent and submission to international arbitration by the host state and the investor satisfies the requirement for 'agreement in writing' in Article II of the New York Convention,[355] or that the arbitration should be conducted in a state that is party to the New York Convention.[356]

There are four municipal court decisions to date dealing with a challenge to investment treaty awards. The first was the Supreme Court of British Columbia in *United Mexican States v Metalclad Corporation*.[357] A preliminary issue arose in relation to the statutory basis for the Court's review given the uncertainty as to whether the International Commercial Arbitration Act or the Commercial Arbitration Act should apply.[358] The pretext for the lengthy submissions by the parties on this point was the wider scope of review permissible under the Commercial Arbitration Act, which extends to the examination of points of law.[359] Justice Tysoe of the Supreme Court of British Columbia found that the NAFTA award was the product of a 'commercial arbitration' for the purposes of the

[353] *Eg*, Austria Model BIT, Art. 14, *UNCTAD Compendium* (Vol. VI, 2002) 265.

[354] UNCTAD has also recognised the applicability of the New York Convention to bilateral investment treaty awards. See UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998) 97–8.

[355] United States Model BIT, Art. 9(4)(b), *UNCTAD Compendium* (Vol. VI, 2002) 507; Denmark Model BIT, Art. 9(5), *ibid.* (Vol. VII) 284; Sweden Model BIT, Art. 8(5), *ibid.* (Vol. IX) 313.

[356] Denmark Model BIT, Art. 9(4), *UNCTAD Compendium* (Vol. VII, 2002) 284; Sweden Model BIT, Art. 8(4), *ibid.* (Vol. IX) 313.

[357] (Judgment, 2 May 2001) (2001 BCSC 664), 5 ICSID Rep 236. See generally: J. Cole, 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA' (2002) 19 *J of Int Arbitration* 185; D. Williams, 'International Commercial Arbitration and Globalization: Review and Recourse against Awards Rendered under Investment Treaties' (2003) 4 *J of World Investment* 251.

[358] (Judgment, 2 May 2001) (2001 BCSC 664), 5 ICSID Rep 236, paras. 39–49.

[359] *Ibid.* para. 39.

International Commercial Act because it met the following definition in section 1(6) therein:

> An arbitration is commercial if its arises out of a relationship of a commercial nature including, but not limited to, the following:
>
> . . .
>
> (p) investing.[360]

No review of the NAFTA award with respect to conclusions of law was thus permitted in this instance.

Mexico had argued that the dispute with Metalclad had actually arisen out of a 'regulatory relationship'[361] insofar as the central issue in the NAFTA award related to the bureaucratic obstacles that prevented Metalclad from obtaining a municipal permit for the construction of its hazardous waste landfill and thereby developing its investment. Mexico also used the language of the 'derivative' theory for investment treaty claims by pleading that claimants were procedurally 'stepping into the shoes' of their national states and exercising rights vested in their national states.[362] Justice Tysoe rejected this submission and his appraisal of the nature of the relationship between the host state and the investor is worthy of full quotation:

> It is true that the dispute between Metalclad and the Municipality arose because the Municipality was purporting to exercise a regulatory function. However, the primary relationship between Metalclad and Mexico was one of investing and the exercise of a regulatory function by the Municipality was incidental to that primary relationship. The arbitration did not arise under an agreement between Metalclad and the Municipality in connection with regulatory matters. Rather, the arbitration was between Metalclad and Mexico pursuant to an agreement dealing with the treatment of investors.[363]
>
> In addition, it must be remembered that Metalclad qualified to make a claim against Mexico by way of arbitration under Chapter 11 because it was an investor of Mexico. If Metalclad was not considered to be an investor of Mexico, the arbitration could not have taken place.[364]

It is submitted that Justice Tysoe was correct to emphasize the commercial nature of the primary relationship between the investor and host state. If Mexico's contention were to be taken to its logical conclusion, a NAFTA award would be 'public in nature' for the purposes of a challenge, and yet 'commercial' in the context of enforcement as envisaged by Article 1136(7) of NAFTA. This analysis of the legal relationship between the investor and the host state is also consistent with the

[360] (Judgment, 2 May 2001) (2001 BCSC 664), 5 ICSID Rep 236, para. 41. [361] *Ibid.* para. 44.

[362] Transcript of Proceedings (19 February 2001) 61, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#Metalclad>. This part of Mexico's submissions was cited in: C. H. Brower, 'Investor-State Disputes under NAFTA: The Empire Strikes Back' (2001) 40 *Columbia J of Transnational L* 43, 63, 70.

[363] (2001 BCSC 664), 5 ICSID Rep 236, para. 46 (Judgment, 2 May 2001).

[364] *Ibid.* para. 47.

conclusion in Part III that the *inter*-state regime of international responsibility does not govern the consequences of the breach of the host state's obligation vis-à-vis the investor.

The second challenge of a treaty award was in *Czech Republic v CME Czech Republic B.V.*[365] before the Svea Court of Appeals in Stockholm. Without elaborate analysis, the Court assumed that the award was part of the Swedish legal order because the seat of the arbitration was in Stockholm.[366] Hence the Swedish Arbitration Act governed the challenge proceedings 'notwithstanding that the dispute has an international connection'.[367]

Similarly, in *United Mexican States v Marvin Roy Feldman Karpa*,[368] Justice Chilcolt of the Ontario Superior Court of Justice applied the Ontario International Commercial Arbitration Act by reason of the parties' designation of Ottawa as the place of arbitration in the NAFTA proceedings.[369] In *Attorney General of Canada v S.D. Myers, Inc.*,[370] Justice Kelen of the Federal Court in Ottawa simply noted that the Commercial Arbitration Act 'expressly applies to an arbitral claim under Chapter 11 of NAFTA.'[371]

Thus, on four separate occasions, a municipal court at the seat of the arbitration has exercised jurisdiction over an investment treaty award pursuant to municipal legislation dealing with commercial arbitration. This state practice is evidence that investment disputes 'arise out of a civil or commercial matter' for the purposes of Article 15 of the European Convention on Sovereign Immunity and the rule of customary international law which it is likely to accurately reflect. It follows that a state party to an investment treaty arbitration cannot plead sovereign immunity from the jurisdiction of a municipal court properly seized of an application pertaining to that arbitration, whether or not the participation of that state in the arbitration constitutes a waiver of immunity.[372] This conclusion, in turn, raises a very strong presumption that the procedural law governing investment treaty arbitrations is the *lex loci arbitri* because the municipal courts of that legal system are under no international obligation to decline jurisdiction over such arbitrations. In the absence of concrete evidence of a contrary intention of the state parties to investment treaties, public international law is not, therefore, the procedural law of investment treaty arbitrations.

[365] (Judgment of 15 May 2003), reproduced and translated in (2003) 42 ILM 919.

[366] *Ibid.* 960.

[367] Section 46 of the Swedish Arbitration Act 1999 provides that: 'This Act shall apply to arbitral proceedings which take place in Sweden notwithstanding the fact that the dispute has an international connection.' *Ibid.*

[368] Decision, 3 December 2003 (03-CV-23500), available at <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/revision/031203_Decision_Chilcott.pdf >.

[369] *Ibid.* paras. 51–2.

[370] Decision, 13 January 2004 (2004 FC 38), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf >.

[371] *Ibid.* para. 21.

[372] 'There is some controversy as to whether a state's consent to an arbitral procedure constitutes a waiver of immunity regardless of the subject matter of the arbitration, or whether the arbitration must nevertheless concern 'civil or commercial matters'. See H. Fox, above n. 333, 269–70.

There is further evidence to support this finding. Many investment treaties contain an offer to arbitrate before an *ad hoc* tribunal pursuant to the UNCITRAL Arbitration Rules, which were designed for international commercial arbitration. Article 1(2) of the Rules provides that '[t]hese Rules shall govern the arbitration except that where any of the Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.' It is widely accepted that Article 1(2) of the UNCITRAL Arbitration Rules contemplates the application of the mandatory rules of the *lex loci arbitri*,[373] and this would not follow from a choice of public international law to govern the arbitration.

It was open to the contracting states of investment treaties to make reference to procedural rules designed for state/state arbitration such as the UN Draft Convention on Arbitral Procedure in their offer to arbitrate with investors. Instead, most investment treaties disclose a clear preference for arbitral rules inspired by international commercial arbitration in the context of investor/state disputes, without replicating that choice for the state/state arbitral mechanism in investment treaties. The clearest example is the radical difference in the choice of procedural rules for investor/state disputes in Chapter 11 of the NAFTA and those rules adopted for state/state disputes in Chapter 20.

E. THE RELEVANCE OF THE PROCEDURAL LAW IN PRACTICE

Investor/state arbitrations under investment treaties are governed by the express provisions of the investment treaty, the relevant procedural rules chosen by the parties (such as the UNCITRAL Rules) and the municipal law of the seat of the arbitration (*lex loci arbitri*). The municipal courts at the seat of the arbitration are competent to exercise a supervisory jurisdiction over the arbitral process and hear applications by the parties for intervention in that process, such as for interim or conservatory measures or the appointment of an arbitrator. They are also competent to hear challenges to the award rendered by the treaty tribunal as demonstrated in *United Mexican States v Metalclad*,[374] *Czech Republic v CME Czech*

[373] At the ninth session of the drafting committee for the UNCITRAL Arbitration Rules it was decided 'to add to article 1 a general reference to the effect that all provisions in these Rules were subject to the national law applicable to the arbitration.' Report of Committee II, Ninth Session (1976) UN Doc A/CN.9/IX/CRP.1, para. 12. See also: K. Böckstiegel, 'The Relevance of National Arbitration Law for Arbitrators under the UNCITRAL Arbitration Rules' (1984) 1 *J of Int Arbitration* 223, 230; A. van den Berg, above n. 35, 342–3. It is interesting to note in this respect that the Permanent Court of Arbitration has issued model arbitration rules for arbitrations between two states that do not replicate Art. 1(2) of the UNCITRAL Arbitration Rules, whereas the model rules for arbitrations between states and private parties do replicate Art. 1(2). See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, available at <http://www.pca-cpa.org/ENGLISH/BD/2stateeng.htm>; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State, Art. 1(3), available at <http://pca-cpa.org/ENGLISH/BD/1stateeng.htm>.

[374] (Judgment, 2 May 2001) (2001 BCSC 664), 5 ICSID Rep 236.

Republic B.V.,[375] *United Mexican States v Martin Roy Feldman Karpa*[376] *and Attorney General of Canada v S.D. Myers, Inc.*[377] Finally, as investment treaty arbitration awards are not public international law awards, they are enforceable under the New York Convention and other international instruments for the recognition and enforcement of foreign arbitral awards.

F. ICSID ARBITRATIONS

Against this background it is necessary to briefly return to the *sui generis* nature of arbitrations conducted under the aegis of the ICSID Convention and the ICSID Arbitration Rules. It is normally assumed that the *lex arbitri* for ICSID arbitrations is international law. But what does this simple designation actually mean? Does it entail, for example, that customary international law on the admissibility of claims should supplement the ICSID Convention and Arbitration Rules?

ICSID arbitration is 'international' in the sense that it is detached from any system of municipal law. That much is uncontroversial. But there is a real danger in making blanket assertions about the *lex arbitri* of ICSID arbitrations as being 'international law'. International procedural rules for the admissibility of claims, such as the rules on the nationality of claims and the exhaustion of local remedies, have developed in the context of diplomatic protection. As was discussed at length in Part II, there is no reason to import such concepts into investment treaty arbitrations. An analysis of the *lex arbitri* of ICSID arbitrations thus requires a far more nuanced approach to reflect the complexities of this *sui generis* regime. For instance, it is clear from the *travaux préparatoires* for the ICSID Convention that the international rules on the nationality of claims were not intended to supplement the express provision of Article 25 of the ICSID Convention.[378] In contrasting the rules on nationality for the purposes of diplomatic protection and the ICSID Convention, Amerasinghe has written:

> In the case of the [ICSID] Convention the role of nationality is different. It serves as a means of bringing the private party within the jurisdictional pale of the Centre. There is no question of diplomatic protection, nor is it by virtue of a State's right to exercise diplomatic protection over a private party that he has the capacity to appear in proceedings before the Centre.[379]

[375] (Svea Court of Appeals, 15 May 2003), reproduced and translated in (2003) 42 ILM 919.

[376] Decision, 3 December 2003 (03-CV-23500), available at <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/revision/031203_Decision_Chilcott.pdf>.

[377] Decision, 13 January 2004 (2004 FC 38), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf>.

[378] C. Amerasinghe, 'Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1976) 48 *BYBIL* 227, 256, 259.

[379] *Ibid.* 244–5, 247, 249, 256. The author further states: '[T]he question of nationality of juridical persons for the purpose of the Centre's jurisdiction can be dealt with by a tribunal or commission in extremely flexible terms and particularly because it is not bound by the law of diplomatic protection

ICSID tribunals have often been sensitive to the *sui generis* nature of this arbitration regime. In *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*,[380] the ICSID Tribunal was confronted with a jurisdictional challenge by the Respondent to the effect that the Claimant was no longer the real party in interest because it had assigned the beneficial interest of its claims to its national state, the Czech Republic, after the arbitral proceedings had commenced.[381] The Tribunal distanced itself from the rule of customary international law that an alien must have beneficial ownership over contractual claims that provide the factual basis of a diplomatic protection claim by its national state:

> [A]bsence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect that standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party.[382]

It is reasonably clear from the existing authority in diplomatic protection cases that this finding contradicts the rule in general international law[383] and can only be justified by the *sui generis* nature of the ICSID regime.

VI. Challenge and Enforcement of Awards

A. Introduction

If the ultimate counterparty to the host state's obligations under an investment treaty were the national state of the investor, and the *inter*-state regime of international responsibility were applicable to a violation of such obligations, treaty tribunals would render true international awards governed by public international law and incapable of being challenged or enforced in municipal courts. As was concluded in Part III, the sub-system of international responsibility that governs a breach of an investment treaty by the host state vis-à-vis the investor does not generate a liability that is comparable to a state's breach of a treaty that is actionable by another state. The liability created by this sub-system of international responsibility is perhaps more adequately described as having a transnational commercial nature in view of the commercial interests at the heart of the dispute, although in itself this label is in practice unlikely to be of great utility. Moreover, this responsibility is backed by an international treaty instrument, and is thus not comparable with, for instance, the

in this regard. The nationality of a juridical person under the Convention can be seen in the light of a broad definition which requires some adequate connection between the juridical person and a State.' *Ibid.* 259.

[380] (Decision on Objections to Jurisdiction, 24 May 1999) Case No. ARB/97/4, 5 ICSID Rep 300.

[381] *Ibid.* para. 28. [382] *Ibid.* para. 32.

[383] *American Security and Trust Company Claim* (1958) 26 ILR 322: 'It is clear that the national character of the claim must be tested by the nationality of the individual holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim', cited in I. Brownlie, above n. 92, 462. See further: *Oppenheim's International Law*, above n. 92, 514.

contractual liability that follows a breach of an international sale of goods contract by a state party. Hence the *sui generis* nature of the secondary rules of responsibility that govern a breach of an investment treaty.

Although these observations on the consequences that flow from a breach of an investment treaty might be novel, it reflects existing state practice. This state practice was reviewed in Part V and yielded the conclusion that treaty instruments and municipal court decisions give controlling weight to the 'private' or 'commercial' aspects of investment treaty awards as opposed to their public international or public regulatory elements.

Judicial consideration of this issue is limited to the four court judgements dealing with challenges to investment treaty awards, namely *United Mexican States v Metalclad Corporation*[384] in the Supreme Court of British Colombia, *Czech Republic v CME Czech Republic B.V.*[385] in the Svea Court of Appeals, *United Mexican States v Marvin Roy Feldman Karpa*[386] in the Superior Court of Justice of Ontario and *Attorney General of Canada v S.D. Myers, Inc.*[387] in the Federal Court in Ottawa. There is no precedent at the time of writing on recognition and enforcement proceedings with respect to investment treaty awards. It is instructive in this context to examine the problems that have arisen in the recognition and enforcement of awards rendered by the Iran/US Claims Tribunal, as many of the insights from this body of precedents will be invaluable in evaluating the applicable enforcement regime for investment treaty awards.

B. PRECEDENTS OF THE IRAN/US CLAIMS TRIBUNAL

The Algiers Accords envisage a strict procedure for the enforcement of awards against Iran whereby payment under such awards is made out of a security fund created from Iran's assets frozen by the United States.[388] Thus, for all practical purposes, awards against Iran are self-executing when rendered. The constituent documents of the Iran/US Claims Tribunal are, on the other hand, silent on the enforcement procedure for awards against US nationals, save for general provisions to the effect that 'all decisions and awards of the Tribunal shall be final and binding'[389] and that the state parties are obliged 'to carry out the award without delay'.[390]

[384] (2001 BCSC 664), 5 ICSID Rep 236.

[385] Reproduced and translated in (2003) 42 ILM 919.

[386] Decision, 3 December 2003 (03-CV-23500), available at <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/revision/031203_Decision_Chilcott.pdf>.

[387] Decision, 13 January 2004 (2004 FC 38), available at <http://www.dfait-macci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf>.

[388] The Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments made by Iran and the United States, para. 7.

[389] The Declaration of the Government of Algeria Concerning the Settlement of Claims by Iran and the United States, Art. IV(1); Art. 32(2) of the Tribunal Rules of Procedure.

[390] Article 32(2) of the Tribunal Rules of Procedure. See generally: R. Lewis, 'What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?' (1988) 26 *Columbia J of Transnational L* 515.

Not long after the Iran/US Claims Tribunal came into existence, Iran requested an interpretation by the Full Tribunal of the nature of the United State's obligation to satisfy promptly any awards rendered by the Iran/US Claims Tribunal against citizens of the United States.

In Case A/21,[391] the Full Tribunal held that, consistent with other instruments relating to international arbitration, the rule that awards shall be 'final and binding' does not entail that the awards are self-executing. Rather, a failure by the award debtor to comply voluntarily with an award that is ripe for enforcement opens the door for the other party to compel compliance through municipal court procedures.[392] The Full Tribunal also rejected Iran's contention that the United States is under an obligation to step in and pay awards against its nationals when such nationals refuse to do so voluntarily due to the 'reciprocal system of commitments' created by the Algiers Accords:

> [T]he Tribunal cannot find that any obligation of the United States to satisfy Tribunal awards against its nationals flows from the 'international' character of the Tribunal, or from any principle of customary international law based on the United States having been a party to the treaty that established the Tribunal.[393]

This conclusion was supported by reference to the *dicta* of a previous interpretative decision of the Full Tribunal in Case A/18[394] to the effect that 'it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal.'[395]

The Full Tribunal in Case A/21 then provided some important guidance on the content of the United States' obligation under the Algiers Accords to respect the final and binding awards of the Iran/US Claims Tribunal:

> [T]he act of entering into a treaty in good faith carries with it the obligation to fulfil the object and purpose of that treaty—in other words, to take steps to ensure its effectiveness. In this respect, the Algiers Declarations impose upon the United States a duty to implement the Algiers Declarations in good faith so as to ensure that the jurisdiction and authority of the Tribunal are respected. The Parties to the Algiers Declarations are obligated to implement them in such a way that the awards of the Tribunal will be treated as valid and enforceable in their respective national jurisdictions.
>
> This good faith obligation leaves a considerable latitude to the State Parties as to the nature of the procedures and mechanisms by which Tribunal awards rendered against their nationals may be enforced. The Tribunal has no authority under the Algiers Declarations to prescribe the means by which each of the States provides for such enforcement. Certainly, if no enforcement procedure were available in a State Party, or if recourse to such procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their

[391] Islamic Republic of Iran and United States (Case A/21) (4 May 1987) DEC 62-A21-FT, 13 Iran/US CTR 324.
[392] *Ibid.* para. 10.
[393] *Ibid.* para. 13.
[394] Islamic Republic of Iran and United States (Case A/18) (Dual Nationality) (6 April 1984) DEC 32-A18-FT, 5 Iran-US CTR 251
[395] *Ibid.* 261.

enforcement, this would violate the State's obligations under the Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as part of the State's legal system they would have to be established, by means of legislation or other appropriate measures. Such procedures must be available on a basis at least as favorable as that allowed to parties who seek recognition or enforcement of foreign arbitral awards.[396]

Case A/21 has been cited at length because the Full Tribunal's comments on the nature and content of the obligation upon the state parties to enforce awards of the Tribunal are apposite for the same obligation on state parties in the context of investment treaty awards. The final sentence of the above quotation indicates that the New York Convention regime is an appropriate enforcement mechanism for Iran/US Claims Tribunal awards and this is consistent with the reference to the New York Convention in many investment treaties.

It might be said that the problem of enforcement is more acute in the Iran/US Claims Tribunal context than for investment treaty arbitration because the work of the former has been more frequently concerned with arbitral awards *against* private parties. Nevertheless, as the challenges to awards in the *United Mexican States v Metalclad Inc.*,[397] *Czech Republic v CME Czech Republic B.V.*,[398] *United Mexican States v Marvin Roy Feldman Karpa*[399] and *Attorney General of Canada v S.D. Myers, Inc.*[400] demonstrate, state parties to investment disputes may be no less resilient than private parties to the enforcement of adverse awards. Moreover, it is reasonable to expect that investment treaty tribunals may have the occasion in the future to award damages against the investor in satisfaction of a counterclaim brought by the state party.[401]

Two issues emerge from the application of the New York Convention, and other international or municipal regimes for the enforcement of foreign awards, to awards rendered by investment treaty tribunals. The first is whether the courts of the enforcement state are at liberty to consider and uphold defences to enforcement such as those set out in Article V of the New York Convention. Formulated differently, is there anything

[396] Islamic Republic of Iran and United States (Case A/21) (4 May 1987) DEC 62-A21-FT, 13 Iran/US CTR 324, paras 14, 15.

[397] (Judgment, 2 May 2001) (2001 BCSC 664), 5 ICSID Rep 236, para. 46.

[398] (Svea Court of Appeals, 15 May 2003), reproduced and translated in (2003) 42 ILM 919

[399] Decision, 3 December 2003 (03-CV-23500), available at <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/revision/031203_Decision_Chilcott.pdf>.

[400] Decision, 13 January 2004 (2004 FC 38), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf>.

[401] The only reported investment treaty case where a counterclaim has been raised by the respondent state (and dismissed on its merits by the tribunal) is: *Genin and Others v Republic of Estonia* (Award, 25 June 2001) Case No. ARB/99/2, 6 ICSID Rep 241. Counterclaims were also advanced by the respondent state in: *Saluka Investments B.V. v Czech Republic* (UNCITRAL arbitration administered by the PCA, Netherlands/Czech Republic BIT). The Tribunal's jurisdiction over these counterclaims was contested. (This case was pending as this article was finalised.)

'special' about an investment treaty award that would lead to a different approach? The second is whether the investor might have a remedy against an improper refusal to enforce a treaty award, for instance, in the courts of the respondent state. The Iran/US Claims Tribunal has grappled with both these issues.

The first instance of non-enforcement was in *Gould Marketing Inc., v Ministry of Defence of the Islamic Republic of Iran*.[402] The US Court of Appeal, consistent with the guidance in Case A/21,[403] ruled that it had jurisdiction on the basis of the New York Convention.[404] It confirmed the award with respect to the order to pay damages of USD 3.6 million to Iran (requested by counterclaim), but refused to enforce an order for specific performance requiring Gould Marketing to surrender certain communications equipment to Iran in Gould's possession. This refusal was motivated by deference to US export regulations, which would have been violated if the communications equipment had been transported to Iran. Iran appealed this part of the District Court's decision, however, in the intervening months the parties reached a settlement.

The second instance was in relation to the award in *Avco Corp. v Iran Aircraft Industries*,[405] pursuant to which the tribunal had upheld the Iranian party's counterclaim for USD 3.5 million. Iran Aircraft Industries brought enforcement proceedings in the US District Court for the District of Connecticut, which again assumed jurisdiction pursuant to the New York Convention.[406] The enforcement petition was denied on the basis of Article V(1)(b) of the New York Convention due to an alleged impediment suffered by Avco in presenting its case caused by detrimental reliance on a procedural direction of the tribunal.[407] The essence of the direction was that Avco could dispense with submitting voluminous invoices in support of its claim by submitting an expert report *in lieu*. A differently constituted tribunal then appeared to draw an adverse inference from this omission in evidence in its final award.[408] The US Court of Appeals affirmed the District Court's judgment. It expressly rejected Iran Aircraft's submission that awards of the Iran/US Claims Tribunals are directly enforceable in the US Courts, and found that 'even a "final" and "binding" arbitral award is subject to the defenses to enforcement provided for in the New York Convention'.[409]

Iran then sought another interpretation of the United States' obligations under the Algiers Accords in light of these two instances of non-enforcement. The Full Tribunal in Case A/27[410] was faced with a dilemma that originated in the guidance previously provided in Case A/21, which

[402] (29 June 1984) 136–49/50–2, 6 Iran/US CTR 272.

[403] Islamic Republic of Iran and United States (Case A/21) (4 May 1987) DEC 62-A21-FT, 13 Iran/US CTR 324.

[404] *Ministry of Defence of the Islamic Republic of Iran v Gould Marketing, Inc.*, 887 F.2d 1357 (9th Cir. 1989).

[405] (18 July 1988) 377–261–3, 19 Iran/US CTR 200.

[406] See *Iran Aircraft Industries v Avco Corp.*, 980 F.2d 141, 142 (2d Cir. 1992).

[407] *Ibid.*

[408] *Ibid.* 143.

[409] *Ibid.* 145.

[410] Islamic Republic of Iran and United States (Case A/27) (5 June 1998) 586-A27-FT.

implicitly endorsed the New York Convention as a mechanism for the recognition and enforcement of Iran/US Claims Tribunal awards by stating that the enforcement procedure 'must be available on a basis at least as favorable as that allowed to parties who seek recognition and enforcement of foreign arbitral awards'.[411] On the other hand, the Full Tribunal in Case A/21 raised the possibility of a violation of the Algiers Accords if resort to this mechanism led to a 'refusal to implement Tribunal awards'.[412] If the US is entitled to rely on the New York Convention as the enforcement mechanism, then surely the possibility of non-enforcement cannot be ruled out if the US court seized of the matter upholds a defence to enforcement on one of the grounds of Article V? The Full Tribunal's answer to this paradox in Case A/27 is not entirely persuasive:

> Indeed, Article IV, paragraph 1, of the Claims Settlement Declaration, which provides that '[a]ll decisions and awards of the Tribunal shall be final and binding,' rules out the possibility of readjudication of the *merits* of Tribunal awards by a municipal court, either under the guise of Article V of the New York Convention or by any other means.[413]

The problem is, of course, that the New York Convention does not permit municipal courts seized with an enforcement application to readjudicate the merits of a foreign arbitral award. The US Court of Appeal had affirmed a decision to refuse enforcement in *Avco* due to a perceived procedural deficiency in the arbitral process. The Full Tribunal essentially reviewed the merits of *that* decision by expressly ruling that the US Court of Appeal was wrong in its assessment of the procedural deficiency. According to the Full Tribunal, the failure of Avco to present the invoices was not material to the Tribunal's decision to dismiss its claim,[414] and hence the US Court's decision to the contrary amounted to 'reconsidering an issue that had been already aired and decided by the Tribunal.'[415] This in turn constituted a failure to treat the award as 'final and binding' in accordance with the Claims Settlement Declaration. The Full Tribunal went on to find that this amounted to a breach of international law attributable to the US for which there was an obligation to make reparation.[416]

Even assuming that the Full Tribunal was correct in its interpretation of the Tribunal's award in *Avco*, it is clear that the US Court's decision cannot be characterised as a denial of justice under customary international law because there was no suggestion that there were serious procedural inadequacies in the administration of justice by the US Courts.[417]

[411] Islamic Republic of Iran and United States (Case A/21) (4 May 1987) DEC 62-A21-FT, 13 Iran/US CTR 324, para. 15. [412] *Ibid.*

[413] Islamic Republic of Iran and United States (Case A/27) (5 June 1998) 586-A27-FT, para. 63 (emphasis added).

[414] This decision by the Second Circuit appears to be erroneous. A careful reading of the Tribunal's award in Avco shows that it was based not on the absence of the invoices underlying Avco's claims, but on a lack of proof that those invoices were payable. *Ibid.* para. 66. [415] *Ibid.* para. 69.

[416] *Ibid.* para. 71.

[417] An authoritative definition of denial of justice is provided by Art. 9 of the Harvard Research Draft of 1929: 'A State is responsible if an injury to an alien results from a denial of justice. Denial of

The Full Tribunal nevertheless found that the United States violated the Algiers Accords.

In reaching this decision, the Full Tribunal entertained the possibility that the 'final and binding' rule of the Claims Settlement Declaration prohibited the US Courts from exercising their jurisdiction to review awards on the grounds of Article V of the New York Convention. Such a ruling would have contradicted its previous finding that the New York Convention was an appropriate mechanism for the enforcement of Iran/US Claims Tribunal awards in the United States. If the New York Convention applies, then a party resisting the enforcement of an award in the United States would be entitled to rely on Article V grounds, unless the Algiers Accords creates an exception within the meaning of Article VII(1).[418] This is unlikely because there is a stipulation in most arbitral rules that an award is 'final and binding' when rendered by an arbitral tribunal, but it has never seriously been argued that an award of an ICC tribunal,[419] for instance, cannot be refused enforcement on the basis of Article V of the New York Convention.

Another problem with this approach is that it would mandate the enforcement of an award regardless of any procedural injustice or fraud that might have infected the arbitral process. Under customary international law, an award procured by fraud or duress or rendered in proceedings violative of fundamental norms of fairness is a nullity.[420] It would be surprising if the special character of the Iran/US Claims Tribunal created a void in which such awards could be enforced. The Full Tribunal actually touched upon this point in a footnote to its decision and intimated a possible solution:

> The Tribunal recognizes that no tribunal can declare itself immune from procedural error or the possibility of fraud, forgery, or perjury that it may not detect. *In such hypothetical cases, however, revision of the award could be done only by the Tribunal, if it concluded that it had the authority to do so, not by any other court.*[421]

justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.' (1929) 23 *AJIL* 173. For approval of this definition, see: D. O'Connell, above n. 72, 947; I. Brownlie, above n. 92, 506, and writers listed at note 51.

[418] Article VII(1) of the New York Convention provides: 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

[419] Article 28(6) of the ICC Rules of Arbitration provides: 'Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.'

[420] See generally: W. Reisman, *Nullity and Revision: The Review and Enforcement of International judgments and Awards* (1971) 64 *et seq.*

[421] Islamic Republic of Iran and United States (Case A/27) (5 June 1998) 586-A27-FT, para. 64 at note 6 (emphasis added), available at <http://www.iusct.org/awards/award-586–927-ft-eng.pdf>.

The Full Court thus appears to discourage parties from raising these fundamental grounds for the nullity of an Iran/US Claims Tribunal award before municipal courts, while at the same time reserving for itself jurisdiction over the revision of an award '*if* it had the authority to do so'.

There is no provision in the Algiers Accords dealing with the competence of the Iran/US Claims Tribunal to review its own awards and it would be extraordinary for an arbitral tribunal created by an international treaty instrument to confer upon itself an inherent jurisdiction to do so in the absence of an express stipulation in that instrument.[422] Unlike the Algiers Accords, the ICSID Convention does have an internal mechanism for the review of awards, but to suggest that the ICSID Secretariat could exercise an inherent jurisdiction and establish a control mechanism in the absence of Article 52 is less than convincing.

In the end, the Full Tribunal backed away from a definitive ruling on what it considered to be the legitimate route to the revision of an award by refusing to accede to Iran's request for an order requiring the United States to establish a suitable procedure for the enforcement of all future awards against United States nationals.[423] The Full Tribunal thereby left the *status quo* of the application of the New York Convention mechanism for enforcement intact, but reserved for itself the power to test the compatibility of US Court decisions dealing with the Article V grounds for the refusal of enforcement with the obligation of the US to respect the provision in the Claims Settlement Declaration that '[a]ll decisions and awards of the Tribunal shall be final and binding.'[424]

The problem of enforcement of awards rendered under the auspices of the Iran/US Claims Tribunals has been discussed at length because of its importance to a proper analysis of how similar issues should be resolved in the context of investment treaty awards. In particular, consideration of a more optimal approach to the situation facing the Full Tribunal in A/27 will shed light on the form of any recourse an investor or state might have in the event that an investment treaty award is annulled or not enforced by a municipal court.

In considering the problem arising in Case A/27, it is first necessary to clarify the significance of a treaty provision to the effect that awards are 'final and binding'. Such a provision, in the context of the Iran/US Claims Tribunal, ensures that decisions of tribunals on the matters in dispute is *res judicata* between the parties in international *fora* and before US and Iranian courts. That an award is 'final and binding' does not mean, however, that the award's validity is impervious to review on narrow grounds relating to procedural irregularity or international public policy. Furthermore, as previously mentioned, most arbitral rules contain

[422] The Iran/US Claims Tribunal considered whether it had an inherent or implied power to review its awards upon an allegation of fraud or perjury on several occasions but never reached any definitive conclusions. See the cases cited by G. Aldrich, above n. 9, 456–7; C. Brower & J. Brueschke, above n. 9, 245–59.

[423] *Ibid.* para. 74.

[424] *Ibid.* para. 63.

a provision to the effect that awards are 'final and binding', and yet awards rendered pursuant to the UNCITRAL or ICC Arbitration Rules are most certainly subject to review under Article V of the New York Convention by municipal courts at the place of enforcement.

The US Court of Appeal did not, therefore, violate the Algiers Accords by exercising its jurisdiction to review the *Avco* award in accordance with the grounds set out in Article V of the New York Convention, and the decision of the Full Tribunal did not rest upon such a conclusion. Instead, the Full Tribunal interpreted the Algeirs Accords to 'rule out the possibility of readjudication of the merits of Tribunal awards . . . under the New York Convention,'[425] and found that the US Court's decision strayed into such a readjudication by reopening the Tribunal's findings with respect to the relevance of the invoices.[426] This conclusion, limited to the specific instance of the US Court's application of Article V of the New York Convention, is far more defensible than the common interpretation that the Full Tribunal categorically denied the possibility of any review of its awards against the grounds in Article V. [427] It is submitted, however, that it would have been preferable for the Full Court to be less equivocal about the legitimacy of the US Court's jurisdiction to review the awards of the Iran/US Claims Tribunal pursuant to Article V of the New York Convention and test the US Court's compliance with its obligations under that international treaty rather than the Algiers Accords. The New York Convention contains more detailed and specific provisions on the scope of the review of arbitral awards and there is a considerable body of judicial precedents to provide interpretative guidance. The New York Convention is, therefore, a more stable platform for invoking the international responsibility of the United States if a breach was to be found. If, on the face of the award, it was in fact clear that Avco's failure to present the original invoices was irrelevant to the tribunal's dismissal of part of its claim, then the US Court's failure to respect the *res judicata* effect of this finding on the significance of the invoices, together with its misplaced reliance on Article V(1)(b) of the New York Convention that followed, might constitute a breach of Article III of the same Convention.[428]

C. CHALLENGES TO AND ENFORCEMENT OF INVESTMENT TREATY AWARDS

The starting point is that it is well settled that the New York Convention is applicable to awards involving states[429] and investment treaties have

[425] Islamic Republic of Iran and United States (Case A/27) (5 June 1998) 586-A27-FT, para. 63.

[426] *Ibid.* para. 66.

[427] See, *eg*: J. Scifi, above n. 33, 21: '[I]t is certain that grounds against enforcement identified in Art. V of the New York Convention cannot be applicable to Tribunal awards.'

[428] On the *res judicata* aspect of Art. III, see generally: A. van den Berg, *The New York Convention* (1981) 244.

[429] In the Netherlands: *Société Européene d'Études et d'Entreprises v Socialist Federal Republic of Yugoslavia*, HR Oct. 26, 1973, NJ 361, translated in (1974) 5 *Netherlands Yrb of Int L* 290. In France: CA Rouen, Nov. 13, 1984, *Société Européene d'Études et d'Entreprises v République Fédérale*

expressly confirmed that this international legal regime for the recognition and enforcement of awards extends to awards rendered by treaty tribunals.[430] Moreover, the existing practice of municipal courts relating to the challenge of investment treaty awards, which have upheld their jurisdiction over such awards on the basis of domestic legislation on international commercial arbitration, is consistent with the characterisation of investment treaty awards as 'foreign' or 'commercial' for the purposes of the New York Convention. In short, there is no evidence from the text of investment treaties or subsequent practice to refute the conclusion that the New York Convention applies to investment treaty awards not rendered under the auspices of the ICSID Convention.

Investors might be aggrieved by the unjustified annulment of awards at the seat of the arbitration or the refusal to enforce awards in the host state or in a third country. What forum would be competent to grant a remedy in such a situation? If the municipal courts of the host state have failed to enforce an award, the investor might bring a fresh claim under the relevant investment treaty to redress the unlawful frustration of its right to enforce against the award debtor. The legal sources of such a right might be several. In relation to a failure to enforce, a cause of action could be advanced on the basis of the state's violation of the New York Convention or a denial of justice in seeking enforcement under customary international law.[431] Each of these grounds would have to be advanced within the scope of one of the express treaty obligations, such as the host state's duty to accord an investment 'fair and equitable treatment'. Furthermore, it would be necessary for the investor to establish that the new dispute relates to the same investment that was the subject of the original award for the purposes of *jus standi*. Alternatively, it may be argued that the award constitutes a new investment in the form of an award debt in favour of an investor.[432]

Another avenue for redress might be the state/state arbitration procedure provided in investment treaties. Although the investor will be confronted with the functional difficulties discussed in Part II that characterise diplomatic protection claims, there would be no problem of identifying the 'investment' underlying the dispute because this is not a requirement for the jurisdiction of the tribunal. The possibility that a national state is competent to bring a diplomatic protection claim to remedy the unlawful refusal to enforce an award is expressly recognised by Article 27(1) of the ICSID Convention.[433] Finally, it should be noted that, of the two possible avenues for redress, only the state/state arbitration

de Yougoslavie, translated in (1985) 24 ILM 345; affirmed, Cass. le civ., Nov. 18, 1986, translated in (1987) 26 ILM 377; as cited in G. Delaume, 'Recognition and Enforcement of State Contract Awards in the United States: A Restatement' (1997) 91 *AJIL* 476, 477 at notes 14 & 15.

[430] See Part V(D) above.

[431] See J. Paulsson, *Denial of Justice in International Law* (forthcoming) Ch. 6.

[432] It would be necessary to demonstrate that the award debt constitutes an investment for the purposes of the definition in the relevant investment treaty and that the *situs* of that debt is at the place of the debtor.

[433] Article 27(1) provides: 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall

mechanism would allow a state to seek a remedy for a failure to enforce an award in its favour in the jurisdiction of the investor (*ie.* if the state had been successful in a counterclaim or had costs awarded in its favour).

VII. Jurisdictional Conflicts in Investment Treaty Arbitration

A. INTRODUCTION

The positivist bias of traditional conflict of laws scholarship, resting on the notion of distinct municipal and international legal orders, is really beginning to show its age. A dispute with international dimensions is ever more likely to give rise to problems of overlapping jurisdictions on both the domestic and international plane. Forum shoppers of the future will be less concerned with the remedial possibilities in proceedings before the domestic courts of different states, but will instead seek advantage from the absence of hierarchy and coordination among the various types of international tribunals[434] and from the often strained relationship between such tribunals and municipal courts. There is as yet no established body of principles to deal adequately with the new realities of vertical and horizontal clashes of adjudicative competence. At the same time, the conceivable range of remedies available to foreign investors has become remarkably broad. First, an investor whose property rights in its investment have been interfered with by an executive act of an organ of the host state would normally have the right to pursue a tortious claim for damages or an administrative procedure to have the relevant decision annulled in the municipal courts. Or, if the investor acquired the investment on the basis of a contract with the host state, the interference may be actionable as a contractual claim before the municipal courts of the host state or an arbitral tribunal with jurisdiction pursuant to an arbitration clause in the contract. The competence of such a tribunal may emanate purely from the contractual incorporation of arbitral rules (for example, an ICC tribunal or an *ad hoc* UNCITRAL tribunal) or a combination of contractual incorporation and an applicable international treaty ratified by the host state and the national state of the investor (the case of an ICSID tribunal). Thirdly, the investor may also rely upon a bilateral or multilateral investment treaty which the national state of the investor has ratified together with the host state and thereby bring a claim based upon the minimum standards of treatment prescribed by the applicable treaty.

have consented to submit or shall have submitted to arbitration under this Convention, *unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.*' (Emphasis added.)

[434] In the human rights context, it has been estimated that there are already forty instances where virtually the same human rights complaints have been brought before both global and regional procedures: Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 60.

Again, depending on the nationality of the investor, it might appeal to the European Court of Human Rights with a claim founded on Protocol 1, Article 1 of the European Convention on Human Rights on the protection of property rights or to the Inter-American Court of Human Rights[435] or the African Commission on Human and Peoples' Rights[436] on a similar basis. Finally, the investor might persuade the government of its national state to bring diplomatic protection proceedings on its behalf against the host state before the International Court of Justice if jurisdiction exists or seek redress through an international agreement between the two states on the lump sum settlement of claims.

At the heart of an investment dispute lies private or commercial interests that owe their existence to municipal law. Municipal courts or contractual arbitration tribunals are often competent to rule upon issues relating to the nature and extent of these interests. The municipal courts of the host state may have jurisdiction because (i) the *situs* of the investor's property is in the territory of the host state, (ii) the investor's contract with the host state envisages performance on the territory of the host state, (iii) an executive or administrative act giving rise to a dispute affecting the investor's interests emanates from an organ of the host state, or (iv) the municipal courts are chosen pursuant to a forum selection clause in an investment contract. Alternatively, a contractual arbitral tribunal might have jurisdiction on the same basis as (iv).

As far as questions pertaining to the existence and extent of property rights constituting an investment are concerned, an investment treaty tribunal has less of a warrant to occupy a pre-eminent position vis-à-vis a municipal court or contractual arbitral tribunal than with respect to questions relating to the conformity or otherwise of state conduct with the treaty standards. In testing the state's conduct, an investment treaty tribunal applies the minimum standards of investment protection set out in an international treaty with the interpretative assistance of international law. In performing this task, the principle of the international law of state responsibility that '[t]he responsible state may not rely on the provisions of its internal law as justification for failure to comply with its obligations'[437] ensures a hierarchical relationship between the international tribunal and any municipal court which has pronounced upon aspects of the state's conduct. But in adjudicating issues relating to property interests in the investment, this hierarchical principle no longer comes into play because a treaty tribunal and a municipal court or contractual arbitral tribunal apply the same law, *viz.* the municipal law of the host state. In these circumstances, the potential overlap between the investment tribunal's jurisdiction to adjudge issues pertaining to the nature and extent of the investment and the jurisdiction of other courts and tribunals to do

[435] Inter-American Human Rights Convention, Art. 21.

[436] African Human Rights Charter, Art. 14.

[437] Article 32 of the ILC's Articles on Responsibility of States for International Wrongful Acts, reproduced in J. Crawford, above n. 12, 207.

the same gives rise to what will be termed as 'asymmetrical conflicts', in recognition of the different roles played by municipal law in these *fora*. Before the municipal court or contractual arbitral tribunal, municipal law supplies the cause of action, whereas in the context of a treaty arbitration, it governs an aspect of the investment dispute where the cause of action is detached from municipal law.

Some investment treaties also create the potential for 'symmetrical conflicts' by allowing an investor to bring contractual claims or other causes of action based on municipal law before an investment treaty tribunal. Investment treaties can be divided into four groups based on the possible scope of the treaty tribunal's *ratione materiae* jurisdiction established by the host state's offer to arbitrate in the treaty. The first group of treaties permits 'all' or 'any' disputes relating to investments to be submitted to a treaty tribunal. This is by far the most prevalent type of clause in BITs.[438] The second group, inspired by the United States Model BIT, restricts the scope of the treaty tribunal's *ratione materiae* jurisdiction to three legal sources for the investor's cause of action:

> For the purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognised by this Treaty with respect to a covered investment.[439]

The third group restricts the subject matter of investor/state arbitration exclusively to alleged violations of the substantive provisions of the treaty itself.[440] This is the type of clause favoured by the two relevant multilateral investment treaties, NAFTA[441] and the Energy Charter Treaty.[442] Finally, there is a fourth group of treaties, whose membership has been in

[438] Cambodia Model BIT, Art. 8(1), *UNCTAD Compendium* (Vol. VI, 2002) 466; Iran Model BIT, Art. 12(1), *ibid.* 482; Peru Model BIT, Art. 8(1), *ibid.* 497; Denmark Model BIT, Art. 9(1), *ibid.* (Vol. VII) 283; Finland Model BIT, Art. 9(1), *ibid.* 292; Germany Model BIT, Art. 11 'divergences concerning investments', *ibid.* 301; South Africa Model BIT, Art. 7(1) 'any legal dispute . . . relating to an investment', *ibid.* (Vol. VIII) 276; Turkey Model BIT, Art. 7(1), *ibid.* 284; Maurice Model BIT, Art. 8, *ibid.* (Vol. IX) 299; Sweden Model BIT, Art. 8(1), *ibid.* 313. Several model BITs simply refer to 'investment disputes' without defining this term. This provision is likely to be interpreted in the same way as the broad formulation under consideration: Croatia Model BIT, Art. 10(1), *ibid.* (Vol. VI) 476; Belgo-Luxemburg Economic Union Model BIT, Art. 10(1), *ibid.* (Vol. VII) 275; Mongolia Model BIT, Art. 8, *ibid.* (Vol. IX) 306. Other Model BITs with a wide formulation for 'investment disputes' include: Asian-African Legal Consultative Committee Model BIT, Art. 10(i), *UNCTAD Compendium* (Vol. III, 1996) 121; Switzerland Model BIT, Art. 8, *ibid.* 180; UK 'Preferred' Model BIT, Art. 8, *ibid.* 189; Egypt Model BIT, Art. 8(1), *ibid.* (Vol. V, 2000) 296; France Model BIT, Art. 8, *ibid.* 305; Indonesia Model BIT, Art. 8(1), *ibid.* 313; Jamaica Model BIT, Art. 10(1), *ibid.* 321; Netherlands Model BIT, Art. 9, *ibid.* 336; Sri Lanka Model BIT, Art. 8(1), *ibid.* 343.

[439] US Model BIT, Art. 9(1), *UNCTAD Compendium* (Vol. VI, 2002) 506; Burundi Model BIT, Art. 8(1), *ibid.* (Vol. IX) 291; Malaysia Model BIT, Art. 7(1), obligations entered into by a Contracting Party and the Investor in relation to an investment and a breach of the rights under the BIT, *ibid.* (Vol. V, 2000) 328.

[440] UK 'Alternative' Model BIT, Art. 8(1), *UNCTAD Compendium* (Vol. III, 1998) 190; Austria Model BIT, Art. 11, *ibid.* (Vol. VII, 2002) 264.

[441] Articles 1116, 1117.

[442] Article 26(1).

steady decline, that limit the investor/state jurisdiction to disputes about the *quantum* payable in the event of a proscribed expropriation.[443]

Where a treaty tribunal established pursuant to an investment treaty that falls within the first or second of these groups exercises jurisdiction over contractual claims or other causes of action based on municipal law, it will be in *direct* conflict with a municipal court or contractual arbitral tribunal that is seized of the same cause of action between the same parties. At the very least, symmetrical conflicts are latent in any situation where the investor has consummated its investment by contracting with the host state directly and the investment is covered by an investment treaty. If disputes arising out of the contract are, by the inclusion of a forum selection clause, subject to the jurisdiction of a municipal court or contractual arbitral tribunal, then the investor may attempt to bypass this jurisdiction by initiating an investment treaty claim. The treaty tribunal will then be faced with a symmetrical conflict of jurisdiction if the essence of the treaty claim rests upon a breach of contract. This was precisely the dilemma facing the ICSID Tribunal in *SGS v Pakistan*, a case that will be considered in detail in Section C of this Part VII.

Whether a conflict of jurisdiction is to be properly classified as 'asymmetrical' or 'symmetrical' thus depends on the investor's cause of action. If it is objectively based on the minimum standards of treatment set out in the treaty, then the possibility of an asymmetrical conflict arises; whereas in the case of a cause of action founded upon municipal law, or a delocalised body of rules catering for commercial contracts such as the *lex mercatoria*, the only potential conflict will be symmetrical. As each type of conflict must inevitably be resolved differently, it becomes crucial to identify the precise nature of the investor's cause of action as a preliminary matter in all investment disputes where the respondent host state raises a jurisdictional objection based on the competence of a different court or tribunal over the subject-matter of the investment dispute. The proper approach to 'cause of action analysis' will be considered in Section D of this Part VII; it will suffice to point out here that it is a matter of some controversy at present as to whether a treaty tribunal must accept the claimant's own formulation of its claims or instead inquire further into the real 'foundation' of the cause of action to determine whether it can be properly characterised as a treaty claim or a claim based on a contractual or other private law obligation.

It is useful at this juncture to summarise the issues that will be addressed in this Part VII. First, brief consideration will be given to the genesis of the conflicts of jurisdiction problem, which is the non-applicability of the rule on the exhaustion of local remedies (Section B). Symmetrical jurisdictional conflicts will then be dealt with in the context of pre-existing

[443] China Model BIT, Art. 9(3), *UNCTAD Compendium* (Vol. III, 1998) 155. Many of the first wave of BITs that followed the friendship, commerce, and navigation treaties from the communist bloc favoured this approach. An early review of these BITs can be found in: P. Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands YB Int L* 91.

forum selection clauses in investment agreements between the investor and host state (Section C), followed by an enquiry into 'cause of action analysis' and the proper approach to resolving symmetrical conflicts of jurisdiction (Section D). The analysis will then shift to certain types of asymmetrical jurisdictional conflicts that arise where multiple *fora* are competent over questions relating to the existence, nature, and scope of the investment (Section E) and then certain rules, both *de lege lata* and *de lege ferenda*, that might be employed to deal with asymmetrical conflicts of jurisdiction (Section F). Finally, the 'fork in the road' provision in bilateral and multilateral investment treaties will be scrutinized in Section G.

B. THE RULE ON THE EXHAUSTION OF LOCAL REMEDIES

It was concluded in Part III that the rule on the exhaustion of local remedies, of fundamental importance to the law of international responsibility and the international procedural law of diplomatic protection, has no *prima facie* application to investment treaty arbitrations in the absence of an express treaty stipulation to the contrary.[444] In other words, the rules of customary international law on the invocation of state international responsibility are not applicable to the sub-system of responsibility established by investment treaties in relation to investor/state disputes.

The fact that investors can bypass the requirement to exhaust local remedies no doubt increases the efficacy of their rights to international recourse under investment treaties. In the diplomatic protection context, a foreign national's failure to adhere to the exacting requirements of the rule is invoked with great frequency by the national's government in motivating a refusal to take up the claim, and is of course a ubiquitous objection made by respondent states to the admissibility of diplomatic protection claims before international courts and tribunals. The rule has the intended effect of delaying an international reclamation. It is all too common for potential claims to fade away due to the time and expense their prosecution may demand at each level of the municipal court system of the host state.

Investors have thus been liberated from a considerable burden by modern investment treaties that do not mandate the exhaustion of local remedies. But this liberation has come at a cost to the investment treaty system generally, measured in terms of the complex jurisdictional problems that continue to exercise treaty tribunals.

The local remedies rule has the effect of resolving conflicts of jurisdiction over the composite elements of an investment dispute. It ensures, for example, that matters within the competence of municipal courts or contractual arbitral tribunals are properly dealt with by these *fora* before the

[444] One such stipulation was considered in the Spain/Argentina BIT in: *Maffezini v Kingdom of Spain* (Decision on Objections to Jurisdiction, 25 January 2001) Case No. ARB/97/7, 5 ICSID Rep 396.

claim is elevated to the international plane.[445] In the absence of the local remedies rule, treaty tribunals must resolve issues such as (a) the significance of pending litigation in the municipal courts of the host state which touches upon an issue central to the investment treaty claim,[446] and (b) the effect of a forum selection clause in an investment agreement between the investor and the host state where the alleged grievance could be simultaneously classified as a breach of the investment agreement and the relevant investment treaty.[447] The displacement of the local remedies rule in investment treaty arbitrations has made it critical to examine the relationship between the municipal, transnational, and international legal orders. If the local remedies rule did apply to investment disputes, a claim would only reach the treaty tribunal after the other *fora* with jurisdiction over essential elements of the investment dispute had pronounced upon the issues before them. The treaty tribunal would then be in a position to survey the entire course of the dispute and test the host state's conduct against the substantive standards of the treaty, including the procedural treatment of the investor in the other *fora* if a denial of justice is alleged.[448]

C. SYMMETRICAL JURISDICTIONAL CONFLICTS: THE SIGNIFICANCE OF A FORUM SELECTION CLAUSE IN A CONTRACT BETWEEN THE INVESTOR AND THE HOST STATE

With increasing frequency, treaty tribunals must determine the effect of the investor's prior contractual acquiescence to an alternative judicial or arbitral forum with jurisdiction over disputes arising out of an investment contract with the host state. Such a forum selection clause can create a symmetrical jurisdictional conflict in four distinct ways. First, the offer to arbitrate in the treaty might be expressed in broad terms so as to include

[445] See J. Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 *BYBIL* 452, 454, '[The local remedies rule is] a rule for resolving conflicts of jurisdiction between international law and municipal tribunals or authorities'; Y. Shany, above n. 434, 143, '[The local remedies rule is] can be described as a "more appropriate forum" provision, limiting forum selection on behalf of the parties by directing litigation, at least initially, to the more appropriate judicial body.'

[446] See, *eg*: *CME* Partial Award; *Lauder* Final Award; *Wena Hotels Ltd v Arab Republic of Egypt* (Award, 8 December 2000) Case No. ARB/98/4, 6 ICSID Rep 89, and (Decision on Annulment, 5 February 2002) 6 ICSID Rep 129.

[447] See, *eg*: *LANCO International Inc. v Argentine Republic* (Preliminary Decision on Jurisdiction, 8 December 1998) Case No. ARB/97/6, 5 ICSID Rep 367; *Salini Construtorri SpA and Italstrade SpA v Morocco* (Decision on Jurisdiction, 23 July 2001) Case No. ARB/00/4, 6 ICSID Rep 400; *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic* (Award, 21 November 2000) Case No. ARB/97/3, 5 ICSID Rep 299, and (Decision on Annulment, 3 July 2002) 6 ICSID Rep 340; *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290; *Azurix Corp. v The Argentine Republic* (Decision on Jurisdiction, 8 December 2003) Case No. ARB/01/12, (2004) 43 ILM 262.

[448] A similar observation was made in the context of the Iran/US Claims Tribunal: D. Lloyd Jones, above n. 42, 274, '[I]f one presupposes a waiver of the requirement of exhaustion of local remedies, as described above, and consequently the absence of any proceedings before municipal courts, it necessarily follows that the international tribunal will have to deal with both the preliminary issue of whether the claimant's private rights in municipal law have been denied, and the substantive issue of whether this constitutes a denial of justice in international law.'

the possibility that the investor can bring 'any' or 'all' disputes arising out of its investment before a treaty tribunal.[449] Secondly, the treaty may expressly provide that the investor can submit disputes arising out of an investment agreement with the host state to a treaty tribunal.[450] Thirdly, although still controversial, the argument has been made that an 'umbrella clause' in a treaty, which exhorts the contracting states to respect contractual commitments with qualified investors, might have the effect of elevating contractual claims to treaty claims.[451] In such a case, the jurisdiction of the contractually selected forum and of the treaty tribunal will overlap with respect to the same claims. Fourthly, the investor might in effect 'disguise' the contractual foundation of its claims by invoking one of the open-textured minimum standards of protection contained in the treaty and pleading its cause of action on this basis before an investment treaty tribunal.

Before the precedents of treaty tribunals are considered, it will be instructive to examine the earlier international jurisprudence dealing with a similar jurisdictional conundrum in the context of interpreting the effect of the Calvo Clause.[452]

The Calvo Clause, so named in honour of its Latin American founder,[453] has two functions: (i) to ensure that all disputes arising out of the contract between the foreign investor and the host state containing the Calvo Clause are subject to the national law of that state and submitted to its local courts or, exceptionally, to private arbitration; and (ii) to effect a waiver by the investor of its right to appeal for the diplomatic protection of its own national state.[454]

The second purported function of the Calvo Clause has been almost universally denied by international tribunals that have had occasion to consider the clause, which often featured in investment contracts with Latin American states. The simple reason for this rejection is that the right of diplomatic protection vests in the national state of the investor and not in the investor itself. Hence the investor cannot waive a right which it itself does not possess.[455] More important, however, to the immediate

[449] See the examples above at n. 438.

[450] See the examples above at n. 442.

[451] This was argued by the claimant in: *Société Générale De Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290. Examples of 'umbrella clauses' are to be found in: Asian-African Legal Consultative Committee Model 'A' BIT, Art. 2(iv), *UNCTAD Compendium* (Vol. III, 1996) 118; Switzerland Model BIT, Art. 10(2), *ibid.* 182; Netherlands Model BIT. Art. 3(4), *ibid.* (Vol. V, 2000) 334; Belgo-Luxemburg Economic Union Model BIT, Art. 9(2), *ibid.* (Vol. VII, 2002) 275; Denmark Model BIT, Art. 2(3), *ibid.* 280; Finland Model BIT, Art. 12(2), *ibid.* 294; South Africa Model BIT, Art. 10(2), *ibid.* (Vol. VIII, 2002) 278; Energy Charter Treaty, Art. 10(1).

[452] See generally: D. Shea, above n. 128; D. O'Connell, above n. 72, 1059–67; *Oppenheim's International Law*, above n. 92, 930–1; K. Lipstein, above n. 128; E. Borchard, above n. 63, 809 *et seq.*; J. Simpson & H. Fox, above n. 53, 117 *et seq.*; R. Lillich, 'The diplomatic protection of nationals abroad: an elementary principle of international law under attack' (1975) 69 *AJIL* 359; W. Rogers, 'Of missionaries, fanatics, and lawyers: some thoughts on investment disputes in the Americas' (1978) 72 *AJIL* 1.

[453] C. Calvo, *Le droit international théorique et pratique* (1896, 5th edn).

[454] D. O'Connell, above n. 72, 1059–60; K. Lipstein, above n. 128, 131–4.

[455] *Martini (Italy) v Venezuela*, reported in J. Ralston, *The Law and Procedure of International Tribunals* (1926) No. 85, 66, 'The right of a sovereign power to enter into an agreement [for the

inquiry is the treatment that has been given to the first part of the Calvo Clause by international tribunals.

The most fertile source of case law on this point comes from the American-Mexican and American-Venezuelan Claims Commissions. The preponderance of these decisions have given effect to the first part of the Calvo Clause and thus Commissions have refrained from accepting jurisdiction over purely contractual disputes within the scope of the Calvo Clause. The persuasive rationale for such an approach is that a contractual cause of action must be adjudged in light of the contract as a whole and thus it is impermissible for an investor to plead a breach of one term and the non-applicability of another.

Thus, for example, in *Rogerio v Bolivia*[456] the American-Mexican Claims Commission declined jurisdiction 'because it is not proper to divide the unity of a juridical act, sustaining the efficacy of some of its clauses and the inefficacy of others.'[457] The effect of this interpretation was that the investor was compelled to exhaust local remedies before appealing to the United States to bring arbitration proceedings under the aegis of the American-Mexican Claims Commission. It was held in the *North American Dredging Company Case*[458] that if the treaty was to override a contractual forum selection clause, such an intention of the state parties must be made express. The express intention of the United States and Mexico could not be divined from the treaty establishing the Commission.[459]

The precedent of the American-Venezuelan Claims Commission is also consistent with this approach. In the *Flannagan, Bradley, Clark & Co. Case*,[460] a claim was made for breach of contract relating to liability under

diplomatic settlement of claims] is entirely superior to that of the subject to contract it away.'; *Mexican Union Railway Ltd. (United Kingdom) v United Mexican States* (1930) 5 UN Rep 115, 120, '[N]o person can, by [a Calvo Clause] deprive the Government of his country of its undoubted right to apply international remedies to violations of international law committed to his hurt.'; *North American Dredging Company of Texas (United States) v United Mexican States* (1926) 4 UN Rep 26, 30, '[The Calvo Clause] did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice . . . The basis of his appeal would be not a construction of his contract . . . but rather an internationally illegal act.'; *North and South American Construction Co. (United States) v Chile*, reported in J. Moore, *History and Digest of the Arbitrations to which the United States has been a Party* (Vol. 3, 1898) 2318, 2320. *Contra: Nitrate Railway Co. Ltd. (United Kingdom) v Chile*, reported in J. Ralston, *ibid.* No. 85, 67, '[P]rivate individuals or associations can, for the purpose of obtaining from a foreign government, privileges and concessions of public works . . . renounce the protection of their governments, and agree by contract not to resort to diplomatic action . . .'

[456] Reported in J. Ralston, *ibid.* No. 88, 69.

[457] See further: *Rudloff Case* (United States v Venezuela), reported in J. Ralston, *ibid.* No. 77, 63; *Mexican Union Railway Ltd. (United Kingdom) v United Mexican States* (1930) 5 UN Rep 115, 120, 'If the Commission were to act as if [the Calvo Clause] had never been written, the consequence would be that one stipulation, now perhaps onerous to the claimant, would cease to exist and that all the other provisions of the contract, including those from which claimant has derived or may still derive profit, would remain in force.'

[458] *North American Dredging Company of Texas (United States) v United Mexican States* (1926) 4 UN Rep 26.

[459] *Ibid.* 32. The relevant provision in the treaty provided that 'no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim'. *Ibid.*

[460] Reported in J. Moore, above n. 455, (Vol. 4, 1898) 3564.

state bonds held by the claimants. The contract contained the following clause:

> Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation.[461]

Commissioner Findlay, speaking for the majority of the Commission, held that the claimants were barred by this clause from referring its contractual claims to any other tribunal:

> We have no right to make a contract which the parties themselves did not make, and we would surely be doing so if we undertook to make that the subject of an international claim, to be adjudicated by this commission, in spite of their own voluntary undertaking that it was never to be made such, and should be determined in the municipal tribunals of the country with respect to which the controversy arose.[462]

This clause did not, however, prejudice the national state of the claimants from bringing an international reclamation if the treatment accorded to them amounted to a breach of international law, and hence the final sentence of the clause would have no effect on this possibility.[463]

This case came before the American-Venezuelan Claims Commission once again as the *Woodruff Case*,[464] which was cited by the ICSID *ad hoc* Committee in *Vivendi v Argentina*.[465] Umpire Barge approved Commission Findlay's analysis, stating that 'by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this commission'.[466] Umpire Barge was prepared to accept jurisdiction

[461] *Ibid.*

[462] *Ibid.* 3565–6. See further: *Turnbull, Manoa Company Ltd. and Orinoco Company Ltd. Cases* (United States v Venezuela) 9 UN Rep 261, 304 per Umpire Barge, '[The forum selection clause] forms part of the contract just as well as any of the other articles and which article has to be regarded just as well as any of the other articles, as the declaration of the will of the contracting parties, which expressed will must be respected as the supreme law between the parties, according to the immutable law of justice and equity: pacta servanda, without which law a contract would have no more worth than a treaty, and civil law would, as international law, have no other sanction than the cunning of the most astute or the brutal force of the physically strongest'. This principle was also applied to arbitration clauses. See *Tehuantepec Ship-Canal and Mexican and Pacific R.R. Co. v Mexico* (United States v Mexico), reported in J. Moore, *ibid.* (Vol. 3, 1898) 3132; *North and South American Construction Co. (United States) v Chile*, *ibid.* 2318.

[463] Whilst Commissioner Findlay may have left this question open, Commissioner Little was unequivocal about this principle in his dissent: 'A citizen may, no doubt, lawfully agree to settle his controversies with a foreign state in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.' Commissioner Little dissented from the majority because, in his view, a stipulation to the contrary infected the rest of the forum selection clause and thus rendered the whole clause a nullity. *Flannagan, Bradley, Clark & Co. Case*, reported in J. Moore, *ibid.* (Vol. 4, 1898) 3564, 3566–7.

[464] (United States v Venezuela), reported in J. Ralston, above n. 455, No. 75, 62.

[465] *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic* (Decision on Annulment, 3 July 2002) Case No. ARB/97/3, 6 ICSID Rep 340, para. 98.

[466] See further: *Rudloff Case* (United States v Venezuela), reported in J. Ralston, above n. 455, No. 77, 63: '[I]n such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming another way, without first going to the tribunals of the republic,

in the event of denial of justice or unjust delay of justice, but the claimants had never even initiated proceedings in the Venezuelan courts.[467]

The leading case on the interpretation of the Calvo Clause is *North American Dredging Company of Texas (United States) v United Mexican States*.[468] The United States brought a claim on behalf of the North American Dredging Company of Texas for losses and damages arising from breaches of a contract signed by the Government of Mexico for dredging at the port of Salina Cruz in Mexico.[469] The Commission had no hesitation in finding that such claims fell within the forum selection clause in the dredging contract, which referred all disputes 'concerning the execution of work [under the contract] and the fulfilment of this contract'.[470] The Commission then distinguished between contractual and international claims:

> If [the claimant] had a claim for denial of justice, for delay of justice or gross injustice, of for any other violation of international law, committed by Mexico to its damage, it might have presented such a claim to its government which, in turn, could have espoused it and presented it here . . . But where a claimant has expressly agreed in writing . . . that in all matters pertaining to the execution, fulfilment and interpretation of the contract he will have resort to local tribunals and then wilfully ignores them by applying to his government, he will be bound by his contract and the Commission will not take jurisdiction of such claim.[471]

The Commission's reasoning should apply with greater force to the investment treaty context, where the investor has complete functional control over the prosecution of its treaty claims and any contractual arrangement to which it is privy.

If this early experience on the treatment of the Calvo Clause is assimilated to investment treaty arbitration, it is submitted that treaty tribunals should follow the same approach in declining its jurisdiction when confronted with a symmetrical jurisdictional conflict; *ie* when the investor brings a cause of action based on a contract before a treaty tribunal

does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity . . . prohibits this commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on the same contract is precisely the aim of their claim.'

[467] A *prima facie* instance of a denial of justice was found to circumvent the claimant's obligation to comply with a contractual choice of forum for the settlement of disputes in *North & South American Construction Co. (United States) v Chile* (Reported in J. Moore, above n. 455, (Vol. 3, 1898, 2318) a case arising under the American-Chilean Claims Commission. The contract referred disputes to arbitration and the arbitral tribunal had been duly constituted, only to then be suppressed by the Chilean Government. As a result of this act, the claimant 'recovered its entire right to invoke or accept the mediation or protection of the government of the United States'. *Ibid.* 2321.

[468] (1926) 4 UN Rep 26.

[469] *Ibid.*

[470] *Ibid.* The Commission found that the US company had thereby 'waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfilment, construction, and enforcement of this contract were international remedies.' *Ibid.* 30.

[471] *Ibid.* 32–3.

and that contract contains a forum selection clause in favour of a different court or tribunal. This rule can only be displaced by an express provision in an investment treaty that purports to override existing dispute resolution clauses to which the investor is contractually bound. No treaty that this writer is aware of contains an express stipulation to that effect. An example of an express abrogation of existing forum selection arrangements is Article II(1) of the Claims Settlement Declaration,[472] a constituent document of the Iran/US Claims Tribunal, which has been interpreted in several cases as overriding an existing jurisdiction clause in favour of the US courts.[473]

This approach to resolving symmetrical jurisdictional conflicts is supported by other authorities.

In *SPP v Egypt*,[474] an ICSID Tribunal was required to interpret a clause in an Egyptian law registering Egypt's consent to submit to three different methods for the resolution of disputes, which includes: (i) any method of settlement previously agreed to by the parties themselves; (ii) dispute resolution pursuant to an applicable BIT; and (iii) arbitration under the ICSID Convention.[475] One of the issues before the Tribunal was whether a hierarchical relationship between these methods was discernable from the text of this clause. The Tribunal noted that these methods were listed from the most specific type of agreement on the resolution of disputes to the most general. From this it was concluded that:

> A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and Egypt, while such a bilateral treaty would in turn prevail with respect to a multilateral treaty such as the Washington Convention. [The clause] thus reflects the maxim *generalia specialibus non derogant* . . .[476]

The Tribunal cited several international authorities approving of this maxim, including the *Mavrommatis Case*.[477] Here the Permanent Court had jurisdiction pursuant to the general compromissory clause in the Mandate for Palestine and the question was the effect that should be given to a dispute resolution clause in another instrument, the Treaty of Lausanne, which covered part of the dispute before the Court relating to the assessment of indemnities. The Court found that the more specific reference in the Treaty of Lausanne 'excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate.'[478]

[472] Reproduced at (1981) 75 *AJIL* 418. [473] C. Brower & J. Brueschke, above n. 9, 60–72.

[474] *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v Arab Republic of Egypt* (Jurisdiction (No. 1), 27 November 1985), 3 ICSID Rep 101. [475] *Ibid.* para. 60.

[476] *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v Arab Republic of Egypt* (Jurisdiction (No. 2), 14 April 1988), 3 ICSID Rep 131, para. 83. [477] *Ibid.*

[478] (1924) PCIJ Rep Series A No. 2, 32. The PCIJ did ultimately exercise jurisdiction over the part of the dispute in question because it was found that the issue related to a preliminary question that could not have been referred to the specific dispute resolution procedure envisaged by the Treaty of Lausanne (*ibid.*). *Contra*: *Chorzów Factory Case* (Germany v Poland) (Indemnity) (Merits) (Jurisdiction) (1928) PCIJ Rep Series A No. 17, 30 (jurisdiction not declined due to inadequate remedies in alternative

It is important to emphasize that the ICSID Tribunal in *SPP* made no distinction between the status of each judicial forum contemplated by each method of dispute resolution. It is submitted that this approach is entirely correct. The referral of contractual disputes by a foreign investor and a host state to a municipal court or arbitral tribunal in an investment agreement and the submission of the same type of disputes to a treaty tribunal based on the investor's acceptance of the state's offer to arbitrate are both acts based on the consent of both parties. It is not legitimate to make a distinction between them, either in terms of the instrument recording the state's consent to the submission, or the ultimate status of the tribunal constituted to hear the dispute, if the subject-matter of the dispute is the same, *viz.* breach of contract. Hence the general principles of *generalia specialibus non derogant*, *prior tempore, potior jure*, and *pacta sunt servunda* must govern the resolution of the symmetrical jurisdictional conflict, rather than a vacuous appeal to the hierarchy of legal orders.

These principles implicitly formed the basis of the ICSID Tribunal's decision in *Klöckner v Cameroon*.[479] The parties had entered into a protocol of agreement and a supply agreement for a fertiliser plant in Cameroon, each of which contained an ICSID arbitration clause.[480] Klöckner seized the ICSID Tribunal on the basis of the supply agreement, whereas Cameroon invoked the jurisdiction of the Tribunal over the protocol of agreement by way of counterclaim.[481] A management contract relating to the same investment in the fertiliser plant was signed by the parties several years later and contained a reference to ICC arbitration.[482] The Tribunal ruled that the 'Claimant is right in denying the jurisdiction of the Arbitral Tribunal to rule on disputes arising from this contract.'[483] The ICSID Tribunal thus upheld the validity of the parties' contractual choice of ICC arbitration for disputes arising out of the management contract, implicitly on the basis of the *generalia specialibus non derogant* principle.

The controversial part of the ICSID Tribunal's decision in *Klöckner* was the partial circumvention of its finding on the status of the ICC arbitration clause in the management contract by pronouncing upon issues pertaining to the management of the plant on the basis of a general provision in the protocol of agreement (over which the Tribunal did have jurisdiction) that recorded Klöckner's obligation to 'be responsible for the technical and commercial management of the [plant]'.[484] This aspect of the Tribunal's decision was the subject of a rigorous dissenting

forum); *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) (1925) PCIJ Rep Series A No. 6, 23 (jurisdiction not declined because alternative forum without exclusive jurisdiction over subject-matter of dispute).

[479] *Klöckner Industrie-Anlagen GmbH, Klöckner Belge, SA and Klöckner Handelsmaatschappij BV v Republic of Cameroon and Société Camerounaise des Engrais SA*. (Award, 21 October 1983) Case No. ARB/81/2, 2 ICSID Rep 9; (Decision on Annulment, 3 May 1985) Case No. ARB/81/2, 2 ICSID Rep 95.

[480] (Award, 21 October 1983) Case No. ARB/81/2, 2 ICSID Rep 9, 13. [481] *Ibid.*

[482] *Ibid.* [483] *Ibid.* 17.

[484] (Award, 21 October 1983) Case No. ARB/81/2, 2 ICSID Rep 9, 13–14, 17–18, 68–70.

opinion[485] and was then sharply criticised by the *ad hoc* Committee on annulment.[486] According to the Tribunal, the fact that the management contract was executed some two years after the plant became operational was evidence that the arbitration clause in the protocol of agreement should be construed broadly as it was the only source of obligations between the parties during this intervening period.[487]

The general conclusion thus far, based primarily on the precedents of the mixed claims commissions, is that a treaty tribunal should decline jurisdiction over contractual claims in favour of a forum that has previously been chosen by the parties to resolve contractual disputes. The principles mandating this approach are the preservation of the unity of the contractual bargain (a requirement of *pacta sunt servunda*), *generalia specialibus non derogant*, and *prior tempore, potior jure*. It is important to realise that the parties' consent to investment treaty arbitration is no more 'solemn' than their consent to the submission of their contractual disputes to a different forum. An investment treaty tribunal has no independent interest in hearing a case that transcends the consent of the parties, unlike the interest of a municipal court in enforcing the law of a particular polity.[488] Moreover, the rationale of a dispute resolution clause is to create a climate of legal certainty in the contractual relations between the parties and avoid litigation over the proper forum for the resolution of disputes and thus the potential risk of multiple proceedings.[489] By accepting jurisdiction over contractual disputes subject to a different forum, a treaty tribunal subverts this contractual certainty to the detriment of one of the parties.[490] Just as municipal courts have bowed to the interests of transnational commerce by upholding dispute resolution clauses, treaty tribunals should also give effect to the collective will of the parties and the principle of *pacta sunt servanda*.[491]

These general conclusions will now be tested against the jurisdictional decisions of treaty tribunals to date.

[485] *Ibid.* 89–93. [486] (Decision on Annulment, 3 May 1985), 2 ICSID Rep 95, 95–117.

[487] (Award, 21 October 1983) Case No. ARB/81/2, 2 ICSID Rep 9, 13–14. This inference was criticised because the management contract expressly stated that it was to apply retroactively to when the plant became operational and yet the majority of the ICSID Tribunal failed to consider this clause. See the Dissenting Opinion, *ibid.* 90. But the retroactivity of obligations concerning the management of the plant causes conceptual problems as well. The majority of the ICSID Tribunal would have been on safer ground to hold that the mismanagement constituted a breach of one of the express clauses of the protocol of agreement relating to the operation of the plant, rather than latching onto the amorphous general clause in that agreement specifically relating to the management of the plant.

[488] See V. Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian YB of Int L* 191, 198–9.

[489] *Scherk v Alberto-Culver Co.* 417 US 506, 516, 519 (1974); G. Born, *International Civil Litigation in the United States Courts* (1996, 3rd edn) 372–3.

[490] In *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290, para. 157, the contractual choice of arbitration pursuant to the arbitration law of Pakistan in the investment agreement between SGS and Pakistan was considered to be a 'deal-breaker' for Pakistan. The ICSID Tribunal was correct to highlight the potential injustice to Pakistan if SGS was effectively allowed to bypass this contractual choice at its own discretion.

[491] See the discussion of the US Supreme Court in: *Breman v Zapata Off-Shore Co.* 407 US 1, 12–13 (1972).

In *LANCO International Inc. v Argentine Republic*,[492] the contract in question was a concession for the development and operation of a port terminal. The parties to the concession included the Argentine Ministry of Economy and Public Works and LANCO. Clause 12 of the concession provided that: 'For all purposes derived from the agreement and the BID CONDITIONS, the parties agree to the jurisdiction of the Federal Contentious-Administrative Tribunals of the Federal Capital of the Argentine Republic.'[493] The Argentine Republic objected to the jurisdiction of the ICSID Tribunal, established upon LANCO's petition in accordance with the Argentina/US BIT, on the basis that LANCO had already agreed to refer contractual disputes to the state courts of Argentina.[494]

In its discussion of the effect of Clause 12, the Tribunal noted that the jurisdiction of the Federal Contentious-Administrative Tribunals over disputes relating to the concession arose by operation of the law and thus would exist even in the absence of any specific contractual designation. Clause 12 was not, therefore, a selection of 'a previously agreed dispute-settlement procedure' for the purposes of the 'fork in the road' provision of the treaty, which would have had the effect of precluding the investor to resort to ICSID arbitration, at least with respect to contractual disputes.[495] The clause was further weakened by the fact that the Argentina/US BIT came into force after the concession agreement was executed and hence the parties could not have had the possibility of recourse to an investment treaty tribunal in contemplation when negotiating the clause.[496] Nevertheless, Argentina maintained that by agreeing to Clause 12 the parties 'exclude the jurisdiction of ICSID for hearing any dispute associated with the contractual relationship emanating from the Concession Agreement'.[497]

The ICSID Tribunal dismissed Argentina's argument by reference to Article 26 of the ICSID Convention, which refers to the exclusivity of ICSID arbitration vis-à-vis any other remedy and to a presumption against the requirement to exhaust local remedies. Insofar as no requirement to exhaust local remedies could be discerned from the Argentina/US BIT, 'the offer made by the Argentine Republic to covered investors under [that] Treaty cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits.'[498]

Given the Tribunal's previous finding on the nature of Clause 12, it is clear that the term 'submission' should be understood in a narrow sense, *viz*. the existence of jurisdiction in domestic courts by operation of law, which is merely confirmed in the concession agreement. On this narrow basis, the Tribunal's decision is no doubt correct. If the investor has made no previous election of an alternative jurisdiction for the resolution of disputes arising out of its contract, then there is no scope for conflict with its election of ICSID arbitration for contractual claims subsequent to the

[492] (Preliminary Decision on Jurisdiction, 8 December 1998) Case No. ARB/97/6, 5 ICSID Rep 367. [493] *Ibid*. paras. 6–7.
[494] *Ibid*. paras. 24, 34. [495] *Ibid*. paras. 19, 26, 38. [496] *Ibid*. para. 27.
[497] *Ibid*. para. 34. [498] *Ibid*. para. 40.

conclusion of that contract. It must be recognised, however, that tribunals have subsequently interpreted the *LANCO* ruling as a general statement of principle,[499] with the effect that a pre-existing contractual choice of forum for the settlement of disputes might be unilaterally avoided at the investor's option in relation to disputes falling within the proper scope of this contractual choice.

Argentina's submission in *LANCO* on the effect of Clause 12 was deliberately very broad—'any dispute *associated* with the contractual relationship'.[500] No sharp distinction was thus made between a cause of action based on the contract and a cause of action based on the treaty, undoubtedly in an attempt to cover all the claims advanced by LANCO, which were based on the standards of protection afforded by the BIT. The term 'associated' was therefore likely to have been utilised to apply to any dispute factually predicated on the contractual relationship between the parties. To the extent that each cause of action advanced by LANCO was objectively based on the BIT standards, the ICSID Tribunal was correct to disregard the submission to Argentina's domestic courts, because this submission did not extend to treaty claims.

To summarise, the *LANCO* ruling is correct but must be limited to the circumstances of that case. The principle in *LANCO*, on this premise, could therefore be articulated as affirming the right of an investor to bring treaty claims to an ICSID tribunal notwithstanding the investor has previously acknowledged the jurisdiction of local courts over contractual claims.

The next treaty tribunal to grapple with this issue was in *Salini Construtorri SpA and Italstrade SpA v Morocco*.[501] The relevant contract in this case was an agreement for the construction of a highway between two Italian companies, Salini and Italstrade, on the one hand, and the Société Nationale des Autoroutes du Maroc ('ADM'), a state company founded by the Moroccan Government.[502] Upon completion of the construction, the Italian companies requested additional compensation for their work when the final account was prepared due to, *inter alia*, exceptionally bad weather and unforeseeable fluctuations in the value of the Yen.[503] ADM rejected the claims for additional compensation and appealed to the Minister of Equipment as required by administrative regulations applicable to the construction contract.[504] No reply was forthcoming and the Italian companies instituted ICSID proceedings under the Morocco/Italy BIT, relying on alleged breaches of the construction contract and the BIT.[505]

[499] See, *eg* : *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic* (Award, 21 November 2000) Case No. ARB/97/3, 5 ICSID Rep 299, at note 18. Commentators have also interpreted the *LANCO* decision too broadly, *see, eg* : S. Alexandrov, 'Introductory Note to ICSID' (2001) 40 ILM 454, 455, 'The Tribunal's finding that the dispute settlement procedures in the BIT supersede any previous agreement on dispute settlement procedures—including a contractual forum selection clause—preserves the integrity and enforceability of the BIT regime.'

[500] (Preliminary Decision on Jurisdiction, 8 December 1998) Case No. ARB/97/6, 5 ICSID Rep 367, para. 34.

[501] (Decision on Jurisdiction, 23 July 2001) Case No. ARB/00/4, 6 ICSID Rep 400.

[502] *Ibid.* paras. 2–3. [503] *Ibid.* para. 5. [504] *Ibid.* [505] *Ibid.* para. 62.

Morocco objected to the jurisdiction of the ICSID tribunal because the regulations incorporated into the construction contract vested jurisdiction in the tribunals of Rabat over claims arising from the performance of the contract.[506]

The ICSID Tribunal devoted only one paragraph to an analysis of this jurisdiction clause, contained in Article 52 of the Cahier des Clauses Administrative Générales (CCAG), and held:

> La compétence des tribunaux du contentieux administratif ne pouvant être prorogée, l'acceptation décrite ci-avant de la juridiction du CIRDI [ICSID] prévaudra sur le contenu de l'article 52 du CCAG, cet article ne pouvant constituer une véritable clause de prorogation de compétence régie par le principe de l'autonomie de la volonté.[507]

Although not free from doubt, the Tribunal appears to have ruled that the incorporation in the construction contract of a submission to the tribunals of Rabat did not constitute a true contractual choice of jurisdiction,[508] but rather was imposed by operation of law. Hence, consistent with *LANCO*, the Tribunal did not perceive a conflict between the automatic jurisdiction of domestic courts over disputes arising out of a contract, and an acceptance by the investor of the host state's offer to refer such disputes to ICSID arbitration.

The *Salini* Tribunal did not ultimately uphold its jurisdiction over Salini's contractual claims. Despite acknowledging that Salini's purely contractual claims may well fall within the scope of the 'all disputes clause' and thus within the Tribunal's jurisdiction *ratione materiae*,[509] the Tribunal nevertheless found that Morocco had not extended its offer of ICSID arbitration to disputes arising out of contracts entered into by distinct legal entities such as the AMD.[510] Hence, as the State of Morocco was not a party to the construction contract, the Tribunal had no jurisdiction *ratione personae* over AMD.[511]

In contradistinction to the LANCO and *Salini* cases, the ICSID Tribunal in *Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*[512] faced a true choice of forum clause for the settlement of disputes. Article 16.4 of the Concession Contract for the operation of a water and sewage system between the claimants (a French company and its Argentine subsidiary) and the Tucumán Province of Argentina provided that '[f]or the purposes of interpretation and application of this Contract the parties submit themselves to the *exclusive* jurisdiction of the Contentious Administrative Tribunals of Tucumán.'[513] The claimants (collectively 'Vivendi') contended, in part, that actions of Tucumán officials, allegedly designed to undermine the operation of the concession, were legally attributable to

[506] *Ibid.* para. 25. [507] *Ibid.* para. 27. [508] *Ibid.* para. 27. [509] *Ibid.* para. 61.
[510] *Ibid.* para. 60–1. [511] *Ibid.* para. 61.
[512] (Award, 21 November 2000) Case No. ARB/96/1, 5 ICSID Rep 153, hereinafter 'Vivendi Award'.
[513] *Ibid.* para. 27. Emphasis added.

Argentina and served as the basis for distinct violations of the Argentina/France BIT.[514] The Tribunal noted that the specific acts complained of by Vivendi fell into four groups: (i) acts that resulted in a fall in the recovery rate under the Concession Contract; (ii) acts that unilaterally reduced the tariff rate; (iii) abuses of regulatory authority; and (iv) dealings in bad faith (in particular, the conduct of the Provincial Governor in the renegotiations of the Concession Contract).[515]

On the basis of these specific acts, the claimants alleged breaches of the prohibition against expropriation and the fair and equitable treatment standard in the Argentina/France BIT. The Tribunal found that, insofar as these claims disclosed causes of action based on the treaty rather than on the Concession Contract, they fell within the jurisdiction of the Tribunal.[516] Having thus accepted jurisdiction, however, the Tribunal held that 'all of the issues relevant to the legal basis for these claims against the Respondent arose from disputes between Claimants and Tucumán concerning their performance and non-performance under the Concession Contract.'[517] The relationship between the forum selection clause in Article 16.4 in the Concession Contact and the jurisdiction of the ICSID Tribunal arising under the BIT therefore came into sharp focus. The Tribunal made the following important ruling:

> . . . [T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until the Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.[518]

In these circumstances, according to the Tribunal, a claim against Argentina could only arise if the claimants:

> [w]ere denied access to the court of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic.[519]

[514] The claimants also alleged that certain omissions of the Argentine Republic violated the BIT directly. These omissions primarily concerned the failure of the Argentine Republic to respond appropriately to the actions of the Tucumán officials. This second limb of the claimants' submissions was dismissed by the ICSID Tribunal on the merits. *Ibid.* paras. 87, 92. [515] *Ibid.* para. 63.

[516] *Ibid.* para. 54.

[517] *Ibid.* para. 77. The ICSID Tribunal listed these issues as 'the reasonableness of the rates and the timing of increases in rates that the Claimants contended were authorized by the Concession Contract, whether individual metering was required or permitted, whether CGE was entitled to charge certain local taxes to its customers in addition to its service tariff, whether CGE was permitted to terminate service to users who failed to pay their water and sewerage invoices, whether CGE failed to submit an investment plan, maintain adequate insurance, or submit an emergency plan in a timely manner and, finally, whether CGE was required to continue operating the system for 10 months after it terminated the Concession Contract.' *Ibid.* [518] *Ibid.* para. 78.

[519] *Ibid.* para. 80.

By accepting jurisdiction over Vivendi's claims based on the BIT, and then summarily dismissing those claims on the merits, the Tribunal exposed itself to a challenge under Article 52(1)(b) of the ICSID Convention on the ground that the Tribunal exceeded its powers by failing to exercise its jurisdiction. Vivendi's inevitable challenge on this basis was upheld by the ICSID *ad hoc* Committee in *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v Argentine Republic*.[520]

The *ad hoc* Committee did not find fault with the Tribunal's analysis of its own jurisdiction[521] and endorsed the distinction between contractual and treaty claims in this context.[522] The Tribunal's error was instead its failure to heed this distinction in its consideration of the merits of the treaty claims by declining to test those claims by reference to the international standards contained in the BIT, due to a perceived overlap with issues arising under the Concession Contract that were subject to resolution in a different forum. The *ad hoc* Committee's reasoning on this point is the most interesting and persuasive part of the judgment. It was first emphasized that the substantive laws applicable to contractual and treaty claims are different so that a 'state may breach a treaty without breaching a contract, and *vice versa*.'[523] This difference has consequences in relation to the proper defendant to the claims. Treaty claims are governed by international law and thus the rules of attribution apply. In this way, Argentina could be internationally responsible for acts of the Tucumán Provincial Government held to be in breach of the BIT. By contrast, according to the *ad hoc* Committee, 'the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts'.[524]

The *ad hoc* Committee then proceeded to consider the effect of a forum selection clause in an investment agreement with the host state. Insofar as the Committee had previously upheld the Tribunal's decision on jurisdiction, this part of the judgment is strictly *obiter dicta*, but has nonetheless had a marked impact on subsequent developments in this area. The *ad hoc* Committee commenced with a bold statement of principle:

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.[525]

Support for this proposition was found in the American-Venezuelan Mixed Commission's consideration of the effects of a Calvo Clause in the *Woodruff Case*.[526] As was submitted previously, this early body of jurisprudence is highly relevant to this inquiry and the *ad hoc* Committee

[520] (Decision on Annulment, 3 July 2002) Case No. ARB/97/3, 6 ICSID Rep 340, para. 115, hereinafter '*Vivendi* Annulment Decision'.
[521] *Ibid.* para. 80.
[522] *Ibid.* para. 76.
[523] *Ibid.* para. 95.
[524] *Ibid.* para. 96.
[525] *Ibid.* para. 98 (footnote omitted).
[526] (United States v Venezuela), reported in J. Ralston, above n. 455, No. 75, 62.

was correct to delve further into pre-investment treaty jurisprudence. In the *Woodruff Case*, it was held that the clause in the contract referring disputes to the Venezuelan courts bound Woodruff, the claimant, from bringing contractual claims before the Commission.

The *ad hoc* Committee recognised that its statement of principle was subject to a stipulation to the contrary in the relevant treaty and cited the Algiers Accord as an example where jurisdiction clauses submitting disputes to US courts were expressly overridden. Whether or not the BIT had this effect was left open.[527]

The next instalment in this evolving jurisprudence was the ICSID award in *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*.[528] The Government of Pakistan had entered into a contract with SGS in 1994 whereby SGS agreed to provide 'pre-shipment inspection' services with respect to goods to be exported from certain countries to Pakistan.[529] This 'PSI Agreement' contained an arbitration clause that envisaged arbitration in Islamabad in accordance with the Arbitration Act of Pakistan.[530] A dispute arose between the parties as to the adequacy of each other's performance, and the Government of Pakistan terminated the PSI Agreement with effect from 1997.[531] SGS then commenced court proceedings against Pakistan at the place of its domicile in Switzerland, alleging unlawful termination of the PSI Agreement.[532] The Swiss Courts dismissed SGS's claim, at first instance on the basis of the parties' existing agreement to arbitrate, and on appeal due to Pakistan's entitlement to sovereign immunity from jurisdiction.[533] At the same time, Pakistan commenced arbitration proceedings in Islamabad pursuant to the arbitration clause in the PSI Agreement.[534] SGS filed preliminary procedural objections to the arbitration, and also made counterclaims against Pakistan for alleged breaches of the PSI Agreement.[535] SGS then commenced ICSID arbitration proceedings by relying on the reference to arbitration in the Switzerland/Pakistan BIT.

Pakistan objected to the jurisdiction of the ICSID Tribunal, primarily because the 'essential basis' of all SGS's claims, in accordance with the dicta of the *ad hoc* Committee in *Vivendi*, was breach of contract and therefore subject to the exclusive jurisdiction of the contractual arbitral tribunal constituted pursuant to the PSI Agreement.[536] SGS defended its invocation of the ICSID Tribunal's jurisdiction by submitting in the alternative that either (i) the effect of the 'umbrella clause' in the BIT was to elevate its contractual claims into claims grounded on an alleged breach

[527] *Vivendi* Annulment Decision, note 69. In relation to the Algiers Accords, this is the combined effect of Arts II and VII of the Claims Settlement Declaration. Writers have stated the position differently in terms of an implied waiver of the rule on the exhaustion of local remedies, see: C. Amerasinghe, 'Whither the Local Remedies Rule?' (1990) 5 *ICSID Rev—Foreign Investment LJ* 292, 297.

[528] *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290.

[529] *Ibid.* para. 11.

[530] *Ibid.* para. 15.

[531] *Ibid.* para. 16.

[532] *Ibid.* para. 20.

[533] *Ibid.* paras. 23–4.

[534] *Ibid.* para. 26.

[535] *Ibid.* paras. 27–9.

[536] *Ibid.* paras. 43–4.

of the BIT[537] or, (ii) the Tribunal had jurisdiction over purely contractual claims based on the general reference to 'disputes with respect to investments' in the investor/state dispute resolution clause in Article 9 of the BIT.[538] In either case, SGS contended that the jurisdiction of an ICSID tribunal, an international tribunal with adjudicative competence by virtue of an international treaty, must prevail over the jurisdiction of the contractual arbitral tribunal sitting in Islamabad.[539]

The ICSID Tribunal dismissed SGS's argument based on the 'umbrella clause'.[540] This paved the way for a classic confrontation between the two competing jurisdictions over the same contractual claims because it was no longer open to SGS to appeal to the different legal nature of contractual claims before the ICSID Tribunal due to their purported 'elevation' by the 'umbrella clause' in the BIT. But this confrontation was ultimately sidestepped by the Tribunal, which denied even the possibility of a jurisdictional conflict altogether. The Tribunal found that it had no jurisdiction over purely contractual claims by attributing a narrow meaning to the wording 'disputes with respect to investments' in Article 9 of the BIT:

> That phrase . . . while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims.[541]

The Tribunal then makes a deduction based on this observation that is highly controversial:

> [N]o implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.[542]

[537] *Ibid.* para. 98. Article 11 of the Switzerland/Pakistan BIT provides: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.'

[538] *Ibid.* para. 100. Article 9 of the Switzerland/Pakistan BIT provides:

> (1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.
>
> (2) If these conditions do not result in a solution within twelve months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States . . .

[539] *Ibid.* para. 106. [540] *Ibid.* paras. 163–174. [541] *Ibid.* para. 161.

[542] *Ibid.* The Tribunal did, however, leave upon the possibility that the parties could, by special agreement, vest a tribunal established pursuant to a BIT with jurisdiction over purely contractual claims. *Ibid.* There is, in fact, already precedent for special agreements of this nature in an ongoing UNCITRAL arbitration arising under the France/Lebanon BIT.

The Tribunal's ruling appears to rest upon an unreasoned assumption that purely contractual claims should not, as a matter of general principle, be covered by the reference to arbitration in BITs. This is problematic, for the first premise quoted above on the distinction between the factual and legal basis of the claims is entirely neutral on this question. The general language of Article 9 does not expressly carve out contractual claims from its purview; to the contrary, the natural meaning of the words 'disputes with respect to investments' is broad enough to encompass any disputes that are factually related to investments. It is curious, therefore, that the Tribunal reversed the burden of persuasion in its analysis of the scope of Article 9 by stating that 'we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.'[543] Given the plain meaning of the text of Article 9, it was surely incumbent on the Tribunal to positively articulate reasons why a more narrow interpretation should be preferred.

The ICSID Tribunal's assumption that contractual disputes should, by their nature, be excluded from the scope of an open-ended reference to investment disputes is refuted by treaty practice.

First, there are numerous BITs that expressly restrict the sphere of disputes that can be referred to international arbitration by the investor to alleged breaches of the substantive provisions of the investment treaty. Article 11 of the Austria Model BIT, for example, provides:

> This Part applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment.[544]

Another example of this express limitation can be found in Article 1116 of the NAFTA, which states that an investor may submit to arbitration under Chapter 11 'a claim that another Party has breached an obligation' under that chapter.

In light of these types of provisions that may be found in investment treaties, it was artificial, in the absence of any further considerations, to place a more limited construction upon the general words used in reference to arbitration in the Switzerland/Pakistan BIT. It was open to the state parties to restrict the *ratione materiae* jurisdiction of international tribunals constituted pursuant to Article 9 of the BIT. They choose not to do so.

Secondly, other BITs make an express distinction between contractual claims and treaty claims in the definition of an 'investment dispute'. The United States Model BIT is a notable example:

> For the purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to

[543] *Ibid.*

[544] Austria Model BIT, Art. 11, *UNCTAD Compendium* (Vol. VII, 2002) 264.

an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.[545]

The only plausible way to read such a clause is to admit the possibility of the investor bringing purely contractual disputes arising out of an investment agreement before the treaty tribunal.

Thirdly, the Tribunal's interpretation of Article 9 of the Swiss/Pakistan BIT is at odds with the previous *dicta* of tribunals on the interpretation of similar clauses in other BITs. The *ad hoc* Committee in *Vivendi* had clearly contemplated that a treaty tribunal can have jurisdiction over contractual disputes:

> . . . Article 8 deals generally with disputes 'relating to investments made under [the France/Argentina BIT] . . . ' Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself . . . [546]

The ICSID Tribunal in *Salini* adopted a similar approach.[547]

Fourthly, in the absence of any previous election by the investor of a different forum (*ie* in an investment contract with the host state), there might be compelling reasons to allow an investor to bring the whole spectrum of its complaints before one tribunal. Where the investment has been made pursuant to a contract with the host state, it is often the case that the investor will have contractual claims and treaty claims, and the questions of fact arising under both will inevitably be intertwined. To avoid the possibility of conflicting judgments and awards, and to promote efficiency and finality in the resolution of disputes relating to investments, it may be appropriate for an investor to seize a single tribunal with both types of claims.

Fifthly, the Tribunal's assertion that a plain meaning interpretation of Article 9, *prima facie* extending to contractual claims, 'would supersede and set at naught' all valid forum selection clauses in contracts between Swiss investors and Pakistan is incorrect. The very issue before the Tribunal, which had been extensively pleaded by both parties, was the circumstances in which an ICSID tribunal established pursuant to a dispute resolution clause in a BIT must defer to another forum with competence over contractual claims. There was no inevitability about Article 9 having the effect postulated by the Tribunal, and indeed the *ad-hoc* Committee in *Vivendi* had laid the foundation for a test to avoid this invidious result.

In conclusion, the award in *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*[548] did not significantly advance the debate on

[545] US Model BIT, Art. 9(1), *ibid.* (Vol. VI, 2002) 506.
[546] *Vivendi* Annulment Decision, para. 55.
[547] (Decision on Jurisdiction, 23 July 2001) Case No. ARB/00/4, 6 ICSID Rep 400, para. 61.
[548] (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290.

what has been labelled 'symmetrical jurisdictional conflicts' in this study due to an artificially narrow construction placed upon the scope of the Tribunal's *ratione materiae* jurisdiction.

At the time of writing, the final instalment in this line of cases dealing with symmetrical jurisdictional conflicts is *Azurix Corp. v Argentine Republic*.[549] The Claimant's Argentine investment vehicle 'ABA' was awarded a thirty year concession by the Province of Buenos Aires for the distribution of potable water and the treatment and disposal of sewerage.[550] The various pre-contractual documents, together with the Concession Agreement itself, all contained an exclusive jurisdiction clause in favour of the courts of the City of La Plata and a waiver by the parties of any other forum.[551] Clause 16.7 of the Concession Agreement, signed by ABA, the Province of Buenos Aires and a municipal authority responsible for sanitation, read as follows:

> In the event of any dispute regarding the construction and execution of the Agreement, the Grantor [the Executive Authorities of the Province of Buenos Aires] and the Concessionaire [ABA] submit to the court for contentious-administrative matters of the city of La Plata, expressly waiving any other forum or jurisdiction that may correspond due to any reason.[552]

Argentina objected to the ICSID Tribunal's jurisdiction under the US/Argentina BIT on the basis that ABA's waiver of jurisdiction bound the Claimant so that the latter was precluded from bringing a claim with respect to the investment in the water concession before another forum.[553] The waiver in clause 16.7 of the Concession Agreement was in fact inserted into the contractual documents by Argentina precisely to avoid the situation that arose in *Lanco* and *Vivendi*.[554] According to Argentina, the Claimant's claims arose out of the Concession Agreement and thus the exclusive jurisdiction clause should be upheld by the ICSID Tribunal with respect to those claims.[555]

One might expect that Argentina's objection would have mandated a careful analysis of the nature of the Claimant's claims, however, such an analysis is nowhere to be found in the ICSID Tribunal's decision. Nor are the Claimant's claims as they were actually pleaded reproduced in the text of the award. In its consideration of its jurisdiction *ratione materiae* pursuant to Article 25 of the ICSID Convention, the Tribunal concluded that '(a) Azurix indirectly owns 90 percent of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is a party to the Concession Agreement . . .'[556] and hence 'the dispute as presented by the Claimant is a dispute arising directly from that investment'.[557] If the investment was ultimately ABA's interest in the concession agreement,[558] and the dispute arose directly from that investment agreement, then there was at least a

[549] *Azurix Corp. v The Argentine Republic* (Decision on Jurisdiction, 8 December 2003) Case No. ARB/01/12, (2004) 43 ILM 262. [550] *Ibid.* para. 22.
[551] *Ibid.* para. 26. [552] *Ibid.* [553] *Ibid.* [554] *Ibid.* para. 78. [555] *Ibid.* para. 59.
[556] *Ibid.* para. 65. [557] *Ibid.* para. 66. [558] *Ibid.* para. 62.

distinct possibility that the 'essential basis' of the Claimant's claims, in the words of the *ad hoc* Committee in *Vivendi*, was the concession agreement and not the BIT. Indeed, Argentina had pointed out that ABA had brought claims before the city courts of La Plata that were 'identical as to their substance' as the Claimant's claims before the ICSID Tribunal.[559]

The ICSID Tribunal articulated the relevant test as 'whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT.'[560] As previously mentioned, the precise way in which the dispute was presented by the Claimant cannot be gleaned from the Tribunal's award. The Tribunal nevertheless concluded in the next sentence:

> The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to the Claimant under the BIT and is based on a different cause of action from a claim under the Contract Documents.[561]

Jurisdiction was thus affirmed by the Tribunal and,[562] moreover, Argentina's request for a stay pending the judgment of the Supreme Court of the Province in relation to ABA's claims[563] was rejected.[564]

In summary, it is submitted that the guidance provided by the *ad hoc* Committee in *Vivendi* provides a more persuasive platform for the resolution of symmetrical conflicts of jurisdiction than the two subsequent decisions of the ICSID Tribunals in *SGS v Pakistan* and *Azurix v Argentina*, which, for very different reasons, essentially fail to confront the problem. In *SGS* the potential for a treaty tribunal assuming jurisdiction over contractual claims was denied, whereas in *Azurix* the investor's mere invocation of BIT provisions in the formulation of its claims was sufficient to found treaty jurisdiction.[565] Nevertheless, all three cases demonstrate the importance of cause of action analysis to a meaningful consideration of this problem of overlapping jurisdictions.

D. THE RESOLUTION OF SYMMETRICAL JURISDICTIONAL CONFLICTS: CAUSE OF ACTION ANALYSIS AND STAY OF PROCEEDINGS

The dilemma that confronted the ICSID Tribunal and *ad hoc* Committee in *Vivendi* relates to the classification of contractual and treaty claims. In the foregoing Section it was argued that treaty tribunals are bound to defer to other judicial *fora* vested with jurisdiction over contractual disputes in

[559] *Ibid.* para. 41. [560] *Ibid.* para. 76. [561] *Ibid.*

[562] *Ibid.* para. 102. It is not entirely clear whether the Tribunal relied upon the additional ground that the exclusive jurisdiction clause in the Concession Agreement was only effective between ABA and the Province of Buenos Aires, neither of whom were parties to the ICSID proceedings (see para. 85, *ibid.*). The difficulty with this approach is that Azurix was claiming through ABA's investment in the form of its interest in the concession agreement and thus it would seem only reasonable for Azurix to be equally bound by the conditions attached to ABA's investment.

[563] *Ibid.* para. 46. [564] *Ibid.* para. 102.

[565] If the *Azurix* finding were to be generalised, then in practice an investor would seldom need to assert contractual claims before a treaty tribunal because the mere reliance on BIT provisions would be effective to upgrade them to treaty claims for jurisdictional purposes.

case of jurisdictional conflicts.[566] This conclusion does not, however, resolve the lingering problem of identifying the boundary between contractual and treaty causes of action. If treaty tribunals are to consider that the investor's pleadings are definitive on the issue, then it will be left to the investor to invoke the jurisdiction of the treaty tribunal in conflict with a previously agreed dispute resolution clause simply by characterising its grievance as giving rise to a breach of one of the amorphous treaty standards, such as the failure to accord fair and equitable treatment. As one can discern from the facts of the cases examined in the previous Section, there are already signs in investment treaty arbitration practice that this tactic is growing in popularity.

A sound legal test is always more concerned with substance rather than form, and hence to accord the investor's articulation of its causes of action a definitive role is unsatisfactory. To hold otherwise would in effect confer the power upon one party to a contractual bargain to override one of the key terms of that bargain at its discretion. The American/Mexican Claims Commission described such an attempt of an investor thus:

> The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if [the choice of jurisdiction clause] of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use.[567]

Put in a different way, a dispute resolution clause in a contract between a foreign investor and a state entity would lose much of its efficacy in jurisdictions covered by applicable investment treaties. One would expect that this would have a chilling effect on negotiations between a state party and foreign investor, and the state party might feel justified in seeking different concessions from the investor in the future because the value of an agreement to refer disputes to the local courts of the state or different forum would be greatly diminished.[568]

Such a result would inevitably have consequences for the sustainability of the investment treaty protection network as well. It would compel states, before treaty tribunals, to defend what might be essentially contractual claims to the merits stage of the proceedings to be tested against

[566] For the clearest exposition of the contrary view, see: A. Parra, above n. 136, 335, 'In most cases, the consent in the BIT of the host State to the submission of the investment disputes to arbitration can also be invoked in preference to any applicable previous agreement on the settlement of such disputes, such as might be embodied in the arbitration clause of an investment contract between the investor and the host State. The consent or "offer" of the host State to submit to arbitration in the BIT, when accepted by the covered investor, simply supersedes their previous agreement to the extent of the overlap between that agreement and the new one formed by the offer in the BIT and its acceptance by the investor.' (Footnote omitted.)

[567] *North American Dredging Company of Texas (United States) v United Mexican States* (1926) 4 UN Rep 26, 31.

[568] In *Azurix Corp. v The Argentine Republic* (Decision on Jurisdiction, 8 December 2003) Case No. ARB/01/12, (2004) 43 ILM 262, the Argentine authorities had inserted a waiver of other *fora* in the contractual documents to avoid the jurisdiction of a treaty tribunal over contractual claims (*ibid.* para. 41). The ICSID Tribunal ruled that the waiver was ineffective. One wonders what Argentina will insist upon in the next round of negotiations with a foreign investor.

the treaty standards. Those claims might well be ultimately dismissed by the tribunal as failing to disclose a breach of the treaty, but the time and expense in securing this result would be perceived by most states to be unacceptable. All these considerations point to the necessity of ensuring that purely contractual claims subject to determination by a different forum are filtered at a preliminary jurisdictional stage of the treaty arbitration which can be readily separated from the merits stage.

The *ad hoc* Committee's decision in *Vivendi* does provide some guidance on the resolution of this dilemma. As previously stated, reliance was placed on the *Woodruff Case*[569] for the principle that 'where *the essential basis of a claim* brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.[570] As the previous analysis of *Woodruff* line of cases makes clear, this is a rule of jurisdiction or admissibility, and hence one may infer that it will be incumbent upon a treaty tribunal to explore the substance of the claim advanced by the investor at a preliminary stage, rather than merely its form.

The Committee's comments must, however, be interpreted in their proper context, which was the section of the decision on the relationship between international and municipal law in *substantive* matters of international responsibility. The Committee had already decided that the ICSID Tribunal was correct in upholding its jurisdiction over the treaty claims, despite their level of connectedness with purely contractual matters that were subject to the jurisdiction of the Tucumán courts. It would seem to follow that the *ad hoc* Committee had, at least implicitly, decided that the 'fundamental basis of the claim' advanced by the investor was the BIT rather than the contract so that the *Woodruff* principle, which operates as a jurisdictional or admissibility bar to the claim, was not applicable. If the contrary were true, then the Tribunal's decision on jurisdiction might be susceptible to annulment in accordance with Article 52 of the ICSID Convention on the basis that the Tribunal exercised a jurisdiction that it did not have. But in the *ad hoc* Committee's consideration of the Tribunal's decision on jurisdiction, one finds a statement endorsing the view that the forum selection clause in the contract did not exclude 'the jurisdiction of the Tribunal *with respect to a claim based on the provisions of the BIT*'.[571] There is no attempt here to investigate the 'fundamental basis of the claim', but rather what appears to be acceptance of the investor's formal characterisation of the claim. This deduction is supported by reference to other parts of the Committee's review of the Tribunal's jurisdictional decision:

> Even if it were necessary in order to attract the Tribunal's jurisdiction that the dispute be characterised not merely as one relating to an investment but as one concerning the treatment of an investment in accordance with the standards laid

[569] (United States v Venezuela), reported in J. Ralston, above n. 455, No. 75, 62.

[570] *Vivendi* Annulment Decision, para. 98. Elsewhere, the *ad hoc* Committee referred to the 'fundamental basis of the claim', which was the expression used in the *Woodruff Case*. *Ibid.* para. 101.

[571] *Ibid.* para. 76.

down under the BIT, it is the case (as the Tribunal noted) that *Claimants invoke substantive provisions of the BIT*.[572]

It is perhaps unfair to attach too much significance to the *ad hoc* Committee's choice of words in this context, especially in light of the fact that the Committee went on to say that the dispute was capable of raising issues under the BIT.[573] Nevertheless, there does appear to be some contradiction between the dictates of the *Woodruff* principle, requiring an analysis of the 'fundamental basis of the claim', and the more formal test that the *ad hoc* Committee actually applied to the facts at the jurisdictional stage.

The dilemma of distinguishing between causes of action based on contract and treaty resurfaced at a separate jurisdictional phase in *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*:[574]

> At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT . . . the Claimant should be able to have them considered on their merits. We conclude that, at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit. We do not exclude the possibility that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims, but this is not such a case.[575]

There is a tension in this passage between the notion that a claimant can characterise the claims 'as it sees fit' and what appears to be the imposition of a threshold in the form of a *prima facie* test of whether 'the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT.' Furthermore, the ICSID Tribunal cited the NAFTA case of *United Parcel Service of America Inc. v Government of Canada*[576] in a footnote to this text where the UNCITRAL Tribunal adopted the following *prima facie* test for jurisdiction:

> [The Tribunal] must conduct a prima facie analysis of the NAFTA obligations, which [the claimant] seeks to invoke, and determine whether the facts alleged are *capable of constituting a violation* of these obligations.[577]

[572] *Ibid.* para. 74 (emphasis added). [573] *Ibid.* paras. 106, 112, 114.

[574] (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290.

[575] *Ibid.* para. 145 (footnotes omitted). The ICSID Tribunal cited further: *Amco Asia Corp, Pan American, Ltd and PT Amoco Indonesia v Republic of Indonesia* (Jurisdiction, 25 September 1983), 1 ICSID Rep 389, 405, 'The Tribunal is of the view that in order for it to make a judgment at this time as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimant's Request for Arbitration. If on its face (that is, if there is no manifest or obvious misdescription or error in the characterization of the dispute by the Claimants) the claim is one "arising directly out of an investment", then this Tribunal would have jurisdiction to hear such claims. In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that *prima facie* the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.'

[576] (Award on Jurisdiction, 22 November 2002), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf>. [577] *Ibid.* para. 33.

The ICSID Tribunal in *SGS v Pakistan* was clearly troubled by the Respondent's submission that claims should be subject to scrutiny at a jurisdictional stage, as suggested by the UNCITRAL Tribunal in *UPS v Canada*. This concern emanated from the 'limited ability' of an arbitral tribunal to analyse the factual basis of claims at a preliminary stage:

> [T]he Tribunal cannot subject the Request for Arbitration to too rigorous a standard of review at this stage as the Claimant is not obliged to set out extensive allegations of fact and arguments as to how the acts complained of might give rise to a breach of the Treaty.[578]

This is certainly a formidable dilemma, but one that is attenuated if the relief claimed by the respondent state is not an outright dismissal of the claims but a stay of the proceedings before the investment treaty tribunal in favour of another forum with competence over the contractual claims. The discretion available to international treaty tribunals to grant a stay of proceedings is a vastly under-utilised resource for the effective management of symmetrical and asymmetrical jurisdictional conflicts.[579] Given the consequences of a stay of proceedings for the claimant are not nearly as draconian as an outright dismissal of its claims, it is not necessary for the investment treaty tribunal to make a definitive ruling on the classification of the claims; rather, the respondent state must demonstrate to the comfortable satisfaction of the tribunal that the 'fundamental basis of the claim[s]' is an investment contract between the claimant and the respondent, and not the minimum standards of investment protection in the investment treaty.

The granting of a stay of proceedings is not completely unknown in the investment arbitration context for the discretion was utilised with prudence by the ICSID Tribunal in *SPP v Egypt*.[580] The Tribunal was in effect confronted with a 'fork in the road' provision,[581] not in a BIT but rather in a unilateral offer to arbitrate in Egyptian legislation on foreign investment. The three *fora* open to foreign investors for the resolution of disputes were listed as: (i) any method of settlement previously agreed to by the parties themselves; (ii) resolution pursuant to an applicable BIT; and (iii) arbitration under the ICSID Convention.[582] Egypt objected to the ICSID Tribunal's jurisdiction on the grounds that SPP had previously agreed to ICC arbitration for disputes arising out of an agreement on the development of two tourist complexes with an Egyptian public sector enterprise ('EGOTH').[583] An award had already been rendered by the ICC Tribunal against EGOTH and Egypt in favour of SPP, but was

[578] *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290 at note 125.

[579] In relation to arbitration under the Energy Charter Treaty, a stay has been recommended as the proper approach to dealing with parallel municipal court proceedings or contractual arbitration: T. Wälde, 'Investment Arbitration under the Energy Charter Treaty', above n. 17, 460–1.

[580] *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v Arab Republic of Egypt* (Jurisdiction (No. 1), 27 November 1985), 3 ICSID Rep 101.

[581] *Ibid.* para. 61.

[582] *Ibid.* para. 60.

[583] *Ibid.* paras. 19–22.

annulled by the Paris Court of Appeal on the basis that Egypt was not privy to the arbitration clause in the agreement with EGOTH and had not waived its sovereign immunity to the jurisdiction of the ICC Tribunal.[584] If the Court of Appeals was correct, then it must have followed that SPP and Egypt had *not* previously agreed on a method for the settlement of disputes and hence there would be no obstacle to the ICSID proceedings.[585] This very issue was pending before the French Court of Cassation on appeal at the time the ICSID Tribunal became seized of SPP's new ICSID arbitration claim.[586]

The ICSID Tribunal affirmed that it was competent to judge its own jurisdiction and thus make a ruling on the issue before the Court of Cassation.[587] The Tribunal nevertheless recognised the possibility that, depending on the ultimate validity of the ICC award, 'concurrent jurisdiction might be exercised with respect to the same Parties, the same facts and the same cause of action by two different arbitral tribunals.'[588] The Tribunal then signalled one possible solution to this potential clash of jurisdictions:

> When the jurisdiction of two unrelated and independent tribunals extends to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.[589]

The ICSID Tribunal thus stayed its own proceedings pending the appeal before the Court of Cassation on the issue of the validity and the scope *ratione personae* of the ICC arbitration clause.[590]

The exercise of the discretion to stay by treaty tribunals might be informed by the approach of some common law jurisdictions to the stay of proceedings in favour of a foreign court on the ground of *forum non conveniens*.[591] In relation to the proper allocation of the burden of proof, for instance, an investment treaty tribunal should recognise that it is the applicant for the stay (the respondent) that must generally persuade the tribunal to exercise its discretion to grant a stay. In accordance with the practice of the English courts on *forum non conveniens* applications, however, this general rule is subject to the evidential burden shifting to a party who seeks to establish the existence of matters which will assist it in persuading the tribunal to exercise its discretion in that party's favour.[592]

[584] *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v Arab Republic of Egypt* (Jurisdiction (No. 1), 27 November 1985), 3 ICSID Rep 101, para. 41. [585] *Ibid.* paras. 78–9.
[586] *Ibid.* para. 44. [587] *Ibid.* para. 81. [588] *Ibid.* para. 82. [589] *Ibid.* para. 84.
[590] A recent example of coordination between an international and supra-national tribunal is provided by the *Mox Plant Case* (Ireland v United Kingdom) Order No, 3, (2003) 42 ILM 1187, where an Annex VII Tribunal constituted under the Law of the Sea Convention 1982 stayed its own proceedings to await a ruling by the European Court of Justice that was relevant to its jurisdiction.
[591] See, in relation to England: *Dicey & Morris The Conflict of Laws* (Vol. 1, 2000, 13th edn by L. Collins) 395–400; *Cheshire and North's Private International Law*, (1999, 13th edn by P. North & J. Fawcett) 336–47. [592] *Dicey & Morris The Conflict of Laws, ibid.* 395.

The primary test for the granting of a stay in the investment treaty context is, as previously stated, whether the 'fundamental basis of the claim[s]' is an investment contract or the treaty. If the respondent manages to discharge its burden to persuade the tribunal that the fundamental basis of the claim is a cause of action for breach of contract and that another forum with jurisdiction over such claims has been previously chosen by the parties, then the tribunal should defer to that forum and stay the proceedings.

There are, however, circumstances when a stay might cause real injustice to the claimant, such as where the respondent state has taken measures to interfere with the dispute resolution process that was previously agreed to in the investment contract.[593] Here there is a risk that a stay of proceedings could simply result in justice delayed. Therefore, where the investment treaty tribunal itself is competent to hear purely contractual claims, the test for a stay should allow the claimant to counter the *prima facie* indication that its contractual claims should be heard by an alternative forum due to the likelihood that it would suffer a denial of justice before this alternative forum. The burden of proof in this second stage of the test would fall squarely on the claimant, and could only be discharged by demonstrating actual steps taken by the respondent state to jeopardize the alternative dispute resolution process for contractual claims. Mere speculation as to the quality of justice before that forum could never be sufficient. This in a sense resembles the second stage of the *forum non conveniens* test alluded to earlier.[594]

In *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, the ICSID Tribunal found that the arbitral tribunal constituted in accordance with the 'PSI Agreement' between the parties had jurisdiction over SGS's contractual claims. Pakistan had argued that the 'essential basis' of all of SGS's claims were contractual because: (i) they were all based on the same limited factual allegations arising out of the contractual relationship;[595] (ii) the prayers for relief submitted by SGS by way of counterclaim before the contractual arbitral tribunal in Islamabad and the investment treaty tribunal were virtually identical; and (iii) SGS had conceded that 'most or all of Pakistan's acts and omissions . . . qualify as breaches of the PSI Agreement as well as violations of the BIT.'[596] In essence, SGS was arguing that either Pakistan's alleged breaches of the PSI Agreement simultaneously constituted a breach of the BIT or that Pakistan's obligations under the PSI Agreement were 'elevated' to BIT

[593] One such measure might be the enactment of legislation in order to vitiate an arbitration clause in a contract between the state and the investor, see: *Losinger Co. Case (Discontinuance Order)* PCIJ Rep Series C No. 78.

[594] *Dicey & Morris The Conflict of Laws*, above n. 594, 398–400; *Cheshire and North's Private International Law*, above n. 594, 341–7.

[595] SGS's Request for Arbitration stated that 'this dispute arises out of Pakistan's actions and omissions with respect to the Pre-Shipment Program and the PSI Agreement.' *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290, para. 63.

[596] *Ibid.* para. 63.

obligations by the operation of the 'umbrella clause'. The ICSID Tribunal dismissed SGS's interpretation of the 'umbrella clause', but reserved its judgment on the relationship between contractual and treaty breaches for the merits.[597] The Tribunal thus upheld its jurisdiction over SGS's claims formulated on the basis of the BIT.[598]

It is submitted that this was the paradigm situation where the grant of a stay would have been wholly justified, and indeed this was one of the forms of relief requested by Pakistan. By refusing to accede to this request,[599] the ICSID Tribunal in effect conceded that it is sufficient for a claimant to plead that a contractual breach simultaneously amounts to a violation of the BIT for the purposes of invoking the jurisdiction of an investment treaty tribunal and proceeding to the merits. One can readily imagine the potential for mischief produced by this result.

The reasoning that lead to the ICSID Tribunal's refusal to grant a stay in *SGS v Pakistan* is difficult to identify in the award. After quoting the *ad hoc* Committee in *Vivendi* on the difference between exercising contractual jurisdiction and 'tak[ing] into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law',[600] the Tribunal stated:

> This Tribunal is bound to exercise its jurisdiction and proceed to consider the BIT claims that are properly before it. Accordingly, we cannot grant the request for a stay of these proceedings.[601]

This refusal to grant a stay does not logically follow from the *ad hoc* Committee's observation in *Vivendi*, which was dealing with an entirely different issue. Moreover, the refusal is not mandated by a finding that the Tribunal was 'bound to exercise its jurisdiction' over the BIT claims. The Tribunal was not bound to exercise that jurisdiction immediately and a stay would have been the most appropriate form of relief in these circumstances. Pakistan would have been saved from the expense and inconvenience of defending claims that, at the very least, were grounded in the same facts and arising from precisely the same contractual relationship as those claims properly before the contractual arbitral tribunal. On the other hand, the door to treaty arbitration would have been left open to SGS in the event that it suffered a denial of justice before the contractual

[597] The ICSID Tribunal may have inadvertently subverted its own ruling on the effect of an 'umbrella clause' in this way. If an umbrella clause does not elevate contractual obligations into treaty obligations, then, for that ruling not to be meaningless, it surely must follow that mere breaches of contract cannot amount to breaches of a treaty (authority for this latter proposition may be found in *Azinian, Davitian and Baca v United Mexican States* (Award, 1 November 1998) Case No. ARB(AF)/97/2, 5 ICSID Rep 272, 287–8). Perhaps the ICSID Tribunal was concerned not to make a definitive finding on the precise nature of SGS's BIT claims at this preliminary stage, however, as will be submitted below, this is exactly why the Tribunal should have exercised its discretion to stay the proceedings until the contractual claims had been dealt with by the contractual arbitral tribunal sitting in Islamabad.

[598] *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290, para. 188. [599] *Ibid.* para. 187.

[600] *Ibid.* para. 186. [601] *Ibid.* para. 187.

arbitral tribunal and its submission that purely contractual breaches might amount to treaty breaches would be reserved for another day.

It will be recalled that the ICSID Tribunal's award in *Vivendi* was annulled by the *ad hoc* Committee because the Tribunal had summarily dismissed BIT claims over which it had jurisdiction for the reason that such claims were interwoven with breach of contract issues subject to resolution by a different forum. The Tribunal's error in resolving the dilemma before it was to make a definitive ruling on the merits when a stay of proceedings would have achieved the desired result. The ICSID Tribunal in *SGS v Pakistan* appears to have exercised too much caution to avoid the plight of the Tribunal's award in *Vivendi*. If this was the apprehension that lead to the refusal to grant a stay, then it was misguided—a decision to grant a stay for the reasons described would be immune from the criticism that produced the annulment in *Vivendi*.

In conclusion, a treaty tribunal is bound to consider the 'fundamental basis' of the causes of action relied upon the claimant. If the 'fundamental basis' is determined to be contractual, then the treaty tribunal must give effect to any valid choice of forum clause in that contract. Where there is significant overlap between the claimant's causes of action based on contract and the minimum standards of protection set out in the treaty, then the treaty tribunal should exercise its discretion to stay its own proceedings to await the resolution of the contractual issues by the chosen forum.

E. ASYMMETRICAL JURISDICTIONAL CONFLICTS: MULTIPLE FORA WITH JURISDICTION OVER ASPECTS OF AN INVESTMENT DISPUTE

Where an investment treaty tribunal has jurisdiction over a cause of action objectively founded upon the host state's violation of a minimum standard of investment protection, that jurisdiction is exclusive of any other forum with respect to that cause of action. Nevertheless, other *fora*, namely municipal courts and contractual arbitral tribunals, may have competence over a constituent part of the investment dispute pertaining to the existence, nature, and scope of the investor's protected interests under municipal law. This has been termed an 'asymmetrical jurisdictional conflict'.

The *CME Czech Republic B.V. (The Netherlands) v The Czech Republic* case provides a good example of this type of problem in practice. ČNTS (the investment of CME) had challenged CET 21's termination of the Service Agreement with ČNTS as unlawful before the Czech courts. At first instance, ČNTS's claim for breach of contract was upheld by the Prague Regional Commercial Court,[602] however, the Court of Appeal later overturned the decision.[603] By the time the UNCITRAL Tribunal handed

[602] *CME* Partial Award, para. 140.

[603] *CME Czech Republic B.V. (The Netherlands) v The Czech Republic*, (Final Award, 14 March 2003), para. 22, available at <http://www.cetv-net.com/ne/articlefiles/439-Final_Award_Quantum.pdf>.

down its award, the Czech Supreme Court had been seized of the final appeal. Two months later, the Czech Supreme Court quashed the Court of Appeal's decision and referred the case back to the Prague Regional Commercial Court.[604]

The UNCITRAL Tribunal's consideration of the significance of the Czech court proceedings is somewhat circular. On the one hand, in the context of upholding its jurisdiction, the Tribunal conceded that whilst 'the contractual arrangements between CET 21 and ČNTS could be decisive for the claimant's claim under these arbitration proceedings',[605] the Tribunal remained competent to hear the claimant's treaty claims. This is uncontroversial. But on the merits, the Tribunal found that '[t]he outcome of the civil court proceedings is irrelevant to the decision on the alleged breach of the Treaty by the Media Council acting in concert with the Respondent.'[606]

The Tribunal appears to have conflated the two distinct analytical stages in adjudging an investment dispute that have previously been described. It is certainly true that a judgment of a Czech court could not be dispositive of the compatibility or otherwise of the Media Council's conduct with the treaty standards. In relation to the first stage of the analysis, however, a judgment of a Czech court may well have been crucial in determining whether the 1996 amendment was the proximate cause of the destruction of CME's investment. The Prague Regional Commercial Court had in fact upheld the exclusivity in the relationship between CET 21 and ČNTS and thus ruled in favour of ČNTS.[607] From this ruling it followed that the 1996 amendment had no bearing on the legal foundation of ČNTS's investment as a matter of Czech law. If the Czech Supreme Court had reinstated this ruling, then the parties would have been put back into the position that existed prior to CET 21's termination of the Service Agreement and it is difficult to conceive how CME's treaty claim could survive. In this respect it is interesting to note that CME had initially, in its Notice of Arbitration, requested relief in the form of the restitution of 'ČNTS's exclusive rights to provide broadcasting services for TV NOVA'.[608] This was precisely the relief granted by the Czech Regional Commercial Court and the very issue pending before the Czech Supreme Court.

In light of the foregoing, it is difficult to comprehend the Tribunal's position on the significance of the Czech court proceedings:

> Even if the regional Commercial Court's judgment is reinstated by the Czech Supreme Court, this will not remedy the Claimant's investment situation. CET 21 may well, at any time, terminate again the Service Agreement for good cause,

[604] The Prague City Court then rejected ČNTS's claim in the new proceedings. ČNTS appealed. The appeal was pending when the quantum phase of the arbitral proceedings was closed on 14 November 2002.

[605] *CME* Partial Award, para. 405.

[606] *Ibid.* para. 415.

[607] *Ibid.* para. 304.

[608] *Ibid.* para. 215.

whether given or not, thereby recurrently jeopardizing the Claimant's investment.[609]

This statement is problematic because if the Czech courts had found the termination of the Service Agreement instigated by Dr Železný to be wrongful (*ie* without legal basis in Czech law) then the 1996 amendment to the investment structure could not be said to have any impact on CME's rights to its investment. As to the possibility that CET 21 might repeat its termination trick again—there is no legal system in the world that can completely shield an investor from having to defend itself against spurious litigation. The critical question is whether the Media Council's actions resulting in the 1996 amendment constituted a breach of the treaty standard in 1996. If there was a breach, then it becomes relevant to inquire whether the subsequent termination of the Service Agreement by CET 21 was causally linked thereto. It is submitted that this causal connection could be established if CET 21's termination was *lawful*, as then it would be evident that the 1996 amendment did in fact eviscerate ČNTS's exclusive rights to provide broadcasting services.

Another example of an asymmetrical jurisdictional conflict comes from *Wena Hotels Ltd v Arab Republic of Egypt*.[610] On this occasion, the other *fora* cognisant of the municipal law aspects of the investment treaty dispute were contractual arbitral tribunals that had rendered their awards well in advance of the ICSID Tribunal's determination of the investor's claims.[611]

The ICSID Tribunal did not consider any of the previous arbitral awards rendered by the *ad hoc* tribunals with jurisdiction over the lease agreements to be relevant to its decision on liability. The fallacy of this approach was considered in Part IV(C) above. It may be further noted here that one of the key findings of the ICISD Tribunal on expropriation was that Egypt breached the BIT by failing to offer Wena 'prompt, adequate and effective compensation'.[612] In truth, Egypt had left the question of compensation to the *ad hoc* tribunals that the parties had agreed would have jurisdiction over disputes arising under the lease agreements and Wena was successful in recovering damages by resorting to these fora. Thus by complying with its contractual obligation to arbitrate these disputes, Egypt was simultaneously found to breach the investment treaty with respect to its failure to offer 'prompt, adequate and effective compensation'. Furthermore, the ICSID Tribunal did, in its decision on quantum of damages, take into account the amount previously awarded to Wena in the contractual arbitrations and deducted this amount from its damages award.[613]

[609] *Ibid.* para. 475. The UNICTRAL Tribunal also stated: 'Even if ČNTS would be in the position to restore the status of the TV station as it was on August, 5 1999, CET 21 could easily jeopardize the arrangement by repeating the same procedure, terminating the Service Agreement for purported good cause and again dragging CNTS into Civil Court proceedings.' *Ibid.* para. 414.

[610] (Award, 8 December 2000) Case No. ARB/98/4, 6 ICSID Rep 89.

[611] See the account of the facts of this case at the text above accompanying n. 258 *et seq.*

[612] *Ibid.* para. 100. [613] *Ibid.* para. 127.

F. THE RESOLUTION OF ASYMMETRICAL JURISDICTIONAL CONFLICTS

The current trend for investment treaty tribunals, as was demonstrated by the *CME v Czech Republic* and *Wena v Egypt* cases, is to refute the relevance of proceedings or decisions of other judicial *fora* relating to the part of the investment dispute governed by the municipal law of the host state. The common justification for this approach is based on the simplistic notion that treaty tribunals are superior to these other *fora*, although the foundation of this superiority in relation to questions of municipal law has never been articulated. To date, treaty tribunals have considered any potential overlap in the jurisdiction of different courts and tribunals over elements of the investment dispute to be a problem relating to the quantum of damages in the sense of maintaining the prohibition against double recovery for a single loss. Thus, in *CME*, it was stated that:

> The outcome of the civil court proceedings is irrelevant to the decision on the alleged breach of the Treaty by the Media Council acting in concert with the Respondent. It may affect the quantum of a damage claim which, pursuant to agreement between the parties, is not a subject of this Partial Award.[614]

Again in *Wena v Egypt*, the ICSID Tribunal ruled that, although irrelevant to liability, the amounts recovered by Wena in the contractual arbitrations must be deducted from the Tribunal's own award of damages.[615]

The choice of law rule for determining the existence, nature, and scope of the investment mandates the application of the municipal law of the host state. Hence the crucial question is the extent to which an investment treaty tribunal must defer to (i) an existing decision of a municipal court or contractual arbitral tribunal on these issues relating to the investment or (ii) concurrent proceedings in which such *fora* are seized of the same subject matter.

It must be first recognised that there are no international rules on the conflicts of jurisdiction in existence that provide a neat solution to these problems. The general principle of *res judicata*,[616] whilst applicable to international arbitral awards,[617] requires that the 'parties, object and cause' are the same.[618] The object and cause of contractual claims or other

[614] *CME* Partial Award, para. 415. The UNICTRAL Tribunal considered the ICC arbitration proceedings in the same way: '[T]he Claimant's claim is not reduced by the Claimant's and/or ČNTS's possible claims to be pursued against Dr. Zelezn [Managing Director of CET 21] in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other potential tortfeasor only the full amount of its damage'. *Ibid.* para. 582.

[615] See (Award, 8 December 2000) Case No. ARB/98/4, 6 ICSID Rep 89, para. 127; (Decision on Annulment, 5 February 2002) Case No. ARB/98/4, 6 ICSID Rep 129, para. 49.

[616] *Trail Smelter Case* (United States v Canada), (1941) 3 UN Rep 1905, 1951–2, 'The sanctity of *res judicata* attached to a final decision of an international tribunal is an essential and settled rule of international law.'

[617] See, *eg*: New York Convention on the Recognition and Enforcement of Arbitral Awards, Art. III; (France) New Code of Civil Procedure, Arts. 1476, 1500; (Switzerland) Private International Law Act, Art. 190; (Netherlands) Code of Civil Procedure, Art. 1059; (England) Arbitration Act 1996, s. 58.

[618] See, *eg*: *Trail Smelter Case* (United States v Canada), (1941) 3 UN Rep 1905, 1952; *China Navigation Co. Ltd. (UK) v United States (S.S. Newchang)*, (1921) 6 UN Rep 64, 65; ICC Case 6363/1991, (1992) XVII YB Commercial Arbitration 186, 198; *Waste Management, Inc. v United Mexican States* (Decision on Preliminary Objection, 26 June 2002) Case No. ARB(AF)/00/3, 6 ICSID Rep 549, para. 39.

claims or applications before municipal courts arising out of investment are different from claims based on the substantive investment protection obligations in an investment treaty. A treaty tribunal is not, therefore, formally bound by a decision of a contractual tribunal or municipal court that purports to decide these issues. Likewise, the doctrine of *lis alibi pendens* is constrained by similar requirements on the identity of the parties and the cause of action in the multiple proceedings.[619]

Consistent with a strict application of these doctrines, treaty tribunals and contractual tribunals established pursuant to the ICSID Convention have almost unanimously rejected the *res judicata* effect of existing municipal court judgments or contractual arbitral awards that deal with aspects of the dispute[620] and likewise have uniformly declined to cede their jurisdiction, whether by dismissal of the proceedings or a stay, to competing *fora* on the basis of *lis alibi pendens*.[621]

An early precedent of the France/Mexico Mixed Claims Commission provides some useful guidance on questions of litispendence between 'international' and municipal tribunals. In *Estate of Jean-Baptiste Caire (France) v United Mexican States*,[622] the widow of a French national assassinated by Mexican soldiers in Mexico had sought compensation before a national commission in France. The French legislation establishing the national commission did not provide for compensation for damage caused by conventional forces (being restricted in scope to damage by the revolutionary forces) and thus no indemnity was paid to the French national's widow in these domestic proceedings. France nonetheless brought a claim against Mexico before the France/Mexico Mixed Claims Commission seeking the same amount of compensation for the same delict. The France/Mexico Claims Commission rejected Mexico's submission that the existence of the national proceedings rendered the international claim inadmissible:

> En effect, le droit international n'oblige point un tribunal international de s'abstenir, dans des conditions telles qu'elles se présentent dans les cas des présentes réclamations, de connaître d'un litige international, par le motif que le même différend est pendant devant un autre tribunal.[623]

The Presiding Commissioner, writing for the majority, was nonetheless careful to specify certain situations when the litispendence doctrine

[619] See, *eg*: *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) (1925) PCIJ Rep Series A No 6, 19–20; *Socaciu v Etat Autrichien et autres* (1927) 7 Recueil des décisions des Tribunaux arbitraux mixtes 785, 791 (different object); *Boskovitz v S. A. Haditermeny et Etat hongrois* (1928) 8 Recueil des décisions des Tribunaux arbitraux mixtes 607, 611 (different parties); *Selwyn Case* (Great Britain v Venezuela) (1904) 9 UN Rep 380, 383 (different object); B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 339–47.

[620] See, *eg*: *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v Arab Republic of Egypt* (Jurisdiction (No. 2), 14 April 1988), 3 ICSID Rep 131, 162–3; *Wena Hotels Ltd v Arab Republic of Egypt* (Decision on Annulment, 5 February 2002) Case No. ARB/98/4, 6 ICSID Rep 129, para. 86; *CME* Partial Award, paras. 415, 582.

[621] See, *eg*: *Société Générale De Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction, 6 August 2003) Case No. ARB/01/13, (2003) 42 ILM 1290, para. 182; *CME* Partial Award, para. 415.

[622] (1929) 5 UN Rep 516.

[623] *Ibid.* 520.

might be applicable between international and municipal judicial *fora*:

> Pour éviter des malentendus, je crois, toutefois, devoir réserver expressément les cas particuliers, dans lesquels, par exemple, la Commission franco-mexicaine se trouverait en présence de questions préliminaires du droit civil, pendantes devant les tribunaux ordinaires mexicains, et donc la solution serait d'importance décisive pour la réclamation en indemnité devant la Commission franco-mexicaine (question préjudicielle de savoir si un bien immeuble appartient en propriété à une personne dont les droits de propriété sont contestés devant un tribunal civil mexicain, mais qui, entre-temps, a présenté à ladite Commission une réclamation en indemnité pour cause de destruction de ce même bien immeuble, etc.).[624]

The Commission thus anticipated that questions of municipal law, such as ownership rights to property under the *lex situs*, could assume an 'importance décisive pour la réclamation en indemnité devant la Commission' and was prepared to accord to municipal courts a leading role in resolving such issues.

An practical example of the type of deference to a municipal court envisaged by the France/Mexico Mixed Claims Commission on questions of municipal law may be found in a preliminary decision rendered by the Permanent Court of International Justice a few years later in the *Prince von Pless Case*.[625] The delict concerned alleged tax abuses by the Polish authorities against a German national, Prince von Pless. The Prince had instituted municipal proceedings against the Polish authorities and, by the time Germany had taken up his case before the Permanent Court, the matter was before the Supreme Polish Administrative Tribunal. The Court dealt with the pending proceedings in a highly pragmatic fashion:

> [I]t will certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that Tribunal . . . the Court must therefore arrange its procedure so as to ensure that this will be possible.[626]

It is not within the scope of the present study to propose a code of principles to deal with the multifaceted problem of asymmetrical conflicts of

[624] (1929) 5 UN Rep. 525.

[625] (1933) (Interim Protection Order) PCIJ Rep Series A/B No. 52, cited by W. Reisman, above n. 420, 366–7.

[626] *Ibid.* 16. The PCIJ was less pragmatic several years earlier in *Certain German Interests in Polish Upper Silesia* (1925) (Decision on Jurisdiction) PCIJ Rep Series A No 6. The Court appeared to almost deny the possibility of litispendence in relation to disputes before the PCIJ and other international *fora*, in this case the German/Polish Mixed Arbitral Tribunal: *ibid.* 20. Professor Reisman's critique of this decision together with his suggestion that the PCIJ should have directed the parties to suspend the specific proceedings for the restitution of property before the Mixed Arbitral Tribunal pending the Court's decision on general issues concerning the interpretation of the relevant treaties is persuasive. See W. Reisman, above n. 423, 373–4.

jurisdiction, which, unlike symmetrical conflicts, are not susceptible to being resolved pursuant to a general formula. Nevertheless, at least the starting point should be that there is no strict hierarchical distinction between the investment treaty tribunal and other *fora* in resolving questions pertaining to the existence, nature, and extent of an investment. This is not an instance when the principle that an international tribunal only takes account of municipal law as 'facts' comes into play,[627] because the municipal court decision is not being relied upon to determine whether conduct attributable to the state is violative of an international obligation. To the contrary, these judicial pronouncements by municipal courts and contractual tribunals are invoked in a context where the applicable law relating to this part of the dispute is precisely the same as before treaty tribunals.

It is thus untenable in principle, but also irresponsible as a matter of policy, for treaty tribunals to dismiss out of hand the relevance of prior judicial decisions on the 'private' aspects of an investment dispute or concurrent proceedings in different *fora* where such issues are to be resolved. More often than not, the judges and arbitrators of such *fora* are more qualified to deal with intricate questions relating to the proprietary and contractual rights of the investor that fall to be examined under the governing municipal system of law than the arbitrators with competence over the treaty claims that have been selected for their expertise in international law. With disturbing frequency, questions of municipal law relating to aspects of the investment are brushed aside as peripheral or dealt with superficially by tribunals that are not predisposed, at least without the assistance of detailed expert evidence, to make informed rulings on these questions. The difficulties of pleading foreign law in municipal courts have been researched and exposed,[628] but little attention has been given to the same phenomena before international tribunals that, due to the nature of their subject matter jurisdiction, are sometimes bound to rule upon complex questions of municipal law.[629]

It is submitted that there should be a rebuttable presumption to the effect that a decision of a competent court or tribunal on questions of municipal law relating to the existence, nature, or extent of the investor's interests in the investment will be followed by the treaty tribunal. The presumption could be rebutted by the party resisting the findings of the competent court or tribunal by the tendering of evidence that the judgment or award is defective due to a serious procedural irregularity (such

[627] *Certain German Interests in Polish Upper Silesia* (1926) (Judgment on Merits) PCIJ Rep Series A No. 7, 19, 'From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as to legal decisions or administrative measures.'

[628] See, *eg*, in relation to the English courts: R. Fentiman, *Foreign Law in the English Courts* (1998).

[629] A timely reminder of what the application of municipal law by an international tribunal actual entails is provided by W. Reisman, 'The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15 *ICSID Rev—Foreign Investment LJ* 362, 368–71.

as those grounds that would normally defeat the *res judicata* effect of a judgment or award)[630] or a serious error of law. The treaty tribunal would always retain the ultimate discretion as to whether to adopt the reasoning and findings of another court or tribunal and would in any case need to properly motivate its decision to accept such reasoning and findings so as to discharge the mandate of its own jurisdiction.

Such an approach would require the treaty tribunal in some cases to assume the role of a court of appeal vis-à-vis a municipal court or arbitral tribunal. But it is more of an affront to judicial comity to completely ignore the prior decisions of competent courts and tribunals than to subject such decisions to a level of scrutiny before adopting their findings.

In relation to concurrent proceedings before other judicial *fora* relevant to aspects of the investment dispute before the treaty tribunal, the grounds for the latter exercising a stay are less compelling than was the case for symmetrical jurisdictional conflicts. As far as asymmetrical conflicts are concerned, the concurrent proceedings do not arise out of the same cause of action but instead are relevant to a composite part of the investment dispute. Nevertheless, there may be situations when a treaty tribunal would be prudent to exercise a stay to await the judicial pronouncements of other *fora* in the manner suggested by the Permanent Court in the *Prince von Pless Case*. For instance, if a treaty tribunal has determined that the fundamental basis of the investor's claim is an alleged violation of the treaty standards and yet, as in *Vivendi*, there is a very close connection with the contractual relationship between the same parties, then a stay of the proceedings before the treaty tribunal might well be appropriate. As previously mentioned, this approach would have saved the ICSID Tribunal's award in *Vivendi* from annulment. It is also relevant to distinguish between a forum seized of certain aspects of the investment dispute by the assertion of subject matter jurisdiction (*ie* before a municipal court) and a forum competent on the basis of a forum selection clause between the investor and the host state. A stay should be exercised by a treaty tribunal with less circumspection when the investor has itself chosen the forum that is competent over questions relating to the nature and scope of its investment interests.

G. 'FORK IN THE ROAD' CLAUSES IN INVESTMENT TREATIES

Many investment treaties allow the investor to choose between different judicial *fora* for the submission of the defined categories of investment disputes. In accordance with what has come to be known as a 'fork in the road' clause, once that election is made by the investor, the treaty normally prescribes that it is to be final and irrevocable. The 'fork in the road' is thus in reality a junction leading to several one-way streets.

[630] B. Cheng, above n. 619, 357–72.

The alternative judicial *fora* set out in such a provision usually include a combination of one or more of the following:[631]

- municipal courts of the host state;
- a court or tribunal previously selected by the investor and the host state in a forum selection clause;[632]
- international arbitration either in the form of an *ad hoc* arbitration pursuant to the UNCITRAL Rules or institutional arbitration under the ICSID Arbitration or Additional Facility Rules.

The rationale underpinning the 'fork in the road' provision in investment treaties is clearly the avoidance of multiple proceedings in multiple *fora* in relation to the same investment dispute. In more colloquial terms, it is designed to prevent the investor having several bites at the cherry. The UNCITRAL Tribunal in *Ronald S. Lauder v Czech Republic* described the purpose of the clause as follows:

> The purpose of [the fork in the road provision in US/Czech Republic BIT] is to avoid a situation where the same investment dispute . . . is brought by the same claimant . . . against the same respondent (a Party to the Treaty) for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute.[633]

The most detailed analysis of the 'fork in the road' is to be found in the *Vivendi v Argentina* decisions. The particular clause in question in this case was Article 8 of the Argentina/France BIT:

1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
2. If such dispute could not be resolved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:
   - either to the national jurisdictions of the Contracting Party involved in the dispute;
   - or to international arbitration in accordance with the terms of paragraph 3 below.

Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.[634]

[631] See below n. 634.

[632] The requirements for such a selection in an investment contract were considered in *LANCO International Inc. v Argentine Republic* (Preliminary Decision on Jurisdiction, 8 December 1998) Case No. ARB/97/6, 5 ICSID Rep 367, paras. 24–8.

[633] *Lauder* Final Award, para. 161.

[634] *Vivendi* Award, at Appendix 1. Other examples of 'fork in the road' provisions may be found in the Energy Charter Treaty, Art. 26(2)(3) and the following model BITs: Chile Model BIT, Art. 8(3), *UNCTAD Compendium* (Vol. III, 1998) 147; Iran Model BIT, Art. 12(3), *ibid.* (Vol. VI, 2002) 483; Peru Model BIT, Art. 8(3), *ibid.* 497; US Model BIT, Art. 9(3), *ibid.* 507; Austria Model BIT, Art. 13, *ibid.* (Vol. VII) 265; Benin Model BIT, Art. 9(2), *ibid.* (Vol. VIII) 283.

Paragraph 3 of Article 8 gives the investor the choice of either *ad hoc* arbitration pursuant to the UNCITRAL Rules or ICSID arbitration. In this case the claimants opted for the latter.

The interpretation given to this clause by the ICSID Tribunal and the *ad hoc* Committee is strictly obiter, because the investor was found to have made a valid choice of ICSID arbitration and the jurisdiction of the Tribunal over the investment dispute submitted by the claimants was upheld.[635] The mere existence of the dispute resolution clause in the Concession Contract between the investor and the Tucumán Province did not, therefore, constitute an election by the investor in favour of the 'national jurisdictions' of Argentina. Both the Tribunal and the *ad hoc* Committee did, nonetheless, consider the hypothetical effect of the investor bringing its contractual grievances relating to its investment before the Tucumán courts in terms of the 'fork in the road' in Article 8 of the BIT, and came to opposite conclusions. This was despite the common ground on the clear distinction between claims grounded in contract and claims based on the BIT. The Tribunal found that, had the investor brought its contractual claims to the Tucumán courts pursuant to the dispute resolution clause of the Concession Contract, this would not have constituted a waiver of any right to subsequently submit treaty claims to an international tribunal pursuant to Article 8 precisely because of the different legal foundations of these causes of action.[636] The *ad hoc* Committee, on the other hand, attached significance to the broad formulation of Article 8(1) as it refers to 'any disputes relating to investments made under this Agreement', thereby encompassing contractual *or* treaty claims arising out of the same investment.[637] Thus if the claimants had brought contractual claims against the Tucumán Province before the Tucumán courts, it would have thereby foreclosed any recourse to an investment treaty tribunal based on a different cause of action.[638]

If the *ad hoc* Committee's interpretation is correct, the 'fork in the road' provision would undoubtedly have a chilling effect on the submission of disputes by investors to domestic judicial *fora* even where the issues in contention are purely contractual, tortious or even administrative, and clearly within the domain of municipal law. One would expect, as a result, an increase in claims simply not ripe for international adjudication on

[635] *Vivendi* Annulment Decision, paras. 72–80.

[636] The reasoning provided by the ICSID Tribunal for this conclusion is sparse: '. . . submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not . . . have been the kind of choice by Claimants of legal action in national jurisdictions (*i.e.* courts) against the Argentine Republic that constitutes the "fork in the road" under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention.' *Vivendi* Award, para. 55.

[637] *Vivendi* Annulment Decision, para. 55. The *ad hoc* Committee compared Art. 8 of the BIT with Art. 11 of the same instrument containing a narrower formulation for the submission of disputes to the state/state arbitration procedure which concerns disputes 'concerning the interpretation or application of this Agreement' and also Art. 1116 of the NAFTA which allows an investor to submit to arbitration 'a claim that another Party has breached an obligation' under Ch. 11. *Ibid.* para. 55.

[638] *Ibid.*

the merits. An investor's premature recourse to a treaty tribunal, with the attendant time and cost this involves, would be difficult to condemn as a matter of policy because the investor would have a legitimate interest to avoid jeopardising its 'day in court' before an international tribunal. This would put both parties in a difficult position because the investor might be compelled to play what is often its best litigation card too early before its main grievances have ripened and thus risk having its treaty claims dismissed on the merits, whereas the host state would be deprived of the opportunity to dispense adequate remedies through its own courts and instead face more numerous and expensive international proceedings. One can detect both these consequences in the *Vivendi* and *SGS v Pakistan* cases.

Such a development is not inevitable. As previously stated, both the ICSID Tribunal and the *ad hoc* Committee in *Vivendi* emphasized the distinct nature of contractual claims and treaty claims, both of which are certainly capable of meeting the definition of 'investment disputes' pursuant to the 'fork in the road' provision. Although the ICSID Tribunal's reasoning in support of its interpretation is very sparse, it can nevertheless be defended for the following reasons. A 'fork in the road' provision cannot, by any reasonable interpretation of this type of clause, prevent an investor from bringing a treaty claim in respect of a grievance completely unrelated to a different grievance that was previously submitted to a municipal court, even if such complaints relate to the same investment. For instance, an application by the investor to an administrative court to challenge an increase in the municipal rates for the disposal of waste from the investor's factory cannot prevent the investor from bringing a claim to an international tribunal for the wholesale expropriation of the factory a week later by a presidential decree. These grievances would constitute different 'investment disputes' for the purposes of the provision. This point merely illustrates the fact that the generality of the 'fork in the road' clause must be subject to some limitations. It is more than plausible, and certainly desirable, to further distinguish 'investment disputes' by the legal foundation for the cause of action. To take the previous example, the investor's swift administrative court application might be partially successful in reducing the municipal charges. But the unforeseen burden of this additional expense might nevertheless destroy the financial viability of the factory so that it ultimately must be closed down. The investor then brings a claim for a breach of the national treatment standard in the relevant investment treaty, having discovered that no other factory in the same industry was subject to the hike in municipal rates. These two claims presented to two different judicial *fora* address the same measure attributable to the host state in relation to the same investment. But they are easily conceptualised as different 'investment disputes' under the 'fork in the road' provision. This approach is, in fact, more consistent with other parts of the *ad hoc* Committee's decision in *Vivendi* for the reasons that now follow.

First, the dispute resolution clause in the Concession Contract was found not to affect the jurisdiction of the ICSID Tribunal with respect to a claims based on the BIT provisions.[639] The *ad hoc* Committee was emphatic on this point: 'A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.'[640] By parity of reasoning, it must follow that the submission of contractual disputes to the Tucumán courts in compliance with this clause should also not affect the ICSID tribunal's jurisdiction over treaty claims. Each would constitute a separate 'investment dispute'.

Secondly, the very basis of the partial annulment was the ICSID Tribunal's summary dismissal of the investor's treaty claims due to the perceived 'crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT'[641] which compelled the investor to first seek redress in the Tucumán courts pursuant to the Concession Contract.[642] To substantiate this basis for annulment, the *ad hoc* Committee emphasized the different juridical character of the claims at length[643] and found that each 'will be determined by reference to its own proper law'[644] so that a 'state may breach a treaty without breaching a contract, and *vice versa*'.[645] Given the fundamental difference between legal foundations of the different types of claim, it would be very curious if they could nevertheless be merged into a single 'investment dispute' for the purposes of the 'fork in the road' provision. Moreover, it would also be surprising if one type of claim could be *res judicata* in relation to the same factual investment dispute for another. It must be conceded, however, that the *ad hoc* Committee did so envisage. Having found that the investor had taken the 'fork in the road', the *ad hoc* Committee stated that it assumed the risk that the Tribunal would find that the acts complained of did not meet the threshold for a breach of the treaty.[646] If this were so, then, according to the *ad hoc* Committee, the investor 'would have lost both its treaty claim and its contract claim'.[647]

A similar problem came before another ICSID Tribunal in the NAFTA case *Waste Management, Inc. v United Mexican States*.[648] Instead of interpreting the type of proceedings that would constitute an election for a 'fork in the road' provision, the Tribunal had to determine the type of proceedings that the investor must waive in order to comply with the conditions precedent for bringing a NAFTA claim. The condition precedent

[639] *Ibid.* para. 76. [640] *Ibid.* para. 103. [641] *Vivendi* Award, para. 78.
[642] *Ibid.* paras. 79, 81.
[643] *Vivendi* Annulment Decision, para. 113: 'A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.' [644] *Ibid.* para. 96.
[645] *Ibid.* para. 95. [646] *Ibid.* para. 113. [647] *Ibid.*
[648] (Award & Dissenting Opinion, 2 June 2000) Case No. ARB(AF)/98/2, 5 ICSID Rep 443. The arbitration proceeded under the ICSID Additional Facility Rules.

in question was Article 1121, which compels the investor to:

> [W]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, *any proceedings with respect to the measure of the disputing Party that it alleged to be a breach* of an obligation under the NAFTA.[649]

The differences between the problems in the *Vivendi v Argentina* and *Waste Management v United Mexican States* must be identified before any attempt is made to shed further light on the 'fork in the road' provision.[650] Most importantly, the 'fork in the road' provision clearly goes to the arbitral tribunal's jurisdiction, while the waiver requirement in Article 1121 of the NAFTA can only affect the admissibility of the claim.[651] This distinction should bear some influence on the interpretation of each clause because a jurisdictional objection, if successful, disposes of the claimant's case *in limine*, whereas a claim that is defective on admissibility grounds can be potentially resubmitted upon rectification by the claimant or severed from other parts of the case which remain untainted. One would expect, therefore, that jurisdictional restrictions should be approached with greater circumspection due to the draconian consequences they entail in light of the object and purpose of investment treaties. Further, the term 'dispute' in the 'fork in the road' provision is perhaps a narrower formulation than 'proceedings with respect to the measure' alleged to be in breach of the NAFTA. The latter wording could be interpreted to be open-ended, so that any proceedings bearing a relationship to the factual or legal measure adopted by the state party might be within the proper scope of the required waiver. On the other hand, a 'dispute' denotes a particular legal cause of action between two identifiable parties based on particular facts and has a singular or 'closed' quality to it (*ie* '*the* dispute' compared to '*any* proceedings').

The ICSID Tribunal in *Waste Management Inc. v United Mexican States* was divided on the proper scope of the waiver in Article 1121. The majority found that there was an overlap between the Mexican court and domestic arbitration proceedings brought by Waste Management[652] relating to non-compliance with the obligations of guarantor assumed under a line of credit agreement with the state-owned entity, on the one hand, and

[649] Emphasis added. Article 1121 exempts 'proceedings from injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party'.

[650] The tribunal established to hear the Waste Management's resubmission of its claim described Art. 1121 as a 'middle course' between a 'fork in the road' provision and a provision allowing the reference of disputes to international arbitration irrespective of whether any local remedies have been pursued.

[651] This was the characterisation of Art. 1121 given in the Dissenting Opinion of Keith Highet in *Waste Management v United Mexican States* (Dissenting Opinion, 2 June 2000) Case No. ARB(AF)/98/2, 5 ICSID Reports 462, paras. 56–63. The majority did not expressly consider this issue, but dismissed the claimant's case on the basis of lack of jurisdiction. *Concord: Ethyl Corporation v Government of Canada*, (Award on Jurisdiction, 24 June 1998), (1999) 38 ILM 708, 729. *Contra: Mondev International Ltd v United States of America*, (Award, 11 October 2002) Case No. ARB(AF)/99/2), 6 ICSID Rep 192, para. 44.

[652] More precisely, Waste Management's Mexican subsidiary.

the submission to the ICSID Tribunal on the other because 'both legal actions have a legal basis derived from the same measures'.[653] By pursuing these proceedings simultaneously, Waste Management's conduct was found to be incompatible with the terms of Article 1121, with the result that the ICSID Tribunal was devoid of jurisdiction to hear its NAFTA claims.[654] In his dissenting opinion, Highet accentuated the difference in the causes of action in the different *fora* as being 'local commercial claims in the Mexican tribunals, and international treaty claims before this Tribunal'.[655] The investor's concurrent legal proceedings in local *fora* could not, on this basis, fall within the purview of the waiver requirement in Article 1121.

The reasoning underlying the dissenting opinion is closer to the 'common ground' in the award and annulment decision in *Vivendi* due to the emphasis on the different legal foundations underpinning the causes of action:

> There must be, and is, a distinction to be drawn in juridical terms between the legal obligations of Mexico under Mexican law and the legal obligations of Mexico under its international treaty obligations imposed by NAFTA.[656]

It will be recalled that the arbitral tribunal in *Vivendi* summarily dismissed the investor's treaty claims because there was a 'crucial connection'[657] to contractual issues that were to be resolved by a different judicial forum. The majority in *Waste Management* may have followed a similar path by declining jurisdiction on the basis of the interconnectedness between the contractual and international law obligations underlying the different causes of action.[658] Despite the common emphasis on the different legal foundations of these obligations, the dissenting opinion in *Waste Management* and the annulment decision in *Vivendi* appear to diverge on the consequences of this distinction for the characterisation of the dispute. It is submitted that the distinction should survive for the purposes of interpreting the 'fork in the road' provision, so causes of action based on municipal and international law obligations would entail two different 'disputes' for the purposes of this clause.

There is support for this approach in the ICSID Tribunal's decision in *CMS Gas Transmission Company v The Republic of Argentina*.[659] In the

[653] (Award, 2 June 2000) Case No. ARB(AF)/98/2, 5 ICSID Reports 443, para. 27.

[654] *Ibid.* para. 31.

[655] (Dissenting Opinion, 2 June 2000) Case No. ARB(AF)/98/2, 5 ICSID Rep 462, para. 28.

[656] *Ibid.* para. 8.

[657] (Award, 21 November 2000) Case No. ARB/97/3, 5 ICSID Rep 299, para. 78.

[658] (Award, 2 June 2000) Case No. ARB(AF)/98/2, 5 ICSID Rep 443, para. 28, 'It is clear that the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.'

[659] (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) Case No. ARB/01/8, (2003) 42 ILM 788.

section of the award entitled 'Jurisdictional objection on the "fork in the road" triggering', the Tribunal noted that:

> Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for a breach of contract, this would not have prevented submission of the treaty claims to arbitration.[660]

The Tribunal was primarily concerned with domestic proceedings launched by TGN (the company in which the Claimant held its investment), which was a distinct entity that could not, according to the Tribunal, trigger the 'fork in the road' vis-à-vis the Claimant.[661] However, the Tribunal also highlighted the fact that the causes of action advanced by TGN in the Argentine courts, and those submitted by the Claimant before the ICSID Tribunal, were 'under separate instruments' and therefore 'different'.[662]

An analysis of investment treaties reveals that the 'fork in the road' provision is often embedded in treaties which allow the investor to invoke the jurisdiction of an international tribunal with respect to a broad sphere of 'investment disputes' that contemplates both municipal and international law claims.[663] This gives rise to the possibility of symmetrical jurisdictional conflicts and hence a more acute need to regulate the competing jurisdictions through the 'fork in the road' mechanism.[664] Treaties that confine the scope of any submission to international arbitration exclusively to claims based on the minimum treaty standards do not usually contain a 'fork in the road' provision. The risk of competing jurisdictions still exists because, in 'monist' jurisdictions where treaties become part of domestic law and thus enforceable before municipal courts, the investor could bring claims based explicitly on the treaty standards in multiple *fora*. This remedial possibility is unlikely to be utilised by investors often in practice, and there is no reported precedent to date. The 'fork in the road' clause is therefore less relevant to such treaties.

[660] *Ibid.* para. 80. Footnote omitted. [661] *Ibid.*

[662] *Ibid.* For further support for this approach to the fork in the road provision, see: *Genin and Others v Republic of Estonia*, (Award, 25 June 2001) Case No. ARB/99/2, 6 ICSID Rep 236, paras. 330–4; *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, (Award, 12 April 2002) Case No. ARB/99/6, para. 71, available at <http://www.worldbank.org/icsid/cases/me_cement-award. pdf>.

[663] See, *eg*: Chile Model BIT, Art. 8(3), *UNCTAD Compendium* (Vol. III, 1996) 148; Peru Model BIT, Art. 9(1), (Vol. VI, 2002) 497; US Model BIT, Art. 9(3), *ibid.* 507; Austria Model BIT, Art. 13, *ibid.* (Vol. VII) 265 (but only if the dispute has been submitted to a municipal court *and* a judgment has been rendered); Benin Model BIT, Art. 9(2), *ibid.* (Vol. IX) 283.

[664] A novel solution to this problem that may not deter recourse to the local courts may be found in the Finland Model BIT: 'An investor who has submitted to a national court may nevertheless have recourse to one of the arbitral tribunals mentioned in paragraphs 2(b) to (d) of this Article [ICSID, ICSID Additional Facility and UNCITRAL] if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.' Article 9(3), *ibid.* (Vol. VII, 2002), 292.

VIII. Conclusions

The principal conclusions of this study are now summarised:

1. The investment treaty regime for investor/state disputes cannot be rationalised either as a purely public international law or purely private international law form of dispute resolution. Rather it embodies elements of both, and can be applied as such in a coherent and effective way.
2. The investment treaty regime for state/state disputes is properly understood as a creation of public international law *stricto sensu*.
3. The practice of investment treaty arbitration does not support rationalising the investor's cause of action against the host state as derivative (*ie* the investor steps into the shoes of its national state to vindicate the rights of the national state).
4. The practice of investment treaty arbitration is instead consistent with a 'direct' theory whereby the investor vindicates its own rights (or the host state's direct obligations to the investor).
5. Investment treaties create certain international obligations opposable by one contracting state to another, and the general rules of state responsibility for international wrongs regulate the consequences of any breach thereof. These obligations can generally be grouped into two categories: (i) adherence to the law of treaties in the interpretation and application of the investment treaty; (ii) the obligation not to frustrate an investor's recourse to international arbitration or the enforcement of any award against the host state.
6. The secondary rules on the responsibility of states for internationally wrongful acts, as codified by the International Law Commission, are not transferable *en bloc* to the investment treaty regime for investor/state disputes.
7. Investment treaties create a sub-system of state responsibility for investor/state disputes. The host state's breach of an investment treaty creates new secondary rights and obligations as between the investor and the host state. The national state of the investor has no residual interest in these new rights and obligations.
8. The international rules on the nationality of claims and the exhaustion of local remedies are not applicable to the sub-system of state responsibility for investor/state disputes created by investment treaties.
9. The three sources of legal rules applicable to the substance of investor/state disputes are the municipal law of the host state, the investment treaty, and general principles of international law.
10. Three distinct choice of law rules are applicable to the substance of an investor/state dispute. First, the municipal law of the host state determines whether a particular property right exists, the scope of that right, and in whom it vests. Secondly, the investment treaty supplies the definition of investments and thereby determines whether

the legal property right recognised by the municipal law of the host state is subject to the protection afforded by the investment treaty. Thirdly, acts or measures attributable to the host state with respect to the investment are to be tested for compliance with the minimum standards of investment protection prescribed by the investment treaty as supplemented by the general principles of international law.

11. The procedure of investor/state arbitrations is governed by the relevant provisions of the investment treaty, the applicable arbitral rules and the *lex loci arbitri*. The *lex loci arbitri* does not, however, apply to investor/state arbitrations conducted under the ICSID Convention, which are ultimately governed by a self-contained procedural regime detached from any system of municipal law.
12. Arbitral awards rendered by treaty tribunals in investor/state cases are 'foreign' or 'commercial' awards for the purposes of the New York Convention. Recognition and enforcement may be refused to such awards on the grounds set out in Article V of the New York Convention. Where an application to recognise or enforce an ICSID award is made in a country that has not ratified the ICSID Convention, the award should also be considered as a 'foreign' or 'commercial' awards for the purposes of the New York Convention.
13. The failure of the municipal courts of the host state to recognise and enforce arbitral awards rendered by treaty tribunals in investor/state cases in accordance with an applicable international treaty on the recognition and enforcement of arbitral awards may constitute a separate breach of the investment treaty that is actionable pursuant to the investor/state or the state/state arbitral mechanism.
14. Conflicts of jurisdiction between treaty tribunals and other judicial *fora* generally arise because investors are not bound to exhaust local remedies in the host state (or other procedures previously agreed to) before instituting proceedings before a treaty tribunal.
15. 'Symmetrical' conflicts of jurisdiction arise when a treaty tribunal is seized of a claim based upon a private law obligation and a different judicial forum has jurisdiction over the same claim.
16. Where the fundamental basis of the investor's claim before a treaty tribunal rests upon a breach of contract, the treaty tribunal must dismiss or stay its proceedings in favour of a judicial forum that has been previously designated by the parties to resolve disputes arising out of the contract, save where the treaty expressly overrides a previous designation. The principles of *pacta sunt servunda*, *generalia specialibus non derogant*, and *prior tempore, potior jure* mandate this approach.
17. In determining the fundamental basis of the investor's claims, the treaty tribunal must conduct a *prima facie* analysis of the treaty obligations that the investor seeks to invoke and determine whether the facts alleged are reasonably capable of constituting a violation of these obligations. The investor's characterisation of its claims is not definitive for this purpose.

18. 'Asymmetrical' conflicts of jurisdiction arise when a municipal court or arbitral tribunal has pronounced upon or is seized of a dispute relating to the existence, nature, or scope of the investor's interests in its investment and such interests are contested in an investment dispute before a treaty tribunal.
19. Property rights are the basis of an investment. Insofar as the municipal law of the host state determines whether a particular legal right to property exists, the scope of that right, and in whom it vests, prior judicial pronouncements or concurrent proceedings that address such issues can be relevant to questions of liability before a treaty tribunal in addition to questions on the quantum of damages.
20. The principles of *res judicata* and *lis alibi pendens* are not appropriate for dealing with asymmetrical conflicts of jurisdiction. The general rule should be that there is a rebuttable presumption that a prior judicial decision will be upheld by the treaty tribunal absent any serious procedural irregularities or a manifest error of law. When there are concurrent proceedings in other judicial *fora* dealing with aspects of the investment dispute, the treaty tribunal has the discretion to stay its proceedings where appropriate.
21. A cause of action based on a private law obligation generates a different 'investment dispute' for the purposes of the 'fork in the road' provision to a cause of action based on an investment treaty obligation, even if these causes of action relate to the same investment.

IX. Postscript—*SGS Société Générale de Surveillance S.A. v Republic of the Philippines*

The Editors have generously ceded a few more pages of this Yearbook to allow the present writer to briefly comment upon an arbitral decision of singular importance to this study that was rendered after the final text had been submitted for publication. The ICSID Tribunal's jurisdictional decision in *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*[665] clarifies many of the issues that were addressed in Part VII of this study on 'Jurisdictional Conflicts and Investment Treaty Arbitration'.[666]

The facts of the case bear many similarities to those in *SGS v Pakistan*,[667] indeed the dispute arose out of the same type of investment activity by the same Swiss company SGS, *viz.*, the provision of certification services based on pre-shipment inspections on behalf of the customs authorities of the host state.[668] The commercial relationship between SGS

[665] (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) Case No. ARB/02/6, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

[666] The decision deals with other preliminary issues as well, such as the territorial requirement for investments and the interpretation of 'umbrella clauses'. This brief comment will, however, focus solely on the jurisdictional issues that arose due to the exclusive jurisdiction clause in the investment contract.

[667] *Ibid.* para. 95. See the text accompanying n. 528 *et seq.* in the main text.

[668] *Ibid.* para. 12.

and the Philippines was formalised in successive contracts over 15 years; the final contract (the 'CISS Agreement'[669]) had been extended several times by the parties before terminating in accordance with its terms on 31 March 2000.[670] Following the termination, SGS submitted certain monetary claims under the CISS Agreement amounting to approximately USD 140 million.[671] SGS instituted arbitration proceedings against the Philippines under the Switzerland/Philippines BIT, claiming that the Philippines, in refusing to pay this amount, violated several of its treaty obligations.[672] The Philippines objected to the jurisdiction of the ICSID Tribunal on the ground that, *inter alia*, SGS's claims were contractual and therefore subject to the jurisdiction of the Regional Trial Courts of Makati or Manilia in accordance with the forum selection clause in the CISS Agreement.[673] The Tribunal approached the question of jurisdiction:

> . . . on the footing that in the Request for Arbitration, SGS made credible allegations of non-payment of very large sums due under the CISS Agreement and claimed that the Philippines' failure to pay these was a breach of the BIT, but that the exact amount payable has neither been definitively agreed between the parties nor determined by a competent court or tribunal.[674]

The Tribunal's reasoning will now be examined under various headings that correspond to the taxonomy adopted in this study.

Can the Ratione Materiae *Jurisdiction of a Treaty Tribunal Extend to Purely Contractual Disputes?*

The ICSID Tribunal held that the reference to 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party' in the BIT was 'not limited by reference to the legal classification of the claim that is made'[675] and thus was sufficiently broad to encompass contractual claims. The Tribunal thus rejected the problematic assumption of the ICSID Tribunal in *SGS v Pakistan*[676] that contractual claims by their very nature were incapable of falling within this broad definition of the *ratione materiae* competence of a treaty tribunal.[677] This is consistent with the critique of the *SGS v Pakistan* ruling on this point in this study.[678]

Does an Investment Treaty Override Existing Contractual Forum Selection Clauses?

The Tribunal resolved an issue left open by the *ad hoc* Annulment Committee in *Vivendi* as to whether the exclusive jurisdiction clause in a

[669] 'CISS' is an acronym for 'comprehensive import supervision service'. *Ibid.* para. 13.
[670] *Ibid.* paras. 13–4. [671] *Ibid.* para. 15. [672] *Ibid.* paras. 16, 44.
[673] *Ibid.* paras. 17, 22, 51. [674] *Ibid.* para. 43. [675] *Ibid.* para. 131 [676] *Ibid.* para. 134.
[677] The grounds favouring an interpretation inclusive of contractual claims are set out in para. 132 of the Decision. [678] See the text accompanying nn. 544–548 *et seq.* in the main text.

contract was somehow overridden by the BIT.[679] The answer given by the majority was in the negative.[680] The principle of *generalia specialibus non derogant* gave precedence to the forum selected in the contract because it was more specific in relation to the parties and the dispute.[681] Furthermore, according to the Tribunal, investment treaties are designed to 'support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.'[682]

Cause of Action Analysis: The Fundamental Basis of the Claims

It was argued by the present writer that it is imperative for a treaty tribunal to objectively distinguish between contractual and treaty causes of action advanced by a claimant.[683] Where the fundamental basis of the claim is the contract rather than the treaty, then a treaty tribunal must decline its jurisdiction over such a claim if either (i) there is a valid forum selection clause in the contract that binds the parties and encompasses the claim, or (ii) the treaty tribunal's *ratione materiae* competence is limited to claims based on treaty violations.

The Tribunal in *SGS v The Philippines* clearly accepted the necessity and legitimacy of cause of action analysis and determined that 'the *substance* of SGS's claim, *viz.*, a claim to payment for services supplied under the Agreement'[684] constituted a 'dispute in connection with the obligations of either party to the CISS Agreement' for the purposes of the exclusive jurisdiction clause.[685] This terminology employed by the Tribunal was thus slightly different from the 'essential basis' test of the *ad hoc* Committee in *Vivendi*, but the distinction is unlikely to be important.

The Resolution of Symmetrical Conflicts of Jurisdiction

Having found that (i) the exclusive jurisdiction clause in the investment agreement covered the substance of SGS's claim for outstanding payments,[686] and (ii) the *ratione materiae* jurisdiction of the tribunal extended to purely contractual claims,[687] the ICSID Tribunal proceeded to deal with the resulting symmetrical conflict of jurisdiction. What effect should be given to the exclusive jurisdiction clause?

[679] See n. 527 in the main text.

[680] Mr Crivellaro dissented on this point and appended a 'Declaration' to the Decision, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-declaration.pdf>.

[681] (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) Case No. ARB/02/6, para. 141, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

[682] *Ibid.* The Tribunal also considered whether the ICSID Convention has the effect of overriding the contractual forum selection clause. Again, the Tribunal refuted this possibility because, *inter alia*, the forum selection clause fell within the exception 'unless otherwise stated' to the exclusive remedy rule in Art. 26 of the ICSID Convention. *Ibid.* para. 147.

[683] See Part VII(D) in the main text.

[684] (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) Case No. ARB/02/6, para. 137, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

[685] *Ibid.* [686] *Ibid.* para. 137. [687] *Ibid.* para. 135.

The present writer proposed the following solution to this problem:

> Where the fundamental basis of the investor's claim before a treaty tribunal rests upon a breach of contract, the treaty tribunal must dismiss or stay its proceedings in favour of a judicial forum that has been previously designated by the parties to resolve disputes arising out of the contract . . .[688]

The Tribunal's analysis is consistent with this proposed solution.

First, the Tribunal concluded that the exclusive jurisdiction clause in the final agreement must be given effect because it was not permissible for SGS to divide the unity of the contractual bargain by pleading the contract as the source of its right to outstanding payments and at the same time refuting the exclusive choice of forum for such claims in the same contract. The Tribunal cited many of the precedents of the mixed claims commissions that were analysed in this study to buttress this principle.[689] In the words of the Tribunal:

> SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.[690]

Secondly, the Tribunal noted that the exclusive jurisdiction clause raised an impediment to its own jurisdiction, rather than abrogating its jurisdiction altogether, and thus the matter was best conceived as one of admissibility.[691] On this basis, the Tribunal declared that it 'should not exercise its jurisdiction over a contractual claim where the parties have already agreed on how such a claim is to be resolved and have done so exclusively.'[692]

Residual jurisdiction over a 'BIT claim independent of the CISS Agreement'?

The point of departure from the principles advocated in this study arises upon the Tribunal's affirmation of jurisdiction over SGS's claims 'under the BIT which can be determined independently from the contractual issues referred to the Philippine courts by Article 12 of the CISS Agreement'.[693] It was submitted by the present writer that if the fundamental or essential basis of the claim is contractual, and the contract in question contains an exclusive jurisdiction clause in favour of a municipal court or arbitral tribunal, then the treaty tribunal must decline or stay its jurisdiction to give effect to that jurisdiction clause. The ICSID Tribunal appears to have determined that the fundamental basis of SGS's claims was contractual when it concluded that Article 12 of the CISS Agreement extended to it.[694] Nonetheless, the significance of this characterisation of the claims was limited to the particular context of the forum selection clause, because the Tribunal went on to apply a different

[688] See Point 16 of the Conclusions in the main text.
[689] See the cases cited at *ibid.* paras. 150–2. [690] *Ibid.* para. 155. [691] *Ibid.* para. 154.
[692] *Ibid.* para. 155. [693] *Ibid.* para. 156. [694] *Ibid.* para. 137.

test to uphold its jurisdiction over two of SGS's treaty claims.[695] This jurisdictional test might be described as a *prima facie* examination of whether a claim has been properly stated under the relevant treaty provision. In the Tribunal's words:

> Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim.[696]

According to the Tribunal, SGS had properly stated claims based on the 'umbrella clause'[697] and the fair and equitable treatment standard, despite the contractual essence of the dispute.

Having ruled that it had jurisdiction over certain of SGS's treaty claims, the Tribunal noted that there were nevertheless important issues between the parties relating to the quantum of the contractual debt under the CISS Agreement. The Tribunal therefore ventured into an asymmetrical conflict of jurisdiction, insofar as it upheld jurisdiction over causes of action based on the treaty, but at the same time recognised that there were contractual issues to be resolved by another forum that were crucial to the ultimate resolution of the dispute.[698] It was concluded in this study that, when faced with an asymmetrical conflict of jurisdiction, a treaty tribunal should exercise its discretion to stay in appropriate circumstances in the interests of comity and the good administration of justice. This was precisely the approach taken by the ICSID Tribunal, who, having found that 'SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process',[699] decided to stay the proceedings to await either a judgment of the courts of the Philippines or a definitive agreement between the parties on the amount payable under the CISS Agreement.[700] The ICSID Tribunal's solution to the asymmetrical conflict of jurisdiction thus resembled the one adopted by the Permanent Court of International Justice in the *Prince von Pless Case*,[701] where the international proceedings were stayed to await the determination of certain tax issues by the Polish courts. The Permanent Court desired to have the benefit of municipal decisions dealing with issues arising under Polish tax law before it adjudged Poland's international responsibility for the alleged abuse of its taxation powers towards a foreign national.[702]

Conclusion

The careful analysis by the ICSID Tribunal in *SGS v The Philippines* of its jurisdiction over contractual claims, the significance of an exclusive

[695] See the cases cited at *ibid.* paras. 157–9. [696] *Ibid.* para. 157.

[697] Article X(2) of the Switzerland/Philippines BIT reads: 'Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.' [698] These issues are described at *ibid.* para. 41.

[699] *Ibid.* para. 163. [700] *Ibid.* para. 175.

[701] (1933) (Interim Protection Order) PCIJ Rep Series A/B No. 52.

[702] See the text accompanying nn. 625 and 626 in the main text.

forum selection clause in an investment contract and the resolution of competing jurisdictions over contractual claims (symmetrical jurisdictional conflicts) deserves full endorsement. Detractors will be quick to point out, however, that the Tribunal's discussion of these issues was *obiter dicta* because it upheld its jurisdiction over certain causes of action that invoked provisions of the treaty. Thus there was no direct conflict between two *fora* with jurisdiction over contractual claims. It may have been more consistent with this *obiter* analysis for the Tribunal to have stuck to its characterisation of SGS's claims as in substance contractual and then stay its jurisdiction on the basis of the exclusive jurisdiction clause in favour of the courts of the Philippines. The reasoning underlying the Tribunal's preference for a different *prima facie* test for its treaty jurisdiction is not entirely clear.

The Tribunal did, however, confront an additional complexity in the form of the 'umbrella clause', which was interpreted as addressing the performance of commitments made by the host state to specific investments, rather than the scope or extent of such commitments.[703] Once the Tribunal had asserted its jurisdiction over an element of the dispute relating to the Philippines' performance of its commitments in the CISS Agreement, then it was open to the Tribunal to refer questions relating to the other elements of the dispute (the scope or extent of those commitments) to a different forum in accordance with the forum selection clause in the same agreement. It is thus possible that the 'umbrella clause' in a sense created a jurisdictional 'wild card' which provided a route to upholding treaty jurisdiction even though the foundation of the claim was contractual.

[703] (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) Case No. ARB/02/6, para. 126, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.