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Mgr. Nicole Kadlec, LL.M.

The Binding Effect of Decisions and Awards in International Disputes

Disertační práce

Školitel: doc. JUDr. Vladimír Balaš, CSc.

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Mgr. Nicole Kadlec, LL.M.

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Abbreviations

BIT	Bilateral Investment Treaty for the Reciprocal Encouragement and Protection of Investments
CJEU	Court of Justice of the European Union
DIS	German Institute of Arbitration
ECT	Energy Charter Treaty, signed in December 1994 and entered into force in April 1998
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment Standard
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington 1965
IIA	International Investment Agreement that comprises of both BITs and MITs
LCIA	London Court of International Arbitration
MIT	Multilateral Investment Treaty for Encouragement and Protection of Investments
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
NAFTA	North American Free Trade Agreement which entered into force on 1 January 1994
OIC Treaty	Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference, signed on 5 June 1981
PCIJ	Permanent Court of International Justice

SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

This thesis, like so many dissertations before, started with an ambitious plan: to consolidate everything there is to know about the binding effect of arbitral awards and decisions of national courts in investment treaty arbitration, international commercial arbitration, and in the proceedings before the International Court of Justice (ICJ). Due to the naivety characteristic of academic novices, I imagined that everything worthy of knowing about the binding effect of decisions in international disputes has already been written and my job will be only to trace the thoughts of the great scholars that came before me and compile them into one final *oeuvre*.

Not only has this project proved to be over-ambitious, but I have also found many a question on the way still unanswered. By the painful process of narrowing down the topic and crossing out possible research questions, there remained but one: How should an arbitrator in investment treaty arbitration treat national judicial decisions? This staggeringly fundamental question still awaits an answer. The fundamentality of the question is perhaps obvious but, for the sake of clarity, please do allow me to briefly illustrate its significance.

In the course of several decades, States have concluded more than 2 800 bilateral investment agreements (BITs) and numerous multilateral investment agreements (MITs, together referred to as IIAs) providing for extensive standards designed to protect foreign investors and their investments.[1] In the majority of those IIAs, States provided investors with direct recourse to bring their claims against the host State, typically before an international tribunal. Such a dispute resolution mechanism replaced the protection of investors through diplomatic protection.[2] The introduction of a direct recourse of an investor against the State where he has made an investment revolutionized the protection of international investments. Unsurprisingly, the growth in the number of concluded IIAs, the quality of protection provided to the investors, and the effectivity of the IIAs' dispute resolution mechanism corresponded with the growth of initiated investment treaty arbitrations.[3]

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1 *See* statistics accessible at https://investmentpolicy.unctad.org/international-investment-agreements.

2 Pavel Šturma, Vladimír Balaš, *Nové mezinárodní dohody na ochranu investic* (Praha: Wolters Kluwer, 2018), pp. 6 – 10; James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford University Press, 2019), pp. 591 – 592; Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford University Press, 2015), pp. 441 – 442.

3 Crawford, *Brownlie's Principles of Public International Law*, pp. 591 – 592; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 443 – 444.

The growth of this dispute settlement mechanism unearthed also some of its weaknesses. Among those is its relative unpredictability caused predominantly by the diffuse system of independent investment treaty tribunals and general and non-specific language of individual standards of protection contained in the IIAs.

Naturally, despite its name, arbitration should not lead to arbitrary decisions. Arbitrariness can be—if not avoided then—moderated by adopting common rules of treatment of applicable law and previous decisions. This is because when tasked to decide a case, an arbitrator will inevitably apply law, either international or even national. In the process of applying such law, the arbitrator stands facing previously rendered judgments, decisions, and awards. The question then arises, how to treat these previously rendered decisions and how, if an arbitrator disagrees with them, could she deviate from them. This dissertation explores the approach of an arbitrator sitting in investment treaty arbitration to decisions of national courts and circumstances under which the arbitrator can deviate from those decisions. By articulating methods of arbitrators' treatment of national judicial decisions, we could moderate the arbitrariness of arbitral decisions and thus safeguard the notion of legal certainty, fairness, and predictability of law.

Observance of legal certainty, fairness, and predictability of law is important not only to the investors bringing their capital to the developing States but also to the States themselves. Recently, there has been an increasing distrust of the States towards international decision-making bodies for their treatment of national law. The States' distrust gives the research question a political dimension, as usual in public international law. This distrust has been manifested for example in the infamous *Achmea case*, where the Court of Justice of the European Union (CJEU) held intra-EU BITs calling for dispute resolution before investment treaty tribunal as incompatible with EU law.[4] The CJEU reached this conclusion after finding that investment treaty arbitration does not ensure the full effectiveness of EU law, especially because arbitral tribunals in investment treaty arbitration could be deciding on questions of EU law without having the possibility to refer to the CJEU for a preliminary ruling.[5] This ruling led to the execution of an agreement for the termination of intra-EU BITs in May 2020.[6]

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4 *Slovak Republic v. Achmea BV*, Case C-284/16, CJEU (Grand Chamber) (6 March 2018).

5 ibid. paras. 38 – 60.

6 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT.

The backsliding of the trust States put in investor-State arbitration is closely connected with the amount of deference investment treaty tribunals give to national law. It reflects the concern of States that their power to regulate is not respected at the international level and ultimately comes down to the question of "*the respect of international courts for national sovereignty and self-determination*".[7] Similarly, the European Court of Human Rights (ECtHR) developed a doctrine of margin of appreciation (*marge d'appréciation*) denoting "*the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights*".[8] The concepts of deference and margin of appreciation are put into effect in investment treaty arbitration for the event a tribunal reviews particular national legislation or decision as to its compliance with the State's international commitments. This thesis is, however, concerned not only with a question of how an arbitrator should approach national judicial decisions when she is considering its effect on State's international commitments, but also when she is applying national law to answer questions of international responsibility of the State not necessarily stemming from certain national legislation or decision.

To give national law adequate deference, an arbitrator must first know how she is supposed to treat national law and national judicial decisions. This is where this thesis steps in. For that purpose, this thesis develops a classification of an investment treaty arbitrator's treatment of national judicial decisions and applies it in the landscape of both common law and civil law. To do so, this thesis considers numerous factors as to their impact on the arbitrator's approach to national case law. These include the hybrid nature of investment treaty arbitration, will of the parties, underlying language of the IIA, selected arbitration forum (ICSID, non-ICSID, institutional, *ad hoc*), common law or civil law culture of the applicable national law, and the nature of an investor's claim brought before the investment treaty tribunal. The complexity of the question asked is shown by the thesis' painstaking classification of these factors according to

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7 Wouter Werner, Lukasz Gruszczynski, "Introduction," in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. Wouter Werner, Lukasz Gruszczynski (Oxford: Oxford University Press, 2014), p. 4; *See also* Johannes Hendrik Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (Bloomsbury Publishing, 2020); Wouter Werner, Lukasz Gruszczynski, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014); Esmé Shirlow, "Structures of Deference in International Adjudication," in *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press, 2021).

8 Steven Greer, Human rights files No. 17: The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, (Council of Europe Publishing, 2000), https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf (last accessed on 10 April 2022), p. 5.

their impact on the arbitrator's approach to national case law. Finally, the thesis concludes with a consideration of possible consequences of not adhering to the appropriate treatment of national judicial decisions by arbitrators.

Research question of this dissertation and its overview

This dissertation asks the following main question: "*How should an arbitrator in investment treaty arbitration treat national judicial decisions?*"

The argument of this dissertation is that arbitrators' treatment of national judicial decisions should change depending on the choice of law made by the parties and the investor's claim in which national law and judicial decisions comes in the picture. By way of example, the treatment should be different when an arbitrator uses national judicial decisions while construing the expropriation standard under international law, when she decides on State's liability for breaches of its contractual obligations under national law and should also change when parties chose to have their dispute governed solely by international law, or when they agreed also on national law.

The journey to answer this question is not a simple one. In order to uncover how to apply certain judicial decisions, one must first turn attention to the person applying it. Due to the hybrid nature of investment treaty arbitration oscillating somewhere between a public international law adjudication and a private law international commercial arbitration,[9] there are bountiful factors to consider. To learn about how an arbitrator should treat national judicial decisions, one must first understand the role of that arbitrator, her position within the national and international legal system, the claims she is mandated to decide, under what circumstances she is tasked to apply national law, how she should treat national law and, consequently, how she should treat national judicial decisions. Hence, to seek an answer on how an arbitrator should treat national case law, one must first know how she should treat national law. Therefore, despite the primary focus of this dissertation on arbitrator's treatment of national judicial decisions, the thesis also extensively discusses an arbitrator's treatment of national law. A pragmatic question following from all the above asks also about the consequences of an arbitrator failing to treat national case law as she should.

[9] *See* Chapter 1 below.

Thus, to achieve the goal of the thesis and answer the main research question, the dissertation answers the following sub-questions:

a) What is the nature of investment treaty arbitration and the role of its arbitrators?
b) Is national law the applicable law in investment treaty disputes?
c) How should an arbitrator in investment treaty arbitration treat national law?
d) How is an arbitrator's treatment of national case law influenced by how the said national legal system perceives the binding nature of its case law?
e) Should an arbitrator's treatment of national judicial decisions change according to the claim the arbitrator is tasked to decide?
f) Can an award be annulled or its enforcement refused if an arbitrator fails to accord the proper treatment to national judicial decisions in investment treaty arbitration?

From these questions and sub-questions follows the overall structure of this dissertation. This dissertation consists of two main parts: classification and application. The classification part consists of the first four Chapters which conceptualize three distinct ways an arbitrator can treat national law and its case law while taking into account multiple factors: the nature of the investment treaty arbitration, the role of its arbitrators, whether it is an ICSID and non-ICSID arbitration or civil law or common law system. In doing so, the first Chapter explores the basic concepts of investment treaty arbitration which are essential for further conceptualization. It explores the hybrid nature of investment treaty arbitration and the differences between the non-ICSID system, embedded in national legal systems, and the ICSID arbitration, with its basis in an international treaty. The Chapter also addresses the role of an arbitrator within these systems both with respect to international investment awards and national judicial decisions. The second Chapter discusses the ways national law becomes relevant in international investment treaty arbitration, the ways an arbitrator ascertains the applicable law and the choices of law by the parties. In the third Chapter, the thesis develops a categorization of possible approaches which an arbitrator can employ when dealing with national law in the context of investment treaty arbitration. These models range from treating national law as a mere matter of fact, through treating it as a national judge, to treating it as a transnational adjudicator. The models are then extended in the fourth Chapter to the arbitrator's treatment of national judicial decisions. In this context, the fourth Chapter also compares the role case law plays in civil law and common law cultures.

In the second part, the thesis applies these models. The second part asks which factors influences the choice between these models by an arbitrator and what are the possible consequences of their misapplication. In this pursuit, the fifth Chapter analyzes under what circumstances national law becomes applicable when dealing with individual standards of protection embedded in an IIA or other claims an investor may bring before the tribunal. The Chapter specifically explores four possible claims: a claim for unlawful expropriation of an investment, for a breach of fair and equitable treatment standard, for a breach of an umbrella clause, and an investor's claim for State's breach of its contractual obligations relating to the investment. The sixth Chapter considers the hybrid nature of investment treaty arbitration, the language of an IIA or arbitration rules, the legal culture of the applicable national law, the arbitration forum (ICSID, non-ICSID), and the nature of investor's claim and analyzes their impact on which of the models of treatment of national (case) law an arbitrator should employ. Finally, in the seventh Chapter, this thesis considers whether an arbitrator not adhering to the proper method of treatment of national (case) law may lead to the award's annulment or unenforceability. In doing so, the Chapter distinguishes between an arbitrator's disregard of the applicable (case) law and a mere error in the application of that (case) law and also discusses the consequences separately for ICSID and non-ICSID arbitration.

Methodology

This thesis employs a doctrinal legal method to answer its research questions. This method is chosen in order to analyze opinions on an arbitrator's treatment of national judicial decisions and her powers to apply and deviate from them contained in the current academic works, national and international case law,[10] and statutes and to fill the possible doctrinal gaps or to correct any inadequacies by proposing new approaches and solutions.

The doctrinal research as used in this dissertation "*aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in existing law.*"[11] Using this method, the thesis consolidates opinions on the use of national judicial decisions in investment treaty arbitration up to this date and draws general

[10] Case law referred to in this particular instance encompasses both judicial decisions and arbitral awards.

[11] Jan M. Smits, "What is legal doctrine? On the aims and methods of legal-dogmatic research," *Maastricht European Private Law Institute Working Paper* 2015/06 (2015), p. 5.

conclusions from the studied sources. To this end, the dissertation describes and analyzes principles, rules, and concepts of international investment law and investment treaty arbitration since these are the primary focus of this dissertation. However, as investment treaty arbitration is a hybrid between international commercial arbitration and public international law adjudication—as is further discussed in Chapter 1—this thesis also analyses principles, rules, and concepts of international commercial arbitration and public international law adjudication with focus on the decision-making of the ICJ on the question of application of national case law. The thesis turns to the ICJ for guidance as it was there where States brought claims for diplomatic protection of their nationals who invested in a foreign State; the claims that are now the essence of investor-State arbitration.[12] The findings of the analysis of the studied sources and identified doctrinal strands are then synthetized. By this synthesis, the thesis aims to create concepts and methods of arbitrators' treatment of national judicial decisions which fit the needs of investment treaty arbitration and reflect the nature of its investment claims.

Where necessary, this work proposes rules to fill the gaps identified by the doctrinal legal research or proposes a solution to any inadequacies. Hence, this dissertation aims to consolidate the so far fragmented and often contradicting opinions on the use of national judicial decisions by arbitrators in investment treaty arbitration and to further build on those opinions to present new solutions to unanswered questions.

When analyzing the doctrine pertaining to international commercial arbitration, this dissertation necessarily compares national rules and concepts of various States. There, this dissertation employs a comparative legal method. Similarly, a comparative legal method is also applied to confront different approached to national judicial decisions by tribunals in investment treaty arbitration, international commercial arbitration and by the judges of the ICJ. However, a fully-fledged comparative legal study is not a goal of this dissertation and serves only ancillary functions to answer some aspects of the research question which still remains doctrinal.

In this dissertation, I combine my experiences gained from practicing in the field of international investment arbitration at a law firm, knowledge gained through my post-gradual studies in international arbitration, including a one-year LL.M. program focused on international commercial arbitration at Stockholm University, and my insight into civil law system obtained

[12] Balaš, Šturma, *Nové mezinárodní dohody na ochranu investic*, p. 6 – 7; Crawford, *Brownlie's Principles of Public International Law*, pp. 591 – 592; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 441 – 442.

by studying law in Prague, Czech Republic, and into common law system acquired by my studies of law in Florida, USA.

An effort was made to include relevant material available by February 2022.

Literature Review

This dissertation concerns topic that has so far not been addressed in its complexity in any academic work. While there are several articles and discussions on the treatment of arbitrators of national case law in international commercial arbitration and of judges of the ICJ, there are no articles or books covering the relationship of arbitrators deciding cases in investment treaty arbitration, in either ICSID, *ad hoc* arbitration or arbitration administered by other arbitral institutions like ICC, SCC or LCIA, to national case law. Furthermore, even authors describing the approach of arbitrators in international commercial arbitration and ICJ judges to the national case law reach different conclusions without any existing discourse on why those different outcomes exist.

This does not mean that the topic of this thesis stayed completely under the radar of scholars and practitioners. One of the most prominent publications on applicable law in investor-State arbitration undoubtedly is the remarkable book by Hege Elisabeth Kjos titled Applicable Law in Investor-State Arbitration.[13] There, similarly to this thesis, Kjos considers the nature of the investment arbitration and the laws applicable. Primarily, the book discusses the primary application of either national or international law in those disputes or their concurrent application. Kjos focuses on the elements that influence the choice between international and national law and the practice of investment tribunals in this respect. The book also briefly considers whether national law should be treated as a matter of fact or applied as law and concludes that both approaches should be allowed while not greatly elaborating on the circumstances in which those two approaches would be taken. The book, however, does not specifically discuss national case law and its application in investment treaty disputes. This thesis thus builds upon her findings but shifts the attention to the manner the national law and especially national case law should be treated by an arbitrator in investment treaty arbitration; considerations not contained in Kjos' book.

[13] Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press, 2013).

Another notable contributor to the theories developed in this book is Zachary Douglas. In his already classical book International Law of Investment Claims,[14] he dedicates one subchapter to the faulty conception of treating national law as facts in investment treaty arbitration. He shows there that for some aspects of investment treaty claims, national law must be more than just a matter of fact since it is the source of *in rem* rights. Douglas, however, does not deal in detail with various scenarios in which national law is applicable or with the treatment that should be accorded to national case law by arbitrators. Furthermore, Douglas's work on hybrid foundations[15] of investment arbitration is heavily cited throughout this thesis as the understanding of the investment arbitration's hybrid foundations is the key to answering the research question asked by this thesis.

Christoph Schreuer's thoughts presented in his article titled Failure to Apply Governing Law in International Investment Arbitrator[16] contribute to the final Chapter of this thesis which discusses possible consequences to arbitrators' failure to treat national case law correctly. As might be apparent from the title of the article, it deals with situations of arbitrator's failure to apply governing law in investment arbitration, be it international or national law. The article also briefly discusses what it means that an arbitrator failed to apply governing law, but does not specifically discuss national case law and does not develop a self-standing theory of how national law and case law should be treated.

In 2017, Dolores Bentolila wrote an insightful monography titled Arbitrator as Lawmakers.[17] There, she deals, as the title suggests, with the arbitrator's powers to make law. In the process, she touches also upon the interpretation of national law by arbitrators. The book looks at international investment as well as commercial arbitration but describes predominantly what this thesis calls the transnational approach to national law.[18] The book thus does not contrast different approaches to national law which arbitrators might take. Lastly, the book also does not specifically target arbitrators' treatment of national judicial decisions.

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14 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009).

15 Zachary Douglas,"The Hybrid Foundations of Investment Treaty Arbitration," *British Yearbook of International Law* 74, no. 1 (2003).

16 Christoph H. Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration," *Austrian Review of International and European Law* 7, no. 1 (2004).

17 Dolores Bentolila, *Arbitrators as Lawmakers*, vol. 43, International Arbitration Law Library (Kluwer Law International, 2017).

18 *See* Chapter 3 of this thesis below for the definition of an arbitrator as a transnational adjudicator.

In the book International Investment Arbitration: Substantive Principles,[19] the authors devote a portion of the work to the issue of simultaneous application of national and international law in investment treaty arbitration and even mention several cases where the tribunal was required to consider national case law. This work, however, serves only as an overview without going into details of the treatment of national law and national case law by international investment tribunals.

In the realm of international commercial arbitration, there are several authors who considered the way an arbitrator should treat national case law.[20] However, these authors approached the problem with a particular jurisdiction in mind without the ambition to fit their theory into a wider theoretical discourse. Thus, these authors propose that an arbitrator shall treat national law either as a national judge or that she should treat it as a transnational adjudicator, without providing general guidelines or a framework to address the issue across jurisdictions. Moreover, even if we overlook these obstacles, it is unclear how the findings pertaining to international commercial arbitration translate to the setting of international investment arbitration.

In sum, many authors concluded that the approach of an arbitrator in investment treaty arbitration to national law and national case law may be variable, however, stopped short of defining the variables. This dissertation thus touches on a question that has so far escaped scholars and practitioners. Given the various standards of protection contained in IIAs and the number of disputes being decided in the forum of investment treaty arbitration, the answer to the question of what approach should an arbitrator take towards national case law is an important one. This study thus provides practical answers to arbitrators sitting in investment treaty arbitral

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19 Laurence Shore Campbell McLachlan, and Matthew Weiniger, *International Investment Arbitration : Substantive Principles.*, 2nd ed. (Oxford: Oxford University Press, 2017).

20 Klaus P. Berger, "The International Arbitrators' Application of Precedents," *Journal of International Arbitration* 9, no. 5 (1992); Klaus P. Berger, "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms," *Arbitration International* 32, no. 2 (2016); Eric Loquin, "Les Pouvoirs des Arbitres Internationaux à la Lumière de l'Evolution Récente du Droit de l'Arbitrage International," *Journal du droit International* (1983); Matthieu de Boisséson, "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective," ed. Pierre Mayer Fabio Bortolotti, *The Application of Substantive Law by International Arbitrators* (Kluwer Law International, 2014); Bernard G. Poznanski, "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration," *Journal of International Arbitration* 4, no. 3 (1987); Pierre Mayer, "Chapter 3: The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator," in *Is Arbitration only As Good As the Arbitrator? Status, Power and Role of the Arbitrator*, ed. Laurent Lévy Yves Derains (Dossiers of the ICC Institute of World Business Law, 2011).

tribunals and also adds to the more general discussion of the relationship of international and national law in international investment law.

Definitions

This dissertation focuses on international investment treaty arbitration between investors on the one side and States on the other, and arbitrators deciding those disputes. Therefore, when this dissertation talks about an arbitrator or arbitration, unless expressly stated otherwise, it means international investment treaty arbitration and arbitrators deciding investment treaty disputes.

The term "*arbitration*" is here understood the same way as defined by Gary Born: "*a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to present* [their] *case*".[21]

National law as used in this dissertation means legal order of or within the State (sometimes also referred to as municipal law, domestic law, or internal law). The term used throughout this dissertation includes local, regional and central laws.[22]

Case law in this dissertation means the national body of judicial decisions not necessarily meaning *jurisprudence constante* or precedents, i.e., any cases rendered by national courts, and is used interchangeably with the term "*judicial decisions*". This dissertation does not concern with awards rendered in national or international arbitrations even when they form part of the national body of law. Nevertheless, conclusions reached and opinions held in awards rendered in international arbitration, either investment or commercial, are analyzed in this dissertation for the purposes of answering the delimited research questions.

The home State is understood as the State of nationality or incorporation of the investor, while the host State means the State where investment is made.

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21 Gary Born, *International Arbitration: Law and Practice*, 2nd ed. (Kluwer Law International, 2015), p. 2.

22 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 198, at fn. 129.

Merits of the dispute is understood as the issues of fact and law which give rise to the cause of action, and which an applicant must establish in order to be entitled to the relief claimed.[23]

The seat of arbitration is used synonymously to the place of arbitration meaning the legal seat of the arbitral proceedings and not the place where hearings and meetings are conducted.

The ICSID arbitration means arbitration initiated under the ICSID Convention and ICSID Arbitration Rules and conducted under the auspices of ICSID. This excludes disputes decided under the ICSID Additional Facility Rules.

The non-ICSID arbitration means either *ad hoc* arbitration initiated by the parties outside any arbitral institution or arbitration initiated and conducted under the auspices of an arbitral institution other than ICSID, i.e. for example ICC, SCC, ICDR, LCIA, or SIAC.

Scope

This thesis discusses an arbitrators' treatment of national case law in investor-State arbitration. As explained above in the part concerning the aim and research questions of this study, this thesis does not discuss or analyze international commercial arbitration or State-to-State arbitration, although some of its conclusions might be applicable in those fields as well. This limitation is done in order for this research to be feasible. To expand the research also to international commercial arbitration and State-to-State arbitration would require introducing different factors and considerations than those contained in this thesis due to their different nature from investor-State arbitration.

The aim of this study is not to closely scrutinize the choice of the applicable law. Rather it focuses on the methods of treating such applicable law once identified. When this thesis discusses the choice of law, it does so only to provide an overview of possible treatments, rather than proposing a method for its determination.

This dissertation also omits from its consideration national law and treatment of judicial decisions in systems of law that cannot be subsumed either under common law or civil law tradition. This is for a simple, yet pragmatic, reason that I am not familiar with the functioning of those systems of law and thus fear that any attempt to cover them would reflect no credit on

[23] *Judge Read, Anglo-Iranian Oil Co*, 148 ICJ Rep (1952).

either. Nevertheless, even with this delamination of the scope, the relevance of the research still spans over the majority of legal systems relevant for investor-State arbitration.

Part I: Classification

1. The Nature of Investment Treaty Arbitration and the Role of its Arbitrators

International investment arbitration is similar to a mythological chimera. It has a head of international commercial arbitration (arguably a national decision-maker) and a tail of pure public international law decision-making body (an organ of international law). But which is it? National decision-makers might be required to see national law through the eyes of respective national judges, while public international law decision-makers might treat national law as a fact.[24] Hence, a proper understanding of the nature of investment treaty arbitration is crucial for assessing how arbitrators treat national law and its case law.

Similarly essential is also understanding of the role an arbitrator has in investment treaty arbitration, i.e. whether she is an agent of the parties appointed to decide the case at hand or whether she is also an agent of wider (international) community, who should consider not only the case at hand but also the development of the applicable law.

This Chapter thus considers (1.1) the nature of investment treaty arbitration and (1.2) the role of an arbitrator deciding international investment cases.

1.1. Investment treaty arbitration: an international or national adjudication?

"*The thinking, attitudes, procedures and concepts of commercial arbitration dominate at present investment arbitration.*"[25] The framework within which investment treaty arbitration takes place is modeled according to international commercial arbitration[26] and thus contains many of its aspects. One of the most prominent aspects is that arbitrators appointed in *ad hoc* arbitration or those deciding disputes under the auspices of arbitral institutions such as ICC, SCC or LCIA, still operate within the ambit of national arbitration law of the seat (*lex arbitri*).[27] This means, among other things, that awards rendered by arbitrators in those arbitrations are subject

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24 *See* Chapter 3 below.

25 Thomas W. Wälde, "The Specific Nature of Investment Arbitration," in *New Aspects of International Investment Law*, ed. Thomas W. Wälde Philippe Kahn (Leiden: Nijhoff, 2007), p. 54.

26 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 12, citing Charles H. Brower II, "Beware the Jabberwock: A Reply to Mr Thomas," *Columbia Journal of Transnational Law* 40, no. 3 (2002), pp. 474 – 475.

27 Campbell McLachlan, *International Investment Arbitration: Substantive Principles,* para. 3.113, citing Lord Collins of Mapesbury et al, *Dicey, Morris & Collins: The Conflict of Laws*, 14 ed. (2006), pp. 778 – 784.

to the national law and might be challenged before and potentially annulled by national courts.[28] Having an award ultimately subjected to the decision-making of a national court and being governed by national law detracts from the possibility to designate *ad hoc* investment treaty arbitral tribunals and tribunals sitting in arbitrations conducted by arbitral institutions such as ICC, SCC or LCIA as public international law decision-making organs.

Yet, those tribunals cannot be characterized as pure national decision-makers either, as a tribunal in investment treaty arbitration adjudicates questions of the liability of a State under public international law. Additionally, the agreement of parties to submit the dispute to investment treaty arbitration, their choice of law and relevant standards of protection are given in a BIT, which is an international treaty and as such, it is governed by international law.[29] Therefore, in addition to the provisions of a BIT, general international law applies.[30]

Arbitration initiated under the ICSID Convention differs. Identically to *ad hoc* arbitrations and those administered by other arbitral institutions, the ICSID tribunal also decides on the liability of a State under public international law and the agreement of parties to submit the dispute to investment treaty arbitration, their choice of law, and relevant standards of protection are also given in a BIT. Contrary to those tribunals, however, arbitral tribunals under the ICSID Convention are not subjected to national *lex arbitri*. Instead, their powers are rooted solely in the ICSID Convention (an international treaty) and its rules. Accordingly, potential challenges and annulments of ICSID awards are governed solely by the ICSID Convention.[31] The nature of the ICSID arbitration contains more public international law elements than the nature of *ad hoc* arbitration or arbitration administered by other arbitral institutions.

Nevertheless, even in the case of ICSID arbitration, the parties to the arbitration are a State and an investor—be it a natural person or a legal entity—who was traditionally not recognized as a subject of international law.[32] This is because, although individuals and

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28 Campbell McLachlan, *International Investment Arbitration : Substantive Principles.*, para. 3.113.

29 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 United Nations Treaty Series 331, 8 ILM 679 (1969), Arts. 2(1)(a) and 31(3)(c); Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 465, para. 8.64; Campbell McLachlan, *International Investment Arbitration : Substantive Principles*, para. 3.112.

30 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 465, para. 8.64.

31 ICSID Convention, Art. 52; Campbell McLachlan, *International Investment Arbitration: Substantive Principles*, para. 3.113.

32 Crawford, *Brownlie's Principles of Public International Law*, p. 111; this dissertation understands subjects as those with the capacity to bear rights and duties under international law.

sometimes even corporations can have rights under international law,[33] they are at all times subject to the jurisdiction of a State, they do not possess normative powers like States or international organizations do, and they are not able, on their own, to enforce the adherence of other subjects to the public international law.[34] Charles Rousseau noted that individuals do not possess international legal personality also because they are not capable of violating rules of public international law which do prescribe any direct obligations on them in the first place:

> N'étant pas sujet direct du droit international, l'individu ne peut violer les obligations édictées par ce droit, et qui ne saureient lui incomber comme tel.[35]

Under this conception, individuals are perceived as objects (*destinataires*) of the rights stemming from international law.[36] This perception shifts in the context of international criminal law, where even individuals can be held responsible for breaching public international law and for that must have some sort of international legal personality.[37] Additionally, in the field of international investment law (among other fields) individuals and corporations also have the procedural capacity, i.e. the capacity to maintain their rights by bringing international claims,[38] which also show some aspects of international legal personality, however circular this argument is in our context.

At first glance, the possibility of a State bringing a counterclaim against the investor in investment treaty arbitration would prove that investors do have both rights *and* obligations under international law. However, importantly, since IIAs traditionally do not contain obligations of an investor (since investors are not even a party to an IIA)[39] these claims usually stem from investment contracts concluded between the foreign investor and the host State, or

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33 Typically, human rights or rights stemming from investment protection, *See* ibid. p. 111.

34 Pavel Šturma, Čestmír Čepelka, *Mezinárodní právo veřejné*, 2nd ed. (Praha: C. H Beck, 2018), p. 59, para. 24.

35 ibid. fn. 94, quoting Charles Rousseau, *Droit International Public*, vol. V (Paris: Recueil Sirey, 1953), p. 173: "*Not being a direct subject of international law, the individual cannot violate the obligations enacted by this law, and which should not be incumbent upon him as such*." [Author's own translation].

36 Čepelka, Šturma, *Mezinárodní právo veřejné*. p. 59, para. 24.

37 ibid. p. 60, para. 24.

38 ibid. pp. 62, 63, para. 25.

39 Newly concluded IIAs seeks also greater balance between the rights and obligations of the host States and investors by, for example, introducing environmental obligations of investors (*See e.g.* Joachim Pohl Kathryn Gordon, "Environmental Concerns in International Investment Agreements: A Survey," *OECD Working Papers on International Investment* 01 (2011), https://www.oecd.org/investment/investment-policy/WP-2011_1.pdf (last accessed on 10 April 2022), p. 23 *et seq*.).

from national law of the host State.[40] Thus, although some tribunals have allowed counterclaims to be filed against the investor,[41] the counterclaim itself is typically not for a breach of a standard in the IIA or other norm of international law, it is a counterclaim usually based in national law or a contract concluded on the national plane. Thus, in fact, counterclaims speak volumes about the hybrid version of the investment treaty arbitration. Following from the above, despite some aspects pointing towards restrictive public international law personality,[42] some authors still insist that individuals and corporations do not have international legal personality.[43]

The above-described hybrid nature of investment treaty arbitration was recognized by Justice Aikens in the proceedings before English courts in *Occidental Exploration and Production Company v. Ecuador*. There, Justice Aikens contemplated the nature of the rights raised in investment treaty arbitration and pointed out the hybrid nature of rights originating from international law being vested in subjects of municipal law to be exercised before a tribunal that will be subject to national procedural rules:

> Some of the rights created by the BIT, which is a treaty between the USA and Ecuador on the plane of international law, are rights that are given to a class of entities which exist on the plane of Municipal law, i.e. "investors". In particular, the right to arbitrate "investment disputes" as defined in Article VI.1 [of the BIT] is given to Municipal law entities. That right can be exercised in an arbitral tribunal (set up under UNCITRAL arbitration rules) that will be subject to procedural laws (UNCITRAL arbitration rules and, if the seat is in England, the 1996 [Arbitration] Act), which exist on the "Municipal" or "private" or "domestic" law plane. So, although the rights have their origin in international law, they are rights that are intended to be exercised by Municipal law entities in a tribunal that is subject to control under Municipal laws. [...] In this case, Occidental and Ecuador have agreed

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40 Yaraslau Kryvoi, "Counterclaims in Investor-State Arbitration," *Minnesota Journal of International Law* 21 (2012), pp. 236 – 242. However, the author also advocates that general principles of law can be source of investor's obligations violation of which could be brought up by a State as a counterclaim (*see* ibid. pp. 248 – 250). *See also Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law,* p. 128 *et seq.*

41 *See e.g. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award (8 December 2016); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

42 Jiří Malenovský, *Mezinárodní právo veřejné, jeho obecná část a poměr k vnitrostátnímu právu, zvláště právu českému*, 4th ed. (Brno: DOPLNĚK, 2004), pp. 136 – 143.

43 *See e.g.* Crawford, *Brownlie's Principles of Public International Law*, pp. 111, 112.

> that rights with their origin in international law will be considered by a tribunal whose procedure is subject to Municipal law.[44]

This dual nature of investment treaty arbitration is also reflected by prominent practitioners of international investment arbitration. By way of example, James Crawford described investment treaty arbitration as a hybrid[45] and Zachary Douglas pointed out the challenge of the dual nature of international investment arbitration:

> 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.[46]

So how investment treaty arbitration should be treated? From what was presented above, it is evident that ICSID arbitration is different from non-ICSID one since its procedure and subsequent annulment is not subjected to any national legal order. Hence, these two types are considered separately below.

1.1.1. Non-ICSID arbitration

As shown above, non-ICSID investment arbitration resembles in many ways international commercial arbitration, among other things, by being seated in a particular jurisdiction. Investment treaty arbitration conducted *ad hoc* or under the auspices of an arbitral institution other than ICSID—such as ICC, SCC, or LCIA—is seated within a certain jurisdiction. The fact that arbitration has a legal seat means that it has an attachment to the legal order of that seat. This usually means that the arbitration law and procedural laws of the State of the seat apply in the arbitration and that the award may be challenged in local courts.

Academics and practitioners have different opinions as to the importance of the seat and the level to which arbitration is tied to the place where it is legally seated. There are three main ways to see non-ICSID arbitration: monolocal, multilocal, and a-national (transnational).[47]

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44 *Occidental Exploration and Production Company v. Ecuador*, Non-justiciability of Challenge to Arbitral Award (29 April 2005), para. 73; *See also* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 34.

45 James Crawford, "The Ideal Arbitrator: Does One Size Fit All," *American University International Law Review* 32, no. 5 (2017), p. 1014.

46 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", p. 152, citing Jan Paulsson, "Arbitration Without Privity," *ICSID Review: Foreign Investment Law Journal* 10, no. 2 (1995), p. 256.

47 Emmanuel Gaillard, "The Representations of International Arbitration," *Journal of International Dispute Settlement* 1, no. 2 (2010); Jan Paulsson, "Arbitration in Three Dimensions," *LSE, Law, Society and*

In short, the monolocal theory suggests that the only legal order important for the arbitral proceedings and the award is the law of the seat.[48] The monolocal theory is the oldest of them[49] and has been overcome by the multilocal theory which better reflects today's globalization tendencies and the international nature of international arbitration.

The multilocal theory represents an idea that not only the law of the seat is important to the proceedings and the award, but other legal orders are as much or even more important. Under this theory, the law of the seat still governs the procedural questions of the arbitration and the award, however, legal orders of the States where the award is to be enforced are also taken into account.[50] This stems from the ideal that the construct of the arbitral seat might be somewhat artificial considering that the arbitration does not have to have any connection to the State of the seat since even hearings can take place somewhere else. What is, however, crucial for the parties is whether the State where the debtor has its assets recognizes and enforces the award.[51] This way, the legal order of the enforcing State comes to prominence.

Lastly, the a-national or transnational theory attempts to introduce aspects of pure public international law arbitration to international commercial arbitration (and by doing so also international investment arbitration modelled according to the international commercial arbitration). Its idea is to liberate arbitration from any seat and thus not having the arbitration and award subject to any national law, instead international recognized rules would apply.[52] This is achieved by the ICSID arbitration, but—despite the appeal of the idea—the seat in the non-ICSID arbitration cannot be overlooked just yet.

This is evident from the LCIA Arbitration Rules which emphasize the importance of the law of the seat by establishing it as the default law governing the arbitration agreement and the arbitration:

> The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the

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Economy Working Papers 2 (2010), p. 3; Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, Les livres de poche de l'Academie de droit international de La Haye (Martinus Nijhoff Publishers, 2008), p. 34 *et seq*.

48 *Aspects philosophiques du droit de l'arbitrage international*, p. 35; Paulsson, "Arbitration in Three Dimensions", p. 3.

49 Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, p. 35.

50 ibid. pp. 43 – 60; Paulsson, "Arbitration in Three Dimensions" pp. 7 – 11.

51 Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, pp. 56, 57.

52 ibid. pp. 60 – 100; Paulsson, "Arbitration in Three Dimensions" pp. 11 – 15.

> extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.[53]

Other rules are not as explicit, although they always recognize a seat of arbitration. The SCC Arbitration Rules explicitly provide for the fiction that an award rendered according to these rules "*shall be deemed to have been made at the seat of arbitration*."[54] This also means that the award is subjected to the law of that State. The same provision can be found in the UNCITRAL Arbitration Rules and the Swiss Rules of Arbitration.[55]

Notably, ICC Arbitration Rules do not contain any such clause, however, this does not mean that ICC arbitration fully subscribes to the ideal of the floating a-national arbitration. As pointed out in the Secretariat's Guide to ICC Arbitration, "*the place of arbitration determines the law governing the arbitration proceedings.*"[56] Thus, even if not expressly stipulated in the rules, the attachment to the laws of the seat persists.

Additionally, apart from the rules set forth by the arbitral institution, the arbitration law of the seat may provide additional rules. For example, UNCITRAL Model Law provides that "*[t]he provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State*."[57]

It follows from decisions rendered by tribunals in non-ICSID investment treaty arbitration that arbitrators also do not subscribe to the transnational theory of arbitration and rather pay regard to the law of the seat as the governing arbitration and procedural law. This was stipulated by the SCC tribunal in *Petrobart Limited v. Kyrgyz Republic*, which held that "*procedural questions which have not been determined by the Treaty* [ECT] *will be decided both in accordance with the institutional Rules of the SCC Institute and in accordance with the law of the seat of arbitration, namely Swedish arbitration law.*"[58]

Similarly, in *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, the UNCITRAL tribunal seated in Switzerland decided on the applicability of the arbitration law of

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53 LCIA Arbitration Rules (2014), Art. 16.4.

54 SCC Arbitration Rules (2017), Art. 25(3).

55 Swiss Arbitration Rules (2021), Art. 16.4.

56 Jason Fry; Simon Greenberg; Francesca Mazza, The Secretariat's Guide to ICC Arbitration, (2012), para. 3-674.

57 UNCITRAL Model Law, Art. 1(2).

58 *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award (29 March 2005), p. 23.

the seat: "*[T]hese proceedings are governed by the arbitration law of the seat* […] *and* […] *by the UNCITRAL Arbitration Rules (1976).*"[59] In *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, the UNCITRAL tribunal also noted the importance of the law of the seat to the arbitration:

> The procedural law to be applied by the Tribunal consists of the procedural provisions of the BIT (particularly its Article VI), the UNCITRAL Arbitration Rules and, since The Hague is the place of arbitration, any mandatory provisions of Dutch arbitration law.[60]

To paint the full picture, there are tribunals advocating for opposing views that either the arbitration should be governed solely by international law or that tribunals should refer to some general principle such as those incorporated in the Model Law.[61] Notably, this latter view is more often represented in older awards.

Despite the non-ICSID arbitration's links to the laws of the seat, a tribunal still is not an organ of the State.[62] This is partly because arbitral tribunals are not organs in the first place. Tribunals are not of a permanent nature to be labelled as an organ considering that the arbitrator(s) are appointed for specific proceedings and their mandate expires upon the issuance of an award (*functus officio*). Arbitrators are persons appointed on an *ad hoc* basis by the parties to a dispute to decide a specific case submitted to them. Importantly, those cases submitted to them are cases in which the parties could settle between themselves without the assistance of any adjudicator.[63] Consequently, the primary source of arbitrators' powers is the agreement of the

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59 *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, Final Award (23 April 2012), para. 142.

60 *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 March 2010), para. 158.

61 *See e.g. Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, (23 August 1958); *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, 17 I.L.M. 1 (1977); *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic*, Award (12 April 1977). These examples have been taken from Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 26.

62 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 27; Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," in *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*, ed. Pieter Sanders (New York: Kluwer Law International, 1987), para. 44.

63 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG*, Case 102/81 1096 (23 March 1982), p. 1102.

parties,[64] not a decision of a sovereign to vest in the arbitrators their adjudicatory powers, even though States might (and usually do) regulate arbitrators' activities.

The nature of the tribunal in investment treaty arbitration might remain unclear. What is clear is, however, that non-ICSID tribunals are to this day, and despite the alluring theories of transnational (a-national) arbitration, to a certain extent subject to the law of its seat:

> Symptomatic of the strength of this theory, the vast majority of states continue to subject arbitration proceedings taking place on their territory to various mandatory, albeit limited, requirements, which again are heeded by third states at the enforcement stage. Such exercise of control, including the sanction of annulment, not only stems from the principle of territorial sovereignty, it is conducive to finality, and it constitutes a healthy 'check' on the system of arbitration as a whole. We may thus conclude that a tribunal's mandate to render awards does not solely stem from the parties, but also—and more importantly—from a national legal order: the tribunal's juridical seat. Accordingly, arbitral proceedings between an investor and a host state are neither a-national, nor international, but rather subject to a national legal order.[65]

As such, the awards rendered by non-ICSID tribunals cannot be considered as public international law awards since they are subject to the power of national courts that can invalidate them.[66] Thus, whichever theory one subscribes to, the seat of the arbitration plays a vital role in the current non-ICSID investment treaty arbitration world alongside the laws of the State of enforcement of an award.

1.1.2. ICSID arbitration

Arbitration conducted under the ICSID Convention is built up on different legal bedrock. Unlike the non-ICSID arbitration whose mechanism is used also for commercial disputes, ICSID arbitration's framework is designed specifically for disputes arising out of foreign investments.

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64 *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Award, ICC Case No. 10623/AER/ACS (7 December 2001), para. 128.

65 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 44 – 45.

66 Bentolila, *Arbitrators as Lawmakers*, p. 72, para. 204, citing *Factory at Chorzów (Germany v. Poland)*, PCIJ Series A, No. 9, 33 (1929) (Judgment of 26 July 1927).

Yet, similar to the non-ICSID arbitration, the ICSID arbitration is largely modeled according to the international commercial arbitration framework.[67]

ICSID is an intergovernmental institution established by a treaty, the ICSID Convention.[68] ICSID is not an international court but provides an institutional framework for arbitration to take place including its own arbitration rules, the arbitral tribunals are then constituted on *ad hoc* basis for a specific dispute.[69] Using the three conceptions of non-ICSID arbitration described above, ICSID arbitration would fall into the category of transnational or a-national arbitration. This is thanks to ICSID having full international legal personality,[70] and its representatives and parties involved in ICSID arbitration enjoy immunity from legal process in its signatory States.[71]

Arbitral tribunals constituted under ICSID then enjoy the non-attachment of ICSID to any national legal order as well. This means, among other things, that awards rendered in ICSID arbitration are not subject to annulment or appeal in national courts, or any other State organ.[72] Hence, ICSID investment arbitration has no seat in the sense that it would be subjected to the jurisdiction of certain State courts in which an ICSID award could be challenged or which would provide assistance to the proceedings.[73] This is despite the fact that the ICSID Convention refers to the place of the proceedings, which should be the seat of the ICSID or other approved location.[74] These, however, have little legal relevance to the nature of the proceedings as it does

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67 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 12 citing Charles H. Brower II, "Beware the Jabberwock: A Reply to Mr Thomas", p. 474 – 475, and Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008), p. 5.

68 Christoph Schreuer, "International Centre for Settlement of Investment Disputes (ICSID)," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford, United Kingdom: Oxford University Press, 2013), para. 1.

69 ibid. paras. 1, 23.

70 ICSID Convention, Art. 18.

71 ICSID Convention, Arts. 21 and 22.

72 ICSID Convention, Arts. 51 and 52.

73 Christoph H. Schreuer, *The ICSID Convention, A Commentary*, 2nd edition ed. (Cambridge University Press, 2009), pp. 1244, 1245; Aníbal Sabater, "When Arbitration Begins without a Seat," *Journal of International Arbitration* 27, no. 5 (2010), p. 446.

74 Art. 62 of the ICSID Convention provides that „*[c]onciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided,*" and Art. 63 stipulates that „*[c]onciliation and arbitration proceedings may be held, if the parties so agree, (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General*."

not anchor the arbitration in particular jurisdiction and does not subject it to the jurisdiction of those courts.[75] This was confirmed also by the tribunal in *Noble Energy v. Equador*:

> [t]he choice of the place of arbitration does not trigger the application of the local arbitration law nor create jurisdiction of the local courts in aid and control of arbitration.[76]

The tribunal in *Mihaly International Corp v. Democratic Socialist Republic of Sri Lanka* reached similar conclusions to the independence of ICSID arbitration on national law:

> The Tribunal maintains that the jurisdiction of the Centre for Settlement of Investment Disputes (ICSID) and of this Tribunal is based on the ICSID Convention and the rules of general international law. It does not operate under any national law in particular, and certainly not under the law of the State of California or the law of the Province of Ontario.[77]

Thanks to this a-nationality and its procedural safeguards embedded in the ICSID Convention and the ICSID Arbitration Rules, a State that is the party to the ICSID Convention cannot impose its own law on the arbitral proceeding even when it has taken place in its territory.[78] The arbitration process is thus detached from national law and there is no *lex arbitri* or *lex fori* to speak of, the resulting arbitral award is also treated as an international decision and is enforced subject to international rules and principles and any non-compliance with the award triggers international responsibility of the refusing party.[79] Thanks to the international personality of ICSID and the rooting of the process in international treaty and not relying on or subjecting itself to the jurisdiction of any State, ICSID investment treaty arbitration is substantially different from the non-ICSID arbitration.

1.1.3. Interim Summary

Both international commercial arbitration and pure international law doctrines are relevant for this study; however, their relevance may differ in the non-ICSID and ICSID

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75 Schreuer, *The ICSID Convention, A Commentary*, p. 1244.

76 *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Award (5 March 2008), para. 228.

77 *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), para. 19.

78 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 56.

79 ibid. p. 46; quoting Moshen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (The Hague, London, Boston: Kluwer Law International, 1999), p. 31.

arbitration. As demonstrated above, the non-ICSID tribunals are tightly connected to the legal order of the State where they are seated (*lex arbitri* or *lex fori*) and are subject to the jurisdiction of its courts. On the contrary, the ICSID tribunals enjoy the benefits of an international organization with their immunities and insulation from any national legal order as they have no seat and operate only within the international framework of the ICSID Convention and also the specific IIA. For ICSID tribunals, the *lex arbitri* is international law.[80]

The need for adopting different approaches to those two models was stressed by Professor Georges Abi-Saab in is dissenting opinion in an ICSID case *Abaclat and Others v. Argentine Republic*:

> This is technically an international ad hoc arbitral Tribunal. It is "ad hoc" because specially established to hear one specific case, suit or action. It is "international" because it is rooted in two layers of international treaties: the ICSID Convention and the Bilateral Investment Treaty between Italy and Argentina. As such it functions under, and is governed by international law, and has to be clearly distinguished from "international" commercial arbitration tribunals, such as those established within the framework of the International Chamber of Commerce, which function under national law and ultimate national judicial control. It is necessary to keep this distinction in mind, as solutions may vary at these two distinct levels; and what is sometimes permissible in municipal law, is not necessarily acceptable in international law.[81]

Thus, ICSID and non-ICSID arbitration merit different approaches and, for that reason, will be considered separately in the following Chapters of this dissertation.

1.2. An arbitrator: the agent of the parties or of the whole international community?[82]

The previous Section considered the placement of the arbitral tribunals within international and national legal orders. This Section asks whether arbitrators in investment treaty

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80 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 46, 60.

81 *Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting opinion of Georges Abi-Saab*, ICSID Case No. ARB/07/5 (28 October 2011), para. 6.

82 This Section was in part published in the *Charles University in Prague Faculty of Law Research Paper No. 2021/II/3,* and partly builds upon my diploma thesis defended on Charles University in Prague, Faculty of Law Department of International Law, on 23 September 2015. *See* Nicole Jančová, "Reasoning with Previous Awards in International Investment Arbitration," *Charles University in Prague Faculty of Law Research Paper No. 2021/II/3* (2021), and Nicole Jančová, "The Binding Effect of Arbitral Awards in International Investment Disputes," (2015).

arbitration are in their decision-making part of some greater community or whether they are strictly agents of the parties without any links to past and future tribunals.

Even though this thesis explores arbitrator's treatment of national law and national judicial decisions, it is crucial for the analysis to understand the role of an arbitrator with respect to other international arbitrators or tribunals at the international plane, as well as the relationship of an international arbitral award to national legal systems. This is because these relationships influence the factors an arbitrator should take into consideration when deciding a case. These then can directly affect the way an arbitrator treats and approaches national (case) law. Shown on an example, if we would consider an arbitrator being an agent of a wider international community safeguarding the development of international (investment) law, she would be tasked to necessarily include these interests into her interpretation and application also of national (case) law.

Being mindful of different interests in applying international and national laws, this topic is approached with the main research question of this thesis in mind. This means that the role of the arbitrator is assessed particularly with respect to the application of the national law and national case law by the arbitrator. This Section splits into two main parts: the first one presenting opinions for the position that an arbitrator should be perceived only as an agent of the parties, the second then discusses the placing of an arbitrator within a greater community.

1.2.1. Strict principal-agent relationship

The theory of principal-agent relationship considers—as the name suggests—the relationship between the parties to the international investment dispute and the tribunal as a principal-agent one. In such scenario "*[a] P-A relationship is constituted when two contracting parties (the Principals) confer upon an arbitrator (the Agent) the authority to resolve any dispute that arises under the contract. The Principles* [sic] *are also free to select the law governing the contract and the procedures to be used in the dispute settlement process, which are assumed to constrain the arbitrator.*"[83]

This theory is prevalent in international investment law since no tribunal is granted with general jurisdiction and derives the authority to decide a particular case from the parties'

[83] Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," *Law and Ethics of Human Rights, Yale Law & Economics Research Paper No. 405* 4, no. 1 (2010), p. 8.

agreement. The power is vested in the arbitral tribunal through the act of delegation.[84] The limited jurisdiction of international tribunals and the close bond and dependency of arbitrators on the parties' agreement to have the dispute settled by them was recognized by Professor Georges Abi-Saab in *Abaclat and Others v. Argentine Republic*. Professor Georges Abi-Saab attributes it to the lack of centralized power on the international plane:

> In international law, all tribunals— not only arbitral, but even judicial— are tribunals of attributed, hence limited jurisdiction (juridictions d'attribution). There is no tribunal or system of tribunals of plenary or general jurisdiction (juridiction de droit commun) that covers all cases and subjects, barring exceptions falling under—i.e. attributed to—the jurisdiction of a specialized tribunal. This is because, in the absence of a centralized power on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, les justiciables) themselves (with the very limited exception of tribunals created by international organizations in the exercise of their powers under their constitutive treaties, which are also ultimately based on the consent of the subjects that concluded or adhered to these constitutive treaties).[85]

The natural outcome of the principal-agent relationship doctrine is that arbitral tribunals are seen to be deciding cases in "isolation", meaning that they are empowered to settle solely the dispute presented to them as they are created on an *ad hoc* basis without any hierarchical organization.[86] Based on this reasoning, the "*tribunals take authoritative decisions whose reach is limited to the parties.*"[87] Some authors indeed keenly subscribe to the concept of strict principal-agent relationship in international arbitration disputes:

> Arbitrators are private persons who derive their powers from the parties' consent and not from a delegation by the public administration of the state or the international community. Arbitrators do not dispense justice on behalf of the people or community of the state, or of a group of states or of the international community as a whole. They surely do not practice a public service and may not exercise sovereignty. Arbitrators

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84 ibid. p. 8.

85 *Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting opinion of Georges Abi-Saab*, para. 7.

86 Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", p. 10.

87 ibid. p. 10 – 11.

> thus do not decide on behalf of the legal systems they apply and are not accountable to the communities subject to these legal systems.[88]

This theory fits well within the ambit of international investment arbitration due to the non-existence of doctrine of precedent in international (investment) law.[89] This rule is materialized in Article 53 of the ICSID Convention when it states that an "*award shall be binding on the parties* […]".[90] Although not explicit, Article 53 of the ICSID Convention is generally perceived as excluding the *stare decisis* doctrine.[91] A similar provision can be found in a number of arbitration rules.[92]

Arbitral tribunals have supported the view that an award is binding only upon the parties and there is no doctrine of *stare decisis* in the international investment law. For example in *AES Corporation v. The Argentine Republic,* the tribunal held that "*each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system*."[93]

Similarly, in *Wintershall v. Argentine Republic*, the tribunal also considered that arbitral awards are binding only on the parties and have no precedential effect:

> *[S]tare decisis* has no application to decisions of ICSID tribunals – each tribunal being constituted *ad hoc* to decide the dispute between the parties to the particular dispute—The award of such tribunal is binding only on the parties to the dispute (Article 53 of the Convention)— not even binding on the State of which the investor is a national. Decisions and Awards of *ad*

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88 Bentolila, *Arbitrators as Lawmakers*, p. 1.

89 Jan Paulsson, "The Role of Precedent in Investment Arbitration, Arbitration under International Investment Agreements: A Guide to the Key Issues," ed. Katia Yannaca-Small (Oxford University Press, 2018), para. 4.13; Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture," *Arbitration International* 23 (2007), p. 357; Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement* 2, no. 5 (2011), p. 16.

90 ICSID Convention, Art. 53.

91 Schreuer, *The ICSID Convention, A Commentary*, p. 1101; August Reinish, "The Role of Precedent in ICSID Arbitration," (2008), https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/role_precedents_icsid_arbitrationaayb_2008.pdf (last accessed 10 April 2022); Bentolila, *Arbitrators as Lawmakers*, p. 73.

92 *See e.g.* SCC Arbitration Rules (2017), Art. 46; ICC Arbitration Rules (2021), Art. 35(6); UNCITRAL Arbitration Rules (as revised in 2010), Art. 34(2).

93 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005), para. 23.

hoc ICSID tribunals have no binding precedential effect on successive tribunals, also appointed *ad hoc* between different parties.[94]

These and many more decisions[95] show that the prevailing opinion is that no rule of *stare decisis* exists in the international investment law and that award rendered by the tribunal should thus be binding only upon the parties to the arbitration.

This conclusion, however, does not mean that arbitrators decide cases independent of the previously rendered awards. Take *Burlington Resources Inc. v. Republic of Ecuador* as an example. There, the majority stated that the tribunal is not bound by decisions of previous awards. At the same time, the majority noted that it should pay due consideration to previous arbitral decisions and should follow solutions consistently established in previous cases and by doing so contribute to the harmonious development of the international investment law.[96] Arbitrator Stern disagreed with the majority, "*as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend*".[97] The approach taken by Ms. Stern could be labelled as a strict approach to the principal-agent relationship of the arbitrators, while the parties the position taken by the rest of the tribunal could be classified as placing an arbitrator within a greater international community as discussed further.

1.2.2. Arbitrator as an agent of an international (investment) community

The second model places arbitrators within the context of a larger community. This means that they hold at heart not only the case they were appointed to decide, but also the development of the law they apply:

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94 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 194.

95 *See e.g. AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the ad hoc Committee on the Application for Annulment (29 June 2012), para. 99 ("*There is no system of binding precedent in ICSID jurisprudence*."); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), para. 66 ("*Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term there should develop a jurisprudence constante in relation to annulment proceedings*."); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 52 ("*The Tribunal agrees with the parties in noting that there is no system of precedent in investor-State arbitration, nor indeed could there be, given the large and diverse set of treaties presently applicable to various investor-State claims*.").

96 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), para 100.

97 ibid. para. 100.

> [I]n contrast to the first model, the second type of model does not assume that arbitrators only make law that is retrospective and particular, or encompassed entirely in the contract. Arbitrators can and should be involved in lawmaking that is also general and prospective.[98]

Stone Sweet supports the opinion that the strict principal-agent model "*is doomed to the extent that the judicialization process proceeds*".[99] He notices the aspects of judicialization in the development of *de facto* precedent, the adoption of balancing techniques by the tribunals, the admission of amicus briefs, and the push for appellate supervision of arbitral awards.[100] An arbitrator in this model is then not just an agent of the parties to the dispute, but she is also an agent of the investment community or of the global legal order:

> [T]he international arbitrator is *not* simply the '*obedient servant' of the parties*, and he is not only called upon to pass a decision in respect of the inter-partes contractual interests. His responsibility is not solely vis-à-vis the parties (as had too frequently be maintained), but goes beyond: The arbitrator of our times, and certainly of the times to come, *has to apply a broader perspective*, a perspective which is not solely confined by the interests of the parties and will have to *take into account the general notions and requirements of the transnational public policy*.[101]

This is because any system of law must provide for some level of legal certainty and predictability, with the assurance that similar cases will be treated similarly.[102] The threat to a system with no precedential weight given to past decisions is that it creates a potential for the existence of "*contrasting awards articulating opposing results for fundamentally the same issue without any guidance as to which awards or analysis is to be preferred*".[103] The practice of investment arbitration shows that this threat is not purely theoretical.

Inconsistencies among arbitral awards make the decision-making process of international investment tribunals unpredictable and, in effect, undermine the legitimacy of investment

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98 Sweet, "Investor-State Arbitration: Proportionality's New Frontier", p. 10.

99 ibid. p. 10.

100 ibid. p. 12.

101 Marc Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel: Helbing & Lichtenhahn, 1999), para. 825 (emphasis in the original), quoted in Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 199.

102 Guillaume, "The Use of Precedent by International Judges and Arbitrators.", p. 6; *See also* D. Neil MacCormick Zenon Bankowski, Lech Morawski & Alfonso Ruiz Miguel, "Rationales for Precedent," in *Interpreting Precedents*, ed. Robert S. Summers D. Neil MacCormick (Routledge, 2016), p. 488.

103 Mike McClure Matthew Weiniger, "Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years," *TDM* 4, no. 1 (2013), p. 10; *See also* Schreuer, *The ICSID Convention, A Commentary*, p. 1102.

arbitration.[104] When addressing this issue, Professor Susan Franck even spoke about a legitimacy crisis in investment treaty arbitration.[105] She noted that the existence of inconsistent awards creates uncertainty and damages the legitimate expectations of investors and States.[106] As a result, "*[a]ny system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness*".[107] This does not mean that tribunals are always required to adhere to previous rulings in similar cases, but for achieving consistency, when diverging from conclusions reached by previous tribunals, they should make a distinction in their application between the case at hand and the previous case or otherwise explain the different outcome reached.[108] Professor Paulsson fittingly points out that "*attention to prior decisions may be viewed as a type of anti-arbitrariness vaccine*".[109]

In fact, despite the non-existence of *stare decisis* doctrine, tribunals do frequently rely on previous awards when deciding cases.[110] In 2007, Jeffrey Commission published a citation analysis of arbitral awards to shed some light on how often tribunals rely on previous decisions.[111] The analysis encompassed 207 publicly available decisions, awards, and orders rendered by tribunals in investment treaty arbitration between the years 1972 and 2006.[112] It follows from the study that while in 1990 tribunals relied on past awards on average 0.33 times per award, the number grew to 2.5 in 1999, and, in 2006, on average 9.3 citations in ICSID awards, 11.25 in ICSID decisions on jurisdiction, and 18.43 in non-ICSID decisions and awards.[113]

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104 Doug Jones, "The Problem of Inconsistency and Conflicting Awards in Investment Arbitration," https://www.ciarb.net.au/wp-content/uploads/2014/12/DJones-Investor-State-Arbitration-The-Problem-of-Inconsistency-and-Conflicting-Awards.pdf (last accessed on 22 February 2019), p. 2.

105 Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," *Fordham Law Review* 73 (2005), p. 1521.

106 ibid. p. 1558.

107 ibid. p. 1583, citing Michael D. Goldhaber, "Wanted: A World Investment Court," *TDM* 3 (2004).

108 Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", p. 1585.

109 Paulsson, "The Role of Precedent in Investment Arbitration, Arbitration under International Investment Agreements: A Guide to the Key Issues", para. 4.17.

110 Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration," *Fordham International Law Journal* 30 (2006), p. 1030.

111 Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence," *Journal of International Arbitration* 24, no. 2 (2007), p. 129.

112 ibid. p. 132.

113 ibid. p. 149 – 151.

In support of the numbers, several tribunals have explained their reliance on previous awards. This was the case of the tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* when it dealt with the relevance of previous decisions and in conformity with above mentioned expressly stated that:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[114]

Similarly, the tribunal in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* noted that it is not bound by previous decisions, but it "*has given them due consideration with the aim of enhancing consistent interpretation of comparable treaty language as applied to similar fact patterns*".[115] Most notably, some tribunals follow previous decisions as "*important precedents set by Tribunals* […]".[116]

The above are leading examples of decisions where tribunals stressed the importance of considering previous decisions, developing a consistent interpretation of similar treaty standards, and deciding similar cases similarly. Tribunals do rely on previous awards when rendering their decisions, despite the fact that the notion of *stare decisis* has been rejected in the international investment law. Past awards thus actually carry some precedential weight and arbitrators seem to

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114 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009), para. 90 (internal citations omitted); *See also Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction, para. 100 ("*The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend*.").

115 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012), para. 897.

116 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of Jurisdiction (27 April 2006), para. 82; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), para. 110.

act as more than just agents of the parties that appointed them. Arbitrators seem to subscribe to the theory that they are part of a bigger international immunity by considering previously rendered awards, concerning themselves with the harmonious development of international investment law and considering the award rendered in the particular case as part of collection of all investment treaty awards.

1.2.3. Arbitrator's role with respect to national case law

It follows from the above that arbitrators could be perceived as more than just agents of the parties tasked to decide the dispute at hand without any consideration of the development of law since they clearly do take into account previously rendered awards. However, the analysis above considered solely international law or international investment law in particular. The analysis did not take into consideration the application of national law by international tribunals.

With respect of the application of national law, the reasons mentioned in the previous Section about the need for consistency and predictability of law fail to apply. It seems improbable that an arbitrator should be viewed as someone who is there to guarantee predictability of national law. The predictability of national law is traditionally secured by ample case law rendered by national courts. Arguably, no one would resort to an award of international arbitral tribunal most likely composed of practitioners that have never practiced the applicable national law, for guidance on the application of that national law. This conclusion is also supported by the text of the Slovak Model BIT which provides that:

> [I]n determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and *any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*.[117]

Since the predictability of national law is safeguarded by national courts, international tribunals need not to fulfill that function. Therefore, at least with respect to the national law and national case law, arbitrators in investment treaty arbitrations do not act as a part of some greater community—be it national or international—as they do not owe to anyone other than the parties the duty of safeguarding the consistency of the national case law and its development. In applying national law, international investment tribunals are strictly agents of the parties.

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[117] Slovak Model BIT (2016), Art. 19(2) (emphasis added).

Nevertheless, this does not mean that arbitrators should feel invited to disregard national case law. This is because their interpretation of national law should still be predictable to the parties. To safeguard consistency in interpretation of national law and application of national case law, this thesis proposes establishing a uniform treatment of that case law by an arbitrator.

1.3. Conclusion

Due to the hybrid nature of investment treaty arbitration, the precise nature of an investment tribunal is difficult to define. What is clear, however, is that elements of pure public international law decision-making body and international commercial tribunal, as a private law decision-making body, are represented differently in the ICSID and non-ICSID arbitration. While non-ICSID arbitration is still attached to its *lex arbitri* and is subjected to the jurisdiction of national courts of the State of the seat where the award can be also challenged, ICSID arbitration evinces no such attachment. Being established within the framework of an international treaty, the *lex arbitri* of ICSID arbitration is international law. The hybrid nature of investment treaty arbitration means that works on both international commercial arbitration and public international law decision making are relevant for this research.

The Chapter then discussed the role an arbitrator has within the system of investment treaty arbitration. There, it introduced two models: a strict principal-agent relationship model and a model in which an arbitrator forms a part of a bigger community. It found that to secure predictability of international investment law, an arbitrator should transcend the strict principal-agent relationship. This means that for the sake of harmonious development of international investment law, an arbitrator should take into consideration previously rendered awards and conclusions reached in them, despite the fact that she is not legally bound to follow them. The situation is, however, different when considering national case law. Since national courts or future arbitral tribunals are unlikely to look into an investment award for an answer regarding the application of national law,[118] there, the arbitrator behaves solely as an agent of the parties. This does not mean that she should not follow national case law. Doing so would result in arbitrariness of the conclusions and unpredictability of the award. It only means that, in applying national law, an arbitrator is not part of a greater community whose interests she should take into consideration or that she should think about the harmonious development of national law. Yet,

[118] Berger, "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms", p. 253.

the arbitrator needs to consider predictability of her decisions and of the law. This dissertation proposes that the way to do so is to establish a uniform approach to national law and national case law.

2. National Law in Investment Treaty Arbitration

Arbitrators in investment treaty arbitration primarily decide on the international responsibility of States according to relevant principles of public international law. It is thus unsurprising that international law should apply. It is less apparent that besides international law, national law also plays a crucial role in the settlement of international investment disputes. A particular focus of this Chapter is on when and in which capacity arbitrators apply national law. Since it was established above that the nature of non-ICSID and ICSID arbitration differs, this Chapter distinguishes between them when addressing the general considerations of the applicable law.

2.1. General rules on applicable law in investment disputes

Arbitrators in investment treaty arbitration indeed sit to decide disputes mostly in accordance with the standards of protection embodied in the IIA or under the applicable rules of international law. Nevertheless, regularly, arbitrators are tasked to apply also national law, be it the law of the host State or any other applicable law.[119] In fact, the substantive law applicable to investment disputes is a combination of national and international law.[120] Typically, the national law prescribes rules for recognizing any *in rem* rights and international law then contains rules to decide whether those *in rem* rights are under substantive protection of the IIA.[121] Similarly, some IIAs may provide for an obligation for investments to be made in accordance with the domestic laws of the host State.[122] Thus, even though the question of the State's responsibility will be of international law, some essential considerations must be made under national law.

There are three potential sources of substantive legal rules: (i) the IIA itself;[123] (ii) international law; and (iii) national law.[124] These three sources of law are not, however, in

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119 However, it is rare that the applicable law would be the law of another State than the host State; *See* Schreuer, *The ICSID Convention, A Commentary*, p. 559, para. 27.

120 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", p. 194; Douglas, *The International Law of Investment Claims*, pp. 8 – 9.

121 Douglas, *The International Law of Investment Claims,* p. 72; Lluis Paradell Andrew Paul Newcombe, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), para. 2.11.

122 *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 230.

123 Due to its nature, an IIA needs not to be singled out as a separate source of applicable substantive law since it could be simply recognized as one of the sources of international law; however, it is singled out to emphasize its importance to the particular case and the direct applicability of its Articles.

contradiction to each other and are not mutually exclusive. On the contrary, the system of international investment arbitration, although designed to adjudicate on international responsibility of States, purports to apply national law in coordination with international law:

> The important insight from the architecture of the investment treaty is that states do not purport to displace municipal laws and regulations on foreign investment in a wholesale fashion by the perfunctory signing of an investment treaty. Instead they envisage a relationship of coordination between international and municipal laws.[125]

Due to this relationship of coordination, in a single case, depending on its nature, arbitrators can be required to apply either international or national law or more likely both.[126] The applicable national law is usually the law of the host State; however, it can be law of another State as well.[127]

Because of this complicated interplay between international and national law in investment arbitration, the choice-of-law rules play a critical role in the resolution of investment disputes.[128] As pointed out above,[129] investment arbitration is largely modelled according to commercial arbitration. As such, consent and the choice of law by the parties is pivotal in the arbitrator's decision on the applicable law and is given precedence over other methods of ascertaining applicable law.[130]

To add to the complexity, there are generally five sources of the choice-of-law provisions in investment treaty arbitration: (i) the IIA itself, (ii) the direct contractual relationship between the investor and the host State, (iii) the arbitration rules governing the reference to arbitration, (iv) the *lex loci arbitri* (although these are not common), and (v) the choice-of-law rule derived

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124 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", p. 194.

125 Douglas, *The International Law of Investment Claims*, p. xxiii.

126 Bentolila, *Arbitrators as Lawmakers*, p. 69, para. 192, citing *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007); *See also* Christoph H. Schreuer, "Investment Arbitration - A Voyage of Discovery," (2004), https://www.univie.ac.at/intlaw/wordpress/pdf/74_cspubl_74.pdf (last accessed on 10 April 2022), p. 75-

127 Schreuer, "Investment Arbitration - A Voyage of Discovery", p. 75.

128 Douglas, *The International Law of Investment Claims*, p. xxiii.

129 *See* Sections 1.1.1 and 1.1.2 above.

130 Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration," in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford University Press, 2018), para 19.03; Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (United Kingdom: Cambridge University Press, 2014), p. 123.

from public international law.[131] The first three sources are the ones most commonly used. In the following Sections, this thesis demonstrates the possible choice-of-law clauses contained in the IIAs and arbitration laws; it omits to delve into the second category of choice-of-law clauses—the ones contained in the direct contractual relationship between the investor and the host State—as these are not, for the most part, publicly available for scrutiny and because they are not essential for the conclusions of this Chapter. The choice-of-law clauses contained in the IIAs and arbitration rules sufficiently demonstrate the importance of national law in settlement on international investment disputes.

2.2. Choice-of-law clause in an IIA

With respect to the consent or agreement contained in the particular IIA, there is an apparent lack of consensus from the side of an investor. Since the IIA is entered into between the home State of the investor and the host State where the investment is made, it is not exactly an analogy to an agreement in the commercial arbitration, because the investor is not a party to that agreement. The same theoretical problem, nevertheless, comes into question when dealing with the arbitration clause itself. There, scholars came up with a concept simulating that the provisions agreed on by the States are there for the benefit of the investor who, by filing a claim against the host State, agrees with the terms of the IIA and thus supplements the second consent needed for effecting the treaty provisions.[132] The same concept then applies to any choice-of-law clause in the IIA. This approach was adopted also by tribunals. For example, the tribunal in *Antoine Goetz et al. v. Republic of Burundi* deduced the consent of the investor with the choice-of-law clause from his decision to file a claim under the treaty (there, Belgium-Luxembourg-Burundi BIT):

> Sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants), mais par les parties à la Convention d'investissement (Burundi et Belgique). Comme cela a été le cas pour le consentement des parties, le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et

131 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", p. 194.

132 Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, p. 125; Schreuer, *The ICSID Convention, A Commentary*, p. 558, para. 23; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2007), para. 76.

> que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention.[133]

Choice-of-law clauses are often incorporated in the particular IIAs.[134] These clauses, however, differ as to the scope of the situation to which they apply—they can determine law for a particular legal issue or governing law of the whole dispute—and the law they determine to be the governing law.

Many IIAs contain a choice of law that shall govern the ascertainment of whether there is an investment and whether the claimant is an investor. Those provisions usually read along the line that the term "*investment*" means any kind of asset invested in the territory of one contracting State by investors of the other contracting State *in accordance with the laws and regulations of the former contracting State*; and that the term "*investor*" means natural persons who, *according to the law of that contracting State*, are considered to be its nationals and legal entities, including companies, corporations, business associations and other organizations, which are *constituted or otherwise duly organized under the law of that contracting State*. These provisions determine the law governing the jurisdictional issues of whether there is an investment and investor. They call for the application of national law of one of the parties to the IIA, i.e. national laws of the host State when considering an investment and national laws of the home State when considering the nature and identity of an investor.

Some IIAs, however, contain a choice-of-law provision *stricto sensu* which applies also to the merits of the dispute. Such clauses differ as to the law chosen and the level of detail in which they govern the application of the chosen law by the tribunal. Three basic variants of these choice-of-law clauses can be distilled from the concluded investment treaties or from the model investment treaties.

In the first one, the parties agree on the simultaneous application of all three possible sources of substantive law, i.e., the BIT itself, international law, and national law (usually of the

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133 *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999), para. 94: „*Undoubtedly, the determination of the applicable law has not been made, strictly speaking, by the parties to this arbitration (Burundi and investor applicants), but by the parties to the Investment Agreement (Burundi and Belgium). As was the case with the consent of the parties, the Tribunal considers, however, that the Republic of Burundi has consented to the applicable law as determined in the aforementioned provision of the Belgian-Burundian Investment Treaty in becoming party to this Investment Treaty and that the investors have made a similar choice by filing their request for arbitration on the basis of the said Convention.*" [Author's own translation]

134 Bentolila, *Arbitrators as Lawmakers*, p. 68, para. 194; *See also* Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", p. 194.

party involved in the dispute). Such a clause can be found for example in the UK – Argentina BIT:

> The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.[135]

A clause calling for the concurrent and supplementary application of the BIT, international law, and national law of the host State was applied for example by the tribunal in *Fedax v. Venezuela*.[136] There, the tribunal stressed that promissory notes that were the subject matter of the dispute were governed by the Venezuelan Commercial Code, which thus became important for the dispute settlement.[137] Interestingly, some IIAs calling for simultaneous application of the provisions of the IIA, international law, and national law distinguish between the standards of protection contained in the particular investment treaty and claims that could be raised under such treaty when determining the applicable law. Such a clause can be found in the US Model BIT which determines that claims alleging State's breaches of its obligations relating to the standards of national treatment, most-favored-nation treatment, minimum standard of treatment, expropriation, and compensation shall be governed by international law and the BIT itself; while claims relating to an investment authorization or investment agreement the choice-of-law clause calls for the application of national law, and allow only subsidiary application of

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135 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993, Art. 8 (4); A similar clause can be also found in the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, 22 November 1991, Art. 8(4): "*The arbitration tribunal shall decide in accordance with the provisions of this Agreement, the law of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the principles of international law.*"; or the SADC (Southern African Development Community) Model Bilateral Investment Treaty Template (2012), Art. 31: "*When a claim is submitted to a tribunal under this Agreement, it shall be decided in accordance with this Agreement. The governing law for the interpretation of this Agreement shall be this Agreement and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.*"

136 *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Award (9 March 1998).

137 ibid. para. 30.

international law.[138] In those clauses, all three sources of law apply equally, depending on the claim brought before the tribunal.

The second type of a choice-of-law provision prescribes the application of the IIA itself and international law to be the governing law and exclude the application of the national law. This type of clause is for example included in the Czech Model BIT:

> The arbitral tribunal shall decide on the basis of law, taking into account the sources of law in the following sequence:
>
> /a/ the provisions of this Agreement and other relevant agreements between the Contracting Parties, as interpreted in accordance with the Vienna Convention on the Law of Treaties;
>
> /b/ other rules of international law.
>
> For greater certainty, the domestic law of the Contracting Parties shall not be part of the applicable law. Where the arbitral tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Contracting Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Contracting Party.
>
> For greater certainty, the meaning given to the relevant domestic law made by the arbitral tribunal shall not be binding upon the courts or the authorities of either Contracting Party. The arbitral tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the Contracting Party which is the party to the dispute.[139]

This approach was also adopted in NAFTA[140] and the ECT.[141] It reflects the traditional perception of the role national law plays in international disputes, where national law would

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138 US Model BIT (2012), Art. 30: "*1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.*

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws;22 and (ii) such rules of international law as may be applicable."

139 Czech Model BIT (2016), Art. 8(14); *See also* Italian Model BIT (2020), Art. 14(10): „*When rendering its decision, the Tribunal shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. Where the Tribunal is required to ascertain the meaning and effects of the provisions of domestic law as a matter of fact, it shall follow the prevailing interpretation made by the courts or authorities of that Party.*" or Norwegian Model BIT (2015), Art. 13: „*A Tribunal established under this Section shall make its award based on the provisions of this Agreement interpreted and applied in accordance with the rules of interpretation of international law.*"

140 NAFTA, Art. 1131.

traditionally be regarded only as a matter of fact. This type of clause might cause interpretation difficulties when dealing with umbrella clauses or contractual claims brought before a tribunal, as those call for direct application of national law that cannot be solved by a mere reference to it as a matter of fact. This conundrum will be discussed at later stages of this thesis.[142]

The third and the last type of a choice-of law clause is a clause that exclusively calls for the application of national law. Notably, some States consider international law to be part of their national law, thus, a mandate to apply solely national law of a particular State can be interpreted as a mandate to apply also international law.[143] Nevertheless, this thesis focuses on national law of national origin and does not concern the interpretation and application of international law applied as a part of national law.

A clause of the third type was present in the BIT between India and Switzerland that is not in force any longer. Arguably, this clause might be construed as only applying to the *in rem* rights stemming from the investment, but not choosing the substantive applicable law to be applicable to settle the dispute brought before the tribunal:

> All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made.[144]

Clauses falling within the third type are hard to come by.[145] Furthermore, since the respective IIA is an international treaty, its interpretation and application will be necessarily governed by international law.[146] Therefore, agreements on the sole application of national law are unlikely to be construed by the tribunal as strictly mandating to apply only law of domestic origin. This, however, could go also for clauses excluding the application of national law since the issues at dispute in international investment arbitration can be rarely answered by sole recourse to international law:

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141 ECT, Art. 26(6).

142 *See* Sections 6.2.2 and 6.2.3 below.

143 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 181 – 187.

144 Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments dated 16 February 2000, terminated on 6 April 2017, Art. 11.

145 Schreuer, *The ICSID Convention, A Commentary*, p. 558, para. 24.

146 Virtus Chitoo Igbokwe, "Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations," *Journal of International Arbitration* 23, no. 4 (2006), p. 298; Ole Spiermann, "Applicable Law," ed. Federico Ortino Peter Muchlinski, and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2012), p. 107.

> Even if the relevant treaty does not provide for a choice of substantive law, arbitrators still have the obligation to consider the relevant national laws of the host state, with the caveat that such law may not be applicable if it is contrary to the obligations assumed by the state under the treaty—the principle that a state cannot rely on its internal laws to derogate from or modify its treaty obligations. To that extent, it is conceded that the arbitrators may have a certain margin and power of interpretation.[147]

From the above classification, it is apparent that the approach of IIAs with respect to the law applicable to the merits of an investment dispute varies greatly in theory, however, not necessarily in practice. There are, in reality, only two operational types choice-of law clauses in the IIAs: those calling for the application of only the IIA and international law, and those adding to the mix of applicable laws also national law. However, even with the first type of the choice-of-law clauses, national law will be relevant. This is because not every recourse to national law makes that law *stricto sensu* applicable. As will be discussed below, national law might be relevant only as an ancillary law to the applicable law. In such a case, the choice-of-law clause would not need to choose national law as the applicable substantive law.

Yet, some IIAs do not have any choice-of-law provision at all.[148] When no such clause is agreed on in the IIA, the provisions of the chosen arbitration rules, *lex arbitri*,[149] or the investment agreement concluded directly with the investor apply. The next Section delves into the relevance of national law in choice-of-law clauses contained in arbitration rules.

2.3. Choice-of-law clause in arbitration rules

To illustrate how national law becomes relevant under the chosen arbitration rules, this Section discusses the choice-of-law contained in selected arbitration rules applicable to (2.1.1) non-ICSID arbitration, and (2.1.2) ICSID arbitration.

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147 Igbokwe, "Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations", p. 298

148 Banifatemi, "The Law Applicable in Investment Treaty Arbitration", para. 19.13; *See e.g.* Agreement between the Government of the Republic of Peru and the Government of the Kingdom of Norway on Promotion and Reciprocal Protection of Investments which entered into force on 9 May 1995.

149 In the event *lex arbitri* contain a default choice of substantive law.

2.3.1. Arbitration rules applicable to non-ICSID arbitration

In case the IIA or the investor-State investment agreement does not contain any choice-of-law agreement, non-ICSID tribunals look primarily into the applicable *lex arbitri* and arbitration rules.[150] To assess the choice-of-law rules contained therein, this Section looks into the most prominent arbitration rules to see whether they contain a manual for arbitrators on the selection of applicable substantive law, and if so, which law should the tribunal apply. Importantly, unlike disputes under the ICSID Convention, non-ICSID arbitration rules are not specifically tailored to investment treaty arbitration. Therefore, the choice-of-law rules are drafted also—or even exclusively —with commercial arbitration in mind and must be adapted by the tribunals to the specifics of investment treaty arbitration. The arbitration rules discussed in this Section include the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, and the SCC Arbitration Rules.

The UNCITRAL Arbitration Rules emphasize the importance of party autonomy by giving precedence to parties' agreement on the law applicable. However, failing to reach an agreement, the tribunal is mandated to apply the law which it deems appropriate while respecting the terms of the underlying contract and apply any applicable trade usages:

> Article 35
>
> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.
>
> […]
>
> 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.[151]

The Article refers to the "*rules of law*" rather than simply "*law*". This was understood by the Working Group as permitting parties (and arbitrators) to have their dispute settled according to rules from more than just one legal system, and even those rules that do not form part of any

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150 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 62.

151 UNCITRAL Arbitration Rules (as amended in 2010), Art. 35.

legal system, exist solely on the international level or are not yet in force (or not any longer).[152] The choice of law—or rather the choice of rules of law—by the parties under this Article, unless expressly stipulated otherwise, concern only substantive provision of the given law and excludes the conflict-of-law provisions.[153] Public international law can be chosen as applicable law under the UNCITRAL Arbitration Rules.[154]

It follows from the text of the UNCITRAL Arbitration Rules that, in the absence of the agreement of the parties, the tribunal enjoys a broad discretion as to the choice of applicable law without any need to consult any conflict-of-law rules.[155] This way, the tribunal is able to apply any rules of law it deems appropriate while observing the terms of the contract and any applicable trade usages, including—or perhaps especially—international trade usages.

The practice also suggests that under the UNCITRAL Arbitration Rules, tribunals in investment treaty arbitration are allowed to apply simultaneously the contract itself, national law and public international law. This was concluded for example by the tribunal in *National Grid plc v. Argentine Republic*[156] or in *Chevron Corporation and Texaco Petroleum Company v. Ecuador.*[157]

The ICC Arbitration Rules contain very similar rules to those present in the UNCITRAL Arbitration Rules. Under Article 21 of the ICC Arbitration Rules, the tribunal is asked to respect the agreement of the parties on the law applicable to the dispute. Failing to reach such an agreement, the tribunal applies those rules of law that it determines to be appropriate while taking into account the provisions of the contract and any relevant trade usages:

> Article 21
>
> (1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

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152 David D. Caron; Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (Oxford University Press, 2013), pp. 114, 116; citing UNCITRAL, "UN Doc A/CN.9/WG.II/ /WP.143/Add.1, n 19", para. 42.

153 Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, p. 113.

154 ibid. p. 116.

155 ibid. p. 118.

156 *National Grid plc v. The Argentine Republic*, UNCITRAL, Award (3 November 2008), para. 85.

157 *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, para 159.

> (2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.[158]

Similarly to the UNCITRAL Arbitration Rules, the ICC Arbitration Rules refer to "*rules of law*" rather than solely to "*law*". Here, as well, this formulation is construed as intentionally calling for a wider interpretation not limiting the parties and the tribunal to one whole legal system, but allowing for application of sets of laws and guidelines created on the international plane, transnational commercial law (*lex mercatoria*), and non-national sets of rules.[159] The "*rules of law*" also encompasses the rights and obligations that may arise under an investment treaty or law, including those of public law, public international law and its principles.[160] These rules can also be combined within one dispute.[161]

Just like the UNCITRAL Arbitration Rules, the ICC Arbitration Rules also give the tribunal broad discretion as to the applicable substantive law by not requiring it to follow specific conflict-of-laws rules, but applying the laws they consider as appropriate for the dispute at hand. Still, this does not equal to arbitrariness since the arbitrators are required to give reasons for their choice of law.[162] Here as well are arbitrators required to apply any applicable trade usages and the terms of the contract.[163]

The SCC Arbitration Rules contain an almost identical clause to Article 35 of the UNCITRAL Arbitration and Article 21 of the ICC Arbitration Rules. Its Article 27 also requires tribunals to first look at the will of the parties as to the law applicable to the merits, allowing the parties (and potentially the tribunal) to apply "*law(s) or rules of laws*" without the application of that law's conflict-of-laws provisions, unless expressly agreed on otherwise by the parties. In the absence of parties' choice, tribunals are tasked to apply most appropriate law or rules of law.[164]

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158 ICC Arbitration Rules (2021), Art. 21(1) and (2).

159 Mazza, *The Secretariat's Guide to ICC Arbitration*, paras. 3-747, 3-761.

160 ibid. paras. 3-747. 3-761.

161 ibid. para. 3-761.

162 ibid. para. 3-756.

163 ICC Arbitration Rules (2021), Art. 21(2); ibid. para. 3-780.

164 SCC Arbitration Rules (2017), Art. 27: "*(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate. (2) Any designation by the parties of the law of a given state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules.* […]".

As apparent from the partial award rendered in *Eastern Sugar B. v. Czech Republic*, the applicable law under the SCC Arbitration Rules can be both national and international law.[165]

It follows from this short excurse to the arbitration rules that arbitrators enjoy broad discretion when it comes to determining the law applicable to the merits of the dispute. After all, Kaufmann-Kohler pointed out that "*what is truly striking in international commercial arbitration is* […] *arbitrators' broad discretion in determining and applying the law that governs the merits of any particular case.*"[166] This is valid also in the investment treaty arbitration. Arbitrators' broad discretion also means that they are free to apply both public international law and national law, should they consider them to be appropriate laws to govern the dispute or rather a particular claim of an arbitrator and tailor the applicable law differently for each of those claims. As shown in the above-cited cases, arbitrators in fact do consider it appropriate to apply both laws to international investment disputes.

2.3.2. ICSID Arbitration Rules

Due to the international nature of the ICSID Convention and the ICSID arbitration in general, ICSID tribunals apply to the dispute choice-of-law norms found in the international legal order.[167] The ICSID Convention contains a choice of law applicable to substantive issues of a particular case or rather a list of potential laws applicable to an investment treaty dispute.[168] Similarly to the non-ICSID arbitration rules shown above, the ICSID Convention also gives precedence to the parties' agreement on the choice of law. This agreement on the choice of law could be present either in the direct investment agreement of the parties or in the IIA that forms the basis of the arbitration.[169]

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165 *Eastern Sugar B. v. Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007), para. 196.

166 Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture", p. 364.

167 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 62.

168 Article 42(1) of the ICSID Convention does not apply to jurisdictional and procedural issues; *See* Schreuer, *The ICSID Convention, A Commentary*, pp. 550 – 551; *See also Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), para. 236, for a ruling on that the choice of law provision contained in Article 42 of the ICSID Convention applies only to the merits of the dispute.

169 In theory, the parties could also agree on the applicable law during the course of arbitration; *See* Schreuer, *The ICSID Convention, A Commentary*, pp. 568 – 569.

As hinted above, the ICSID Convention, contrary to the non-ICSID arbitration rules, is designed to apply specifically to investment treaty arbitration cases. Consequently, the choice-of-law rules are worded to suit the public international law aspect of these disputes. This is apparent from the rules prescribed for the choice of law in case of the absence of parties' agreement. Failing to reach such an agreement, the ICSID Convention prescribes the application of national law of the host State and international law. Unlike the UNCITRAL Arbitration Rules or the SCC Arbitration Rules, national law is understood by the ICSID Convention as including its conflict of laws:

> Article 42
>
> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[170]

Similarly to the UNCITRAL Arbitration Rules, ICC Arbitration Rules, and the SCC Arbitration Rules,[171] the parties to arbitration need not choose one system of law in its entirety. The clause provides for a choice of "*rules of law*", which is understood as not necessarily meaning one system of national law, but being permissive of parties combining rules from several systems of law to govern their relationship.[172]

One of the most well-known ICSID awards dealing with the law applicable to the dispute—and indeed the first one based solely on the provisions of an IIA (in this case Sri Lanka – United Kingdom BIT)—is *APPL v. Sri Lanka*.[173] There, the tribunal considered that if a dispute is based on an IIA and not a direct investment agreement between the parties, there could hardly be an agreement on the choice of law by the parties since the IIA is entered into by two States (and not the investor himself).[174] Although, as shown above, this view is already considered outdated,[175] the award still contains valuable insight into the interpretation of

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170 ICSID Convention, Art. 42(1).

171 *See* Section 2.3.1 above.

172 Schreuer, *The ICSID Convention, A Commentary*, p. 563 para. 39; *See also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003), para. 96.

173 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990).

174 ibid. paras. 19, 20.

175 *See* Section 2.1 above.

Article 42 of the ICSID Convention and the simultaneous application of national law and international law in investment treaty disputes. In this case, the tribunal placed the provisions of the BIT into a wider context, acknowledging that not only its provisions govern the dispute, but, depending on the circumstances of a particular case, international law and national law might be concurrently applicable:

> Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridic 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.[176]

The concurrent application of national and international law under the second sentence of Article 42 of the ICSID Convention was further confirmed by the annulment committee in *Wena v. Egypt*.[177] Apart from ruling on the possible concurrent application of international law and national law of the host State, the annulment committee even took the position that Article 42 of the ICSID Convention allowed for the application of only international law:

> What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. *So too international law can be applied by itself if the appropriate rule is found in this other ambit*.[178]

This view was then followed for example by the tribunal in *Tokios Tokelés v. Ukraine*[179] or *Azurix Corp. v. Argentina*.[180]

In contrast to these decisions stands the decision of the annulment committee in *Klöckner v. Cameroon*.[181] There, the annulment committee also explored the relationship

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176 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, para. 21.

177 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002), pp. 940-41.

178 ibid. p. 941, para. 40 (emphasis added).

179 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (26 July 2007), para. 140: "*The Tribunal shares the view expressed by the Annulment Committee in Wena Hotels Ltd. v. Arab Republic of Egypt that under Article 42(1), second sentence, 'both legal orders… have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit'*".

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

between national law of the host State and international law. The tribunal articulated the complementary and corrective role of international law in relation to national law without allowing for sole application of international law to the merits of a dispute:

> This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a twofold role, that is, complementary (in the case of a "lacuna" in the law of the State), or corrective, should the State's law not conform on all points to the principles of international law. In both cases, the arbitrators may have recourse to the "principles of international law" only after having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to one principle, even a basic one) and after having applied the relevant rules of the State's law.[182]

The tribunal then continued and excluded the possibility of sole application of international law by holding that "*Article 42(1)* […] *clearly does not allow the arbitrator to base his decision solely on the 'rules' or 'principles of international law'.*"[183]

This supplemental and corrective function of international law was adopted also by the tribunal in *Autopista v. Venezuela* which went as far as calling it a well-accepted practice of international law:

> It is further a well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement (under the second sentence of the same treaty provision) […].[184]

Other tribunals also evaluated the relationship between international and national law in ICSID arbitration, admitting that national law—and especially national law of the host State—forms an important part of the applicable law. The tribunal in *Goetz and Others v. Republic of Burundi*, for example, subscribed to the complementary role of international law in respect of national law of the host State:

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181 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee (3 May 1985).

182 ibid. para. 69 (emphasis in the original).

183 ibid. para. 69.

184 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, para. 207 , *see also* para. 102, 103.

> 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 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 exclusif 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.[185]

The above analysis shows that even in ICSID arbitration, the agreement between the parties on the applicable law prevails over the tribunal's ruling on it. What is more, the ICSID Convention provide for a combination of various rules from different legal systems as opposed to requiring the parties to choose one legal system in its entirety.

Still more importantly, however, it shows the undeniable importance of national law in the settlement of international investment disputes. Without an express choice of law applicable to the merits of the dispute between the parties to ICSID arbitration, ICSID tribunals are provided with a mandate to apply national law of the host State and rules of international law. Published awards demonstrate that even in practice tribunals are in agreement that national law (of the host State) plays a vital role in deciding an investment dispute. There is, however, not unity as to the precise relationship between the two applicable legal systems. Some tribunals allow for the application of only international law (if the case requires such an approach) and thus give prevalence to international law, while some stretch the importance of national law of

185 *Antoine Goetz et consorts v. République du Burundi*, para. 69: „*It is not without interest in this regard to note that the rather frequent reference, in choice of law clauses inserted in investment protection agreements, to the provisions of the agreement itself – and, more broadly, to the principles and rules of international law – causes, after a certain ebb in practice and jurisprudence, a remarkable return of international law in legal relations between host States and foreign investors. This internationalization of investment relations – whether contractual or not – certainly does not lead to a radical "denationalization" of the legal relations born from foreign investment, to the point that the national law of the host State would be deprived of any relevance or application in favor of an exclusive role of international law. It only means that these relations fall simultaneously – in parallel, one might say – under the sovereign control of the host State over its national law and the international commitments to which it has subscribed.*" [Author's own translation]; The complementary function of international law was also observed by the tribunal in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), para. 207.

the host State, giving international law only complementary and corrective function. Evidently, national law does play an important role and forms part of the law applicable to the merits of the dispute.

2.4. Conclusion

It follows from this Chapter that both international law and national law play important roles in deciding investment treaty cases by investment treaty tribunals. While there is a multitude of sources of choice-of-law provisions, the most often used are those in the IIA itself, in the direct contractual relationship between the investor and the host State, or the arbitration rules governing the reference to arbitration which may contain a default choice of law. Upon closer scrutiny of several IIAs, it is apparent that there is not one uniform and universally agreed on provision indicating either national law or international law to govern investment disputes. In fact, IIAs contains various choice-of-law clauses choosing that only international or only national law is applicable, or—more often—that both of them apply, but giving priority either to the national law or the international law.

If the particular IIA or a direct investment agreement between the investor and the host State fails to provide for a choice of substantive law, attention usually turns to the applicable arbitration rules. The most prominent non-ICSID arbitration rules generally give broad discretion to the arbitral tribunal to choose the law that is most appropriate considering the dispute submitted to them, while also urging them to consider the terms of the parties' contract or any applicable trade usages. Interestingly, tribunals or parties need not stick to one national system of laws when choosing the applicable law but could combine different rules from different legal orders. Nevertheless, under those arbitration rules, both national and international law regularly apply.

The ICSID Convention sets forth very similar rules for the choice of law to those present in the non-ICSID arbitration rules reviewed in this Chapter, i.e. the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, and the SCC Arbitration Rules. What is different is that since the ICSID Convention is specifically designed to fit the investment disputes, its provisions expressly factor international law into the equation of applicable laws. Similarly to the non-ICSID arbitration rules, arbitrators are also not required to apply the whole set of one national legal order, they may pick and choose different rules without any regard to the whole. Several ICSID awards also attempted to reconcile the interplay between international law and national

laws in investment treaty disputes. Some concluded that although both national and international law is applicable, international law prevails over national law and can even be the sole law applicable to a particular case, others gave precedence to national law claiming the international law to have only supplementary and corrective function. This demonstrates not only the importance of national law in international investment disputes but also the want of uniform rules on how to treat national law when settling investment claims. This brings us back to the main research question of this thesis which seeks to define the proper treatment of national (case) law in international investment disputes.

3. Models of Arbitrator's Treatment of National Law

The previous Chapters established that national law indeed plays a vital role in the settlement of international investment disputes. A question then naturally arises as to the approach of an arbitrator to national law and its treatment. To answer this question, one must come back to the findings of the first Chapter of this dissertation. There, it was concluded that investment treaty arbitration is in its nature a combination of international commercial arbitration and public international law adjudication. Thus, to discover which approach to national law an arbitrator should entertain, this Chapter analyzes doctrinal works on investment treaty arbitration as well as on both international commercial arbitration and conclusions of the International Court of Justice (as a representative of public international law decision-making bodies).

To conceptualize possible treatments of an arbitrator, I develop three general models of treatment of national law by international decision-making bodies in general, and arbitrators in particular. Presented from the most restrictive model to the one where an arbitrator is the least restricted when construing national law, the models are as follows:

1. An arbitrator compelled to treat national law as a fact;
2. An arbitrator perceived as being in the same position as a national judge; and
3. An arbitrator acting as a transnational adjudicator.

By placing herself in one of the three models above, the arbitrator gets closer to ascertaining her treatment of national law. Identifying the proper model of treatment of national law is the first step in determining how an arbitrator should treat national case law. This is because placing herself within one of these models will facilitate understanding of the role an arbitrator plays within the respective national and international legal system.

3.1. Arbitrator treating national law as a matter of fact

The traditional public international law model of approaching national law is to treat it as a matter of fact. The law to an arbitrator is then something external. Such an approach restricts the arbitrator's powers to independently interpret and apply the chosen law by prescribing that the arbitrator must treat national law the same way it would treat factual matters. When applying such law, the arbitrator must apply the predominant interpretation given by the jurisprudence of

the legal system which the parties have selected.[186] The result of arbitrator treating national law as facts is that the maxim "*iura novit curia*" does not apply and national law needs to be proven to her, usually through texts of legislation, evidence on pertinent legislative history, judicial decisions, administrative guidelines, written and oral testimonies of experts from the particular jurisdiction, or even through arbitrator's own research.[187] This also means that the burden of proof weights on the party alleging the existence of a certain provision or particular interpretation of a certain provision of national law.[188]

This approach was articulated by the Permanent Court of International Justice (PCIJ) in the oft-quoted 1926 decision in *Certain German Interests in Polish Upper Silesia*, where the court was tasked to decide, among other things, on whether the application of certain provisions of Polish law, constituted a measure of liquidation within the meaning of Article 6 and the following Articles of the Convention of Geneva. There, the court emphasized that it is not tasked to interpret national law (in this case Polish law), as, from its standpoint, national law is only a matter of fact:

> It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. *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 do legal decisions or administrative measures. *The Court is certainly not called upon to interpret the Polish law as such*; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in

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186 Poznanski, "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration", p. 85; citing Loquin, "Les Pouvoirs des Arbitres Internationaux à la Lumière de l'Evolution Récente du Droit de l'Arbitrage International", p. 325.

187 Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge University Press, 2007), pp. 207, 208, citing *Brazilian Loans Case*, Ser. A No. 21 (12 July 1929), p. 124. Which held that: "*Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken." See also Mavrommatis Jerusalem Concessions*, PCIJ Ser. A No. 5 (26 March 1925), pp. 29, 30.

188 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 210.

> conformity with its obligations towards Germany under the Geneva Convention.[189]

It is unclear what the PCIJ meant by the qualifier "*as such*".[190] Under one view, it means that international tribunals do not have the authority to substitute their own interpretation of national law for that of the national authorities, thus, "*in many situations, an international tribunal must simply take note of the outcome of a domestic decision and then deal with its international implications.*"[191] This view originates from the public international law system of diplomatic protection, where the interplay between national law system applying national law and international law system applying international law was solved by the requirement of exhaustion of local remedies. That way, the question of national law was separated from the questions of international law as it was dealt with before the initiation of the arbitration on the national plane by competent national authorities.[192] A WTO panel in *US – Section 301* case interpreted the term „*as such*" arguably taken from the PCIJ decision in *Certain German Interests in Polish Upper Silesia* and held that "*we do not, as noted by the Appellate Body in India – Patent I, interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of* [the US law] *as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations*."[193] The panel then stressed that the rules of burden of proof apply in this respect.[194] Thus this view suggests that international tribunals, when treating law as a matter of fact, do not interpret national law.

However, the second view takes a more pragmatic stand stating that when presented with a set of national rules and decisions, arbitrators ought to interpret it in order to apply it to the

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189 *Certain German Interests in Polish Upper Silesia*, PCIJ Ser A No 7 (25 May 1926), p. 19 (emphasis added).

190 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 213.

191 Crawford, *Brownlie's Principles of Public International Law*, pp. 49 – 50.

192 Crawford, "Treaty and Contract in Investment Arbitration," *Arbitration International* 24, no. 3 (2008), p. 352.

193 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 217, quoting *United States — Sections 301–310 of the Trade Act 1974*, Report of the Panel (8 November 1999), para. 7.18. Although the WTO system and its dispute resolution is outside the scope of this dissertation, opinions and decisions of the WTO's panels on treatment of national law as a matter of fact do possess an informative value even to arbitrators in investment treaty arbitration. This is especially because the WTO's panels discuss the approach to national law as a matter of fact in the way as stipulated by the PCIJ, which is also relevant to investment treaty arbitration.

194 *United States — Sections 301–310 of the Trade Act 1974*, para. 7.18.

case at hand. This view suggests that the qualifier "*as such*" in *Certain German Interests in Polish Upper Silesia* means solely that arbitrators (and any international tribunals) do not authoritatively interpret national law as their interpretation is not authoritative within the legal system of that particular State.[195] This corresponds to the findings of the first Chapter of this dissertation that arbitrators' conclusions on national law do not have any precedential effect in the particular national legal system.[196]

Consistent with the second view, Crawford highlights that an arbitrator, when she is called to apply rules of national law, will interpret and apply them "*as such*".[197] When presented with legislative texts, guidelines and case law, arbitrators must perform some interpretation to apply the submitted legal texts to the particular case. This is because national law differs in its nature from other facts relating to events or actions that took place in the past. National law—irrespective of how it is treated by the tribunal—possesses a normative quality which means that its content cannot be established without a certain amount of interpretation.[198] Such interpretation is then performed by the tribunal usually in accordance with the canons of interpretation of the State whose national law is applied.[199] In the WTO practice, when interpreting national law, tribunals considered (i) the text of the law at issue; (ii) its historical background and/or legislative history; (iii) the relevant domestic case law, (iv) intention or object and purpose of the law; (v) the context of the legal provision in question; (vi) administrative criteria and practice; and (vii) representations made before panels.[200] Thus enlisted interpretative considerations are standard considerations adopted by many national adjudicators.

In fact, the treatment of national law as a matter of fact was adopted also in several IIAs. For example, the Czech Model BIT explicitly states that "*[w]here the arbitral tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Contracting Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by*

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195 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, pp. 213, 214.

196 *See* Section 1.2.3 above.

197 Crawford, *Brownlie's Principles of Public International Law*, p. 50.

198 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 216.

199 ibid. p. 208.

200 ibid. p. 220 (references to the particular WTO cases omitted, but can be found in the cited source).

the courts or authorities of that Contracting Party."[201] Similarly, the Italian Model BIT also provides for treatment of national law as a matter of fact and following interpretation made by Italian courts when it provides that "*[w]here the Tribunal is required to ascertain the meaning and effects of the provisions of domestic law as a matter of fact, it shall follow the prevailing interpretation made by the courts or authorities of that Party.*"[202] Slovak Model BIT also joins the Model BITs that uniformly prescribe the treatment of national law as a matter of fact when it states that "*in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*".[203]

Some investment treaty tribunals also treated national law as facts. In *MTD v. Chile*, the tribunal recognized that "*[t]he breach of an international obligation will need, by definition, to be judged in terms of international law. To establish the facts of the breach, it may be necessary to take into account municipal law*."[204] In *Soufraki v. UAE*,[205] the tribunal considered the nationality of the investor for which it needed to consult Italian law. The tribunal concluded on the method in which it shall interpret national law by holding that "*[i]t will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities*."[206] Moreover, in an SCC award *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, initiated under the ECT, the tribunal decided on an alleged violation of the FET standard and violation of the ECT by adopting expropriatory, arbitrary, and discriminatory measures. When considering the price clauses in the relevant contracts, pertaining obligations under Latvian law, and decisions of the Latvian Supreme Court, the tribunal treated them as facts.[207] Recently, the tribunal in *Pawlowski AG and Project sever s.r.o. v. Czech Republic* held that Claimants' arguments referring to Czech law are made

201 Czech Model BIT (2016), Art. 8(14).

202 Italian Model BIT (2020), Art. 14(10).

203 Slovak Model BIT (2016), Art. 19(2).

204 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 204; quoted in Spiermann, "Applicable Law", p. 111.

205 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (7 July 2004).

206 ibid. para. 55.

207 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC (16 December 2003), Section 3.7.

only in order to provide context for Claimants' claims under the BIT. National law is only "*one of the factual elements which the Tribunal must take into account when establishing whether the Czech Republic has observed its undertakings in the Czech-German BIT*."[208] This is because the tribunal derives its competence exclusively from the BIT, an international treaty, and is not competent to interpret national law, review the interpretation of domestic law in court decisions or express an opinion on the interpretation of Czech law on matters which have not been decided by Czech courts.[209]

A similar approach was suggested by the claimant in *CMS Gas Transmission Company v. Argentina* in the case alleging indirect expropriation, FET breaches, umbrella clause violation and adoption of arbitrary, unreasonable, and discriminatory measures. There, the claimant claimed that Argentinian law played only a marginal role in the findings of the tribunal and was relevant only as a matter of fact.[210] The tribunal however ultimately rejected this proposition by finding that one law does not prevail over the other.[211] The tribunal then opted for an approach adopted also in *Wena v. Egypt*,[212] i.e. recognized the interaction between the national law and international law and resolved to the complementary application of both laws.[213] The tribunal in *Total SA v. Argentina*, which was deciding a similar claim to the tribunal in *CMS v. Argentina*, also refused to treat national law as a matter of fact.[214] Although the

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208 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award (29 October 2021), citing *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award (15 July 2011), para. 391.

209 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, citing *Rupert Joseph Binder v. Czech Republic*, paras. 390 – 391.

210 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 109.

211 ibid. para. 116.

212 *Wena Hotels Ltd. v. Arab Republic of Egypt*.

213 *CMS Gas Transmission Company v. The Republic of Argentina*, Award, paras. 115 – 122.

214 *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010), para. 39: "*The first question concerns the role of Argentina's domestic law in determining the content and the extent of Total's economic rights as they exist in Argentina's legal system. In this regard the Tribunal believes that Argentine law has a broader role than that of just determining factual matters. The content and the scope of Total's economic rights (in Total's words, "Argentina's commitments to Total") must be determined by the Tribunal in light of Argentina's legal principles and provisions. Moreover, the extensive reliance by the Claimant on Argentina's acts of a legislative and administrative nature governing the gas, electricity and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, is a recognition that Argentina's domestic law plays a prominent role. Thus, the Tribunal shall determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT has occurred*." (internal citations omitted).

tribunals in *CMS Gas Transmission Company v. Argentina*, *Total SA v. Argentina*, and *Wena v. Egypt* rejected to treat national law as a mere matter of fact, they stopped short of describing how the law *should* in fact be treated instead.

The proposition that national law should be treated as a matter of fact is by far not uncontested. Douglas concludes that treating national law as a matter of fact before an international tribunal "*undermines the coherent development of international investment law because it trivalises the critical role of municipal law as the source of the rights comprising the investment.*"[215] Douglas suggests that the law applicable to international investment cases is more like a mosaic rather than international law being the exclusive law applicable.[216] This view is supported by Crawford when he states that "*the general proposition that international tribunals take account of national laws only as facts 'is, at most….debatable'*".[217] Crawford argues that the notion adopted in cases of diplomatic protection is inapplicable in investment treaty arbitration and national law cannot be treated as a mere matter of fact.[218]

The critics of the approach that treats national law merely as facts fail, however, to suggest, what should be the treatment adopted by the tribunal in its stead. From the current legal writings and case law, two different models could be proposed: treating national law as a national judge of that particular jurisdiction, or treating national law as a so-called transnational adjudicator. Both of these models are discussed below.

3.2. Arbitrator acting as a national judge

The second model asks for an arbitrator to treat national law the same way as a national judge of the State whose law the arbitrator is applying. This model is perhaps the least advocated for in scholarly writing on investment treaty arbitration and in awards rendered by investment treaty tribunals. However, the lack of representation might be caused by the fact that these sources usually limit the discussion to whether national law should be treated as a matter of fact or not. If they conclude that national law should not be just facts to the tribunal, they stop there without proposing the way national law should actually be treated.

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215 Douglas, *The International Law of Investment Claims*, p. 72.

216 ibid. p. 40.

217 Crawford, *Brownlie's Principles of Public International Law*, p. 49, citing W. C. Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons Ltd., 1964), p. 548.

218 Crawford, "Treaty and Contract in Investment Arbitration", p. 353.

Advocates of the model of treating national law as a national judge can, nevertheless, be found in scholarly writings concerning international commercial arbitration. Rolf A. Schütze unequivocally states that the arbitral tribunal must apply German law as a domestic court would do.[219] Gary Born also arguably subscribes to this model when he explains that legal certainty of the parties requires arbitrators to follow national case law.[220]

The concern for legal certainty and legitimate expectation of the parties choosing particular law is shared by Matthieu de Boisséson, who considers parties' legal certainty and legitimate expectations to be an "*essential need of international trade*".[221] He opines that respect for these expectations requires the arbitrator to treat the law in the same way as national judges.[222]

Again in the context of international commercial arbitration, Mistelis et al. also advocate for an arbitrator treating national law as a national judge of that particular jurisdiction:

> It is arguable that if the parties have chosen or the tribunal has determined the applicable substantive law this should be applied and interpreted by the tribunal in the way in which it would have been applied by national judges applying that law. The arbitrators should look at the legislative texts, case law, scholarly writings and other sources in the legal system in question.[223]

Mistelis et al., however, venture on and propose a somewhat mixed form of this category. They argue that by applying national law as a national judge, an arbitrator should also take into consideration not only the methods of interpretation of the chosen substantive law but also international practice and international standards.[224] By such proposition, this model comes closer to the third model, i.e. the one of a transnational adjudicator.

Interestingly, the investment arbitration tribunal in *F-W Oil Interests, Inc. v. Trinidad and Tobago* had to answer a question not settled under the law of Trinidad and Tobago. The tribunal

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219 Rolf Schütze, *Schiedsgericht und Schiedsverfahren*, 5th ed. (Munich Beck, 2012), para. 391, cited in Berger, "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms", p. 86.

220 Gary Born, *International Commercial Arbitration*, 2nd ed. (Kluwer Law Intl, 2014), p. 3820f.

221 Boisséson, "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective", p. 123.

222 ibid.

223 Loukas A. Mistelis Julian D.M. Lew, Stefan Kröll *Comparative International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2003), paras. 18 – 21.

224 ibid.

thus considered how a common law court would proceed in answering such a question. To do so, the tribunal looked not only to the Trinidad and Tobago courts' decisions, but also precedents from other common law jurisdictions.[225] In every case, however, attempting to look at the applicable law from the point of view of national judges—being a national judge of that particular State or of the State whose system of law is similar to the one that is being applied. Thus, this tribunal arguably subscribed to this model of national law treatment.

Naturally, a question arises as to judge of which court should be taken as the model for the arbitrator—the lowest court of the jurisdiction, the Supreme Court, or the court which would have had jurisdiction to decide this type of dispute? Considering that there is generally no appeal in international investment arbitration due to the finality of an award,[226] this would indicate that the arbitrator should take a position of a Supreme Court judge.[227]

The second model thus calls for arbitrators' treatment of national law through the lenses of a national judge of the highest instance. Even though this model is not frequently represented in the investment arbitration sphere and more supporters of this model are to be found in the territory of international commercial arbitration, several investment treaty tribunals upheld this mode and applied it to its decision-making.

3.3. Arbitrator acting as a transnational adjudicator

The last and least restrictive model of treatment of national law is the approach of a transnational adjudicator. This is the category that also receives the biggest support in current academic writings, but that might be also attributed to the fact, that it is also the widest of all three categories. There is not just one model of a transnational adjudicator as transnational adjudicators' powers may vary. While many authors subscribe to the theory that an arbitrator possesses greater powers when interpreting and applying national law than a national judge, they are not unanimous in the scope of these powers. Put more precisely, arbitrators as transnational adjudicators could be placed on a scale depending on the freedom they enjoy in interpreting national law. The scale goes from an arbitrator that acts almost like a national judge, but has the

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225 *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), cited in Bentolila, *Arbitrators as Lawmakers*, p. 131.

226 Perhaps safe for the annulment process under Art. 52 of the ICSID Convention or appeal on the points of law under Art. 69 of the English Arbitration Act (1996).

227 *See e. g. Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki (7 June 2007), paras. 96, 97.

power to reflect to her reading of national law international trade usages or international principles, to an arbitrator that is only loosely bound to the applicable national law or even just some rules from it, using only the text and interpreting it without reference to the national interpretation of that law. A transnational treatment of national law, however, should not lead to arbitrator's arbitrariness as the arbitrator still does not have unlimited powers.[228] These will be discussed further below.

3.3.1. Reflecting the specific character of the legal system

The first model discussed among those of a transnational adjudicator is one, where arbitrators are allowed to depart from the national interpretation of law "*so long as the solution that they find for the problem before them still reflects the specific character of this legal system*".[229] This model comes very close to the model of a national judge, however, irrespective of what methods a judge in the particular jurisdiction needs to employ when construing national law, an arbitrator under this model may depart from those methods and adopt a different solution so long as she finds support for that conclusion within the doctrine of the State whose law she is applying.[230] Similarly, the tribunal in *Azurix v. Argentina* corrected the outcome of the applicable national law, which seemed disproportioned to the tribunal, with a legal maxim *exceptio non adimpleti contractus*, after ensuring that such a maxim existed in the applicable Argentinian law:

> It would seem appropriate that the Concession Agreement be interpreted consistently with the provisions of the Law. On the other hand, the Tribunal cannot ignore the practical result of this interpretation: if taken to the extreme, a concessionaire would be obliged to continue to provide the service indefinitely at the discretion of the government and its right to terminate the Concession Agreement would be deprived of any content. For this reason, the application of the maxim *exceptio non adimpleti contractus* provides a balance to the relationship between the government and the concessionaire. […] This exception is not unknown to Argentine law and to legal systems generally as it is a reflection of the principle of good faith. The Tribunal will take it into account when

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228 This will be further discussed in Chapter 6, where I distinguish between an arbitrator acting as a transnational adjudicator and an arbitrator acting as *amiable compositeur*or acting *ex aequo et bono* or indeed acting arbitrarily.

229 Berger, "The International Arbitrators' Application of Precedents", p. 12 *et seq*.

230 Berger, "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms", p. 257.

> evaluating the actions of the Province under the standards of protection.[231]

This model calls for a liberal approach to the national law, trusting that if an arbitrator finds somebody within the legal system who reached the same conclusion, such a solution reflects the specific character of that particular legal system. This treatment, however, does not contain that many traces of the transnational character of the decision-maker, other than relative liberty from national rules of interpretation.

3.3.2. The national judge perspective extended with international principles, general principles of national laws, and trade usages

The predominant view when subscribing to the theory of an arbitrator as a transnational adjudicator is that an arbitrator is allowed to enjoy freedom from national law interpretation when she applies international principles or trade usages. In this context, trade usages are understood as "*constant and repeated practices, which bear a normative force by virtue of their ubiquity and repetition*".[232] Arbitrators' recourse to trade usages, international principles or general principles of national law is, again, most represented in scholarly writings on international commercial arbitration:

> The specificity of international trade can be expressed by the application by arbitral tribunals of transnational rules. International arbitral tribunals, unlike national courts, enjoy a certain freedom in respect of the application of the rules to settle the dispute brought before them. This freedom is expressed in different ways, among which are the taking into account of (i) trade usages and (ii) the principles of international law of commerce or *lex mercatoria*.[233]

This approach seeps to investment treaty arbitration through many arbitration rules used in international commercial arbitration as well as in investment treaty arbitration such as the ICC Arbitration Rules, the UNCITRAL Arbitration Rules, the Swiss Arbitration Rules, the SIAC Arbitration Rules, and the DIS Arbitration Rules, to name a few. The ICC Arbitration Rules in its Article 21(2) provide that "*[t]he arbitral tribunal shall take account of the provisions of the*

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231 *Azurix Corp. v. The Argentine Republic*, para. 260 (emphasis in the original).

232 Giacomo Marchisio & Fabien Gélinas Emmanuel Jolivet, "Chapter 9: Trade Usages in ICC Arbitration," in *Trade Usages and Implied Terms in the Age of Arbitration*, ed. Fabien Gelinas (Oxford University Press, 2016), p. 211, citing Pierre Mousseron, "Introduction terminologique: des comportements aux "bonnes pratiques"," *Journal des sociétés* 92, no. 12 (2011).

233 Boisséson, "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective", p. 117 (emphasis in the original).

contract, if any, between the parties ***and of any relevant trade usages***."[234] This means that irrespective of the fact whether the applicable substantive law recognizes the application of trade usages, the arbitrator adjudicating under the above arbitration rules should take them into account when applying the applicable national law—that is unless the parties expressly agree otherwise.

The Secretariat's Guide to ICC Arbitration stresses that the arbitration rules only call for taking trade useges in account, the tribunal is not compelled to give them full effect.[235] Admittedly, provisions of the governing law might override trade usages (or even the contractual terms) that would otherwise be relevant to the dispute.[236] The Secretariat's Guide also points out, that in investment treaty arbitration, trade usages are unlikely to be relevant at all.[237]

Seemingly different from trade usages are international principles. Under a broad interpretation, however, trade usages also encompass such international principles as UNIDROIT Principles of International Commercial Contracts or *lex mercatoria*, and general principles of national law.[238] This approach was taken by the tribunal in *Dow Chemical* case, where the tribunal subsumed the group-of-companies doctrine under the customs of international trade.[239] Moreover, other tribunals have also applied other principles of law, such as the principle of severability of the arbitration clause, the principle of validity and effectiveness of the arbitration agreement, and the principle of estoppel.[240] This view is, however, not universally accepted. For example, in *ICC Case No. 8873*, the arbitral tribunal refused to give effect to the UNIDROIT Principles, because it did not consider the principle of hardship in the UNIDROIT Principles as a "*trade usage*".[241] There, the arbitrators made the decision in reference to the preamble of the UNIDROIT Principles of 1994 which states that the UNIDROIT Principles

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234 ICC Arbitration Rules (2021), Art. 21(2) (emphasis added); similar rule is also provided for in the UNCITRAL Arbitration Rules, Art. 35(3), Swiss Arbitration Rules (2021), Art. 35(3), SIAC Arbitration Rules (2016), Art. 31.3, and the DIS Arbitration Rules (2018), Art. 24.3.

235 Mazza, *The Secretariat's Guide to ICC Arbitration*, para. 3-782.

236 ibid.

237 ibid.

238 Emmanuel Jolivet, "Chapter 9: Trade Usages in ICC Arbitration", p. 212.

239 *Dow Chemical France, The Dow Chemical Company, Dow Chemical A.G., and Dow Chemical Europe v. ISOVER SAINT GOBAIN*, ICC Award No. 4131 (23 September 1982).

240 Bentolila, *Arbitrators as Lawmakers*, p. 94, para. 257.

241 ibid. p. 132, 133 para. 354, citing ICC Case No. 8873.

could only be applied where the parties choose them or when it proves impossible to establish the relevant rule of the applicable law.[242]

Following from the above, under many arbitration rules that are also applicable in international investment arbitration, arbitrators are allowed to depart from the applicable national law when applying trade usages. Under one theory, the application of trade usages also opens a gate to the application of international principles and general principles of national law. Nevertheless, this broad definition of trade usage is not universally accepted.

3.3.3. Using a corrective and supplementary function of international law

Another model of a transnational adjudicator is one that uses international law to correct and supplement the applicable national law. This is a wider category than the previous one as there are manifold reasons for correcting or supplementing national law, other than trade usages and international principles of commerce. Kaufmann-Kohler mentions in connection with international commercial arbitration that arbitrators employ their freedom when applying national law in three ways: first, to reinforce a decision based on national contract law by supplementing it with elements of transnational law; second, to correct a decision reached in the application of national law which is considered unsatisfactory or inadequate; or third, to take into account the multinational character of the contract by applying transnational law from the outset.[243] Kaufmann-Kohler herself calls for transnationalization of national law, i.e. for supplementing national law with transnational and international aspects.[244]

Similarly, as briefly introduced above,[245] tribunals especially in the ICSID arbitration have concluded on the supplementary and corrective function of international law. Article 42 of the ICSID Convention stipulates that "*in the absence of agreement between parties, the Tribunal shall apply the law of the Contracting State party to the dispute* [...] *and such principles of international law as may be applicable*".[246] Both supplementary and corrective function of international law means that tribunals *after* having established the content of national law and

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242 ibid.

243 Gabrielle Kaufmann-Kohler, "The Transnationalization of Contract Law " in *Mélanges en l'honneur du Professeur Jean-Michel Jacquet*, ed. Dolores Bentolila Marcelo Kohen (Lexis Nexis, 2013), p. 113.

244 ibid.

245 *See* Section 2.3.2 above.

246 ICSID Convention, Art. 42(1) (emphasis added).

after having applied its relevant rules may have recourse to the principles of international law.[247] Similarly, Aron Broches described that arbitrators should first look at national law and test the result against international law which may lead to the arbitrator not applying the law that violates international law.[248]

There are several ways in which tribunals can exercise this corrective (and supplementary) function of international law. The one that is the most obvious is to correct any national law findings by applying international *jus cogens*, i.e. the peremptory or overriding norms of public international law. Typical representatives of this group of rules are the prohibition of the use of force, of genocide, of crimes against humanity, of massive pollution of the atmosphere or of the seas, and those prohibiting the slave trade together with the obligation to observe basic human rights.[249] These rules are, in fact, not just owed by the State to another State, but to the international community as a whole.[250] By this optic, if the outcome of the arbitrator's interpretation of national law would result in a rule incompatible with peremptory rules of international law, the tribunal would "*correct*" such results reached by the national law and supplement it with rules of international character instead. Arguably, since the observance of international *jus cogens* rules is owed by each State, an arbitrator should always correct the result of interpretation of national law to observe them. Thus, an arbitrator correcting national law by international *jus cogens* should not be necessarily considered as acting as a transnational adjudicator.

Some go even further and suggest that arbitrators should "*[i]n no case violate the transnational public policy as to which a broad consensus has emerged in the international community*."[251] The transnational public policy contains *jus cogens* but expands also beyond that.

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247 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, para. 69.

248 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 157, quoting Aron Broches, "Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 136 (1972), p. 392.

249 Crawford, *Brownlie's Principles of Public International Law*, pp. 581, 582; Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, pp. 136 – 137; Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 201.

250 Crawford, *Brownlie's Principles of Public International Law*, p. 582; Čepelka, Šturma, *Mezinárodní právo veřejné*, para. 32.

251 Bentolila, *Arbitrators as Lawmakers*, para. 319, quoting Session of Santiago de Compostela International Law Institute, "Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises," (1989), Art. 2.

These rules can include those that endorse "*slavery, corruption, drug/arms/human organ/cultural goods trafficking, and embargos imposed by the international community to promote peace and security.*"[252]

International law's supplementary function may also come to play when the applicable national law contains gaps or lacunae.[253] This can be either result of the parties' express agreement or by way of interpretation and application of the default mode of Article 42 of the ICSID Convention. In *AGIP S.p.A. v. People's Republic of the Congo*, the parties expressly agreed to the application of "*the law of the Congo, supplemented if need be by any principles of international law*."[254] This function of international law was also prominent in the case of *Klöckner v. Cameroon*[255] mentioned above. There, the tribunal interpreted Article 42 of the ICSID Convention as, by default, asking for the application of national law corrected and supplemented by international law.[256] Similarly, in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, the tribunal held that even if the parties implicitly agreed to the application of national law, it cannot be said that where a gap occurs there is agreement as to the application of a non-existent rule of law. Instead, the tribunal held, the second sentence of Article 42(1) of the ICSID Convention would come into play, and national law would be supplemented by international law.[257]

This interpretation would thus signify that the ICSID Convention—unless parties agree otherwise—calls for an arbitrator acting as a transnational adjudicator. This would not be all the more surprising considering that the ICSID Convention is an international treaty. Nevertheless, such interpretation would result in a rather boundless power of an arbitrator to supplement and

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252 Bentolila, *Arbitrators as Lawmakers*, para. 318.

253 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 189.

254 *AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award (30 November 1979), para. 82; cited in Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 193.

255 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*.

256 ibid. para. 69, the tribunal in *Amco v. Indonesia* reached similar conclusions when it stated that the rules of international law "*fill up lacunae in the applicable domestic law*": *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment (16 May 1986), para. 20; *See also* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 191.

257 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), cited in *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 192.

correct national law since the provision does not really set forth in which circumstances and by which particular rules national law shall be supplemented and corrected. This, however, might be intentionally left up to the arbitrators to consider on a case-by-case basis. The reason why this thesis considers filling gaps of national law with international law as acting as a transnational adjudicator is, that national law has its own ways of filling its gaps. Thus, had the arbitrator been acting as a national judge, she would be using the tools of that national system to fill its gaps. By using rules of international law, the arbitrator oversteps the role of a national judge and thus acts as a transnational adjudicator.

Interestingly, under limited circumstances, tribunals may also declare the unconstitutionality of national law. An example of such a situation would be if it is transparently clear that national law would be treated as unconstitutional or invalid by the national courts.[258] By proposing this, Paulsson calls for an arbitrator acting not only as a judge of the national Supreme Court, but also a judge of its Constitutional Court:

> In all legal systems worthy of the name, courts may annul or disregard laws which violate the rule of law—often by their constitutional irregularity. International courts and tribunals must have at least equally great authority if their duty to apply the national law is to have its full meaning.[259]

Arguably, the tribunal's decision on the unconstitutionality of certain rules of national law will most likely have no effect in the legal order of that particular State and such a proclamation would only suit the purposes of the investor-State arbitration and potentially also future investment treaty arbitrations concerning the same provisions. All the same, in most cases, tribunals will likely not be too eager to deal with the constitutionality of national rules,[260] but resort to some other ways in which they can correct the outcomes of national law.

In any case, there are limits to the correction of national law by international law. Bentolila suggests that in supplementing (and correcting) national law, arbitrators should, in principle, respect its mandatory rules.[261] She subscribes to the theory of arbitrator being a

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258 Crawford, *Brownlie's Principles of Public International Law*, p. 50.

259 Jan Paulsson, "Unlawful Laws and the Authority of International Tribunals," *ICSID Review - Foreign Investment Law Journal* 23, no. 2 (2008), p. 224; quoted in Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 202.

260 *Interpretation of the Statute of the Memel Territory* PCIJ Ser A/B No 49 294 (1932), p. 336.

261 Bentolila, *Arbitrators as Lawmakers*, p. 133, para. 357; *See also* Phillip Capper, "Chapter 3. 'Proving' the Contents of the Applicable Substantive Law(s)," in *The Application of Substantive Law by International*

transnational adjudicator whereby it applies mandatory rules of the national law and then supplements them with transnational or international principles and trade usages as appropriate.[262] Nevertheless, some tribunals refuse to apply mandatory rules of national law if they conflict with the principles of international trade. One ICC tribunal, for example, refused to give effect to a mandatory rule that prohibited compound interest.[263]

Following from the above, it is clear that many authors advocate for the treatment whereby an arbitrator first interprets the applicable national law which it then supplements and corrects by the international law. This supplementation and correction can take multiple forms. It can be as simple as ensuring that the outcome of interpretation of the applicable national law does not violate international *jus cogens*, or the corrective rules may include also transnational public policy or universally acknowledged rules of trade. In any way, it is advisable that the tribunal respects mandatory rules of that particular legal system; otherwise, the rendered award might run the risk of not being enforceable in the State whose national law was thus corrected.[264]

3.3.4. Yielding to the parties' autonomy

The last and probably the most permissive model emphasize the autonomy of the parties to have their dispute settled according to the rules they chose. William W. Park, in the context of international commercial arbitration, considers that it is up to the parties to determine what part of the national law should be applied by the arbitrator. He submits that it is possible to construe that the parties wanted the law only to fill in the gaps not agreed on by the parties:

> In an international contract, the primacy of the parties' agreement may lead arbitrators to conclude that the litigants intended to invoke only part of a national legal system.[265]

This approach can be easily translated to the international investment arbitration sphere. As discussed above,[266] many of the arbitration rules applicable to investment treaty arbitration

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Arbitrators, ed. Pierre Mayer Fabio Bortolotti (Dossiers of the ICC Institute of World Business Law, 2014), pp. 35, 36.

262 Bentolila, *Arbitrators as Lawmakers*, p. 133, para. 357.

263 ibid. citing an ICC Case No. 5514 of 1990.

264 *See* Chapter 7 of this thesis.

265 William W. Park, "Chapter 4. The Predictability Paradox Arbitrators and Applicable Law," in *The Application of Substantive Law by International Arbitrators*, ed. Pierre Mayer Fabio Bortolotti (Kluwer Law International, 2014), p. 62.

266 *See* Section 2 above.

allow parties to choose applicable rules of law, rather than a whole body of law of a certain State. For example, Article 35 of the UNCITRAL Arbitration Rules, Article 21 of the ICC Arbitration Rules, and Article 27 of the SCC Arbitration Rules all provide for parties to designate applicable "*rules of law*". The phrase "*rules of law*" is understood as allowing parties to decide to have their dispute settled according to rules from more than just one legal system, and even in accordance with those rules that do not form part of any legal system, exist solely on the international level or are not yet in force (or not any longer), like guidelines, transnational commercial law (*lex mercatoria*), and non-national sets of rules.[267]

The same liberty exists under the ICSID Convention. Article 42 of the ICSID Convention allows parties to select only certain rules from a particular system of law rather than the whole system of law or indeed selecting international guidelines or transnational rules just like the non-ICSID arbitration rules.[268] Naturally, since parties can actually combine rules from multiple national systems of law together with those that are existent only on the international plane in the form of guidelines, the arbitrator cannot be expected to treat the applicable rules of particular national law the same way a national judge would do. Here, the arbitrator acts as a transnational adjudicator *par excelance*. Subscribing to this model, arbitrators are not bound to the national interpretation of the certain rule, because they are not obligated to interpret them within the context of the same system of law, as they only apply one particular rule from that system. Arguably, arbitrators under this model do not even apply national law as such, but merely rules of law compiled by the parties. Thus, this model falls outside the scope of this thesis which concerns the application and treatment of *national law* by arbitrators.

3.4. Conclusion

This Chapter showed that there is no consensus among scholars and practitioners on the way an arbitrator should treat national law when deciding on an investment treaty dispute. Scholarly writings and awards that brush over the manner in which an arbitrator should treat national law always introduce only one way of treatment without mentioning other approaches mentioned by authors in the field or by arbitral awards. This thesis, nevertheless, distilled three

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267 Mazza, *The Secretariat's Guide to ICC Arbitration*, paras. 3-747, 3-761; Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, pp. 114, 116, citing UNCITRAL, "UN Doc A/CN.9/WG.II/ /WP.143/Add.1, n 19", para. 42.

268 Schreuer, *The ICSID Convention, A Commentary*, p. 563, para. 39.

general approaches from the arbitral awards and scholarly writings: treating national law as a matter of fact, approaching it as a national judge, or adopting a transnational perspective.

The approach of treating national law as a matter of fact was adopted from the pronouncements of the PCIJ made in the sphere of public international law. There, the only law applicable so to speak is international law as it is the function of public international law decision-makers to decide on the international responsibility of States. By this logic, national law is reduced to the factual plane as tribunals or international courts do not have the mandate to decide on questions of national law. This, however, is not entirely apposite in investment treaty arbitration. As shown above, investment treaty arbitration is a hybrid between pure public international law decision making and international commercial arbitration. Consequently, both public international law and national law apply. This means that arbitrators cannot just blindly follow the footsteps of the PCIJ or ICJ, but should instead adopt a more nuanced approach. That is where the other two treatments come to relevance.

The notion of arbitrator treating national law as a national judge come from the realm of national and international arbitration but has its advocates also in investment treaty arbitration. It is because if an arbitrator is mandated to apply Czech law, it can only mean that she should apply the law as it is actually applied in the Czech Republic by the Czech courts. Any other approach would risk not actually applying the chosen (or determined) law. This is, however, subject to parties' choice. Many arbitration agreements and arbitration rules, in fact, contain an amended choice-of-law clause calling for the application of international trade usages or for supplementing and correcting national law with international law. This model too originates possibly from international commercial arbitration but found home also in investment treaty arbitration.

Nevertheless, these models are not mutually exclusive. All three treatments may have their places in investment treaty arbitration. The tribunal only needs to asses which treatment it should employ in dealing with a particular claim it has been presented. The choice of the arbitrator of one of the three models of treatment of national law—if there indeed is a choice—is dealt with in the following Chapters.

4. Arbitrator's Treatment of National Judicial Decisions

The previous Chapter discussed different ways of how an arbitrator can approach national law. In sum, an arbitrator mandated to decide an investment treaty dispute can treat national law (i) as a matter of fact,[269] (ii) as a national judge,[270] or (iii) as a transnational adjudicator.[271] This Chapter goes further and asks how does an arbitrator treat national judicial decisions within these models? This question has two sides. Not only is the answer to this question important in order for an arbitrator to know how to apply national case law and possibly deviate from it, but it is also particularly important in order for her to know, whether national judicial decisions form part of the body of law which she is mandated to apply.

To answer this question, this Chapter first discusses different national models of understanding judicial decisions. At the risk of oversimplification, this thesis will discuss only two basic models of national case law treatment, the civil law model and the common law model. Subsequently, this Chapter applies these models to the setting of the investment treaty arbitration and more specifically, to the three types of treatments of national law described in the preceding Chapter.

4.1. Case law within civil law versus common law model

The risk of oversimplification mentioned above lies in the fact that States' approach to and treatment of their judicial decisions is not just subsumed under either civil law or common law model. More than being identified with a pure civil law or common law model, States' are placed on a scale with different aspects of each system represented in their approach.[272] Each of the below-described models is thus—in its pure form—borderline impossible to come by.

This, however, does not mean that it is not important to distinguish between the two models, since their approach to case law, albeit very similar in practice, is formed on different theoretical bedrock which affects an arbitrator's treatment of national judicial decisions in investment treaty arbitration.

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269 *See* Section 3.1. above.

270 *See* Section 3.2. above.

271 *See* Section 3.3. above.

272 Michal Bobek, "Význam judikatury v kontinentálním právu," in *Judikatura a právní argumentace*, ed. Zdeněk Kühn et al. Michal Bobek (Praha: Auditorium, 2013), pp. 32 – 33.

4.1.1. Civil law treatment of judicial decisions

The civil law model of treating judicial decisions originates in its pure form from the 19th-century continental positivism that forbade its judges to make law. This perception was based on a vision that the law created by legislative organs was complete and there was thus no need for judges to make law.[273] Consequently, judges were also forbidden to follow other judicial decisions.[274] This model in its extremity denied any normative effect to judicial decisions; the power to make rules was vested strictly to the legislative power. Thus in the extreme form of the civil law system, its judicial decisions cannot even be called "*case law*" as they do not possess the necessary normative effect to be called "*law*".

This strict continental (or civil law) conception is, however, not existent anymore. The perception changed throughout the 20th century with the change of the approach to legal interpretation—i.e. the introduction of a systematic and teleological interpretation and establishment of constitutional courts.[275] In this new perception, judges were not only called to apply and interpret the law but also *make* the law and follow other rulings of national courts.[276] In this model, courts were to follow the settled case law of the highest courts which is called *jurisprudence constante*. This conception persists up until today.

The present-day importance of case law created by national courts is apparent from the decision-making of the European Court of Human Rights (ECtHR). The ECtHR includes in the concept of national law not only statutes and codes but also enactments of lower rank than statutes, encompassing also settled case law:

> Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" […] In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.[277]

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273 ibid. pp. 23 – 28.

274 ibid.

275 ibid. pp. 29 – 32.

276 ibid.

277 *Case of Kruslin v. France*, ECtHR, Application no. 11801/85 (24 April 1990), para. 29.

The ECtHR thus comprehends in the concept of continental law also settled case law. This serves the predictability of law and the basic notion of justice, equality, and fairness that similar cases will be decided similarly.[278] This conception was developed in connection with the language of the ECHR that provides for interference with certain rights "*in accordance with the law*."[279] In this context, ECtHR thus adopts an extensive understanding of the law, i.e. understands it in its substantive sense as encompassing also settled case law.[280]

A comprehensive understanding of the role of case law in continental legal systems was offered by Aleksander Peczenik, who divided the law into three categories of sources—the must-sources, should-sources, and may-sources—(i) the sources that *must* be applied so that it can be said that the judge applied the applicable law (typically statutes); (ii) the sources that *should* be applied for a judge to ensure that her decision is rational, coherent, and consistent with the law (case law in the continental system belongs to this category); and (iii) the sources a judge *may* use to augment the argumentative weight of the reasoning (for example foreign case law).[281] A fourth category can be also conceived as the sources that a judge *cannot* use (e.g. historical case law from the totalitarian era that is inconsistent with the values of the current system of law).[282]

It follows that continental judicial decisions form part of the law an arbitrator is tasked to interpret. This is because continental judicial decisions nowadays carry some normative weight that should not be overlooked even at the international plane. However, continental case law does not form the source of law that *must* be applied in order for an arbitrator to discharge her duty to apply national law, but merely the source that *should* be applied by an arbitrator.

4.1.2. Common law treatment of judicial decisions

The common law system is formed differently. The sources of law in 19th century Great Britain were different from those on the continent. While on the continent major codes have been

278 Bobek, "Význam judikatury v kontinentálním právu", pp. 33, 34.

279 *See e.g.* Protocol 4 to the ECHR Arts. 2(3), 2(4), Protocol 7 to the ECHR Art. 1(1).

280 For a comparison of this ECtHR's substantive concept of law with a narrower understanding of the term by the European Court of Justice, *See Kristina Blažková Ondřej Kadlec, "Co je to právo? Právněteoretický pohled na rozhodnutí Soudního dvora ve věci Al Chodor," Jurisprudence 1 (2018).*

281 Aleksander Peczenik, *On Law and Reason*, 2nd ed. (Springer, 2009), pp. 261 *et seq*.; cited by Bobek, "Význam judikatury v kontinentálním právu", pp. 36 – 37.

282 Bobek, "Význam judikatury v kontinentálním právu." p. 37.

adopted and the judge-made law abandoned, the British system continued the development of law made by judges with an occasional and exceptional Act of the Parliament.[283] Similarly to the continental system, the 20th-century development in Great Britain transformed the legal system and assimilated it to the civil law system by increasing the legislative activity of the Parliament.[284]

The characteristic feature of the common law system is, however, not that it is entirely made by judges, but the importance the system gives to its judicial decisions.[285] In the common law system, previously rendered judicial decisions are binding in future cases through the doctrine of *stare decisis*. Put very simply, the binding effect concerns cases rendered by courts of the same court system and of higher or equal levels.[286] Taking the above-described systematization proposed by Peczenik, judicial decisions are in common law sources of law of equal force as statutes. As such they are included in the must-sources,[287] i.e. the first category of sources. This means that judicial decisions in common law are the source that, if not applied, would amount to a failure to apply the applicable law.

4.1.3. Interim summary

This Section showed that despite the oft-cited insurmountable differences between the common law and civil law treatment of case law, the two systems are, in fact, very similar. The concept that civil law countries do not recognize judicial decisions as carrying a normative force for future cases is outdated. Case law has in both civil law and common law system a normative force and forms part of that law. Nevertheless, differences still persist.

In the above-described Peczenik's concept of sources of law, he divided the sources into three categories: the must-sources, should-sources, and may-sources. Omission of application of the source of the second category constitutes an error of law as opposed to the omission of application of the source in the first category, which would constitute a failure to apply the law.[288] Case law in civil law countries falls into the second category, while in common law

283 Bobek, "Precedent v tradici common law", pp. 42 – 44.

284 ibid. p. 44.

285 ibid. p. 45.

286 ibid. p. 46.

287 Peczenik, *On Law and Reason*, pp. 261 *et seq*., cited by Bobek, "Význam judikatury v kontinentálním právu", p. 37.

288 Bobek, "Význam judikatury v kontinentálním právu", p. 37.

countries it falls into the first one. Thus, in a civil law country, omission to apply settled case law constitutes an error of law, while in a common law country that omission could amount to a failure to apply the law altogether.

4.2. Treatment of national case law by investment arbitration tribunals

The above Section demonstrated that national case law forms part of the law an arbitrator is tasked to apply. Furthermore, the principles of predictability of law, legal certainty, and basic notions of fairness are inherent to any decision-making activity and, as such, apply also to tribunals in investment treaty arbitration. Arbitrators thus cannot simply turn away from the national case law, irrespective of whether they are applying national law of civil law or common law country. According to Born, disregarding national case law would return the parties to the "*legal no-man's land*":

> If international arbitral tribunals were to deny effect to national court decisions, parties would be returned to precisely the "legal no-man's land" that their choice of law and arbitration agreements were designed to avoid. That would be doubly misconceived, given that the fundamental purposes of rules of stare decisis and binding precedential authority are to enable "professional men," and women, to "regulate their actions and their contracts" by reference to decided authority, and "to ensure predictability, certainty and economy of conflict resolution."[289]

Accordingly, arbitrators ordinarily observe national case law. Nevertheless, how much deference they give to that case law and under what conditions they could deviate from it depends on which of the above models of treating national law they implement and whether they apply common law or civil law. This Section thus analyzes the approaches of international tribunals to national case law and divides them according to the models of national law treatment discussed above. For ease of reference, this Section's structure mirrors that of Chapter 3.

4.2.1. Arbitrator treating national case law as a fact

The first model of treating national law is the one derived from public international law tribunals which treat national law as a mere matter of fact. The best way to discuss the approach to national case law under this model is thus to look at the ICJ's (or PCIJ's) treatment. The PCIJ in *Serbian Loans* was tasked to apply French law (i.e. law of civil law tradition) and noted that it

[289] Born, *International Commercial Arbitration*, p. 3820.

is French legislation as applied in France that should be applied by the PCIJ. According to the PCIJ, it cannot disregard existing judicial decisions in its decision-making:

> For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. […] It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.[290]

Similarly, in *Brazilian Loans*, the PCIJ reiterated—again with respect to French law—that it must apply the law as it is applied in the particular country as otherwise, it would not be applying the municipal law of the country.[291] For that, the international tribunal must pay the utmost regard to the decisions of the municipal courts.[292] Building on this opinion, some authors go as far as to suggest that the interpretation of national law by the courts of that State is binding on an international tribunal.[293] However, calling the national case law's effect as binding within this model is imprecise since facts cannot be legally binding on a tribunal. International tribunals should exercise a strong bias towards respecting national case law when deciding questions of national law in a case when the tribunal is tasked to treat national law as a matter of fact.

In this context, Douglas advocates for the existence of a rebuttable presumption 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.[294] Such a presumption may be rebutted, and arbitrators thus may deviate from that case law, in event of a serious procedural irregularity or a serious error of law.[295] Similarly, in *Diallo*

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290 *Serbian Loans*, PCIJ Ser. A No. 20 (1929), pp. 46 – 47.

291 *Brazilian Loans Case*, p. 124.

292 ibid.

293 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 218.

294 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", pp. 273 – 274; *See also* Campbell McLachlan, *International Investment Arbitration : Substantive Principles,* para. 3.108, pp. 74 – 75.

295 Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", pp. 273 – 274; *See also* Campbell McLachlan, *International Investment Arbitration : Substantive Principles,* para. 3.108, pp. 74 – 75.

case, when applying Congolese law,[296] the ICJ addressed its power to deviate from national case law. The ICJ reiterated that it "*does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts*".[297] The ICJ, however, pronounced that it can adopt what it finds to be the proper interpretation only "*where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case*".[298] The PCIJ in *Brazilian Loans* and later the ICJ in *ELSI* also held that "*[i]f* [the jurisprudence of municipal courts] *is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law*."[299] It is, nevertheless, debatable whether to call this situation *deviation* from national case law, since the international decision-maker only chooses between multiple national interpretations and is not substituting national interpretation by its own. In any case, arbitrators should substitute the interpretation of municipal courts for their own interpretation only in exceptional circumstances.

The PCIJ's and ICJ's conclusions surpass the sphere of pure public international law. Findings of the *Serbian Loans* and the *Brazilian Loans* were adopted in the realm of investment treaty arbitration. The annulment committee in *Soufraki v. UAE*, when reviewing the tribunal's assessment of the claimant's nationality, stressed that the tribunal should interpret the law as the highest court of that jurisdiction:

> An international tribunal's duty to apply Italian law is a duty to endeavor to apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities. A State's nationality law consists of its legislative and administrative provisions as well as the binding interpretations of those provisions by its highest court […].
>
> It is the view of the Committee that the Tribunal had to strive to apply the law as interpreted by the State's highest court, and in harmony with

296 A legal system of civil law tradition.

297 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports 2010 (30 Novembre 2010), p. 665, para. 70; cited in Crawford, *Brownlie's Principles of Public International Law*, p. 50.

298 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, p. 665, para. 70.

299 *Brazilian Loans Case*, p. 124; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ Rep. 15 (20 July 1989), p. 47, para. 62.

> its interpretative (that is, its executive and administrative) authorities. […].[300]

The annulment committee in *Fraport v. Philippines*, when applying Philippine law[301] for the assessment of the tribunal's jurisdiction *ratione materiae*, treated national law strictly as a matter of fact and held that the tribunal should give particular consideration to the municipal courts' construction of national law in order to learn how the law would be applied within that legal system.[302] As to the possibility to deviate from such case law, the annulment committee held that when applying national case law, the tribunal would need to question, just as in the *Diallo case*, the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the State.[303] Similarly to the tribunal's treatment of other factual evidence, with respect to the national case law and interpretation provided by national courts, the tribunal "*retains the ultimate power to judge the probative value of evidence placed before it*."[304]

It follows from the above, that the reasons of a tribunal for deviating from the interpretation of national law given to it by a national decision-maker correspond with the reasons for deciding not to use certain factual evidence. When assessing the factual evidence, a tribunal looks at its probative value. A probative value of a national judicial decision lessens if that decision has been overruled, the case law is a result of serious procedural irregularity, there exist contradictory interpretations or if the courts, as State organs, were partial towards the State's interests in its rendering. This goes for both civil law and common law jurisdictions, even though all the cases cited in this Section concerned civil law jurisdictions. Nevertheless, for tribunals treating national law as a matter of fact, the internal binding structure and function of the judicial decision within the system are irrelevant. An international tribunal only observes that such a decision is a recognized interpretation given by a national adjudicator.

For the application of national law as a fact, national case law plays a crucial role. It provides the tribunal with an understanding of the content of the law; the tribunal does not act as a decision-maker within that system, it only notes how the law is applied within the State.

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300 *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, paras. 96, 97.

301 A legal system of predominantly civil law tradition.

302 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010), para. 236.

303 ibid. para. 242.

304 ibid.

Accordingly, an arbitrator may deviate from a certain interpretation or disregard certain case law for the same reasons as would normally lead to disregard of certain factual evidence.

4.2.2. Arbitrator acting as a national judge

A role of an arbitrator when applying national law in a capacity similar (if not identical) to a national judge is worlds apart from the first model. Here, the distinction between common law and civil law system has a role to play. The general idea of an arbitrator treating national law as a national judge is simple: if the national legal system accords binding, precedential weight to judicial decisions, then arbitral tribunals should give those decisions no less legal effect than would a court in that system.[305] An arbitrator is thus obliged to inquire as to the degree to which a Supreme Court judge[306] of the State whose law the arbitrator is mandated to apply is bound by the previous judicial decisions. This inquiry includes recognition of the differences between common law and civil law systems and any particularities of that particular legal system.

The above consideration is closely connected to the ability of an arbitrator to come to a conclusion different from the one held by the courts of that State. An arbitrator needs to investigate the conditions under which in that particular national legal system a judge can depart from previous precedents (in common law system) or an established case law (or *jurisprudence constante* in civil law systems) to learn any consideration she needs to employ in her handling previously rendered national judicial decisions. Boisséon concludes that an arbitrator can decide not to apply a particular case law under the same conditions as a national judge.[307] In such a case, "[…] *a decision by an arbitral tribunal to disregard such a precedent would not amount to a refusal to apply case law, but to a reasoned interpretation of the national law applicable to the dispute before it, and would result from a careful analysis and consideration of national case law*."[308] The bottom line for an arbitrator under this model thus is what a national judge would do.

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305 Guilherme Rizzo Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil," *Revista Brasileira de Arbitragem* 14, no. 56 (2017), fn. 10 at p. 58.

306 *See* Section 3.2 above.

307 Boisséson, "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective", p. 123.

308 ibid.

4.2.3. Arbitrator acting as a transnational adjudicator

In the third model, an arbitrator is not restricted by an obligation to treat national law as a matter of fact or by the national notion of a judge and her treatment of case law. The third model has an arbitrator liberated—at least partially—from those constraints.

In common law systems, Garner acknowledges that an arbitrator is not necessarily bound by *stare decisis* effect of case law rendered by common law courts, she is primarily bound by the parties' agreement as the basis of her mandate.[309] This means that an arbitrator follows the law and precedents to the extent that the parties, who regulate an arbitrator's use of law, wish her to do so.[310] Considering the above-described Peczenik's division of sources of law, to disregard an applicable common law precedent would normally result in an arbitrator not applying the applicable law. This consequence is muted if the parties mandate the arbitrator to omit certain precedent, or more likely mandate her to implement in her decision-making certain considerations that would make certain precedents inapplicable even though national judges would be obligated to apply them.

This goes all the more so for the civil law jurisdictions where precedents fall among the should-sources of law. Here too arbitrators must follow parties' instructions as to how the national law should be applied, or rather which considerations shall be taken into account when interpreting and applying the law. These instructions apply naturally also to arbitrators' treatment of national judicial decisions.

Under this model, an arbitrator would thus be able to depart from precedents or established national case law if she interprets arbitration agreement or the choice-of-law clause in a way that the parties did not want her to apply such case law. Therefore, even though the arbitrator's position is considerably different from the one of a national judge, her freedom is still limited, only here the limitation is imposed by the will of the parties.

4.2.4. Interim summary

There are vast differences between arbitrators' treatment of national law depending on the model they implement when deciding on a claim placed before them. In principle, they shall respect national judicial decisions in each of them; however, their treatment varies when

309 Bryan A. Garner et al., *The Law of Judicial Precedent* (Thomson Reuters, 2016), p. 769.

310 ibid.

exploring the possibilities of deviating from the national law interpretation of national decision-makers as shown in the following table:

Figure 1: Treatment of national case law and grounds for deviation

Model of arbitrator's treatment of national law	Model of treatment of national case law	Ground for deviation from national case law
Treating national law as a matter of fact	Adopting constructions of the national highest court in harmony with its interpretative authorities.	The tribunal assesses the probative value of the particular case law. Typical grounds for deviation include: - serious procedural irregularity or a serious error of law in rendering the decision, - the decision has been overruled, or - the interpretation of national law is manifestly incorrect and partial.
Treating national law as a national judge	Arbitral tribunals should give national decisions no less legal effect than would a judge of the highest court in that system. This includes distinguishing between the common law and civil law treatment of national case law.	An arbitrator needs to investigate the conditions under which in that particular national legal system a judge can depart from previous precedents (in common law system) or an established case law (or *jurisprudence constante* in civil law systems) to learn any consideration she needs to employ in her handling previously rendered national judicial decisions.
Treating national judge as a transnational adjudicator	Depends on the will of the parties	Depends on the will of the parties

In the first model, an arbitrator treats national law as a fact and, accordingly, can decide not to follow certain precedents or judicial decisions under similar circumstances as she would decide not to regard certain factual evidence. In the context of judicial decisions, this could typically be the case where contradictory evidence exists (i.e. the decision has been overruled or there exists contradictory interpretations) or if courts were partial towards the State's interests. In the second model, the arbitrator assumes the role of a national adjudicator, thus, her possibilities of deviating from national case law depend on the possibilities of a judge of that particular legal

system. The third model then sees an arbitrator as a transnational adjudicator with a whole range of supra-national considerations the arbitrator could implement.[311] Which of those considerations would be implemented depends on the will of the parties and so does depend also the arbitrator's treatment of national case law.

4.3. Conclusion

The differences between civil law and the common law treatment of case law are often exaggerated. In both legal systems, previous judicial decisions form part of that law and carry binding force, although vary as to its degree and the consequences which they associate with not following previous decisions. In common law systems, previous case law (precedents) are considered among the must-sources—i.e. the sources of law that must be applied in order for the law to be applied. In civil law countries settled case law (*jurisprudence constante*) fall among the should-sources of law. This distinction is particularly important when discussing the consequences of not following national case law.[312]

The three models of arbitrators' treatment of national law formed in the preceding Chapter, apply also to arbitrators' treatment of national judicial decisions. The classification of the models of arbitrators' treatment of national case law and national judicial decisions comprises of three distinct models. These models consider the hybrid nature of investment arbitration which fluctuates between international commercial arbitration as a private law decision-making body and public international law decision-making bodies.

The next part of the thesis applies these models by considering the nature of investment claims and indicating which model of national (case) law treatment is most appropriate.

311 For examples of those supra-national considerations, *See* Chapter 3.3 above.

312 *See* Chapter 7 below.

Part II: Application

5. Nature of Investment Claims

The previous Chapters demonstrated that there is no one definite answer as to the nature of the investment treaty arbitration, the role of its arbitrators, and the law applicable to investment disputes. Rather, there seems to be an agreement on the hybrid nature of investment treaty arbitration in all these respects. The Chapters also showed that the notion of this hybrid nature fluctuates on the scale of almost pure public international law decision-maker and more of a national decision-maker. Accordingly, an arbitrator may adopt three different models of treatment of national law and its case law. This Chapter proposes that the nature of the decision-making process also fluctuates depending on which investment claim is being heard by the tribunal. Such fluctuation then influences which of the above models of treatment of national (case) law an arbitrator should adopt.

Tribunals apply national law not only in the jurisdictional phase but also to decide substantive claims.[313] The choice between application of the national law and international law is, however, not random—or at least should not be. Generally, since the IIA is an international treaty, any alleged treaty breaches are governed by international law, and alleged breaches of a contract would be governed by national law.[314] Accordingly, a successful treaty claim would result in international responsibility of the respondent State under the rules of international law, while a successful contract claim would result in the State's responsibility under the national law rules.[315] This, however, is a simplistic view which does not mean that national law is irrelevant when ascertaining a treaty breach and vice versa. In fact, both national and international law often apply simultaneously.

To navigate between the simultaneous applicability of international and national law and determine the applicable law, an arbitrator should assess the nature of each individual claim, i.e. its cause-of-action, and decide which of the two laws should be applicable based on the

313 Bentolila, *Arbitrators as Lawmakers*, pp. 68, 69, para. 194; Douglas, *The International Law of Investment Claims*, p. 197.

314 Bentolila, *Arbitrators as Lawmakers*, p. 128, para. 343; *See also* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 108, 111, citing Zachary Douglas, "Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex," *Arbitration International* 22, no. 1 (2006), p. 40.

315 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 111.

claim's nature.[316] This approach would result in national law being sometimes relevant only as a matter of facts and sometimes incorporated directly into a particular standard of protection or applicable independently from any standard of protection.[317] Such an approach was adopted by the tribunal in *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*:

> The question is not about the preeminence of one rule over the other but about applying the relevant rule depending on the type of norm that has been breached. It is the Tribunal's task to identify the specific rules that dictate the consequences for each of these breaches. Once these rules have been identified and their consequences established, the Tribunal will address the question of possible overlapping claims for reparation in such a fashion as to avoid double recovery.[318]

Similarly, the tribunal in *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, stressed that Article 42(1) of the ICSID Convention does not prescribe the primary application of either law and leaves the job of deciding which law to apply to the decision on a breach of the particular standards of protection contained in the IIA to the tribunal:

> The Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the Tribunal to determine whether an issue is subject to national or international law.[319]

The same conclusion was reached also by the tribunal in *Burlington Resources Inc. v. Republic of Ecuador*, holding that "*[i]t is thus for the arbitrators to determine whether an issue is subject to national or international law*.[320]

The following Sections consider the context in which national law is relevant within the application of some of the typical investment treaty standards and claims and whether, in those

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316 Mazza, *The Secretariat's Guide to ICC Arbitration*, para. 3-766: "*Wherever more than one substantive law applies, the arbitral tribunal should determine each claim according to the substantive law that applies to it.*"; Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 108, citing Campbell McLachlan, "Investment Treaty Arbitration: The Legal Framework," in *50 Years of the New York Convention, ICCA Congress Series no 14*, ed. Albert Jan van den Berg (Alphen aan den Rijn: Kluwer Law International, 2009), p. 114.

317 James Crawford, "The Internationally Wrongful Act of a State " in *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* ed. James Crawford (Cambridge University Press, 2002), p. 89

318 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), para. 441

319 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (15 April 2016), para. 117 (internal citations omitted).

320 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 Decenber 2012), para. 179.

scenarios, it is applicable as a governing law or whether it plays only an ancillary role to aid the application of international law. This will be done through consideration of the nature of selected standards of protection and other claims regularly brought before tribunals.

The essential—and some of the most common—standards of protection are protection against expropriation without compensation, the right to fair and equitable treatment (FET), right to full protection and security, the protection against arbitrary or discriminatory treatment, the right to national or most favored nation treatment, the right to be accorded free transfer of funds and assets, and protection against the State's breaches of its investment obligations undertakings (umbrella clause).[321] Under some of the investment treaties, arbitrators are also mandated to decide whether national law has been breached without the need to breach an international law standard of protection.[322]

To demonstrate the possibly different natures of individual claims that an arbitrator can be tasked to decide and various approaches she might be required to take into consideration, this Chapter considers four types of claims: the prohibition of expropriation without compensation, the claim for a breach of a FET standard, an umbrella-clause claim, and a pure contractual claim. These are chosen specifically for their varying nature. The first two are very traditional standards of protection originating from international law and the last two claims are more based on national law. The discussion in the remaining Chapters of this thesis also evolves around these four types of claims.

5.1. No expropriation without compensation

The standard of protection forbidding the host State to expropriate the investment without compensating the investor is contained in practically every IIA as it targets one of the basic human rights, the right to property. This standard protects investor's right to property and requires that for a State to deprive an investor of his titles to property, it needs to be (a) done for a public purpose, (b) non-discriminatory, (c) in accordance with due process, and (d) upon

321 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 470, para. 8.78.

322 *See e. g.* Art. 13(1)(d) of the OIC Treaty; *See also* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 118; Christoph H. Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Todd Weiler (Cameron May, 2005), p. 296; Konstantin Christie, "Treaty Claims vs. Contractual Claims in ISDS," (2021), https://jusmundi.com/en/document/wiki/en-treaty-claims-vs-contractual-claims-in-isds (last accessed on 10 April 2022).

payment of prompt, adequate, and effective compensation.[323] Generally, expropriation can be *direct*, meaning the transfer of title or outright physical seizure of a property,[324] or *indirect*, resulting in a substantial deprivation of the use of the property or permanent deprivation of its economic value without transferring the actual title.[325]

Expropriation is thus tightly connected to the property rights of an investor as there can be no expropriation—either direct or indirect—without property. When ascertaining the international liability of a State on an investor's claims of expropriation, tribunals inevitably face a decision on property rights. Those rights are governed by national law at the situs of the property (presumably of the host State).[326] Accordingly, the tribunal is required to apply national law to decide whether an investor owned the investment and also whether such property was even capable of being owned. This is because customary international law contains no substantive rules on property law.[327]

The decision in *EnCana Corporation v. Republic of Ecuador* offers a good example on the interplay of national and international law when deciding on expropriation claims. There, the choice-of-law clause in the Canada – Ecuador BIT prescribed for application of only the BIT itself and the rules of applicable law. Nevertheless, the tribunal assumed an extensive interpretation of the BIT by construing that it had powers to apply also Ecuadorian taxation laws when deciding on the expropriation claim since the BIT expressly allowed applying the standard of protection against expropriation to taxation measures:

> The second preliminary question concerns the applicable law. The relevant clause, Article XIII(7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an

323 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 471, para. 8.80; Vladimír Balaš, Pavel Šturma, *Mezinárodní ekonomické právo*, 2nd ed. (Praha: C. H. Beck, 2013), pp. 404 – 405.

324 UNCTAD, Expropriation: A Sequel, (United Nations, 2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf, p. xi (last accessed on 10 April 2022); Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 471, para. 8.81; Crawford, *Brownlie's Principles of Public International Law*, p. 605.

325 UNCTAD, *Expropriation: A Sequel*, p. xi.

326 Douglas, *The International Law of Investment Claims*, p. 44, citing Christopher Staker, "Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations," *British Yearbook of International Law* 58, no. 1 (1987), pp. 163 – 169.

327 Douglas, *The International Law of Investment Claims*, p. 52.

> investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador. The effect of the opening words of Article XII(4) is to permit this Tribunal to determine and apply the taxation law of Ecuador to the extent that it is necessary to do so in order to deal with a claim under Article VIII.[328]

This shows that even when the choice of law in a particular case provides only for application of international law, tribunal still might be required to consider national law. However, even though national law plays an important role in deciding on the property rights of investors which are claimed to have been expropriated, the above-mentioned aspects of lawful expropriation are developed on the international plane. This means that, ultimately, national law plays only an ancillary role in deciding preliminary issues of proprietary rights within the ambit of tribunal's deciding on the international responsibility of a State for expropriation.[329]

Importantly, this Section does not concern the prohibition of expropriation provided for in an investment contract. Rather, it deals with the prohibition of expropriation stipulated in an IIA. This is because the inclusion of such a prohibition to an investment contract could transform also the nature of the claim from an international to contractual[330] as discussed below.[331]

5.2. Fair and equitable treatment (FET)

Another standard of protection that is present in almost every IIA[332] is the standard of fair and equitable treatment. Unlike the standard prohibiting expropriation without adequate compensation, the content of this standard is much more elusive and harder to be captured in just a few sentences especially due to the varying language in which it is expressed in IIAs.[333]

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328 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (3 February 2006), para. 184.

329 Similarly, *See* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 157 – 158.

330 *See e.g.* Ibid. pp. 115 – 116; *Biloune and Marine Drive Complex Ltd. v. Ghana*, UNCITRAL, Award on Jurisdiction (27 October 1989).

331 *See* Section 5.4 below.

332 UNCTAD, Fair and Equitable Treatment: A sequel, (United Nations, 2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf, p. xiii (last accessed on 10 April 2022); Šturma, Balaš, *Mezinárodní ekonomické právo*, p. 387.

333 Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law*, 2nd edition ed. (Oxford University Press, 2012), p. 184 – 185; Crawford, *Brownlie's Principles of Public International Law*, p. 600, mentioning four main approaches to the FET: „*(1) a selfstanding standard without additional reference to international law or other criteria, (2) FET defined in accordance with international law, (3) FET linked to*

Essentially, under this standard, a host State is agreeing to accord to foreign investors a "*stable and predictable investment environment in order to maximize investments.*"[334] A dominant element of this standard is the protection of investors' legitimate expectations,[335] securing due process, consistency, and transparency in the functioning of public authorities, including according protection to the investor in the host State's judicial system,[336] and securing non-abusive treatment.[337] Another element of this standard is protection against discriminatory conduct of the host State that would favor domestic entities over foreign investors.[338]

When deciding on breaches of this standard, tribunals will often face national law. National law of the host State and its commitments will be most often scrutinized to see the legal framework existing at the time the investment was made and whether it has changed in a way that could be considered as a breach of the investor's legitimate expectations which could then potentially amount to State's responsibility for violation of the international law standard. Oftentimes, the tribunal will also look into national administrative and judicial decisions that have either affected the investment or through which the host State allegedly denied justice to the investor:

> Where the claimant complains of a breach of fair and equitable treatment based upon the exercise of the judicial power of the host State, the international tribunal will have to apply the denial of justice standard. This may entail a review of the domestic law, but only for the purpose of determining the international law question of whether there has been a denial of justice. The treaty tribunal is not a court of appeal on domestic law issues […].[339]

Similarly to the standard of expropriation, national law plays only an ancillary role in the application of the FET standard as national law does not give meaning to the FET standard of protection, it serves only as evidence for the tribunal to decide whether the host State has

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the customary standard of minimum treatment of aliens, and (4) FET with express reference to substantive obligations" (internal citations omitted).

334 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 478, para. 8.98.

335 ibid. p. 477, para. 8.98; UNCTAD, *Fair and Equitable Treatment: A sequel*, p. xvi.

336 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 478 – 479, para 8.102-4.

337 Crawford, *Brownlie's Principles of Public International Law*, p. 601; UNCTAD, *Fair and Equitable Treatment: A sequel*, p. xvi.

338 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 478, para. 8.103.

339 Campbell McLachlan, *International Investment Arbitration : Substantive Principles,* para. 3.111

changed its investment framework or decided in a way that would amount to the violation of its obligation to accord fair and equitable treatment to the investor.

Some tribunals even extended the protection of the FET standard to comprise also the observance of contractual obligations,[340] which connects this standard with the umbrella-clause claim discussed below. However, as will be shown, the approach to national law under these two claims might differ.

5.3. Umbrella clause

Obligations of the States under umbrella clauses contained in IIAs differ from those of the prohibition of uncompensated expropriation and obligation to treat investments fairly and equally. Essentially, they impose an obligation on the host State to respect specific undertakings towards an investor made with regard to an investment.[341]

By way of example, an umbrella clause contained in the Argentina – USA BIT or Romania – USA BIT reads that "*[e]ach Party shall observe any obligation it may have entered into with regard to investments*".[342] Similarly, an umbrella clause in Switzerland – Philippines BIT provides that "*[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.*"[343] In the United Kingdom – Serbia BIT, the parties agreed that "*[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*."[344] Another example could be the OIC Treaty which stipulates that

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340 Rudolf Dolzer, *Principles of International Investment Law*, p. 201; citing for example *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012).

341 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 488, para. 8.134. Crawford, *Brownlie's Principles of Public International Law*, p. 607.

342 Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, entered into force on 20 October 1994, Art. II(2)(c); Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, signed 28 May 1992; entered into force 15 January 1994, Art. II(2)(c).

343 Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investment, Art. X(2).

344 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, with Exchange of Notes Cm 7129, Belgrade, 6 November 2002, entered into force on 3 April 2007, Art. 2(2).

"*[t]he investor shall be entitled to compensation for any damage resulting from any action of a contracting party or one of its public or local authorities or its institutions* […] *causing, by other means or by an act or omission, damage to the investor in violation of laws in force in the state where the investment exists*."[345] Although the specific language of umbrella clauses contained in IIAs varies, umbrella clauses essentially provide for an obligation of the host State to observe contractual obligations it has entered into with regard to the investment.

Authors distinguish between four schools of thought with respect to umbrella clauses: (1) a narrow interpretation of umbrella clauses permitting their operation only if there is an identifiable shared intent of the parties that any breach of contract should amount to a breach of the IIA, (2) limitation of the application of these clauses to breaches of contract by the host State when exercising its sovereign authority, (3) internationalizing investment contracts by transforming contractual claims into treaty claims, (4) and finally, the last view suggest that umbrella clauses may form the basis for a treaty claim without transforming the contractual claim into a treaty claim and changing the law of the contract including its provisions of dispute settlement.[346]

The purpose of this thesis is not to decide which of these models (if any) should be adopted. Although there is not a unanimous view as to the effect of an umbrella clause, this thesis will highlight the fourth conception of the effects of umbrella clauses as it has the most profound impact on the arbitrator's treatment of national law in investment treaty arbitration, but later also addresses circumstances under which other conceptions of umbrella-clause claims can be employed.[347] Tribunals following the fourth conception found the host States to be in breach of the IIA for they had failed to observe contractual commitments made towards the investor under the national law governing the contract:[348]

> The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the

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345 OIC Treaty, Art. 13(1)(d).

346 Crawford, *Brownlie's Principles of Public International Law*, p. 608; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 489 – 490, para. 8.139; Crawford, "Treaty and Contract in Investment Arbitration", p. 368; Bentolila, *Arbitrators as Lawmakers*, para. 344, pp. 128 – 129.

347 *See* Sections 6.1.2 and 6.2.2 below.

348 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), para. 135.

> parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[349]

This approach is reflected also in Crawford's integrationist conception of umbrella clauses which proposes that the claims brought under an umbrella clause are still contractual and are still governed by their own applicable law.[350] Douglas also stipulates in his Rule 11 that the law applicable to claims based on, among other things, a contractual obligation is the law governing the contract:

> The law applicable to an issue relating to a claim founded upon a contractual obligation, tort or restitutionary obligation, or an incidental question relating thereto, is the law governing the contract, tort or restitutionary obligation in accordance with generally accepted principles of private international law.[351]

As a consequence, investment tribunals when deciding on umbrella clause cases might be tasked to apply national law to decide whether the host State has breached its contractual obligations towards the investor. This breach would then directly result in a breach of the IIA itself, because the "*analysis of whether a treaty obligation has been breached first requires an analysis of the existence of a contract breach*."[352] Unlike the claims for breach of the FET standard or expropriation standard, national law here is not just a law for deciding ancillary questions—such as the question of property—but directly questions of whether a contract, and consequently also the IIA, has been breached. Such a finding could then result in the international responsibility of that State. Hence, evidently, the role of national law is different when deciding on the breach of the investment contract between an investor and the host State, which might cause the approach of an arbitrator to the applicable national law could also be different.

5.4. Pure contractual claims

Tribunals may also hear so-called pure contractual claims. These are based on wide dispute resolution clauses contained in IIAs that allow the tribunal to hear *any* dispute relating to

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349 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007), para. 95(c).

350 Crawford, "Treaty and Contract in Investment Arbitration", p. 370.

351 Douglas, *The International Law of Investment Claims*, p. 90.

352 Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, pp. 31, 128.

the investment.[353] While still controversial, the possibility of deciding a contractual claim in investment treaty arbitration was recognized by several arbitration practitioners.[354] Schreuer writes that when jurisdiction conferred upon the tribunal is defined broadly, the tribunal is competent to hear also contract claims not necessarily amounting to a treaty claim (i.e. a claim for a violation of a treaty or other provision of international law).[355] Similarly, Douglas formulates the arbitrator's power to decide a contractual claim in investment treaty arbitration in his Rule 25: "*In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction ratione materiae may extend to claims founded upon an investment treaty obligation, a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of measures of the host contracting state party relating to the claimant's investment.*"[356]

These claims were also admitted by tribunals. For example, the tribunal in *Salini v. Morocco* decided based on the Italy – Morocco BIT which provided for the tribunal's jurisdiction to settle all disputes between a contracting party and an investor of the other contracting party concerning an investment of said investor in the State territory of the first contracting party.[357] The tribunal there held that it can either hear disputes concerning the violation of the BIT itself or concerning any breach of a contract concluded between the investor and the respondent State directly:[358]

> In other words, Article 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly. The jurisdiction offer contained in

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353 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 118.

354 Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered", p. 296; Christie, "Treaty Claims vs. Contractual Claims in ISDS"; Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 118.

355 Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered", p. 296.

356 Douglas, *The International Law of Investment Claims*, p. 234.

357 Italy – Morocco BIT, Art. 8(1): "*Tous les differends ou divergences, y compris les differends relatifs au montant de l'indemnisation a verser en cas d'expropriation, nationalisation ou mesures analogues, entre une Partie Contractante et un investisseur de l'autre Partie Contractante concernant un investissement dudit investisseur sur Ie territoire de la premiere Partie Contractante devront, dans la mesure du possible, etre regles a l'amiable.*"

358 Similarly, *see also SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, para. 129, and *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Award (22 September 2005), Section 2.1.

> Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party.[359]

The result of such a jurisdictional clause is similar to the umbrella clauses. The tribunal first decides on the host State's private law liability by assessing whether the host State breached a contract with the investor. Differently from the umbrella clause, a contractual breach under this category does not ultimately amount to a breach of the IIA itself as there is no provision similar to an umbrella clause that would cause transformation. Put simply, the arbitrator is given jurisdiction to preside over a pure contractual dispute relating to an investment. Here, an arbitrator naturally cannot treat national law, which inevitably applies, the same way as an international adjudicator would but, instead, she should adopt an approach similar to that of an arbitrator deciding an international commercial arbitration case.

5.5. Conclusion

Both national and international law is essential in the resolution of investment disputes. This Chapter however showed that they are not equally important or do not present themselves in the same capacity in different investment claims. To demonstrate this fluctuation, the Chapter discussed four types of investment claims as to their nature and possible application of national law. The types of claims have been purposefully chosen for their fundamentally different nature: on one side the FET standard and the expropriation standard, two standards of protections developed by the IIAs, and on the other umbrella-clause claims and pure contractual claims, whose essence lies in a contractual breach.

What the FET standard and the expropriation standard have in common is that they use national law only as an ancillary source to ascertain preliminary questions governed by national law in order to rule on the international responsibility of the host State. For this, they do not treat national law as applicable law; the only applicable law is international law.

On the other side of the spectrum, umbrella-clause claims and pure contractual claims are primarily reliant on the assessment of the host State's breach of its contractual obligations under its national law. For umbrella clauses, this finding on State's contractual breaches results in its international responsibility under the IIA, for the pure contractual claim, the breach remains in

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359 *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, para. 61; *See also* decision of *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), reaching a decision to the contrary.

the private law domain, yet decided on by an investment treaty tribunal. For both of these, however, national law is the applicable law, either exclusively or together with international law.

The varying nature of investment claims interacts with the choice-on-law clauses discussed above. These are then among the factors an arbitrator must take into consideration when deciding which model of treatment of national law and national judicial decisions she will adopt. How exactly they interact is addressed in the next Chapter.

6. How to Choose Between the Models?

In the first part of this dissertation, I developed three distinct treatments an arbitrator can employ with respect to national law and national judicial decisions. To develop these models, I considered the hybrid nature of investment treaty arbitration, which oscillates between a private law decision-making similar to international commercial arbitration and a public international law decision-making. Moreover, I also took into consideration the role of its arbitrators, arbitration clauses contained in the ICSID Convention, IIAs, and several arbitration rules, while also acknowledging the differences between the common law and civil law treatment of national judicial decisions.

The first model has an arbitrator assuming a position of traditional public international law adjudicator and treats national law as well as national case law as a mere matter of fact. The second model asks for an arbitrator to adopt a position of a national judge including the national treatment of case law. In the third model, an arbitrator acts as a transnational adjudicator. The third position is also the most varied one as it could mean that an arbitrator acts as a national adjudicator, but merely takes into consideration international principles or trade usages, or it can be tasked to decide the dispute according to rules of law that do not even have to form a whole national law. While the first model belongs to the world of public international law adjudicators, the second two are more commonly encountered in the province of national law decision-making either by courts or by commercial law arbitrators.

A natural question arises: How does an arbitrator choose between the three models? The above Chapters have the hybrid nature of investment treaty arbitration as their common denominator; the tug of war between its public international law and private law nature. This disparity projects also to the arbitrator's treatment of national law. The aim of this Chapter is to reconcile the findings of the previous Chapters by proposing that the arbitrator shall choose between the three models of treatment of national law and case law based on the claim she is appointed to decide. This means that an arbitrator might even change her treatment of national law and case law throughout the proceedings, depending on the nature of the claim she is deciding on at the moment.

This position stems from the different nature of the claims an investment treaty tribunal might be presented with which can be addressed only by adapting arbitrators' approach to the law applicable to the particular claim. The varying nature of investment claims was discussed in

the preceding Chapter. Standards of protection like the prohibition of expropriation without compensation or FET standard are deeply rooted in the public international law, meaning that arbitrators by applying them decide purely on the international responsibility of States by applying elements of those standards prescribed by international law. There, national law serves only an ancillary function for the decision-making process of the tribunal. National law plays completely different roles when tribunal decides on the basis of an umbrella clause or if it decides a pure contractual dispute relating to an investment. In those claims, the breach—although ultimately resulting in international responsibility of a State—originates in national law. Accordingly, an arbitrator decides that claim according to national law. Had it not been for investment treaty arbitration, such a claim would have otherwise been resolved by national courts or arbitrators in commercial arbitration. Hence, for the choice of the suitable model of national (case) law treatment, it is important which standard is applied and which claims is being decided.

Finding equivocal the conclusions of the PCIJ in *Certain German Interests in Polish Upper Silesia*, where the court pronounced that it is not tasked to interpret the Polish law "*as such*",[360] several authors advocated for the proposition that each claim shall be assessed individually as to its applicable law and the treatment of that law shall change accordingly.[361] Those then opined that the PCIJ's conclusions solely indicate "*the manner in which national law can be treated in certain types of cases, which does not foreclose the possibility that in other types of cases it may be necessary to treat national law quite differently*".[362] Remarkably, some tribunals acknowledged that national law should not be treated under all circumstances according to the same model. In *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, the *ad hoc* annulment committee was confronted with quite a standard choice-of-law clause that provided for the application of the BIT itself, national law of Argentina, and the principles of international law. The annulment committee then ventured to conclude that not all thus selected sources of law apply to the same

360 *Certain German Interests in Polish Upper Silesia*, p. 19; *See also* Section 3.1 above.

361 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 235; Ernst-Ulrich Petersmann, "Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication," in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. Wouter Werner Lukasz Gruszczynski (Oxford: Oxford University Press, 2014), p. 31.

362 Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, p. 214; citing Jenks, *The Prospects of International Adjudication*, p. 548.

degree in every issue presented to the tribunal. Rather, the tribunal itself shall determine which law shall govern which issue:

> Article 8(4) of the BIT constitutes the agreement between the Parties regarding the applicable law, since the BIT constitutes the text of the arbitration agreement. The applicable law thus consists of the text of the BIT itself, the law of Argentina and the principles of international law, as well as the terms of any relevant special agreement, such as the Concession Agreement. However, the fact that a particular legal system supplies part of the applicable law does not mean that that law governs a given issue in dispute between the Parties. *Which of the various applicable laws determines the answer to any particular question will depend upon the nature of that question.* Thus, the interpretation and application of the Concession Agreement clearly fall to be determined by reference to Argentine law as the proper law of that contract. By contrast, if the issue to be determined concerns the interpretation or application of the BIT, those are questions governed by international law.[363]

Similarly, some IIAs also recognize the need to distinguish the applicable law and approach to it based on the applied standard of protection or the claim at hand. Take the US Model BIT as an example. In its Article 30, the parties agree that when deciding upon a claim for a breach of the national treatment standard, the most-favored-nation standard, the minimum standard of treatment and the expropriation with compensation standard, the tribunal shall apply the BIT and applicable rules of international law. On the other hand, when deciding on an issue concerning an investment authorization or an investment agreement, the tribunal shall apply the terms of the authorization or agreement, or the respective national law and any applicable rules of international law:

> Article 30: Governing Law
>
> 1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.
>
> 2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the

363 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment (5 February 2016), para. 219 (emphasis added, internal citations omitted).

> rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.[364]

In the first category of issues, national law is not among the agreed laws to be applied to the issue. If in such a case, a question of national law arises, arbitrators ought to treat it merely as a matter of fact. The second group is different. National law of the respondent State is agreed to be applicable and can be supplemented by the rules of international law. Such a treatment then corresponds to the model of a transnational adjudicator that supplements national law with international law and principles. This BIT is thus an example of what this Chapter proposes—that the treatment of national law and case law shall differ according to the claim that is being decided by the tribunal.

The approach taken by an arbitrator with respect to national law and case law is influenced also by a choice-of-law clause provided by the parties which arbitrators must observe. This is primarily because disrespecting a choice-of-law agreement of the parties might lead to annulment or non-enforceability of the award thus rendered.[365] The second Chapter of the thesis reviewed multiple choice-of-law clauses contained either in IIAs or arbitration rules. That Chapter also divided those clauses into three different groups based on the law they choose to be applicable to the particular dispute. These are (i) a clause calling for the simultaneous application of international law, the IIA which forms the basis of the dispute, and national law; (ii) a clause calling for the application of only international law and the particular IIA; and, finally, (iii) a clause calling for the application of solely national law. These are discussed, because the law chosen by parties to govern their relationship has a direct effect on the jurisdiction of the tribunal, the characterization of the claims brought before it and it also compels the approach an arbitrator ought to take with respect to national law and case law.[366] The matter in which the choice-of-law clauses and various investment claims influence the way an arbitrator ought to treat national law and national case law is discussed *seriatim* below.

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364 United States Model BIT (2012), Art. 30.

365 *See* Chapter 7 for further discussion on potential consequences of an arbitrator disrespecting the chosen law.

366 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 116.

6.1. Choice-of-law clause calling for the application of the IIA, national law, and international law

The first type of choice-of-law clause is the simplest to apply. It calls for the application of international law, the IIA, and national law. This means that the clause provides for all three possible sources of law applicable to the dispute. It is then up to the arbitrator to decide which law should be applied to which claim brought before her. This type of choice-of-law clause is frequent in IIAs. In its pure form, it can be found for example in the Southern African Development Community Model BIT:

> When a claim is submitted to a tribunal under this Agreement, it shall be decided in accordance with this Agreement. The governing law for the interpretation of this Agreement shall be this Agreement and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.[367]

On top of the choice between the IIA, international law, and national law as the applicable laws, it is possible that the choice-of-law clause contains a reference to a fourth source of law; that is the investment contract itself. This clause is to be found, for example, in the United Kingdom – Argentina BIT:

> The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.[368]

Such alteration does not make much difference in arbitrator's application of law. It could, however, be construed as highlighting the importance of, for example, choice-of-law provisions of the investment agreement itself, which is likely to point to the national law of the host State or

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367 SADC (Southern African Development Community) Model Bilateral Investment Treaty Template (2012), Art. 31.

368 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993, Art. 8 (4); *See also* the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, 22 November 1991, Art. 8(4): *"The arbitration tribunal shall decide in accordance with the provisions of this Agreement, the law of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the principles of international law.*"

other national law, rather than international law. This emphasizes the importance of arbitrators not dismissing national law as non-applicable to the claims concerning the investment agreement, especially when deciding an umbrella-clause claim or a contractual claim, irrespective of the fact, that those claims are heard by an international (or quasi-international) tribunal. Even if the clause does not contain an express reference to the investment agreement itself, it would likely be applicable nonetheless and since these clauses contain the choice of national law as the applicable law, its contractual provisions would probably be governed by the municipal law of the host State.

This type of choice-of-law clause thus prescribes the sources of laws that an arbitrator should take into consideration and apply when deciding the case at hand. The clause, however, only provides that all three can and should be applied when dealing with the claims brought before the tribunal under the particular IIA. The clause does not state which law should be used for which claim.

The *ad hoc* committee in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* was confronted with a similar question and concluded that not all thus selected sources of law are applicable to the same degree in *every* issue presented to the tribunal, but, in fact, "*[w]hich of the various applicable laws determines the answer to any particular question will depend upon the nature of that question*."[369] The annulment committee then continued and held that the interpretation and application of the concession agreement in dispute was to be determined by reference to national law, in that case the Argentine law, as the proper law of that contract;[370] the interpretation and application of the IIA itself were to be governed by international law.[371] It follows clearly, all three thus selected sources of law are not to be applied all at once, but rather the arbitrator should consider a particular claim and decide which law should be applicable at that instance. The arbitrator shall consequently determine the method of treating any applicable national law and case law.

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369 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, Decision on Annulment, para. 219.

370 ibid.

371 ibid.

6.1.1. Expropriation and the FET standard of protection

Claims for unlawful expropriation of investment and for a breach of the FET standard are discussed together as their nature is similar.[372] This also holds true for the role national law plays in the application of those standards.

When deciding on *an expropriation claim*, national law plays only an ancillary role. The reason for that is that the elements of the standard prohibiting expropriation without compensation are articulated by international law. As foreshadowed above, national law, nevertheless, applies. The international requirements for an expropriation to be lawful are the following: it must be done (a) for a public purpose; (b) in a non-discriminatory manner; (c) in accordance with due process of law; and (d) against the payment of compensation.[373] National law then becomes relevant on numerous instances; it can be to ascertain the original ownership of the subject of expropriation, to assess the transfer of the ownership rights or how investor was prevented from exercising its ownership rights, assess the conditions of the expropriatory acts, or to assess whether the expropriation process complied with the due process of law. Even though these instances are necessary in order to determine whether the expropriation was lawful and thus whether the respondent State should be found liable, they do not answer the question of whether the test for expropriation has been satisfied, because that test is stipulated by international law and interpreted within its ambit.[374]

Therefore, in the context of the expropriation standard, national law shall be treated solely as a matter of fact, and not as applicable law, since it is necessary, but not sufficient, for the tribunal to discharge its duty, i.e. to decide on the international responsibility of the respondent State for the alleged unlawful expropriation of investor's property. This treatment of national law in the context of an expropriation claim is supported by Douglas:

> For instance, where the host state defends its alleged expropriatory conduct as "non-discriminatory" and refers to other legislative enactments that treat other investors in the same way, these enactments

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372 *See* Sections 5.1 and 5.2 above.

373 UNCTAD, *Expropriation: A Sequel*, p. 27.

374 *Compare* Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 229 – 234, stating that BIT claims should be decided in accordance with international law.

> are "facts" for the investment tribunal's judgment as to whether the test for expropriation has been satisfied in the particular instance.[375]

Similarly, the above-cited US Model BIT also specifies that the expropriation claims shall be governed by the BIT itself and international law, not national law.[376] Likewise, the PCIJ in *Certain German Interests in Polish Upper Silesia* was presented with a dispute concerning the liquidation of property. There, despite its general pronouncements on the role of national law, the PCIJ decided that it does not have the power to interpret national law as such. Instead, it held that national law, and consequently also national case law, is only a matter of fact to its decision-making.[377] This treatment is also in line with the approach adopted by the investment treaty tribunal in *MTD v. Chile*, where the tribunal recognized that "*[t]he breach of an international obligation will need, by definition, to be judged in terms of international law. To establish the facts of the breach, it may be necessary to take into account municipal law*."[378]

The FET standard is similar to the expropriation standard. The requirements of conduct to be considered fair and equitable are provided under international law, however, the conduct of the State that is subject of the investor's claim will likely involve the adoption of certain national law, an act of the respondent State, or a decision by its decision-making bodies. The legality of these, however, is not decisive for the arbitrator's assessment of the international responsibility of the host State. The FET standard is, in fact, independent from the national legal order.[379] Accordingly, the tribunal in *GAMI v. Mexico* confirmed, among other things, that the State's failure to satisfy requirements of its national law does not necessarily mean that the State violated international law.[380] Similarly, in *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, the tribunal when deciding a FET claim and claim of adoption of expropriatory, arbitrary, and discriminatory measures, held that clauses in the relevant contracts, obligations under Latvian law, and decisions of the Latvian Supreme Court, are facts.[381] The analysis and inquiry into national law and its case law thus does not dispose of the question of

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375 Douglas, *The International Law of Investment Claims*, p. 70.

376 United States Model BIT (2012), Art. 30(1).

377 *Certain German Interests in Polish Upper Silesia*.

378 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, para. 204, quoted by Spiermann, "Applicable Law", p. 111.

379 UNCTAD, *Fair and Equitable Treatment: A sequel*, p. 3.

380 *Gami Investments Inc. v. Mexico*, UNCITRAL (15 November 2004), para. 97 (emphasis added).

381 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, Section 3.7.

whether there was a breach of the FET standard. Instead, this question needs to be answered under international law.

It follows that national law and national case law should be treated by the tribunals merely as a matter of fact when the tribunal is presented with an investor's claim that its investment has been unlawfully expropriated by the host State or a FET claim. The tribunal might need to consult national law to answer ancillary questions arising from the application of an international standard of protection, but that does not elevate national law among the applicable laws to that question. National law remains to be applicable only as a matter of fact and national case law shall be treated accordingly also only as facts. This means that national law must be proven to the arbitrator and she must apply the predominant interpretation given by the jurisprudence of the legal system which the parties have selected. The arbitrator must apply the law as it is applied in the particular country and does not have the power to substitute her own interpretation for that of the national courts. An arbitrator may, nevertheless, deviate from the interpretation established by the national courts if their interpretation is manifestly incorrect, was reached through serious procedural irregularities or contains an apparent bias towards the State.[382]

6.1.2. Umbrella-clause claims

The role of a tribunal when deciding on an umbrella-clause claim is different from the expropriation and the FET standards. Here, the tribunal is not applying an internationally-defined standard of protection, but, instead, is deciding whether the respondent State has violated its obligations towards the investor relating to the investment. Admittedly, these obligations do not need to be contractual.

The preceding Chapter conceptualized the umbrella-clause claims into four different schools:[383] (1) one school permitting the operation of umbrella clauses only if there is an identifiable shared intent of the parties that any breach of contract should amount to a breach of the IIA, (2) limiting its application to breaches of contract by the host State when exercising its sovereign authority, (3) internationalizing investment contracts by transforming contractual claims into treaty claims, and (4) suggesting that umbrella clauses may form the basis for a treaty claim without transforming the contractual claim into a treaty claim and changing the law of the

382 *See* Section 4.2.1 above.

383 *See* Section 5.3 above.

contract including its provisions of dispute settlement.[384] From the perspective of governing law, it is thus possible to see an umbrella-clause claim to be governed by either international or national law. The goal of this thesis, however, is not to describe which umbrella-clause model should be adopted, but to show, how national law would be treated in those models, these considerations only serve the illustration of the variety of approaches to the applicable law when deciding an umbrella-clause claim.

When deciding on an umbrella-clause claim, an arbitrator inevitably faces a choice between vastly different conceptualizations. It is possible for one tribunal to conclude that any contractual claims would be internationalized to a treaty claim and thus governed by international law, as well as for another to decide that the law of the contract shall remain to be national law. Interpretation of the scope and nature of the umbrella clause depends on the wording of the whole IIA. Being part of an international treaty, the BIT, the umbrella clause, and the scope of the umbrella clause should be interpreted within the ambit of international law and its rules of treaty interpretation, such as Articles 31 and 32 of the VCLT.[385] If, for example, the IIA contain a clause expressly providing for the application of the "*terms of any specific agreement concluded in relation to such an investment*"[386] it could signify that the arbitrator should abide by the choice of applicable law contained in the particular investment agreement and refrain from internationalizing the rights and obligations contained therein.

Should the tribunal decide that the umbrella-clause claim causes internationalization of the contractual claims, then national law would once again serve only an ancillary role and just like in the expropriation or FET claims, arbitrators would treat it only as a matter of fact.[387] However, should the arbitrators decide that the umbrella-clause claims are to be governed by national law, then the national law governing the contract or the non-contractual obligation does not just play an ancillary role; it is the law the decision under which leads directly to the conclusion on the international responsibility of the respondent State. Thus, in such a situation,

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384 Crawford, *Brownlie's Principles of Public International Law*, p. 608; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 489-490, para. 8.139; Crawford, "Treaty and Contract in Investment Arbitration", p. 368; Bentolila, *Arbitrators as Lawmakers*, para. 344, pp. 128 – 129.

385 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 248.

386 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993, Art. 8 (4).

387 *See e.g. Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005), para. 53.

an arbitrator cannot treat national law as a matter of fact. She should either treat the law as a national adjudicator or as a transnational adjudicator.

Choice-of-law agreements[388] as well as cases concerning challenges for arbitrators' improper treatment of national law[389] often obscure and confuse the distinction between the choice of law and the choice of treatment of that law. Those are indeed interconnected, albeit different aspects of looking at national law. Apart from the decision on the applicable law, the arbitrator must also decide how to treat national law. If the arbitrator concludes that it is the national law that should govern the contractual claims, she is to either adopt the model of a national judge or a transnational adjudicator. The discussed type of a choice-of-law clause is, however, not by itself indicative of how an arbitrator should treat national law. For that, the arbitrator needs to look into the IIA, the applicable arbitration rules or any other agreement of the parties to determine, whether the parties' mandate her to apply national law as a national judge or as a transnational adjudicator. Generally, one will look at what were the expectations of the parties when referring this dispute to the arbitral tribunal: Did they want the arbitrator to decide the dispute in accordance with the law as applied by national judges, or did they choose to have the dispute adjudicated in international arbitration precisely because they wanted to avoid application of the national view on the applicable law? This is something an arbitrator should consider on a case-by-case basis.

By way of example, when the IIA provides that any dispute shall be settled under the ICC Arbitration Rules, it allows for an arbitrator not only to use the law and the rules of law as explicitly agreed but also such that she determines to be appropriate.[390] As explained above, this means that the arbitrator is not constrained by one system of law, but may apply rules from different national and international systems. On top of this, an arbitrator is expressly authorized to apply relevant (international) trade usages, even if the parties did not agree on this expressly in their choice-of-law clause.[391] By choosing the ICC Arbitration Rules or rules of similar wording, parties thus mandate an arbitrator to apply national law as a transnational adjudicator. It is only a matter of interpretation of the parties' will to decide to what extent the arbitration is detached

388 *See* Section 2 above.

389 *See* Section 7 below.

390 ICC Arbitration Rules (2021), Art. 21(1).

391 ICC Arbitration Rules (2021), Art. 21(2).

from a particular national system of law and can thus implement international consideration in her interpretation and application of national law.

Deciding how to treat national law when dealing with an umbrella-clause claim is far from being simple. It is possible to conceive that all of the above-defined models of treating national law could be applied to such a claim. Therefore, an arbitrator must carefully construe the intention of the parties with respect to the resolution of the umbrella-clause claims. First, determine whether the parties intended to internationalize contractual claims. If so, national law would be only relevant as a matter of fact. If, however, those contractual claims remained governed by national law, the arbitrator would need to construe, whether the mandate covers her dealing with national law only as a national judge or whether she transcends national interpretation and to what degree. However difficult this task might be in practice, theoretically, it is the best way how to honor the nature of the umbrella-clause claim.

6.1.3. Pure contractual claims

Imagining the FET and expropriation claims to stand on one end of a spectrum, pure contractual claims stand on the other end. These are the claims over which the tribunal has jurisdiction thanks to a wide jurisdictional clause mandating the tribunal to hear all disputes relating to the investment.[392]

Here—even more than when deciding an umbrella-clause claim—the tribunal obviously should not treat national law as a mere matter of fact. National law in this case is the only law applicable since the tribunal acts the same way as an international commercial tribunal would. There are no provisions of the IIA concerned (apart from the arbitration agreement and the choice-of-law clause) and, thus, no reason to apply international law. When deciding pure contractual claims, the tribunal should thus treat national law either as a national judge or a transnational adjudicator.

Identically to the umbrella-clause claims, an arbitrator needs to look into the parties' agreement to see whether they have mandated her to act as a transnational adjudicator or whether she should treat national law strictly as a national judge. The traces of the parties' mandate towards the international adjudicator can be seen for example in the IIA, the choice of arbitration rules, or in the investment agreement.

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[392] *See* Section 5.4 above.

6.2. Choice of only international law and the provisions of the IIA

Interpretation and application of national law by an arbitrator differ greatly if the choice-of-law clause provides solely for the application of the IIA itself and international law. Under such clauses, national law does not become the applicable law at any point but rather can be applied only as an ancillary law when settling particular questions of national law. This approach closely resembles the PCIJ's and ICJ's treatment of national law and national case law.[393]

Such a clause can be found, for example, in the Czech Model BIT, where the clause explicitly states that should national law become relevant for settling a particular issue, it shall be applied only as a matter of fact:

> The arbitral tribunal shall decide on the basis of law, taking into account the sources of law in the following sequence:
>
> /a/ the provisions of this Agreement and other relevant agreements between the Contracting Parties, as interpreted in accordance with the Vienna Convention on the Law of Treaties;
>
> /b/ other rules of international law.
>
> For greater certainty, the domestic law of the Contracting Parties shall not be part of the applicable law. Where the arbitral tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Contracting Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Contracting Party.
>
> For greater certainty, the meaning given to the relevant domestic law made by the arbitral tribunal shall not be binding upon the courts or the authorities of either Contracting Party. The arbitral tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the Contracting Party which is the party to the dispute.[394]

A clause mandating an arbitrator to apply only international law (and the IIA) influences not only which law an arbitrator applies to various claims, but also how she applies it.

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393 *See* Section 3.1 above.

394 Czech Model BIT (2016), Art. 8(14); *See also* Italian Model BIT (2020), Art. 14(10): „*When rendering its decision, the Tribunal shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. Where the Tribunal is required to ascertain the meaning and effects of the provisions of domestic law as a matter of fact, it shall follow the prevailing interpretation made by the courts or authorities of that Party.*" or Norwegian Model BIT (2015), Art. 13: „*A Tribunal established under this Section shall make its award based on the provisions of this Agreement interpreted and applied in accordance with the rules of interpretation of international law.*"

6.2.1. Expropriation and the FET standard of protection

The choice of only international law (and the IIA) as the applicable law poses no challenge to the interpretation and application of the FET standard and the standard prohibiting expropriation without compensation. This is because, for these standards of protection, national law is never the applicable law, but is relevant only as a matter of fact. The only applicable law is international law and relevant provisions of the particular IIA. This approach was taken by the tribunal in *EnCana Corporation v. Republic of Ecuador*, where the tribunal held that even though the BIT in question provided for sole application of the international law, "*the rights affected must exist under the law which creates them, in this case, the law of Ecuador.*"[395] Hence, the tribunal had also recourse to national law to establish the existence of the allegedly affected rights. An arbitrator's treatment of national law of claims falling in this category is identical to the treatment under the first choice-of-law clause.[396]

6.2.2. Umbrella-clause claim

The situation is different for the umbrella-clause claims. As demonstrated above, the umbrella clause can be understood in different ways, one of which is internationalization of the contract claims and their transformation into treaty claims.[397] In such a situation a respect of any contractual obligation between an investor and a State is made into an obligation under the IIA.[398]

The exclusion of national law from the pool of applicable laws inevitably results in narrowing the tribunal's choice in the perception of the umbrella clause. When mandated to apply only international law (and the provisions of the IIA), arbitrators cannot consider the contractual claims brought under the umbrella clause pursuant to national law. Instead, arbitrators should internationalize the contractual claims and consider them as breaches of the IIA. This way, the applicable law would be international law without the non-mandated resort to

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395 *EnCana Corporation v. Republic of Ecuador*, para. 184.

396 *See* Section 6.1.1 above.

397 Crawford, *Brownlie's Principles of Public International Law*, p. 608; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, pp. 489 – 490, para. 8.139; Crawford, "Treaty and Contract in Investment Arbitration", p. 368; Bentolila, *Arbitrators as Lawmakers*, para. 344, pp. 128 – 129, *See also Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005).

398 *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005), para. 251.

national law. In this way, relevant national law and national case law would be also treated only as a mere matter of fact, because the applicable law to the claim is international law.

6.2.3. Pure contractual claims

Similarly to the obstacles faced by arbitrators when applying umbrella clauses, arbitrators presented with a broad dispute resolution clause that could encompass also pure contractual claims must carefully interpret the IIA. A treaty which, on one hand, provides that arbitrators can only apply international law and, on the other hand, contains a wide dispute resolution clause that could be construed as to include also a mandate to decide pure contractual clauses, is in apparent contradiction. According to the VCLT 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*."[399] Therefore, an arbitrator interpreting such a treaty should take into consideration the context of the IIA's provisions and their object and purpose. In fact, the dispute resolution clause is closely connected to the choice-of-law clause as both delimit the mandate of the tribunal. Interpreting the dispute resolution clause in connection with a clause that mandates arbitrators to apply only international law must lead to an interpretation that such arbitrators do not have the mandate to decide pure contractual claims.

Another possibility suggests itself in a form of internationalizing the contract at hand. Although this approach is still controversial, several tribunals in fact went against an express choice of national law in the contract and concluded that thanks to its international nature, the contract should be governed by international law.[400] This way, the tribunal could hear even a pure contractual claim in a case where the choice of law in the IIA calls for the application of only international law. The same result—and less controversial—is also achieved if the parties expressly provide that their investment agreement is to be governed by international law. In such a case, however, national law would not come into question as the contractual claim would be decided pursuant to the rules of international law.

It follows from the above that choice-of-law clauses have significant interpretative power within the IIA. Chosen law forms together with a dispute resolution clause a bedrock of an arbitrator's mandate from the parties. These clauses thus must work together seamlessly. If

399 VCLT, Art. 31(1).

400 Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, pp. 214 – 222.

the choice-of-law clause provides only for the application of international law and the provisions of the particular IIA, it should not be possible for arbitrators to construe the IIA in a way that would also allow her to hear pure contractual claims pursuant to the applicable national law of the contract.

6.3. Choice of only national law

The third—and rather rare—category of choice-of-law clauses discussed above is the one that chooses solely national law as the applicable law. The Section above mentioned the now-terminated India – Switzerland BIT as an example of this type of clause:

> All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made.[401]

Considering that an arbitrator is deciding on the international responsibility of States and that the IIA itself is an international treaty, it would not be viable for an international treaty not to have the rights and obligations stemming from it governed by international law. The above clause (and those of similar wording) must thus be interpreted as only applying to the *in rem* rights stemming from the investment. In that case, the arbitrator would likely treat the IIA as not containing a choice of substantive law.

6.4. Conclusion

This Chapter provided tools for choosing and applying the correct—or rather the most suitable—model of treatment of national law and national case law. It demonstrated that the choice of the model of treatment of national law and case law which an arbitrator employs depends on myriad factors. As a first consideration, an arbitrator shall inquire of the law applicable to the dispute. For a choice-of-law clause to be viable, it can provide either for the application of the IIA, international law, and national law, or only of the IIA and international law. Naturally, this has a direct effect on the law governing individual claims and, consequently, on the treatment which an arbitrator shall accord to the applicable national law and national case law.

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401 Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments dated 16 February 2000, terminated on 6 April 2017, Art. 11.

Taking first claims for unlawful expropriation and violation of the FET standard. Thanks to their public international law nature, these claims are under both choice-of-law clauses settled pursuant to the terms of the IIA and international law. Any questions of national law are settled only through the ancillary application of national law and national case law. As a consequence, national law and national case law is to be treated as a matter of fact.[402]

Similarly straightforward are also pure contractual claims brought before the investment treaty tribunal thanks to a wide dispute resolution clause. These claims, by their nature, are always to be governed by national law. If the choice-of-law clause in the IIA provides for the application of both international law and national law, the arbitrator shall apply national law and shall treat it either as a national adjudicator or a transnational adjudicator. The choice between the two depends on the mandate from the parties, i.e. whether or not the parties mandated her to employ some transnational (or non-national) considerations when construing the applicable national law.[403] If, on the other hand, the choice-of-law clause provides only for the application of international law (and the IIA) then, unless the particular contract is to be governed by international law, the tribunal must interpret the dispute resolution clause restrictively as not having jurisdiction to settle contractual claims.[404]

Umbrella-clause claims oscillate somewhere between the two. This oscillation is caused by the nature of umbrella clauses which allow for the claims brought under them to be either governed by international law or national law. Thus, if the choice-of-law clause calls for the application of national law as well as international law, the arbitrator must decide, whether the contractual provisions are to be internationalized or not. If they are, then the breach of such a provision is once again considered as a breach of the IIA itself and should be treated in a similar way as the FET claims and expropriation claims. This means that in such a case, national law is not the applicable law and should be treated as a mere matter of fact. If, however, the arbitrator decides that the contractual claims are to be governed by the proper law of that contract, then national law is directly applicable and the arbitrator shall treat it together with national case law, again, either as a national judge or as a transnational adjudicator. The choice between these is to be construed from the agreement of the parties.[405] Lastly, in case the choice-of-law clause

402 *See* Section 6.1.1. and Section 6.2.1,

403 *See* Section 6.1.3.

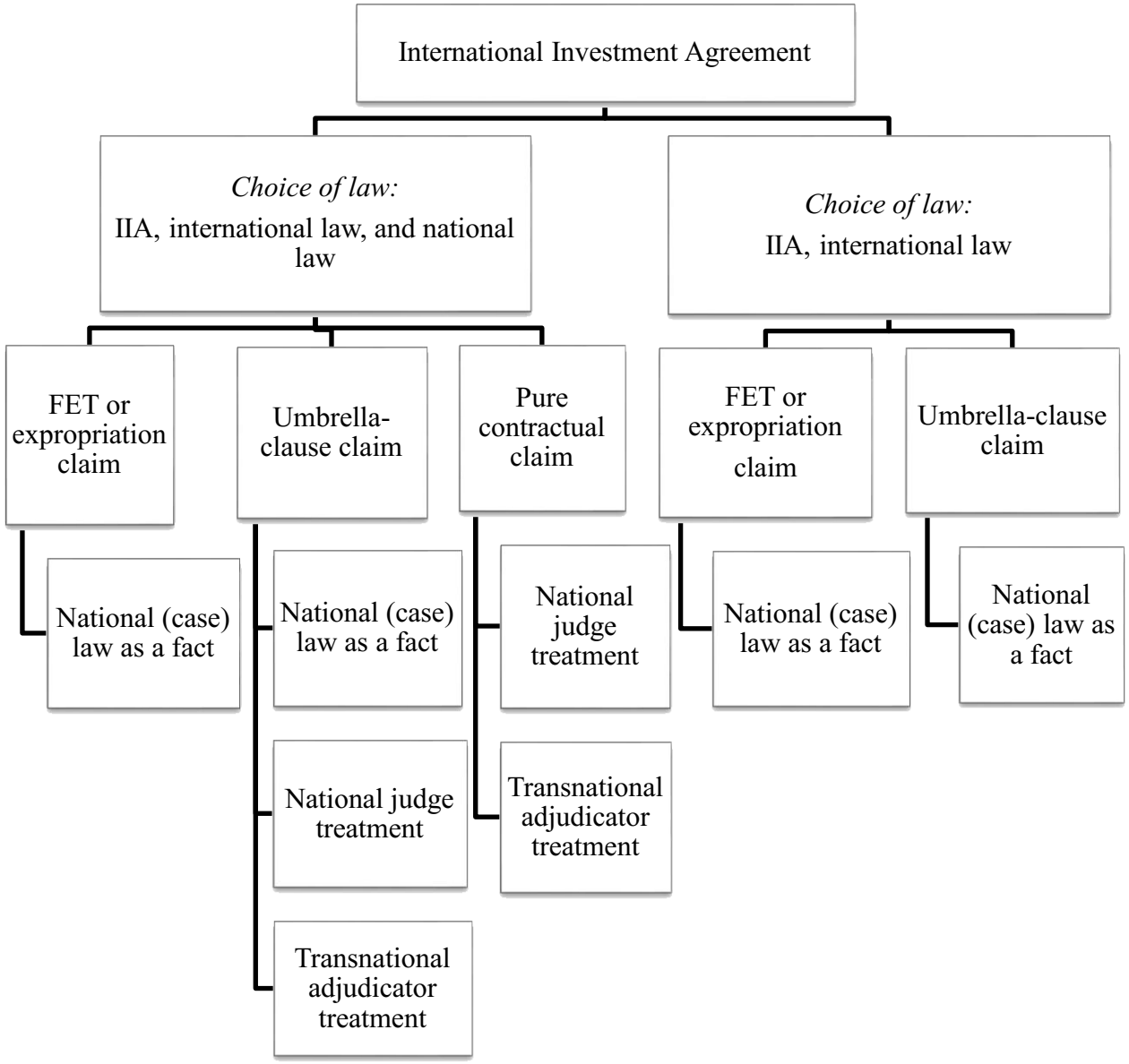
404 *See* Section 6.2.3.

405 *See* Section 6.1.2.

provides only for the application of the IIA and international law, the arbitrator's job is easier. In that case, the umbrella clause shall be deemed as internationalizing contractual claims and national law and national case law are to be treated as facts.[406]

All the above-listed considerations are visualized in a so-called arbitrator's mind map below.

Figure 2: Diagram of factors influencing arbitrator's choice of appropriate model of national (case) law treatment



406 *See* Section 6.2.2.

7. Consequences of Failing to Accord National Law and National Case Law Proper Treatment

What happens when an arbitrator chooses the wrong model of treatment of national (case) law or fails to adhere to it? In the introduction to this dissertation, I cautioned that arbitration should not be means of reaching arbitrary awards. This precept must be stressed especially in the context of the principle of finality, according to which arbitral awards shall be final and binding resolution of the dispute between the parties and not "*the first step on a ladder of appeals through national courts*".[407] Thus, with no direct instance of appeal to review the rendered award—either from the factual or legal standpoint—arbitrators should so to speak get it right on their first try. However, the notion of finality and thus the absence of an appellate body should not entice an arbitrator to treat the law and the facts contrary to the mandate she has received from the parties.

One of the central duties of an arbitrator is to render a decision in accordance with the applicable law.[408] In the context of commercial arbitration, Lord President Clyde held in *Mitchell-Gill v. Buchan* that an arbitrator should act as any other judge with respect to the manner in which she treats the facts and law:

> When it is said that an arbiter in Scotland is the final judge of both fact and law, it is not implied that he is entitled either to make the facts as he would like them to be, *or to make the law what he thinks it ought to be*. Like any other judge, he must take the facts as they are presented to him, *and the law as it is*. Otherwise he would act, not as the parties' judge, but as their oracle; his function would not be judicial but arbitrary; and his award would be given, not according to the principles of justice, but according to the caprice of personal preferences.[409]

Lord President Clyde then further pointed out that an arbitrator may, of course, err in the application of law and interpretation of facts, however, the finality of her award—due to which these errors cannot be corrected—should not result in arbitrator inventing facts or misconstruing law to suit her ideas:

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407 Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 569, para. 10.02.

408 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 147.

409 *Mitchell-Gill v. Buchan*, SC 390 (1921), quoted in *Leslie & Ors*, P1120/13, CSOH 136 (2015) (emphasis in the original).

> Like other judges of more highly specialised qualifications and experience, he may err both in interpreting the evidence before him and in applying the law to the facts which he thinks are proved; and, he being the final judge on the subject matter of the submission, any such errors and misunderstandings into which he may innocently fall cannot be corrected. But that is all that is meant by saying that he is the final judge of fact and law. If it could be proved that, in arriving at his award, an arbiter had invented the facts to suit some of his own, *or had fashioned the law to suit his own ideas*, then, however innocent in itself might be the eccentricity which had seduced him into such a travesty of judicial conduct, his behaviour would naturally imply that justice had not been done […].[410]

Similarly, in *Nema case* Lord Diplock recognized the finality of an arbitral award as an objective as long as it is not the means of arbitrators to depart from settled principles of law.[411] For these reasons, the award's finality is not absolute even in investment treaty arbitration. Although the finality of an award does not allow national judges (and annulment committees) to review the merits of the case,[412] the award can still be reviewed from the public policy perspective and as to the arbitrator's adherence to her mandate and the most important procedural rules.

An arbitrator has a best-effort obligation to render an award that will survive the challenge procedure and that will be enforceable.[413] Accordingly, an award can be subjected to scrutiny at two instances: at the annulment stage and at the enforcement stage. These two stages vary greatly in non-ICSID and ICSID arbitration. For that reason, this Chapter, like some of the preceding, discusses separately the non-ICSID and ICSID arbitration when considering consequences to arbitrators' possible ill-treatment of national law and national case law. The question of consequences to arbitrator's treatment of national (case) law is of importance as it can demonstrate whether improper treatment of national law or improper deviation from national case law can result in award's annulment or unenforceability.

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410 *Mitchell-Gill v. Buchan*, quoted in *Leslie & Ors* (emphasis in the original).

411 *Pioneer Shipping Ltd v. BTP Tioxide Ltd*, AC 724 (1982).

412 As admitted below, some jurisdictions do allow limited review even on the merits, but those are exceptions rather than a rule. *See e.g.* Yoanna Schuch Helmut Ortner, "Chapter III: The Award and the Courts, How to apply the applicable Law in International Arbitration," in *Austrian Yearbook on International Arbitration 2017*, ed. Peter Klein Christian Klausegger, et al. (Manz'sche Verlags- und Universitätsbuchhandlung, 2017), p. 200.

413 ICC Arbitration Rules (2021), Art. 42; LCIA Arbitration Rules (2020), Art. 32.2; SIAC Arbitration Rules (2016), Art. 41.2; SCC Arbitration Rules (2017), Art. 2(2).

There are two degrees of possible improper treatment national law and national case law—albeit often distinguishable only with difficulties—disregard of national law and case law and error in its application. A complete disregard of applicable law and case law could even amount to non-mandated exercise of powers as *amiable compositeur* and a mere misapplication of the applicable rules might, under certain circumstances, amount to annulment or rejection of enforcement of the award. Thus, these two are discussed below. Lastly, this Chapter also discusses possible consequences of arbitrator's failure to apply or error in the application of national (case) law in those cases, where she should treat it as a matter of fact.

7.1. Disregard of national law and case law

It follows from the above analysis that the possible scope of arbitrator's powers as to the interpretation and application of national law and case law ranges between her treating national (case) law as a matter of fact through acting as a national judge to acting as a transnational adjudicator with a possibility to consider international principles; the former being the most restrictive and the latter the least. While at any stage one must inquire of the consequences of not adhering to the applicable law or case law, on the most unlimited end of this scope, a natural question arises: When does an arbitrator stop interpreting and applying the law and start acting as an *amiable compositeur* without having a mandate from the parties for doing so?

Deciding case as *amiable compositeur* or *ex aequo et bono*, which are used in this dissertation synonymously,[414] means to decide it in equity.[415] This, however, does not mean solely that an arbitrator would not rely on any law at all. There are several degrees of equitable considerations an arbitrator may employ: applying relevant rules of law, but ignoring those that are purely formalistic; applying relevant rules of law to the dispute, but ignoring any rules that appear to operate harshly or unfairly in the particular case; deciding according to general principles of law; or ignoring completely any rules of law.[416] Following from this, the above-defined models of a transnational adjudicator could be, theoretically, construed also as meaning that an arbitrator acts within them as an *amiable compositeur* who cannot act as such without proper mandate from the parties. The line between regular applications of law and deciding in equity is not drawn sharply.

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414 On historical differences between the term *amiable compositeur* and *ex aequo et bono see* Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, para. 3.196.

415 ibid. para. 3.193.

416 ibid.

By way of an example, the French Supreme Court when presented with an award where an arbitrator set an interest rate in violation of French law annulled such an award as the arbitrator acted as *amiable compositeur* without being mandated to do so by the parties:

> […] the French Supreme Court ruled that by tempering the contractual interest rate, the arbitral tribunal had 'necessarily' rendered a decision in equity, *en amiable compositeur*, without the authorization of the parties.[417]

On the other hand, when French courts were presented with an objection to enforcement of an award for supplementing French law with international trade usages and principles, such an objection was rejected as, in the court's opinion, the arbitrator has not acted *ex aequo et bono*.[418]

This Chapter attempts to reconcile these apparently diverging positions. In doing so, it considers an arbitrator who is disregarding the applicable and engaging equitable considerations without having sufficient mandate to do so. These situations, however, do not concern only the arbitrator's disregard to the particular law in its entirety, but also the arbitrator's disregard to only one (or several) provisions of the applicable law or one applicable (or several) cases of that jurisdiction.

7.1.1. Disregard of national (case) law in non-ICSID arbitration

Non-ICSID awards may be annulled by national courts for grounds that are stipulated in national arbitration laws.[419] As a result, grounds for annulment vary greatly. This also means that cases concerning arbitrators' disregard of or departure from national law or national case law are scattered throughout many jurisdictions and are available usually only in the respective local languages. This makes it challenging to obtain them and to abstract a general rule of treatment of national (case) law in non-ICSID arbitration and possible consequences for failing to observe that standard.

The above Chapters showed that an arbitrator is not at liberty to decide which law she will apply to the dispute. More often than not, the applicable law is either directly agreed by the

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417 Boisséson, "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective", p. 117, referring to *Société Groupe Antoine Tabet v. République du Congo*, Cour de cassation, First Civil Chamber (12 October 2011).

418 Bentolila, *Arbitrators as Lawmakers*, para. 336.

419 *See e.g.* Vladimír Balaš, "Review of Awards," in *The Oxford Handbook of International Investment Law*, ed. Federico Ortino Peter Muchlinski, and Christoph Schreuer (Oxford University Press, 2008), pp. 1136 – 1137.

parties, or may be determined based on the mechanism contained in the applicable arbitral rules. Thus, an agreement on applicable law is an essential part of the framework for the decision that the tribunal is bound to observe[420] and forms part of the arbitrator's mandate.

This is crucial because one of the grounds for annulment and rejection of enforcement of an award is arbitrators' excess of mandate. A failure to apply the governing law is a serious violation of the arbitrator's mandate.[421] Non-observance of such an agreement could amount to an excess of powers (*excès de pouvoir*) by the arbitrator which could lead to the annulment of the thus rendered award.[422] In fact, any attempt to go beyond the choice of law made by the parties would be an unwarranted expedition, by which the arbitrator would clearly be exceeding her powers.[423] Consequently, several arbitral awards have been annulled for failing to apply proper law.[424] This Section focuses on the annulment rules in several jurisdictions.

This excursion starts with the UNCITRAL Model Law jurisdictions. [425] Model Law is discussed first because its text has been adopted in at least 85 States in a total of 118 jurisdictions.[426] The relevant part of the Model Law containing grounds for a challenge of an award is in its Article 34. This Article recognizes that an award may be set aside by a national court, among other things, in case of an excess of powers by the arbitrators. Using the exact wording, national courts may set aside an award if:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated

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420 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 163; Bentolila, *Arbitrators as Lawmakers*, p. 109, para. 291.

421 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 147; Redfern, Hunter, Blackaby, and Partasides, *Redfern and Hunter on International Arbitration*, p. 469, para. 8.77; Rudolf Dolzer, *Principles of International Investment Law*, p. 305.

422 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 163; Helmut Ortner, "Chapter III: The Award and the Courts, How to apply the applicable Law in International Arbitration", p. 202.

423 Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 58.

424 Schreuer, "Investment Arbitration - A Voyage of Discovery", p. 75.

425 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

426 Data taken from an official UNCITRAL website: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed on 10 April 2022).

> from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.[427]

At first glance, Article 34 of the Model Law concerns only an excess from matter submitted to the tribunal, the subject matter of the dispute, and thus does not apply to an arbitrator's excess with respect to the applicable law. However, some national courts construed Article 34 together with Article 28 of the Model Law which stipulates that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute and the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.[428] According to those courts, although Model Law does not allow review of the award on the merits, including issues of law and issues of facts,[429] acting as *amiable compositeur* without a mandate from the parties to do so or disregarding the applicable law altogether could still result in an annulment of an award.

By way of example, courts of Hong Kong, a Model Law jurisdiction, may set aside an award if the tribunal consciously disregarded the applicable law.[430] In Egypt, a court set aside an award rendered by an arbitrator who acted as *amiable compositeur* without being expressly authorized by the parties to do so.[431] Similarly, in Oman, a court annulled an award because the arbitrator did not apply the contract concluded between the parties.[432] Thus, some Model Law jurisdictions indeed allow for an award's set aside due to the arbitrator's (conscious) disregard of national law.

The question of arbitrators' excess of mandate for disregarding national law is closely connected with the role of national case law and its application by the arbitrators. As

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427 UNCITRAL Model Law, Art. 34(2)(a)(iii).

428 UNCITRAL Model Law, Art. 28(1) and (3).

429 UNCITRAL, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, (United Nations Commission on INTERNATIONAL TRADE LAW, 2012), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf (last accessed on 10 April 2022), p. 140.

430 *American International Group and AIG Capital Corporation v. X Company*, Hong Kong Court of First Instance, HCCT 60/2015 (30 August 2016), cited in Simon Chapman May Tai, Briana Young, 28 September 2016, https://hsfnotes.com/arbitration/2016/09/28/hong-kong-court-dismisses-set-aside-application-after-plaintiffs-fail-to-establish-a-conscious-disregard-of-the-law/ (last accessed on 10 April 2022).

431 *Case No. 72/117*, Cairo Court of Appeal, Egypt (8 January 2002), cited in UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, p. 153, para. 88.

432 *Case No. 2/98*, First Instance Court, Oman (19 October 1998), cited in *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, p. 153, para. 88.

demonstrated above, both civil law and common law countries consider case law to be part of the body of law. Therefore, when an arbitrator is mandated to apply national law, it comprehends also national case law. The consequences or arbitrator's failure to apply national case law, however, differ between the two legal cultures. This is connected to the conceptualization of sources of law articulated by Peczenik, which divides the sources of law into must-source, should-sources, and may-sources.[433] By not applying all the must-sources, an arbitrator is not applying the law, while by not applying all the should-sources, an arbitrator merely erroneously applies the law. In common law countries, case law falls into the category of must-sources, while in civil law countries, case law forms the category of should sources. Accordingly, in Germany,[434] Klaus Peter Berger distinguishes between the deviation from long-standing German case law and acting *ex aequo et bono* proposing that departing from established case law shall not be regarded with the same gravity as if the arbitrator would decide the case *ex aequo et bono*:

> The arbitrator's deviation from the long-standing case law of the BGH must, therefore, not be confused with rendering a decision according to what the arbitrator deems fair and reasonable in the particular case ("*ex aequo et bono*") […].[435]

This clearly demonstrates that not applying case law of a civil law jurisdiction should not be regarded as amounting to a disregard of the applicable law and, consequently, an award should not be annullable on that ground.

In the USA, a non-Model Law jurisdiction, the benchmark for setting aside an award for an arbitrator's failure to apply the applicable law is arbitrator's manifest disregard of the law,[436] a vacatur ground not expressly provided by the Federal Arbitration Act, but developed by the case law.[437] By way of example, the court in *San Martine Compania De Navegacion, S.a. v. Saguenay Terminals Limited*, distinguished between the manifest disregard of the law and a mere error in the application of the law or even failure on the part of the arbitrators to understand

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433 *See* Section 5.1 above.

434 A civil law country.

435 Berger, "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms", p. 253.

436 Garner et al., *The Law of Judicial Precedent*, p. 768; Helmut Ortner, "Chapter III: The Award and the Courts, How to apply the applicable Law in International Arbitration", pp. 202, 203.

437 Philip Danziger J.P. Duffy IV to Kluwer Arbitration Blog, Is Manifest Disregard Alive and Well in the Second Circuit?: A Remand to Find Out, 12 November 2019, http://arbitrationblog.kluwerarbitration.com/2019/11/12/is-manifest-disregard-alive-and-well-in-the-second-circuit-a-remand-to-find-out/ (last accessed on 10 April 2022).

or apply the law. Despite the fact that the US arbitration law does not authorize award's setting aside on the grounds of an erroneous finding of fact or of misinterpretation of law, the court held that the manifest disregard of the law "*might be present when arbitrators understand and correctly state the law, but proceed to disregard the same*".[438] In that particular case, the court did not find any evidence of such behavior and, hence, decided not to annul the award.[439] Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, the court emphasized that manifest disregard of the law is a very narrow standard of review where a mere error in interpretation or application of the law would be insufficient. The court held that to amount to manifest disregard, the award "*must fly in the face of clearly established legal precedent*".[440] It interpreted the threshold of "*manifest disregard*" in the following way: "*[w]hen faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."* The court further held that "*[i]f a court can find any line of argument that is legally plausible and supports the award then it must be confirmed*."[441] Interestingly and conforming to Peczenik's categorization, the US courts held that arbitrator exercises manifest disregard of law if she disregards a clearly established legal precedent; a US court vacated an award for arbitrator's manifest disregard of law when the arbitrator decided not to apply a precedent from the particular circuit, while being well aware of its existence and decided to apply different cases from different circuits instead.[442] This shows, that in common law countries, non-application or rather disregard of certain precedent could

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438 *San Martine Compania De Navegacion, S.a., Appellant, v. Saguenay Terminals Limited, Appellee*, U.S. Court of Appeals for the Ninth Circuit - 293 F.2d 796 (1961), cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 61.

439 *San Martine Compania De Navegacion, S.a., Appellant, v. Saguenay Terminals Limited, Appellee*, cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 61.

440 *Merrill Lynch, Pierce, Fener & Smith, Inc. and Sam Alberico, Plaintiffs-Appellants, v. Stanley F. Jaros, Defendant-Appellee*, United States Court of Appeals,Sixth Circuit, No. 94-3876 (15 November 1995), cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 61.

441 *Merrill Lynch, Pierce, Fener & Smith, Inc. and Sam Alberico, Plaintiffs-Appellants, v. Stanley F. Jaros, Defendant-Appellee*, cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 61.

442 *New York Telephone Company, Plaintiff-Counter-Defendant-Appellee, v. Communications Workers of America Local 1100, AFL-CIO District One, Defendant-Counter-Claimant-Appellant*, United States Court of Appeals,Second Circuit, No. 00-9182 (5 July 2001), cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 61.

very well amount to setting aside of that award since the arbitrator failed to apply the applicable law.

Although the above cases were rendered in the context of international commercial arbitration, their conclusions apply to international investment arbitration when an arbitrator is tasked to treat national (case) law either as a national judge or as a transnational adjudicator.

The second stage at which an award may be reviewed with respect to the law applied by the tribunal is the enforcement stage. Enforcement of non-ICSID awards is—similarly to the annulment process—also a matter of national courts' jurisdiction. Nevertheless, when the request for enforcement of an award concerns an award rendered by a tribunal seated in a different State, that award is likely to be enforced in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). This means that the rules for such enforcement—or rather for refusal of enforcement—are the same across jurisdictions of contracting States, although national interpretations might vary.

Similarly to the Model Law mentioned above, the New York Convention also provides for a possibility to set aside an award if an arbitrator exceeded her mandate. This possibility is embedded in Article V(1)(c) of the New York Convention, which provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> […]
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.[443]

This provision, again, is by some jurisdictions interpreted as providing a possibility to refuse enforcement of an award if the arbitrator disregarded the applicable law, resulting in her un-mandated actions as *amiable compositeur*. Thus, even at the enforcement stage, if arbitrators fail to respect the parties' choice of substantive law it might be considered as a failure to conduct

[443] The New York Convention, Art. V(1)(c).

the procedure in accordance with the parties' agreement, thus exceeding the arbitrators' mandate.[444]

For example, in the enforcement procedure before French courts, in the above-mentioned case, the court rejected the objections against enforcement of an award that was issued in proceedings according to the ICC Arbitration Rules (as valid at that time). The tribunal in the award decided that, by following Article 13 of those rules, which provided that in the absence of any indication by the parties as to the applicable law, they shall apply the law designated by the rule of conflict which they deem appropriate and shall also resort to general contractual principles usually applied in international commerce. As a consequence, the arbitrators decided to apply general principles and trade usages. During the enforcement proceedings, the award debtor claimed that the tribunal had exceeded its mandate by deciding the dispute *ex aequo et bono*, rather than under the proper law of the contract selected through a conflict of law rule. The court rejected this objection, because the parties have agreed on the application of the ICC Arbitration Rules that allowed for the tribunal's application of general principles and trade usages the application of which was justified in that case given the difficulty of applying a particular national law. Thus the tribunal acted within its mandate.[445]

Notably, the ICC Arbitration Rules contain a similar provision up to this date,[446] thus the above-reached conclusion still finds its applicability. This is not contrary to the provisions of the ICC Arbitration Rules that prescribe that the tribunal is entitled to disregard the applicable law only when assuming the powers of *amiable compositeur* in accordance with Article 21(3) of the ICC Arbitration Rules.[447] This provision constitutes parties' agreement on the widening of the applicable law by concrete provisions and principles and, as a consequence, allows the arbitrators to act as transnational adjudicators rather than strictly as national judges.[448]

Furthermore, apart from the refusal of recognition and enforcement of an award on the grounds of excess of arbitrator's mandate if the arbitrator disregards the applicable law, the New

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444 Mazza, *The Secretariat's Guide to ICC Arbitration*, para. 3-752.

445 *Société Norsolor v. Société Pabalk Ticaret Limited Sirketi*, Cour d'appel de Paris (Court of Appeal of Paris), France, No. I I0I92 (15 December 1981), cited in Bentolila, *Arbitrators as Lawmakers*, para. 336.

446 ICC Arbitration Rules (2021), Art. 21(2): "*The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*"

447 ICC Arbitration Rules (2021), Art. 21(3); Mazza, *The Secretariat's Guide to ICC Arbitration*, para. 3-782.

448 See Section 3.3.2 above.

York Convention also recognizes a possibility to refuse the recognition and enforcement on the grounds of an award being contrary to the public policy of the country of enforcement:[449]

> (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.[450]

This ground for refusal of enforcement is infamously known for its rather extensive application and intricately determinable boundaries. This Article provides that an award cannot be enforced, if it is contrary to the public policy of the country of enforcement, without any indication of what could be comprehended by that notion. Generally, the public policy provisions should include rules or principles of the most fundamental importance whose observance is considered essential to the political, social, and economic organization of the country.[451] Using the wide scope of this provision, some jurisdictions considered it to be against their public policy when an arbitrator disregards the national law she was mandated to use.

For example, the Indonesian courts in *Karaha Bodas v. Pertamina* somewhat confusingly decided that the arbitrator's failure to interpret the concept of *force majeure* under the Indonesian Civil Code amounted to a manifest disregard of applicable law and violated Indonesian mandatory rules and thus the arbitrators not only exceeded their powers, but also the award violated Indonesian public policy.[452] Even though the approach presented by Indonesian courts in *Karaha Bodas v. Pertamina* is by no means a mainstream approach to the interpretation of the New York Convention, it showcases a possibility of the grounds national courts might refuse the award's enforcement.

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449 Fifi Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview," *Indonesia Law Review* 2 (2015), p. 152.

450 The New York Convention, Art. V(2)(b).

451 Edward TI Seng Wei, "Why Egregious Errors of Law May yet justify a refusal of enforcement under the 'New York Convention' " *Singapore Journal of Legal Studies* 12 (2009), pp. 605 – 606, citing Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," in *Comparative Arbitration Practice and Public Policy in Arbitration* ed. Pieter Sanders (Deventer: Kluwer Law and Taxation Publishers, 1987). p. 228; and Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", p. 260.

452 *Karaha Bodas v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*, District Court of Central Jakarta, No. 86/PDT.G/2002/PN.JKT.PST (2002), cited in Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", p. 153.

It follows from the brief excurse above, that arbitrator's treatment of national law and national case law matters. In fact, it matters to the extent that improper treatment of national (case) law could result in the award's annulment or refusal of enforcement. Interestingly, the disregard does not have to concern the whole body of national law; it can be also a disregard of certain provisions or, in a common law system, of certain precedent. The possible vacatur or non-enforcement grounds are two: the excess of the arbitrator's mandate and the violation of public policy.

7.1.2. Disregard of national (case) law in ICSID arbitration

The annulment process is completely different for ICSID awards. Since the ICISD arbitration is embedded in the ICSID Convention, which is an international treaty, national courts do not get the chance to scrutinize awards rendered under the ICSID Convention upon their challenge. Instead, the ICSID Convention provides for a review mechanism independent of any State by setting up an *ad hoc* annulment committee for each filing for annulment. Nevertheless, similarly to the non-ICSID review process, ICSID annulment procedure does not allow for review of the award from the point of its substantive correctness, i.e. on the merits, but is concerned solely with the legitimacy of the process that has led to the issuance of the award:[453]

> Article 52
>
> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) *that the Tribunal has manifestly exceeded its powers*;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.[454]

Like the Model Law or other national arbitration laws, Article 52 of the ICSID Convention also recognizes an application for annulment in case of an arbitrator's excess of powers. Unlike the Model Law, the wording of the ICSID Convention is wide enough to comprehend the disregard of national law into its provisions without much interpretative

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453 Schreuer, *The ICSID Convention, A Commentary*, p. 901, para. 11.

454 ICSID Convention, Art. 52(1) (emphasis added).

difficulty. The ICSID Convention requires a *manifest* excess of powers for an annulment committee to set aside an ICSID award. In the context of the research question posed by this dissertation, Article 52 is to be read with Article 42 of the ICSID Convention which provides that the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties (or ascertained by the tribunal in case of lack of parties' agreement) and shall have power to decide a dispute *ex aequo et bono* only if the parties so agree:[455]

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
>
> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
>
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.[456]

As is the case with the non-ICSID awards, an arbitrator's failure to adhere to the provisions of Article 42 of the ICSID Convention to the extent that would amount to her failure to apply proper law, may result in an excess of her powers; Schreuer even talks of a widespread agreement on that point.[457] The vacatur ground of excess of tribunal's powers is available to the parties not only when the tribunal disregards or fails to apply the law actively chosen by them, but also when arbitrators disregard the law determined as applicable in case of the lack of parties' choice (the second sentence of Article 42(1) of the ICSID Convention).[458] Similarly to the challenged non-ICSID cases, the annulment committee in *MINE v. Guinea*, recognized when interpreting the first sentence of Article 42(1) of the ICSID Convention that the choice of law by the parties forms part of the arbitration agreement, i.e. the mandate of the tribunal. By

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455 ICSID Convention, Art. 42(1) and (3): "*(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.* […] *(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree*."

456 ICSID Convention, Art. 42.

457 Schreuer, *The ICSID Convention, A Commentary*, p. 955, para. 196.

458 ibid. p. 959, para. 209; *See also Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 37: "*Non-application of the law agreed by the parties or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of powers*."

disrespecting the choice of law, arbitrators exceed their mandate; if such excess is manifest, the award could be annulled:

> From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.[459]

Identical conclusions to that stated by the annulment committee in *MINE v. Guinea* reached also the annulment committee in *MTD v. Chile*.[460] Thus, it follows from the cited legal doctrine and the mentioned decisions of annulment committees, that a failure to apply applicable law or disregard of such law might constitute a ground for annulment—if such excess of tribunal's powers is manifest.

The qualifier "*manifest*" has been construed in two ways: first, as relating "*not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent*",[461] second, as concerning the extent of the failure or disregard and not clarity.[462] Either way, the construction of the annulment grounds for the disregard of the applicable law under Article 52 of the ICSID Convention shall be restrictive.[463]

This restrictive approach is reflected in annulment committees' approach to claims purporting that by engaging equitable considerations when interpreting and applying the applicable law, the tribunal has exceeded its mandate and acted as *amiable compositeur* (or *ex*

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459 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee (22 December 1989), para. 5.03.

460 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007), para. 44: "*But the ground of manifest excess of powers is not limited to jurisdictional error; it is established that a complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can constitute a manifest excess of powers, as also a decision given ex aequo et bono – that is to say, in the exercise of a general discretion not conferred by the applicable law – which is not authorised by the parties under Article 42(3) of the Convention*."

461 *The ICSID Convention, A Commentary*, p. 938, para. 135, also adopted in *Wena Hotels Ltd. v. Arab Republic of Egypt*, para. 25: "*The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest*." or also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, para. 47: "[…] *the error must be "manifest," not arguable* […]."

462 *The ICSID Convention, A Commentary*, p. 939, para. 139.

463 ibid. p. 974, para. 257.

aequo et bono). Although, theoretically, a decision rendered as *amiable compositeur* without authorization from the parties constitutes a failure to apply the proper law and is subject to annulment,[464] the annulment committees have stressed that the threshold to clear is whether the tribunal identified the applicable law and tried to apply it as it is "*impossible to conclude that the tribunal has disregarded law for the sake of equity.*"[465] The threshold is this low because in interpreting and applying (national) law arbitrators necessarily take into consideration the notions of equity and fairness and balance various interests, as is evident also from the FET standard of protection which literally calls for fair and equitable treatment.[466] This was held by the annulment committee in *Amco v. Indonesia*:

> The *ad hoc* Committee thus believes that invocation of equitable considerations is not properly regarded as automatically equivalent to a decision *ex aequo et bono* which, in view of the determination of the law applicable to the present case (*supra* para. 24) would constitute a decision annullable for manifest excess of powers. Nullity would be a proper result only where the Tribunal decided an issue *ex aequo et bono* in lieu of applying the applicable law.[467]

Furthermore, deciding without proper reference to the applicable law does not automatically mean that the arbitrator decided the dispute as *amiable compositeur*,[468] yet it could potentially constitute a different annulment ground consisting of the failure to state reasons.[469] A different conclusion was reached by the annulment committee in *Klöckner v. Cameroon*, where the annulment committee set aside an award because the tribunal seemed to decide in equity rather than under proper law, despite the fact that it has properly established the applicable law, but only failed to reference it in the application part of the award.[470] The annulment committee admitted though that the tribunal did not make this decision without providing reasons, within the meaning of Articles 48(3) and 52(1)(e) of the ICSID Convention, but applied concepts or principles it probably considered equitable and thus acted as *amiable*

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464 *See above* and also ibid.

465 ibid.

466 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, para. 48.

467 *Amco Asia Corporation and others v. Republic of Indonesia*, para. 28.

468 *The ICSID Convention, A Commentary*, p. 974, para. 257.

469 ICSID Convention, Art. 52(1)(e).

470 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, para. 124.

compositeur.[471] The annulment committee did not discuss the justification of the tribunal's conclusions, but instead postulated—rather than demonstrated—the existence of the applied principles in Cameroonian law, which is based on French law.[472] This decision attracted criticism as it seemed that the annulment committee was not so much concerned with the failure to apply proper law, but with the quality of reasoning of the reached conclusion.[473]

A more pragmatic approach was adopted by the tribunal in *MINE* v. *Guinea*. There, the annulment committee concluded that even though the tribunal in the original decision cited to Article 1134 of the French Civil Code, it should have in fact relied on Article 1134 of the Code Civil de l'Union Française, albeit these two provisions bore not only the same numbering but also had the same contents. Thus the annulment committee held that this error did not warrant annulment.[474]

It remains to answer, whether partial application of the applicable law while disregarding several provisions of that law or some case law amounts to tribunal's excess of powers. Schreuer opines in this regard that a "*pars pro toto argument holding that disregard of one provision amounts to non-application of the law does not appear tenable."*[475] Schreuer claims that had the annulment for partial failure to apply national law been allowed, it would have been indistinguishable from annulment for the erroneous application of national law,[476] and thus akin to allowing an appeal against ICSID awards. In ICSID arbitration a partial non-application of national laws cannot cause annulment.

The process of enforcement of ICSID awards is more straightforward than in the non-ICSID system. Under the ICSID Convention, ICSID awards are subject to automatic enforcement as each contracting State shall recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final

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471 ibid. para. 78.

472 ibid. para. 79.

473 Schreuer, *The ICSID Convention, A Commentary*, p. 967.

474 *Maritime International Nominees Establishment v. Republic of Guinea*.

475 *The ICSID Convention, A Commentary*, p. 964, para. 226.

476 ibid.

judgment of a court in that State.[477] The national court of the enforcing State thus does not have powers to set aside or refuse enforcement of an ICSID award.[478]

7.1.3. Interim summary

Although both non-ICSID and ICSID awards could be set aside if the tribunal exceeded its mandate, the differences in the application of such a vacatur ground are considerable. The foremost difference rests in the quality of considerations of the applicable law that an arbitrator needs to employ to avoid her award being set aside. While both non-ICSID and ICSID awards could be annulled for the arbitrator's complete disregard of the applicable national law, the difference is when it comes to a partial disregard of the applicable law.

In the non-ICSID awards, it appears from the above-cited case law that national courts carefully consider whether the tribunal truly applied national law and consider also the role case law plays in that legal system. Through this approach, national courts held that disregarding an applicable precedent in a common law system (the USA) potentially leads to an annulment of the award for a failure to apply the applicable law. It was opined with respect to a civil law country (Germany) that not following settled case law should not amount to an award's set aside.

The same distinction is not visible in the ICSID system. There, the benchmark to clear by the arbitrator for them to be considered to have applied the law is much lower, more formalistic and less substantive. It appears that as long as an arbitrator gives an impression that she has inquired as to the content of the applicable law and occasionally cites to it, the award would not be annulled on the ground of the arbitrator's disregard of the applicable law. No particular regard also seems to be given to the treatment of case law in that particular legal system and whether it bears elements of the common law or the civil law culture.

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477 ICSID Convention, Art. 54(1).

478 Notably, on 28 June 2021, the Egyptian Parliament approved a draft law expanding jurisdiction of its Supreme Constitutional Court by permitting it to review international arbitral awards rendered against the Egyptian State, including the ICSID awards. It still remains to see what effect such a law would have on the ICSID awards as the contracting States to the ICSID Convention are under obligation to abide by and comply with the terms of the award and the only recourse against such award is through the ICSID annulment procedure (Art. 53(1)) and have the obligation to recognize and enforce such an award within its territories as if it were a final judgment of a court in that State (Art. 54(1)). *See Yasmin Omar Mai El-Sadany, "Egypt's Constitutional Court Amendments: The International System On Its Own Terms," https://carnegieendowment.org/sada/84941. Mahmoud Gawish Muhammad Gharib, Mahmoud Ramzy, "The "Representatives" agree to amend the jurisdiction of the Constitutional Court as a whole," https://www.almasryalyoum.com/news/details/2362660.*

Here, perhaps the difference between the non-ICSID and ICSID annulment system is most visible due to the fact that the non-ICSID award is handed to national judges for consideration while the ICSID award is reviewed by another international tribunal. It can be presumed, hopefully not unreasonably, that national courts are stricter when it comes to proper interpretation and application of national law and national case law, especially if it is the law of that State, than an international annulment tribunal consisting of arbitrators who, most likely, are not qualified to practice the applicable national law.

Additionally, it is visible from the above-cited non-ICSID cases that courts also do distinguish between the particular models of treatment of national law. In France, courts have been presented with the issue of an arbitrator not treating national law as a national judge, but employing international trade usages. There, the courts inquired into the will of the parties and ultimately confirmed the model chosen by the arbitrators, as it was clear that the parties mandated the tribunal to act—in the word of the above classification—as a transnational adjudicator by implementing international considerations such as international trade usages.

7.2. Error in the application of national law and case law as an applicable law

In contrast to the disregard of national law and case law—or rather as a different shade of grey—stands misapplication or erroneous application of the provisions of national (case) law or other conduct of an arbitrator that does not amount to a non-mandated decision as *amiable compositeur* or *ex aequo et bono* or other forms of an excess of the tribunal's mandate.

Generally, there seems to be a rare consensus that a mere error in the application of the national law does not lead to annulment.[479] This might have a logical explanation since it would have been borderline impossible to decide on an erroneous application of substantive law without introducing an appeal mechanism to investment awards and thus wholly undermining the principle of award's finality. Nevertheless, there are also voices claiming that an egregious mistake of law committed by arbitrators would violate the parties' autonomy in a similar way as a review of the awards on merits by national courts. This is because the parties' choice of law forms part of the arbitration agreement and an „*egregious error of law by the tribunal is a betrayal of the parties' choice of governing law, for parties may have contracted for say, English law precisely for a particular rule, and ignoring that rule surely usurps party intent. This in turn leads to a bastardisation of party autonomy, the very concept which is deemed to*

[479] Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 163.

justify 'no review of the merits'."[480] Admittedly, these voices remain in the minority arguably because truly egregious errors of the applicable law by the arbitrators that would shock the notion of justice remain infrequent and protracting the dispute settlement by introducing a court review is less desirable than the comfort of having a final award.

Just like the preceding Section of the thesis, this Section addresses the consequences of the error of law by arbitrators first in the system of non-ICSID awards and then in the ICSID system.

7.2.1. Error in the application of national (case) law in non-ICSID arbitration

As explained above, non-ICSID awards may be challenged at a national plane. Despite this disintegration of the annulment process, many jurisdictions set in unison that an award should not be set aside for a mere erroneous application of national law. Similarly to the structure above, this Section will illustrate various jurisdictions' approaches to arbitrators' error in law, but by no means claims to be an exhaustive overview.

To mirror the order in the above overview, this Section also begins with the UNCITRAL Model Law. As already demonstrated, the Model Law admittedly allows for setting aside of an award in case of an excess of powers by arbitrators. While some jurisdictions included in such an annullable excess of powers also arbitrator's disregard to the applicable law, arbitrator's error in national law application is not regarded with the same gravity. By way of example, a Singaporean court in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* considered it a "*trite*" that awards are not set aside for mere error in the application of law:

> [I]t is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law.[481]

In Spain, annulment on the ground of the excess of the arbitrator's mandate is limited to breaches of the arbitration agreement itself or of the essential procedural guarantees under the

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480 Seng Wei, "Why Egregious Errors of Law May yet justify a refusal of enforcement under the 'New York Convention' ", p. 613.

481 *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, Court of Appeal, Civil Appeal No 59 of 2010 (Summons No 4970 of 2010), SGCA 33 (13 July 2011), para. 33.

Spanish Constitution. Similarly to the above-cited Singaporean case, breaches of substantive law applicable to the case are excluded from the ground for award's annulment.[482]

In the USA, the courts in the context of commercial arbitration held in the case of *Amicizia Societa Nav. v. Chilean Nitrate* that the statutory grounds for vacating or modifying the award of arbitrators do not authorize the setting aside of an award on grounds of an erroneous finding of fact or misinterpretation of law.[483] Similarly, the court in the above-cited *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros* emphasized that manifest disregard of the law is a very narrow standard of review where a mere error in interpretation or application of the law would be insufficient.[484]

Although the above cases were decided within the ambit of international commercial arbitration, their findings are doubtlessly applicable also to the situation of international investment arbitration where arbitrators would be required to treat national (case) law as a national adjudicator or as a transnational adjudicator. It follows from those cases, that national courts are hesitant to annul an award in case an arbitrator identifies the applicable law and applies it but makes an error in such application.

Applying this to Peczenik's categorization of sources of law, civil law jurisdictions consider case-law as a "should-source", the omission of which does not result in non-application of applicable law, but merely misapplication thereof. Such a situation thus falls into this category (contrary to the situation of omitting application of a common-law precedent) and would not represent a ground for the annulment of the award.

Quite in a different light stands the English Arbitration Act of 1996. Conventionally, it recognizes a challenge of an award for an excess of arbitrator's mandate:

> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

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482 *Uniprex S.A. v. Grupo Radio Blanca*, Madrid Court of Appeal, Spain, Case No. 178/2006-4/2004 (22 March 2006), cited in UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, p. 141, para. 26.

483 *San Martine Compania De Navegacion, S.a., Appellant, v. Saguenay Terminals Limited, Appellee*.

484 *Merrill Lynch, Pierce, Fener & Smith, Inc. and Sam Alberico, Plaintiffs-Appellants, v. Stanley F. Jaros, Defendant-Appellee*.

> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> […]
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67) […].[485]

Similarly to other jurisdictions, in *Lesotho Highlands Development Authority v. Impregilo SpA and others*, the House of Lords rejected a challenge of an award on the grounds of excess of powers of the tribunal under Section 68(2)(b) of the English Arbitration Act 1996, when it distinguished between the erroneous exercise by an arbitral tribunal of an available power vested in it (a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. While the first example was not capable to bring about the annulment of an award on the basis of an excess of powers, in the second example, the award would be liable to annulment under Article 68 of the English Arbitration Act 1996.[486]

The House of Lords took a different stand in the context of Section 69 of the English Arbitration Act 1996 which allows the appeal on the points of law (if it is not excluded by the parties' agreement). Section 69 is a unique instrument of English arbitration law that is uncommon among other national arbitration laws. Despite the generally accepted notion of finality of arbitral awards, Section 69 of the English Arbitration Act allows for the appeal against an award on the points of law:

> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> (3) Leave to appeal shall be given only if the court is satisfied—
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award—

485 English Arbitration Act (1996), Section 68(1),(2).

486 *Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants)*, UKHL 43 (2005).

> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.[487]

In the *Chrysalis case*, when presented with an application for appeal on a question of law against an award (albeit under the Arbitration Act preceding the English Arbitration Act 1996), Lord Justice Mustill considered three stages of arbitrator's process of reasoning: (1) the arbitrator ascertaining the facts; (2) the arbitrator ascertaining the law, which comprises not only the identification of all material rules of the statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached; and finally (3) the arbitrator reaching her decision in the light of the facts and the law so ascertained.[488] Lord Justice Mustill stressed that only the second step is appealable.[489]

In *Sinclair v. Woods of Winchester Ltd*, the court considered that "*if there is a point of law on which the Arbitrator was obviously wrong, it would be just and proper for the Court to intervene*."[490] Thus, in *Carboex SA v. Louis Dreyfus Commodities Suisse SA*, the court decided to set aside an award that failed to apply relevant precedents that formed part of the applicable law, here English law, and thus erred in the application of the governing law.[491] This case stands in interesting contrast to the above-cited *New York Telephone Company v. Communications Workers of America*,[492] where the US court set aside an award for a failure to apply relevant precedent by the arbitrator, which the court considered to be a manifest disregard of law. Interestingly, English judges set aside an award for failure to apply precedents not on the basis of

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487 English Arbitration Act (1996), Section 69(1),(3).

488 *Finelvet AG v. Vinava Shipping Co Ltd (The Chrysalis)*, 1 WLR 1469, 1 Lloyds Rep 503 (1983).

489 ibid.

490 *Sinclair v. Woods of Winchester Ltd*, EWHC 3003 (TCC) (2006), cited by Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, p. 32.

491 *Carboex SA v. Louis Dreyfus Commodities Suisse SA*, EWHC 1165 (2011), cited in Amaral, "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil", p. 20.

492 *New York Telephone Company, Plaintiff-Counter-Defendant-Appellee, v. Communications Workers of America Local 1100, AFL-CIO District One, Defendant-Counter-Claimant-Appellant*.

the excess of powers, but as a consequence of the appeal on the questions of law. This, however, might be caused by the fact that the FAA (the US arbitration act) does not allow for an appeal against the award. Either way, awards rendered in both jurisdictions are under threat of being set aside for the arbitrator's failure to ascertain and apply relevant precedents.

This brings us, once again, to the enforcement stage of an award. Similarly to the doctrine at the annulment stage, national courts do not allow for refusal of award's enforcement for mere errors of law, "*unless the tribunal has been so erroneous in its conduct that fundamental justice calls for it to be corrected*."[493] For example, in *Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd*, the Federal Court of Australia called for a restrictive interpretation of the grounds for refusal of award's enforcement and adopted the principle of no merits review.[494] Specifically to an error of law, in *Wilko v. Swan*, the US court decided that an error of law is not sufficient to bring about the award's non-enforcement. Such an error must be so extreme that it would amount to manifest disregard of law,[495] as described above.

Nevertheless, the public policy ground for refusal of an award's enforcement can be used also in case of mere errors of law, if such an error violates principles essential to the political, social, and economic organization of the country.[496] Indian judiciary endorsed an extensive understanding of Article V(II)(b) of the New York Convention providing for the refusal of enforcement of a foreign award for the public policy reasons, and included even a mere error of law among those grounds.[497] In *Oil & Natural Gas Corporation Ltd. v. Saw Pipes*, the court held that award is opposed to public policy and could be set aside if its enforcement would be contrary to: (a) fundamental policy of Indian law; (b) the interest of India; (c) justice or morality;

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493 Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", p. 147.

494 *Uganda Telecom Limited v. Hi-Tech Telecom Pty Ltd*, Federal Court of Australia, FCA 131 (2011), cited in Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", p. 158.

495 *Wilko v. Swan*, United States Supreme Court, 346 U.S. 427 (1953), cited in Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", p. 155.

496 *See* Section 7.1.1 above.

497 Ewelina Kajkowska Sherina Petit, "Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement," (August 2019), https://www.nortonrosefulbright.com/de-de/wissen/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement#22 (last accessed on 10 April 2022); Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", p. 157.

if it is (d) patently illegal; or (e) so unfair or unreasonable that it shocks the conscience of the court.[498] This line of interpretation is said to have been since abandoned.[499]

However, even abstracting from the extensive interpretation developed in jurisdictions like India, egregious errors that are incompatible with the notion of justice may result in award's refusal of enforcement by invoking the public policy ground in Article V(2)(b) of the New York Convention discussed above.[500]

7.2.2. Error in the application of national (case) law in ICSID arbitration

The Section above established that application of law other than that agreed to by the parties constitutes an excess of powers and is a valid ground for annulment of an award.[501] Generally, despite its general wording, Article 52(1) of the ICSID Convention is not interpreted as to allow for annulment of an award on the basis of an error of law no matter how egregious.[502] An error in the application of the proper law, even if it leads to a manifestly incorrect application of the law, does not lead to award's annulment.[503] This is connected with the above demonstrated low standard in ICSID arbitration that an arbitrator must clear in order to be considered that she has applied the applicable law. Under one view, it suffices for the award to correctly identify the applicable law and contain a minimum analysis of the principal legal issues under that law and it should suffice to satisfy that the tribunal applied the law.[504]

Accordingly, in *Soufraki v. UAE*, the annulment committee emphasized that an annulment committee should not be mistaken for a court of appeal providing a remedy to the arbitrator's erroneous application of the applicable law. Instead, the annulment committee's task

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498 *Oil & Natural Gas Corporation Ltd. v. Saw Pipes*, Supreme Court of India, SCC 705 (2003).

499 Sherina Petit, "Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement".

500 *See e. g.* decision *Zimbabwe Electricity Supply Authority v. Maposa*, Supreme Court of Zimbabwe, S.C. 114/99, CLOUT case 323 (21 December 1999), where the court, while observing the need to construe the public policy ground narrowly, refused to enforce an award which was, in the court's opinion, based on "*so fundamental an error,* […] *that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that* [...] *the conception of justice in Zimbabwe would be intolerably hurt by the award, then it should be contrary to public policy to uphold it.*"

501 *See* Section 7.1.2 above.

502 Schreuer, *The ICSID Convention, A Commentary*. paras. 902 – 903. *See also* Balaš, "Review of Awards." p. 1138.

503 Schreuer, *The ICSID Convention, A Commentary*, p. 955, para. 195.

504 Gabriel Bottini, "Special Focus Issue Present and Future of ICSID Annulment: The Path to an Appellate Body?," *ICSID Review* 31, no. 3 (2016), p. 722.

is to review, whether the tribunal applied the law it was bound to apply. Only failure to apply the applicable law could bring about the annulment of an ICSID award, not mere errors of interpretation or application:

> The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law would constitute a manifest excess of power on the part of the Tribunal and a ground for nullity under Article 51(1)(b) of the Convention. The ad hoc Committee approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.[505]

That errors of law are not grounds for annulment of an award was held also by the annulment committees in *Repsol v. Petroecuador,*[506] *Klöckner v. Cameroon*,[507] and *MINE v. Guinea* which reiterated that "*[d]isregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.*"[508]

The annulment committee in *CDC v. Seychelles* was presented with a claim for annulment of an award for arbitrators' failure to consider certain precedents when interpreting and applying English law, as well as various legislative acts and legal doctrines. By doing so, Seychelles claimed that the tribunal exceeded its powers. The annulment committee disagreed and held that such an error cannot amount to the award's annulment. The annulment committee noted that the tribunal did not ignore cases cited by the respondent State, but simply found them inapplicable while also relying on other cases. It was not for the annulment committee to review

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505 *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 85.

506 *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment (8 January 2007), para. 38, holding that "[…] *in ICSID's annulment system, the errors made in the application of a law, in contrast with the breach of said law (or of legal rules agreed upon by the parties), do not constitute, pursuant to Article 42 of the Convention, grounds for annulment of an award.*"

507 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, para. 169.

508 *Maritime International Nominees Establishment v. Republic of Guinea*, para. 5.04.

the correctness of the application process of English law; rather, the annulment committee was tasked to determine whether the tribunal endeavored to apply English law or not. By seeing that the tribunal expressly stated that it had applied English law and made repeated citations to English law throughout the award, the annulment committee was satisfied.[509]

Despite the clear doctrine providing that a mere error of law cannot bring about the annulment of an ICSID award on the grounds of excess of tribunal's powers as opposed to a blatant disregard of the applicable law, an error in the application of the law and the failure to apply the proper law have become increasingly indistinguishable.[510] Take the decision of the *ad hoc* annulment committee in *Amco v. Indonesia* as an example. The annulment was based on a claim that the tribunal failed to apply an essential provision of the correctly chosen applicable law, not that it has failed to identify the proper law. Indonesia, the respondent State, claimed that the tribunal had ignored a rule of Indonesian law that only registered investments recognized by the competent Indonesian authority were to be considered investments.[511] By doing so, the tribunal was to exceed its powers. Just like the tribunals cited above, the annulment committee pronounced that only a failure to apply the proper law can constitute a ground for annulment under Article 52(1)(b) of the ICSID Convention as opposed to a mere misapplication or error of law.[512] Yet, the annulment committee in *Amco v. Indonesia* annulled the award as it considered that the tribunal failed to apply the applicable law. Thus, despite the proper identification of the governing law and its content, the award was annulled for not referring to any specific Indonesian statutory or regulatory provision or to any Indonesian case law.[513] According to Schreuer, the "*ad hoc Committee simply came to a different interpretation and described what it perceived as an erroneous application as a non-application*."[514] This annulment decision thus arguably passes the borderline of an appeal decision.

In *MTD v. Chile* the annulment committee emphasized the importance of not reviewing issued awards on the points of law by deciding whether arbitrators made an erroneous

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509 *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (29 June 2005), para. 45.

510 Christoph H. Schreuer, "From ICSID Annulment to Appeal: Half Way Down the Slippery Slope," *Law and Practice of International Courts and Tribunals* 10 (2011), p. 225.

511 *Amco Asia Corporation and others v. Republic of Indonesia*, paras. 93 – 105.

512 ibid. para. 23.

513 ibid. para. 58; Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 174.

514 Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration", p. 174.

application of that law. Put simply, this approach "*goes far down the slippery slope of appeal for error of law*."[515] The annulment committee then continued and held that an award could be annulled "*if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be "manifest," not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*"[516] While the annulment committee labelled the application of a different law as a manifest error of law, such labelling should not confuse the reader into thinking that a mere error of law could, in fact, be a ground for award's annulment. The annulment committee in *MTD v. Chile* only dressed up disregard of the applicable law as a "*manifest error of law*".

In *Sempra v. Argentina*, the annulment committee also held that it "*would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.*"[517] Yet, such a statement was only an *obiter dicta* for the case since the annulment committee ultimately found that the tribunal failed to apply the applicable law altogether and thus liberated them from the need to review whether a manifest error of law was committed by the tribunal or not.[518] It thus remains unclear, what are the circumstances under which the tribunal would conclude that an error of law is manifest as to constitute an excess of powers of the tribunal.

Abstracting thus from the holdings of the annulment committees in *MTD v. Chile* and *Sempra v. Argentina*, it seems to be widely accepted that a mere error of law cannot constitute an arbitrator's excess of powers. If one was to admit that a manifest error of law could be a vacatur ground, further guidance would be needed to distinguish it from the appeal on the point of law or from a disregard of the applicable law. As is it, the *MTD v. Chile* committee merely described a situation of disregard of the applicable law (rather than an error of law) and the *Sempra v. Argentina* committee only made an unnecessary disclaimer that it did not wish to rule out the possibility while not actually deciding on the matter in that particular case.

To extend these conclusions to the case law categorization drawn above, disregard or misapplication of judicial decisions originating in civil law system causes a mere error of law.

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515 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, para. 47.

516 ibid. para. 47 (internal citations omitted).

517 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010), para. 164.

518 ibid. para. 165.

Thus, such an omission should not be able to bring about the annulment of an ICSID award, if, however, such disregard is not manifest. Disregarding judicial decisions from common law system, on the other hand, could potentially be understood as arbitrators' failure to apply the applicable law at all, however, annulment committees in the ICSID arbitration seem to be less strict.

7.2.3. Interim summary

The finality of an arbitral award is an important principle that should not be easily circumvented. It means that it should not be possible for another decision-maker—either national or international—to review a rendered award from the point of view of the arbitrator's factual findings and legal conclusions. This Section discussed a situation in which an award is being challenged for an arbitrator's error in the application of the applicable law. To admit such a challenge would come indistinguishably close to an appeal on the points of law and would thus undermine the award's finality.

For this reason, tribunals in non-ICSID and ICSID arbitration held that a mere error of law cannot constitute a vacatur ground. This general rule is not, however, a safe harbor. A non-ICSID award can be still battled at the enforcement stage on the ground that the error of law violated the public policy of the enforcing State. In the ICSID system, the doctrine of manifest error of law, if developed, could break down the general rule of not allowing for annulment for arbitrator error of the applicable law.

7.3. Failure to correctly apply national law and case law as a matter of fact

Previous Sections observed the possible consequences of arbitrators' failure to apply national (case) law or errors in doing so when she was mandated to treat national (case) law either as a national judge or as a transnational adjudicator. This Section focuses on those cases, where the arbitrator is mandated to treat national law and national case law as a matter of fact.

As established in Chapters 3, 4, and 6 above, an arbitrator could be mandated to treat national (case) law as a matter of fact. Instances in which arbitrators should treat national (case) law as a matter of fact are typically when arbitrators decide on a claim for unlawful expropriation or violation of the FET standard. In those instances—as explained above—national law plays only an ancillary role. The standard of protection whose breach is claimed is defined by international law and so is its breach. Necessary assessment on the level of national law is

thus done only as a matter of fact. Therefore, the conclusions reached in the previous Sections of this Chapter on the disregard of applicable law or the error of law do not apply in such a case as, here, national law is not construed as the applicable law.

Nevertheless, the principle of finality of an arbitral award still comes to the forefront. This is because this principle prevents the reopening of the substance or the merits of the dispute at the annulment or enforcement stage—irrespective of whether in ICSID or non-ICSID arbitration. To allow for a review of the arbitrator's treatment of facts would fly in the face of this principle. Failure to observe or blatant disregard of facts should thus not be capable of bringing about annulment or unenforceability of an arbitral award.

7.4. Conclusion

This Chapter inquired after the consequences of an arbitrator's failure to treat national law and national case law properly. It found that the answer depends on the nature of the arbitrator's offence against national law and national case law and divided the nature of the possible offences into two main categories: arbitrator's disregard of the applicable national (case) law and arbitrator's error of the applicable law. The Chapter further found that, generally, disregard of the applicable law is subjected to annulment, because in such a case the arbitrator is deemed to have exceeded her mandate, while a mere error of law is not capable of producing such a result.

This differentiating corresponds to Peczenik's concept of sources of law. Peczenik considered written law and precedents in common law systems to be part of the must-sources of law, the sources that, if not applied, would result in the decision-maker not applying the law at all. Thus, disrespecting the must sources would constitute a disregard of the applicable law and would thus be a ground for annulment of such award.

Case law in the civil law systems, however, falls into the category of should-sources and as such, if not applied, may constitute a mere error of law. This means that if the tribunal does not apply settled case law from a civil law jurisdiction, such an omission should not result in the award's set aside on the ground of the arbitrator's excess of mandate. The award debtor, however, still claim that a decision rendered without application of principles contained in the omitted case goes against the State's public policy.

Generally, ICSID and non-ICSID vacatur grounds are the same (or essentially identical), but they differ in their application. In the challenge proceedings against a non-ICSID award, national courts seem to carefully review the arbitrator's process of application of national law to see whether she disregarded it. The review goes as far as national courts considering whether the applied law is of common law or civil law origin and whether an arbitrator has been mandated to apply the law as a national judge or whether she could employ some other considerations, such as international trade usages, and is thus mandated to apply national law as a transnational adjudicator. The annulment process of an ICSID award seems to be less thorough and less substantial. It seems that the annulment committee usually only formally reviews whether the applicable law has been identified and whether the tribunal referenced to it.

Arbitrators—especially those mandated to decide the case as transnational adjudicators in non-ICSID arbitration—must tread lightly when applying national law to the merits of the dispute at hand. They are walking a fine line between disregarding the parties' intentions and issuing an award that would be unenforceable or could be set aside for disregarding the law.

Conclusion

It is the time to collect the strands of a lengthy argument for an answer to an inquiry of how an arbitrator in investment treaty arbitration should treat national case law is not a simple one. The crux of the complexity lies in the hybrid nature of investment treaty arbitration.

This thesis thus first inquired after the nature of investment treaty arbitration and the role of its arbitrators. International investment arbitration combines aspects of both international commercial arbitration and pure public international law adjudication, albeit these aspects are represented in the non-ICSID and ICSID arbitration to different extents. While non-ICSID arbitration is still attached to national *lex arbitri* and is subjected to the jurisdiction of national courts of its seat where the award can be also challenged, ICSID arbitration evinces no such attachment. Being established within the framework of an international treaty, the *lex arbitri* of ICSID arbitration is international law. A common ground for both types of tribunals is that they decide on the international responsibility of States in a proceeding where one of the parties is an individual or a private law legal entity (traditionally not recognized as subjects of international law). This hybrid nature of investment treaty arbitration means that works on both international commercial arbitration and public international law adjudication are relevant for this research.

Similarly hybrid is also the role of its arbitrators. In investment treaty arbitration, arbitrators oscillate between acting strictly as agents of the parties when applying national law and acting as agents not only of the parties but also of a broader international community when applying international investment law. This is because when applying national law, arbitrators are not looked at as its creators or interpreters; such a role is safeguarded by national courts. On the other hand, when applying international investment law, arbitrators should think also about the harmonious development of such law. In that respect, they are part of a wider community. Nevertheless, even when adopting a strict principal-agent relationship when interpreting national law, arbitrators should not render arbitrary and unpredictable awards without regard to national judicial decisions.

This hybrid nature of international investment arbitration resurfaces again when addressing the applicable law and possible claims an investment treaty tribunal can hear. When answering the second sub-question asking "*Is national law the applicable law in investment treaty disputes?*" the thesis analyzed many choice-of-law provisions contained in IIAs and various arbitration rules. From this analysis, it is apparent that there is not one uniform and

universally agreed on provision indicating either national law or international law to govern investment disputes. In fact, IIAs' choice-of-law clauses select either that only international or only national law is applicable, or—more often—that both of them apply, but giving priority either to the national law or the international law. The ICSID arbitration rules and the most prominent non-ICSID arbitration rules generally give broad discretion to the arbitral tribunal to choose the law that is most appropriate considering the dispute submitted to them, while also urging the arbitrators to consider the terms of the parties' contract or any applicable trade usages. Interestingly, tribunals or parties need not stick to one national system of laws when choosing the applicable law but could combine different rules from different legal orders. This demonstrates not only the applicability and indeed importance of national law in international investment disputes but also the want of uniform rules on how to treat national law when settling investment claims.

This want brought this thesis to its third research sub-question asking "*How should an arbitrator in investment treaty arbitration treat national law?*" This thesis devised three models of treatment of national law and national case law by arbitrators in investment treaty arbitration which, individually, appear in current scholarly writing, but have never been confronted with each other and against the claims to which they can be applied.

The first model is derived from the treatment which the ICJ (and the PCIJ) developed with respect to national law and national case law when deciding cases presented to it. This model asks for treating national law and consequently national case law as a mere matter of fact. Under this model, great deference should be given to the conclusions reached by national courts which should not be substituted by legal analysis of the arbitrators under that national law. From the way of treatment of national (case) law also stems the ways in which an arbitrator may deviate from national case law, as they should overlap with the reasons for which an arbitrator may decide not to ascertain any or little probative value to a factual exhibit.

The second model calls for the treatment of national law and national case law of a national judge of the particular State. Under this model, the treatment of law and an arbitrator's possibilities to deviate from national case law are straightforward: at the core of an arbitrator's considerations should be a question: "*What would a judge of that particular State do?*"

The third, and last, model is the most variable one. It views an arbitrator as a transnational adjudicator. In this model, the parties to the dispute mandated the arbitrator not only to apply specific national law but also not to be strictly bound by its provisions and the

national interpretation provided by the national courts. Instead, the parties provided the arbitrator with certain international or transnational considerations which she should implement when interpreting and applying national law. This can result in as little as arbitrators treating national law almost identically to the second model (i.e., as a national judge), but implementing consideration of international trade usages or principles. However, the parties may also provide an arbitrator with greater liberty in the interpretation and application of national law, but it always depends on the agreement of the parties and thus the mandate the arbitrator receives. Accordingly, an arbitrator should treat national case law and decide to deviate from it in accordance with her mandate. This means that not one uniform answer may be provided here, as it would be judged on a case-by-case basis, depending on the considerations an arbitrator is allowed to employ in her decision-making.

Interestingly, each of these models has its place in investment treaty arbitration and an arbitrator is required to adopt the one that suits the claim she is deciding. In responding to the research sub-question "*Should an arbitrator's treatment of national judicial decisions change according to the claim the arbitrator is tasked to decide*?" this thesis presented a myriad of factors an arbitrator must consider in order to choose the method of treatment of national law applicable to a particular case, or rather to a particular claim within that case. These factors or considerations can be divided into two groups: the hard factors and the soft factors. The hard factors are those set forth by international or national law or those agreed on by the parties; the soft factors are derived from the practice of investment treaty tribunals without having any apparent legal anchoring.

The two primary *hard factors* include the necessity to consider the choice-of-law clause and the type of investment claim brought before the tribunal. The need to first consider the choice-of-law clause is evident, it gives the arbitrator the laws she can consider when deciding any claim brought before her and thus provides the limits of her powers. These clauses might be basically of two types: one that provides for the application of both international law and national law, and one that provides only for the application of international law in which national law shall be treated only as a matter of fact. The arbitrator then proceeds to consider the claim brought before her in the light of the chosen choice-of-law clause.

This thesis considered four types of investment claims: a claim for unlawful expropriation, for the breach of the FET standard of protection, a claim brought under an umbrella clause, and a pure contractual claim. In the first two claims—the expropriation and

the FET claim—national law always plays an ancillary role and is relevant only as a matter of fact. The applicable law to those claims is international law. This holds true when either of the two choice-of-law clauses is applicable. When it comes to the claims brought under the umbrella clause of the particular IIA, the situation is different. There, the arbitrator must choose between different conceptions of umbrella clauses. Under one, contractual claims brought under an umbrella clause are internationalized and are considered as treaty claims, under another, the contractual claims retain their national governing law. The umbrella clause conception chosen by the arbitrator influences the method in which an arbitrator treats national law. Should the arbitrator choose that the umbrella clause internationalizes the contractual claims, then the applicable law would be international law and national law would be relevant only as a matter of fact. Should the contractual claims brought under the umbrella clause retain their governing law, then the arbitrator treats that law either as a national judge or as a transnational adjudicator (depending on the will of the parties). Naturally, if the choice-of-law clause only provides for the application of international law, the second conception cannot be applied and the tribunal should internationalize the claims brought under the umbrella clause. Lastly, an arbitrator should always treat pure contractual claims either as a national judge or as a transnational adjudicator (depending on the will of the parties). If the choice-of-law clause provides only for application of international law, an arbitrator shall interpret her mandate restrictively as not allowing her to hear claims where national law would not apply and play—at most—an ancillary role.

Another hard factor an arbitrator needs to consider when approaching national case law is the legal tradition of the applied national law. This factor was identified when answering to the research sub-question: "*How is an arbitrator's treatment of national case law influenced by how the said national legal system perceives the binding nature of its case law?*" Although the practical binding effect of common law and civil law judicial decisions is borderline the same, they still hold different places in their respective legal systems. In this respect, I used the categorization developed by Peczenik, who divided sources of law into three groups: must-sources, should-sources, and can-sources. Importantly, precedents in common law systems are considered as must-sources, civil law judicial decisions fall into the should-sources category. This distinction is crucial at the annulment and enforcement stage which brings us to the final research sub-question: "*Can an award be annulled or its enforcement refused if an arbitrator fails to accord the proper treatment to national judicial decisions in investment treaty arbitration?*" While the omission of application of should-sources is considered as an error of law which is generally not capable of bringing about the award's annulment or unenforceability,

omission to apply must-sources results in arbitrator failing to apply the applicable law, which is considered as a vacatur ground. Thus, the legal tradition of the applicable national law matters. Arbitrator's omission or misapplication of judicial decision of civil law tradition—which are considered as should-sources—will most likely not result in annulment or non-enforcement of arbitral award, because it would be considered as a mere error of law. On the other hand, arbitrator should treat case law of common law tradition with much more vigilance. Those decision are considered as must-sources, which means that if not applied, an arbitrator failed to apply the applicable law altogether. Such misconduct could lead to award's annulment or refusal of its enforcement.

Apart from the above hard factors, an arbitrator should also consider whether she acts within the ICSID system or non-ICSID system as a *soft factor*. This factor comes into relevance especially when considering an arbitrator's best-effort obligation to render an enforceable award that would not be annulled. The relevant difference between the systems in this context is that the annulment and enforcement proceedings of the non-ICSID awards are done by national courts, while ICSID awards are subjected only to a review by an annulment committee (i.e., another international tribunal). Arguably, the risk of a national court setting aside an award disregarding or misapplying national law or case law is higher than that of an annulment committee in the ICSID arbitration, especially if the applicable law is the law of the State of the seat where the award is to be challenged. Relevant case law and arbitral awards show that national courts are more thorough when reviewing the treatment of national case law by arbitrators, while international tribunals are typically more benevolent to misapplication of certain case law.

It follows that to determine the correct way of treating national case law one must immerse oneself into a complex matrix of factors and considerations influencing the choice. It also follows that there is no simple answer to the question I asked at the beginning of this thesis. In the true lawyerly fashion, I thus conclude that the answer to a question: "*How should an arbitrator in investment treaty arbitration treat national judicial decisions?*" most honestly is: "*It depends.*" Nevertheless, thanks to this dissertation, an arbitrator knows what it depends on.

Sources

1. Books, Electronic Books, and Book Chapters

Balaš, Vladimír. "Review of Awards." In *The Oxford Handbook of International Investment Law*, edited by Federico Ortino Peter Muchlinski, and Christoph Schreuer: Oxford University Press, 2008.

Balaš, Vladimír, Pavel Šturma. *Nové mezinárodní dohody na ochranu investic.* Praha: Wolters Kluwer, 2018.

Banifatemi, Yas. "The Law Applicable in Investment Treaty Arbitration." In *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, edited by Katia Yannaca-Small: Oxford University Press, 2018.

Bentolila, Dolores. *Arbitrators as Lawmakers.* International Arbitration Law Library. Vol. 43: Kluwer Law International, 2017.

Bhuiyan, Sharif. *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System.* Cambridge University Press, 2007.

Blessing, Marc. *Introduction to Arbitration: Swiss and International Perspectives.* Basel: Helbing & Lichtenhahn, 1999.

Bobek, Michal. "Precedent v tradici common law." In *Judikatura a právní argumentace*, edited by Zdeněk Kühn et al. Michal Bobek. Praha: Auditorium, 2013.

Bobek, Michal. "Význam judikatury v kontinentálním právu." In *Judikatura a právní argumentace*, edited by Zdeněk Kühn et al. Michal Bobek. Praha: Auditorium, 2013.

Born, Gary. *International Arbitration: Law and Practice.* 2nd ed.: Kluwer Law International, 2015.

Born, Gary. *International Commercial Arbitration.* 2nd ed.: Kluwer Law Intl, 2014.

Campbell McLachlan, Laurence Shore, and Matthew Weiniger. *International Investment Arbitration : Substantive Principles.* 2nd ed. Oxford: Oxford University Press, 2017.

Caplan, David D. Caron; Lee M. *The UNCITRAL Arbitration Rules: A Commentary.* 2nd ed.: Oxford University Press, 2013.

Capper, Phillip. "Chapter 3. 'Proving' the Contents of the Applicable Substantive Law(s)." In *The Application of Substantive Law by International Arbitrators*, edited by Pierre Mayer Fabio Bortolotti: Dossiers of the ICC Institute of World Business Law, 2014.

Crawford, James. *Brownlie's Principles of Public International Law.* 9th ed.: Oxford University Press, 2019.

Čepelka, Čestmír, Pavel Šturma. *Mezinárodní právo veřejné.* 2nd ed. Praha: C. H Beck, 2018.

de Boisséson, Matthieu. "Chapter 8. Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective." In *The Application of Substantive Law by International Arbitrators* edited by Pierre Mayer Fabio Bortolotti, Kluwer Law International, 2014.

de Brabandere, Eric. *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications.* United Kingdom: Cambridge University Press, 2014.

Derains, Yves. "Public Policy and the Law Applicable to the Dispute in International Arbitration." In *Comparative Arbitration Practice and Public Policy in Arbitration* edited by Pieter Sanders. Deventer: Kluwer Law and Taxation Publishers, 1987.

Dolzer, Rudolf, Christoph Schreuer. *Principles of International Investment Law.* 2nd edition ed.: Oxford University Press, 2012.

Douglas, Zachary. *The International Law of Investment Claims.* Cambridge University Press, 2009.

Fahner, Johannes Hendrik. *Judicial Deference in International Adjudication: A Comparative Analysis.* Bloomsbury Publishing, 2020.

Gaillard, Emmanuel. *Aspects philosophiques du droit de l'arbitrage international.* Les livres de poche de l'Academie de droit international de La Haye. Martinus Nijhoff Publishers, 2008.

Garner, Bryan A. et. al., *The Law of Judicial Precedent.* Thomson Reuters, 2016.

Greer, Steven. *Human rights files No. 17: The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. Council of Europe Publishing, 2000. https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf.

Gruszczynski, Lukasz, Wouter Werner. *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation.* Oxford University Press, 2014.

Gruszczynski, Lukasz, Wouter Werner. "Introduction." In *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, edited by Wouter Werner Lukasz Gruszczynski. Oxford: Oxford University Press, 2014.

Jenks, W. C. *The Prospects of International Adjudication.* London: Stevens & Sons Ltd., 1964.

Jolivet, Emmanuel, Giacomo Marchisio & Fabien Gélinas. "Chapter 9: Trade Usages in ICC Arbitration." In *Trade Usages and Implied Terms in the Age of Arbitration*, edited by Fabien Gelinas: Oxford University Press, 2016.

Kjos, Hege Elisabeth. *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law.* Oxford University Press, 2013.

Lalive, Pierre. "Transnational (or Truly International) Public Policy and International Arbitration." In *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*, edited by Pieter Sanders, 258. New York: Kluwer Law International, 1987.

Lord Collins of Mapesbury et. al, *Dicey, Morris & Collins: The Conflict of Laws.* 14 ed. 2006.

Malenovský, Jiří. *Mezinárodní právo veřejné, jeho obecná část a poměr k vnitrostátnímu právu, zvláště právu českému.* 4th ed. Brno: DOPLNĚK, 2004.

Mayer, Pierre. "Chapter 3: The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator." In *Is Arbitration only As Good As the Arbitrator? Status, Power and Role of the Arbitrator*, edited by Laurent Lévy Yves Derains: Dossiers of the ICC Institute of World Business Law, 2011.

Mazza, Jason Fry; Simon Greenberg; Francesca. *The Secretariat's Guide to ICC Arbitration*. 2012.

McLachlan, Campbell. "Investment Treaty Arbitration: The Legal Framework." In *50 Years of the New York Convention, ICCA Congress Series no 14*, edited by Albert Jan van den Berg. Alphen aan den Rijn: Kluwer Law International, 2009.

Mistelis, Loukas A., Julian D.M. Lew, Stefan Kröll *Comparative International Commercial Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2003.

Mohebi, Moshen. *The International Law Character of the Iran-United States Claims Tribunal.* The Hague, London, Boston: Kluwer Law International, 1999.

Newcombe, Andrew Paul, Lluis Paradell. *Law and Practice of Investment Treaties: Standards of Treatment.* Kluwer Law International, 2009.

Ortner, Helmut, Yoanna Schuch. "Chapter III: The Award and the Courts, How to apply the applicable Law in International Arbitration." In *Austrian Yearbook on International Arbitration 2017*, edited by Peter Klein Christian Klausegger, et al.: Manz'sche Verlags- und Universitätsbuchhandlung, 2017.

Paulsson, Jan. "The Role of Precedent in Investment Arbitration, Arbitration under International Investment Agreements: A Guide to the Key Issues." edited by Katia Yannaca-Small: Oxford University Press, 2018.

Peczenik, Aleksander. *On Law and Reason.* 2nd ed.: Springer, 2009.

Petersmann, Ernst-Ulrich. "Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication." In *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, edited by Wouter Werner Lukasz Gruszczynski. Oxford: Oxford University Press, 2014.

Redfern, Alan, Martin Hunter, Nigel Blackaby, and Constantine Partasides. *Redfern and Hunter on International Arbitration.* 6th ed.: Oxford University Press, 2015.

Rousseau, Charles. *Droit International Public.* Vol. V, Paris: Recueil Sirey, 1953.

Shirlow, Esmé. "Structures of Deference in International Adjudication." In *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication*: Cambridge University Press, 2021.

Schreuer, Christoph H. "International Centre for Settlement of Investment Disputes (ICSID)." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford, United Kingdom: Oxford University Press, 2013.

Schreuer, Christoph H. *The ICSID Convention, A Commentary.* 2nd ed.: Cambridge University Press, 2009.

Schreuer, Christoph H. "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered." In *International Investment Law and Arbitration:*

Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, edited by Todd Weiler: Cameron May, 2005.

Schütze, Rolf. *Schiedsgericht und Schiedsverfahren.* 5th ed. Munich Beck, 2012.

Spiermann, Ole. "Applicable Law." In *The Oxford Handbook of International Investment Law,* edited by Federico Ortino Peter Muchlinski, and Christoph Schreuer Oxford: Oxford University Press, 2012.

Šturma, Pavel, Vladimír Balaš. *Mezinárodní ekonomické právo.* 2nd ed. Praha: C. H. Beck, 2013.

UNCITRAL. *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*. United Nations Commission on INTERNATIONAL TRADE LAW, 2012. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf.

UNCTAD. *Expropriation: A Sequel*. United Nations, 2012. https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

UNCTAD. *Fair and Equitable Treatment: A sequel*. United Nations, 2012. https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

van Harten, Gus. *Investment Treaty Arbitration and Public Law.* Oxford University Press, 2008.

Wälde, Thomas W. "The Specific Nature of Investment Arbitration." In *New Aspects of International Investment Law*, edited by Thomas W. Wälde Philippe Kahn. Leiden: Nijhoff, 2007.

Zenon Bankowski, D. Neil MacCormick, Lech Morawski & Alfonso Ruiz Miguel. "Rationales for Precedent." In *Interpreting Precedents*, edited by Robert S. Summers D. Neil MacCormick: Routledge, 2016.

2. Journal Articles and Electronic Articles

Amaral, Guilherme Rizzo. "Judicial precedent and arbitration – are arbitrators bound by judicial precedent? A comparative study among England, Scotland, the United States and Brazil." *Revista Brasileira de Arbitragem* 14, no. 56 (2017).

Berger, Klaus P. "The International Arbitrators' Application of Precedents." *Journal of International Arbitration* 9, no. 5 (1992).

Berger, Klaus P. "To what extent should arbitrators respect domestic case law? The German experience regarding the Law on Standard Terms." *Arbitration International* 32, no. 2 (2016).

Bottini, Gabriel. "Special Focus Issue Present and Future of ICSID Annulment: The Path to an Appellate Body?". *ICSID Review* 31, no. 3 (2016).

Broches, Aron. "Convention on the Settlement of Investment Disputes between States and Nationals of Other States." *Collected Courses of the Hague Academy of International Law* 136 (1972).

Brower, Charles H. II,. "Beware the Jabberwock: A Reply to Mr Thomas." *Columbia Journal of Transnational Law* 40, no. 3 (2002).

Commission, Jeffrey P. "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence." *Journal of International Arbitration* 24, no. 2 (2007).

Crawford, James. "The Ideal Arbitrator: Does One Size Fit All." *American University International Law Review* 32, no. 5 (2017).

Crawford, James. "The Internationally Wrongful Act of a State ". In *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* edited by James Crawford: Cambridge University Press, 2002.

Crawford, James. "Treaty and Contract in Investment Arbitration." *Arbitration International* 24, no. 3 (2008).

Douglas, Zachary. "The Hybrid Foundations of Investment Treaty Arbitration." *British Yearbook of International Law* 74, no. 1 (2003).

Douglas, Zachary. "Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex." *Arbitration International* 22, no. 1 (2006).

Duffy IV J.P., Philip Danziger. "Is Manifest Disregard Alive and Well in the Second Circuit?: A Remand to Find Out." In *Kluwer Arbitration Blog, Is Manifest Disregard Alive and Well in the Second Circuit?: A Remand to Find Out*: Kluwer Arbitration Blog, 12 November 2019.

Franck, Susan D. "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions." *Fordham Law Review* 73 (2005).

Gaillard, Emmanuel. "The Representations of International Arbitration." *Journal of International Dispute Settlement* 1, no. 2 (2010).

Goldhaber, Michael D. "Wanted: A World Investment Court." *TDM* 3 (2004).

Guillaume, Gilbert. "The Use of Precedent by International Judges and Arbitrators." *Journal of International Dispute Settlement* 2, no. 5 (2011).

Gharib, Muhammad, Mahmoud Gawish, Mahmoud Ramzy. "The "Representatives" agree to amend the jurisdiction of the Constitutional Court as a whole." https://www.almasryalyoum.com/news/details/2362660.

Cheng, Tai-Heng. "Precedent and Control in Investment Treaty Arbitration." *Fordham International Law Journal* 30 (2006).

Igbokwe, Virtus Chitoo. "Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations." *Journal of International Arbitration* 23, no. 4 (2006).

Christie, Konstantin. "Treaty Claims vs. Contractual Claims in ISDS." (2021). https://jusmundi.com/en/document/wiki/en-treaty-claims-vs-contractual-claims-in-isds.

Jančová, Nicole. "Reasoning with Previous Awards in International Investment Arbitration." *Charles University in Prague Faculty of Law Research Paper No. 2021/II/3* (2021).

Jones, Doug. "The Problem of Inconsistency and Conflicting Awards in Investment Arbitration." https://www.ciarb.net.au/wp-content/uploads/2014/12/DJones-Investor-State-Arbitration-The-Problem-of-Inconsistency-and-Conflicting-Awards.pdf.

Junita, Fifi. "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview." *Indonesia Law Review* 2 (2015).

Kadlec, Ondřej, Kristina Blažková. "Co je to právo? Právněteoretický pohled na rozhodnutí Soudního dvora ve věci Al Chodor." *Jurisprudence* 1 (2018).

Kathryn Gordon, Joachim Pohl. "Environmental Concerns in International Investment Agreements: A Survey." *OECD Working Papers on International Investment* 01(2011). https://www.oecd.org/investment/investment-policy/WP-2011_1.pdf.

Kaufmann-Kohler, Gabrielle. "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture." *Arbitration International* 23 (2007).

Kaufmann-Kohler, Gabrielle. "The Transnationalization of Contract Law ". In *Mélanges en l'honneur du Professeur Jean-Michel Jacquet*, edited by Dolores Bentolila Marcelo Kohen: Lexis Nexis, 2013.

Kryvoi, Yaraslau. "Counterclaims in Investor-State Arbitration." *Minnesota Journal of International Law* 21 (2012).

Loquin, Eric. "Les Pouvoirs des Arbitres Internationaux à la Lumière de l'Evolution Récente du Droit de l'Arbitrage International." *Journal du droit International* (1983).

Mai El-Sadany, Yasmin Omar. "Egypt's Constitutional Court Amendments: The International System On Its Own Terms." https://carnegieendowment.org/sada/84941.

Matthew Weiniger, Mike McClure. "Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years." *TDM* 4, no. 1 (2013).

Mousseron, Pierre. "Introduction terminologique: des comportements aux "bonnes pratiques"." *Journal des sociétés* 92, no. 12 (2011).

Park, William W. "Chapter 4. The Predictability Paradox Arbitrators and Applicable Law." In *The Application of Substantive Law by International Arbitrators*, edited by Pierre Mayer Fabio Bortolotti: Kluwer Law International, 2014.

Paulsson, Jan. "Arbitration in Three Dimensions." *LSE, Law, Society and Economy Working Papers* 2 (2010).

Paulsson, Jan. "Arbitration Without Privity." *ICSID Review: Foreign Investment Law Journal* 10, no. 2 (1995).

Paulsson, Jan. "Unlawful Laws and the Authority of International Tribunals." *ICSID Review - Foreign Investment Law Journal* 23, no. 2 (2008).

Poznanski, Bernard G. "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration." *Journal of International Arbitration* 4, no. 3 (1987).

Reinish, August. "The Role of Precedent in ICSID Arbitration." (2008). https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/role_precedents_icsid_arbitrationaayb_2008.pdf.

Sabater, Aníbal. "When Arbitration Begins without a Seat." *Journal of International Arbitration* 27, no. 5 (2010).

Seng Wei, Edward TI. "Why Egregious Errors of Law May yet justify a refusal of enforcement under the 'New York Convention' ". *Singapore Journal of Legal Studies* 12 (2009).

Sherina Petit, Ewelina Kajkowska. "Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement." (August 2019). https://www.nortonrosefulbright.com/de-de/wissen/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement#22.

Schreuer, Christoph H. "Failure to Apply the Governing Law in International Investment Arbitration." *Austrian Review of International and European Law* 7, no. 1 (2004).

Schreuer, Christoph H. "From ICSID Annulment to Appeal: Half Way Down the Slippery Slope." *Law and Practice of International Courts and Tribunals* 10 (2011).

Schreuer, Christoph H. "Investment Arbitration - A Voyage of Discovery." (2004). https://www.univie.ac.at/intlaw/wordpress/pdf/74_cspubl_74.pdf.

Smits, Jan M. "What is legal doctrine? On the aims and methods of legal-dogmatic research." *Maastricht European Private Law Institute Working Paper* 2015/06 (2015).

Staker, Christopher. "Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations." *British Yearbook of International Law* 58, no. 1 (1987).

Sweet, Alec Stone. "Investor-State Arbitration: Proportionality's New Frontier." *Law and Ethics of Human Rights, Yale Law & Economics Research Paper No. 405* 4, no. 1 (2010).

Tai, May, Simon Chapman, Briana Young. "Hong Kong court dismisses set aside application after plaintiffs fail to establish a “conscious disregard” of the law." 28 September 2016. https://uk.practicallaw.thomsonreuters.com/w-003-6515?transitionType=Default&contextData=(sc.Default)&firstPage=true.

3. Cases

Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting opinion of Georges Abi-Saab, ICSID Case No. ARB/07/5 (28 October 2011).

AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005).

AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment (29 June 2012).

AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1, Award (30 November 1979).

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ Reports 2010 (30 Novembre 2010).

Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment (16 May 1986).

American International Group and AIG Capital Corporation v. X Company, Hong Kong Court of First Instance, HCCT 60/2015 (30 August 2016).

Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award (10 February 1999).

Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990).

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award (23 September 2003).

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (14 July 2006).

Biloune and Marine Drive Complex Ltd. v. Ghana, UNCITRAL, Award on Jurisdiction (27 October 1989).

Brazilian Loans Case, Ser. A No. 21 (12 July 1929).

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (14 Decenber 2012).

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010).

Carboex SA v. Louis Dreyfus Commodities Suisse SA, EWHC 1165 (2011).

Case No. 2/98, First Instance Court, Oman (19 October 1998).

Case No. 72/117, Cairo Court of Appeal, Egypt (8 January 2002).

Case of Kruslin v. France, ECtHR, Application no. 11801/85 (24 April 1990).

CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14, Decision on Annulment (29 June 2005).

Certain German Interests in Polish Upper Silesia, PCIJ Ser A No 7 (25 May 1926).

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007).

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (12 May 2005).

CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK, Court of Appeal, Civil Appeal No 59 of 2010 (Summons No 4970 of 2010), SGCA 33 (13 July 2011).

Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (22 August 2012).

Dow Chemical France, The Dow Chemical Company, Dow Chemical A.G., and Dow Chemical Europe v. ISOVER SAINT GOBAIN, ICC Award No. 4131 (23 September 1982).

Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008).

Eastern Sugar B. v. Czech Republic, SCC Case No. 088/2004, Partial Award (27 March 2007).

EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Decision on Annulment (5 February 2016).

EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award (11 June 2012).

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision of Jurisdiction (27 April 2006).

Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), ICJ Rep. 15 (20 July 1989).

EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, Award (3 February 2006).

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010).

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007).

Eureko B.V. v. Republic of Poland, Partial Award (19 August 2005).

F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award (3 March 2006).

Factory at Chorzów (Germany v. Poland), PCIJ Series A, No. 9, 33 (1929) (Judgment of 26 July 1927).

Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Award (9 March 1998).

Finelvet AG v. Vinava Shipping Co Ltd (The Chrysalis), 1 WLR 1469, 1 Lloyds Rep 503 (1983).

Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010).

Gami Investments Inc. v. Mexico, UNCITRAL (15 November 2004).

Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award (7 July 2004).

Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (7 June 2007).

Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 March 2010).

Inceysa Vallisoletana SL v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006).

Interpretation of the Statute of the Memel Territory, PCIJ Ser A/B No 49 294 (1932).

Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova, SCC, Award (22 September 2005).

Jan Oostergetel and Theodora Laurentius v. Slovak Republic, Final Award (23 April 2012).

Judge Read, Anglo-Iranian Oil Co, 148 ICJ Rep (1952).

Karaha Bodas v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina), District Court of Central Jakarta, No. 86/PDT.G/2002/PN.JKT.PST (2002).

Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision of the *Ad Hoc* Committee (3 May 1985).

Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants), UKHL 43 (2005).

Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic, Award (12 April 1977).

Leslie & Ors, P1120/13, CSOH 136 (2015).

Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee (22 December 1989).

Mavrommatis Jerusalem Concessions, PCIJ Ser. A No. 5 (26 March 1925).

Merrill Lynch, Pierce, Fener & Smith, Inc. and Sam Alberico, Plaintiffs-Appellants, v. Stanley F. Jaros, Defendant-Appellee, United States Court of Appeals,Sixth Circuit, No. 94-3876 (15 November 1995).

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (15 March 2002).

Mitchell-Gill v. Buchan, SC 390 (1921).

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

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004).

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007).

National Grid plc v. The Argentine Republic, UNCITRAL, Award (3 November 2008).

New York Telephone Company, Plaintiff-Counter-Defendant-Appellee, v. Communications Workers of America Local 1100, AFL-CIO District One, Defendant-Counter-Claimant-Appellant, United States Court of Appeals,Second Circuit, No. 00-9182 (5 July 2001).

Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Award (5 March 2008).

Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (12 October 2005).

Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG, Case 102/81 1096 (23 March 1982).

Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC (16 December 2003).

Occidental Exploration and Production Company v. Ecuador, Non-justiciability of Challenge to Arbitral Award (29 April 2005).

Oil & Natural Gas Corporation Ltd. v. Saw Pipes, Supreme Court of India, SCC 705 (2003).

Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006).

Pawlowski AG and Project Sever s.r.o. v. Czech Republic, ICSID Case No. ARB/17/11, Award (29 October 2021).

Petrobart v. Kyrgyz Republic, SCC Case No. 126/2003, Award (29 March 2005).

Pioneer Shipping Ltd v. BTP Tioxide Ltd, AC 724 (1982).

PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (19 January 2007).

Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/01/10, Decision on the Application for Annulment (8 January 2007).

Rupert Joseph Binder v. Czech Republic, UNCITRAL, Final Award (15 July 2011).

Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award (30 June 2009).

Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, Award, ICC Case No. 10623/AER/ACS (7 December 2001).

San Martine Compania De Navegacion, S.a., Appellant, v. Saguenay Terminals Limited, Appellee, U.S. Court of Appeals for the Ninth Circuit - 293 F.2d 796 (1961).

Saudi Arabia v. Arabian American Oil Company (ARAMCO), (23 August 1958).

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010).

Serbian Loans, PCIJ Ser. A No. 20 (1929).

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003).

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004).

SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29, Award (10 February 2012).

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (17 January 2007).

Sinclair v. Woods of Winchester Ltd, EWHC 3003 (TCC) (2006).

Slovak Republic v. Achmea BV, Case C-284/16, CJEU (Grand Chamber) (6 March 2018).

Société Groupe Antoine Tabet v. République du Congo, Cour de cassation, First Civil Chamber (12 October 2011).

Société Norsolor v. Société Pabalk Ticaret Limited Sirketi, Cour d'appel de Paris (Court of Appeal of Paris), France, No. I I0I92 (15 December 1981).

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

Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, 17 I.L.M. 1 (1977).

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award (26 July 2007).

Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010).

Uganda Telecom Limited v. Hi-Tech Telecom Pty Ltd, Federal Court of Australia, FCA 131 (2011).

Uniprex S.A. v. Grupo Radio Blanca, Madrid Court of Appeal, Spain, Case No. 178/2006-4/2004 (22 March 2006).

United States — Sections 301–310 of the Trade Act 1974, Report of the Panel (8 November 1999).

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26, Award (8 December 2016).

Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award (15 April 2016).

Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002).

Wilko v. Swan, United States Supreme Court, 346 U.S. 427 (1953).

Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (8 December 2008).

Zimbabwe Electricity Supply Authority v. Maposa, Supreme Court of Zimbabwe, S.C. 114/99, CLOUT case 323 (21 December 1999).

4. International Treaties

Agreement between the Government of the Kingdom of Morocco and the Government of The Italian Republic on the Reciprocal Promotion and Protection of Investments, signed on 18 July 1990, entered into force on 7 April 2000.

Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, 22 November 1991.

Agreement between the Government of the Republic of Peru and the Government of the Kingdom of Norway on Promotion and Reciprocal Protection of Investments, entered into force on 9 May 1995.

Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference, signed on 5 June 1981.

Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investment, signed on 31 March 1997, entered into force on 23 April 1999.

Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments dated 16 February 2000, terminated on 6 April 2017.

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990, entered into force on 19 February 1993.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, with Exchange of Notes Cm 7129, Belgrade, 6 November 2002, entered into force on 3 April 2007.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, entered into force on 7 June 1959.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington 1965.

Energy Charter Treaty, signed in December 1994, entered into force in April 1998.

North American Free Trade Agreement, entered into force on 1 January 1994.

Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, entered into force on 20 October 1994.

Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, signed on 28 May 1992, entered into force on 15 January 1994.

Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, 1155 United Nations Treaty Series 331, 8 ILM 679 (1969).

5. Arbitration Rules and Model Laws and Treaties

Czech Model BIT (2016)

German Institute of Arbitration (DIS) Arbitration Rules (2018)

International Chamber of Commerce (ICC) Arbitration Rules (2021)

Italian Model BIT (2020)

London Court of International Arbitration (LCIA) Arbitration Rules (2014)

SADC (Southern African Development Community) Model Bilateral Investment Treaty Template (2012).

Singapore International Arbitration Centre (SIAC) Arbitration Rules (2016)

Slovak Model BIT (2016)

Stockholm Chamber of Commerce (SCC) Arbitration Rules (2017)

Swiss Arbitration Rules (2021)

UNCITRAL Arbitration Rules (as revised in 2010)

UNCITRAL Model Law

US Model BIT (2012)

6. Other

International Law Institute, Session of Santiago de Compostela. "Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises." 1989.

Jančová, Nicole. "The Binding Effect of Arbitral Awards in International Investment Disputes." Masters' Diploma Thesis (2015)

UNCITRAL. "UN Doc A/CN.9/WG.II/ /WP.143/Add.1, n 19."

Abstrakt a klíčová slova: Závaznost rozhodnutí a nálezů v mezinárodních sporech

Abstrakt

Mezinárodní investiční právo poskytuje zahraničním investorům dva základní typy ochrany: standardy ochrany, které musí státy dodržovat vůči investorům a jejich investicím, a možnost řešit spory týkající se těchto investic před nestranným mezinárodním rozhodčím tribunálem. Přestože standardy ochrany a mandát rozhodců jsou zakotveny v mezinárodní úmluvě, rozhodce při řešení investičních sporů aplikuje jak mezinárodní, tak i národní právo. Nicméně jelikož je takový rozhodce vnímán především jako arbitr rozhodující o mezinárodněprávní odpovědnosti států, otázky národního práva jsou v akademické diskuzi upozaďovány. Tato disertační práce napravuje tento nedostatek a pokládá si následující otázku: Jak by měl rozhodce v mezinárodní investiční arbitráži zaházet s národní judikaturou? Práce tuto otázku zodpovídá doktrinální analýzou akademických prací, soudních rozhodnutí a rozhodčích nálezů z oblasti práva mezinárodní investiční arbitráže, mezinárodní obchodní arbitráže a analyzuje také praxi Mezinárodního soudního dvora. Rozličnost zdrojů, ze kterých tato práce čerpá a které analyzuje, je dána hybridní povahou mezinárodní investiční arbitráže, která se pohybuje mezi národním způsobem řešení sporů a řešením sporů v rovině mezinárodního práva veřejného.

Na základě takto provedené analýzy formuluje tato práce tři rozdílné přístupy rozhodce k národnímu právu a národní judikatuře: (i) národní právo a judikatura jako faktická otázka, (ii) přístup k národnímu právu a judikatuře jako národní soudce a (iii) přístup k národnímu právu a judikatuře jako nadnárodní rozhodce. Všechny tyto přístupy se pak uplatní při rozhodování mezinárodních investičních sporů.

Hlavním argumentem této práce je, že by rozhodce měl přistupovat ke každému žalobnímu nároku jednotlivě a teprve na základě jeho povahy rozhodnout, jaký z výše uvedených modelů zacházení s národním právem a judikaturou zaujmout. Tato práce ukazuje, že povaha daného žalobního nároku ovlivňuje roli, kterou národní právo a národní judikatura při řešení daného sporu sehrávají. Proto by se měl měnit i přístup rozhodce. Práce ilustruje toto rozdílné zacházení ovlivněné povahou žalobního nároku na čtyřech různých nárocích: žaloby pro nezákonné vyvlastnění investice, žaloby o porušení standardu spravedlivého a rovného

zacházení, žaloby na základě tzv. umbrella clause a žaloby o porušení čistě smluvní povinnosti. Ve svém závěru tato práce demonstruje možné dopady nesprávného zacházení s národním právem a judikaturou arbitrem v mezinárodní investiční arbitráži.

Klíčová slova: mezinárodní investiční arbitráž, zacházení s národní judikaturou, národní právo

Abstract and Key Words: The Binding Effect of Decisions and Awards in International Disputes

Abstract

International investment law accords foreign investors two main types of protection: first, it articulates standards of protection a host State must adhere to with respect to foreign investments, and, second, it provides an investor with a choice to have investment disputes settled by an independent international tribunal. While standards of protection and the mandate of arbitrators stem from an international investment treaty, arbitrators apply both national law and international law. Nevertheless, being regarded as principally deciding on the international responsibility of States, questions of national law are usually sidelined in the academic debate. This thesis rectifies this neglect and asks: How should an arbitrator in investment treaty arbitration treat national judicial decisions? The thesis addresses this question from doctrinal angle by analysing academic writings, judicial decisions, and arbitral awards in the field of international investment arbitration, international commercial arbitration, and the practice of the International Court of Justice. This is because investment treaty arbitration is a hybrid formation oscillating between public international law adjudication and national adjudication.

On the basis of this analysis, the thesis forms three distinct models of arbitrator's treatment of national law and national judicial decisions: (i) treating it as a matter of fact, (ii) treating it as a national judge, and (iii) treating it as a transnational adjudicator. The thesis finds that all three are applicable in investment treaty arbitration.

The main argument of the thesis is that an arbitrator shall decide with respect to each claim she was mandated to decide which of the models of national (case) law treatment should be employed. The thesis demonstrates that the nature of the investment claim influences the role national law plays in its settlement and, accordingly, its treatment should change as well. This is illustrated on four investment claims: a claim for unlawful expropriation, breach of fair and equitable treatment standard, an umbrella-clause claim, and a pure contractual claim. The thesis concludes with demonstration of possible consequences of improper treatment of national case law by arbitrators.

Key words: investment treaty arbitration, treatment of national case law, national law