

INTERNATIONAL INVESTMENT ARBITRATION

Substantive Principles

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domestic political reasons for a State failing to emphasize certain environmental or human rights issues.⁶⁸ Non-disputing parties have the potential to fill all these gaps and ensure that the tribunal has the benefit of a wider spectrum of relevant views. This in turn will increase the political legitimacy of the process.

E. The Nature of the Legal Rights at Issue in Investment Treaty Arbitrations

Legal rights arising under investment treaties

3.51 In any consideration of the legal relations arising between investors and host States under a bilateral investment treaty it is important to distinguish three principal situations in which rights can arise. These are:

- (1) *Law applicable to the substance of the dispute (lex causae)*. These are the primary obligations (the substantive rights provided by the treaty) that the investor is seeking to enforce. These rights arise under the treaty and are interpreted according to public international law.
- (2) *Law applicable to the agreement to arbitrate between the investor and the State*. This agreement is created by the BIT and is closely linked to it. As such, while the agreement is not contained in the BIT itself, it should be seen as governed by public international law. If one were instead to determine the proper law of the agreement by looking for the jurisdiction with closest connection to the dispute, one would be drawn to the law of the host State. This would be the jurisdiction of one of the two disputing parties and the physical place where the subject-matter of the dispute, the investment, is located. However, such a conclusion would be at odds with the policy of protection of investments which the BIT is supposed to promote.⁶⁹
- (3) *The law applicable to the arbitration procedure itself (lex arbitri)*. If the parties have started an ICSID arbitration the arbitration procedure will be governed by the ICSID Convention and thus take place under public international law. If they have chosen any other system the law governing the arbitration procedure would be municipal law and it is on this basis that national courts have reviewed the actions of BIT tribunals.⁷⁰

⁶⁸ D Shelton, 'The Participation of Non-Governmental Organizations in International Judicial Proceedings' (1994) 88 AJIL 611, 615. The article is an excellent introduction to the issue generally in international law.

⁶⁹ This is the conclusion reached in *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116; [2006] QB 432, 458–459.

⁷⁰ See eg L Collins et al, *Dicey, Morris & Collins on the Conflict of Laws* (14th edn, 2006) 778–784.