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Chapter 2 - Applicable Substantive Law and Interpretation

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Introduction

§2.1 Applicable law and interpretation

Two preliminary questions arise when international investment agreement (IIA) obligations are to be applied: what is the law to be used to establish the content of the legal rules on a given issue (i.e., the question of applicable law) and what is the process and criteria to ascertain that content (i.e., the question of interpretation). These questions arise primarily before tribunals that apply IIAs in specific disputes.

This chapter begins by introducing the meaning and relevance of applicable law and then considers questions of applicable law and interpretation in seven parts. Part I addresses the various types of choice of law clauses in IIAs. Part II turns to the relevant sources of law for IIA disputes. The role of the IIA as the primary source of law is considered in Part III. Part IV addresses the role of domestic law in IIA disputes. Part V examines the role of international law as the law applicable to issues of state responsibility. Sources of applicable international law, including the role of precedent, are considered in Part VI, and Part VII addresses the interpretation of IIAs.

§2.2 Meaning of applicable substantive law

IIA disputes may be brought before three different fora: (i) international arbitration pursuant to the dispute resolution mechanisms in the IIA; (ii) domestic courts if the IIA is part of the relevant municipal law system; or (iii) a contractually agreed forum in the
P 76 case of an investor-state contract. Domestic or contract IIA litigation has been uncommon because IIAs provide their own effective system of dispute resolution. (1) In any case, with regard to the question of applicable law, the same issues that are relevant to an international tribunal (i.e., what law is applicable to the different aspects of the dispute) should be equally relevant to domestic courts applying an IIA. (2)

IIAs contain two types of dispute resolution mechanisms: international arbitration for inter-state disputes, i.e., disputes between the contracting parties regarding the interpretation and application of the IIA; and international arbitration for investor-state disputes, i.e., disputes between a protected investor of a contracting party and another contracting party. Inter-state disputes under IIAs are disputes between subjects of international law concerning an international agreement governed by international law (as established in Article 2(1)(a), *Vienna Convention on the Law of Treaties*) (3) and are, by definition, disputes in which public international law is the applicable law. (4) However, as discussed below in relation to investor-state disputes, when the dispute relates to a specific underlying investment some factual and legal investigation into domestic law may be required. (5)

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Investor-state disputes are more complex. Three different questions arise as to applicable law in this type of dispute: (i) what is the law applicable to the substance of the dispute, that is, the law that applies to determining the content of the rights and obligations that the investor seeks to enforce; (ii) what is the law applicable to jurisdictional issues, that is, the law that applies to determining the scope of the arbitration agreement; and (iii) what is the law applicable to the procedure, that is, the law that regulates the arbitration process and the validity and enforce-ability of the award. This chapter deals with the first of these questions – the law applicable to the substance of disputes. Nevertheless, this also involves considering the law applicable to some jurisdictional issues, which, in practice, are often inseparable from the merits of a given case, such as the existence of a protected investment under the relevant IIA.

In determining the law applicable to the substance of disputes, a further distinction is required. In IIA claims the investor normally brings proceedings relying on rights conferred by the IIA. But if the IIA's investor-state dispute resolution clause is widely formulated, thereby permitting purely contractual and domestic law disputes to be referred to an IIA tribunal, the investor may also seek to enforce its contractual and/or domestic law rights, or some combination of these with treaty rights, through the IIA's jurisdiction clause. (6) In pure contractual claims, the law applicable to the substance of the dispute will be the contract and the law governing the contract. In domestic law claims it will be the relevant domestic law system. However, where the investor relies on rights conferred directly by the IIA (e.g., fair and equitable treatment, non-discrimination, no expropriation without compensation or observance of commitments), the applicable law is a composite. In addition to the municipal law under which the investment was made, and any underlying contract, the applicable law includes, first and

foremost, the IIA itself and general international law as the proper law of the IIA. The role of the IIA and general international law is unassailable since the question will be whether the host state has breached the standards of investment protection provided by the treaty beyond any question of strict contractual or domestic law breach or liability. The focus of this chapter is on the law applicable to the substance of these IIA disputes.

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§2.3 Relevance of the applicable law

The applicable law is an essential element of the agreement to arbitrate since it constitutes the parameters of any arbitral tribunal's activity. Hence, applying the wrong law or no law at all may amount to a derogation from the terms of reference within which the tribunal has been authorized to function. Ultimately, the failure to apply the proper law may result in the nullification or non-recognition of the award. Under Article 52(1)(b) (excess of powers) of the *ICSID Convention*, (7) and many national legal systems, (8) disregarding the applicable law (as opposed to a mistake in applying the law) may be a valid ground for annulment or non-recognition of an award. It could hardly be otherwise since the proper resolution of the case is at stake. In the *ELSI* case, the International Court of Justice (ICJ) highlighted that: 'what is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.' (9) This point was also emphasized by the tribunal in
P 79 *Antoine Goetz et consorts v. Burundi*. (10) The tribunal examined the measures complained of both under Burundian law and the applicable BIT, and found that they were in breach of the latter but not the former. (11) Thus, determining the proper law is a necessary precondition for a correct resolution of a dispute.

I Choice of Law Clauses

§2.4 Express choice of law clauses

Some IIAs contain clauses providing an express choice of law for the resolution of IIA disputes. There are generally six types of clauses.

The first and most common type of clause calls for the application of a variety of legal sources, including the law of the host state. The majority of these clauses refer to four sources of law: (1) the IIA itself; (2) the municipal law of the host state; (3) the provisions of any investment agreement or contract relating to the investment; and (4) general principles of international law. An example of this choice of law clause is that of most Argentine BITs, including Argentina-UK (1990), which provides as follows at Article 8(4):

> 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. The arbitration decision shall be final and binding on both Parties. (12)

Some IIAs add other sources of applicable law, such as any rules agreed to by the parties to the dispute, (13) or any other agreements between the contracting parties. (14) Others shorten the list to three sources, omitting the reference to any underlying investment agreement or contract. (15)

Among the abundant differences in wording in this type of clause, the most curious aspect is the great diversity of expressions used to designate international law: 'rules,''principles,''norms,' sometimes with the qualifications 'applicable,''basic,''general,''relevant,''generally recognized,''universally accepted'
P 80 and/or 'adopted by both Contacting Parties,' of 'public,''general' or 'customary' international law. (16) A 'veritable confusion of tongues' as one author has put it, (17) with countless combinations and permutations and abundant room for interpretation. It is not clear what influenced these choices of terms, and whether a specific choice must be deemed intentional or rather the result of confusion regarding how to refer to international law, especially considering that the expressions used often make no logical sense. For example, the preference in this type of clause for the concept of 'principles' rather than 'rules' of international law is difficult to understand: principles tend to be identified with more elusive and vague norms than those usually referred to as rules; if the purpose of referring to principles was to use a comprehensive notion, then the expression 'international law' without more would be adequate. In reality, the reference to principles may well have a historical explanation. Its roots may be traced to the applicable law clauses of state contracts in the early and mid twentieth century, which referred to a relevant applicable municipal law system and added 'general principles of law.' That reference prompted the so-called 'internationalization' of state contracts: it was used as a justification to apply international law alongside domestic law to contractual disputes. (18)

However peculiar and whatever the motives for the specific references to international law in treaty choice of law clauses, they have been understood as calling for the application of all sources of international law without restriction, (19) unless there is clear

evidence of a contrary intention by treaty drafters. That said, to avoid confusion and
P 81 interpretive difficulties, it would be better for IIA choice ● of law clauses to simply refer to 'international law,' without distinguishing between principles and rules or adding further qualifications.

Another curious element of express choice of law clauses is the explicit inclusion, in many cases, of the 'rules on the conflict of laws' in the reference to host state law. This explicit mention seems superfluous. Private international law or conflict rules would be applicable as part of the host state law. Their specific mention may be an instance of abundance of caution. It may respond to the concern of the contracting states that a plain reference to host state law may overlook the relevance of the law of the investor's home state (or even the law of a third state) in cases and for matters sufficiently connected with that law, for example, the nationality of the investor. (20) In any case, even if specific reference to conflict rules is omitted, these rules are still applicable unless there is evidence that their omission was intended.

A second type of choice of law clause also refers to a list of legal sources but provides, in somewhat looser language, that the tribunal shall 'take into account' those sources of law and, further, that the list of legal sources is non-exhaustive. An example is Article 8(6), Czechoslovakia-Netherlands (1991):

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force in the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.

In *CME Czech Republic B.V. v. Czech Republic*, the tribunal noted that this clause 'is broad and grants to the Tribunal a discretion' since it 'instructs the Tribunal to *take into account* (not: to apply) the above mentioned sources of law, in particular *though not exclusively*.' (21) It was, *inter alia*, on the basis of this provision, that the tribunal rejected the respondent's argument that the measures complained of be first examined under Czech law and then, the result thereby obtained, checked for compliance with international law. According to the tribunal, the treaty provided no specific order in which the listed legal sources would apply, nor did the provision require the application of domestic law, but simply to take it into account. (22) The tribunal's conclusion rejecting the respondent's two step analysis seems correct, although arguably that results neither from the wording of the specific clause nor from any discretion in applying domestic law, but
P 82 rather from the specific and ● distinct roles that domestic law and international law play in IIA disputes as discussed below. (23)

A third type of clause refers to the application of the treaty itself and international law. This clause is present in a small number of BITs; (24) Article 26(6), *Energy Charter Treaty* (ECT); (25) Article 17-20(1) ('Applicable Law'), *Group of Three Treaty*; (26) and Article 1131, *North American Free Trade Agreement* (NAFTA) ('Governing Law') which reads:

> A tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.

A fourth type of clause is that found in Indian BIT practice, where the choice of law, which provides for the application of the treaty itself, refers only to disputes to be submitted to *ad hoc* United Nations Commission on International Trade Law (UNCITRAL) arbitration and not to the alternative arbitration option, ICSID arbitration. (27) Presumably this is because ICSID arbitration has its own choice of law clause at Article 42(1), ICSID Convention.

A fifth type of clause is that found in the most recent IIAs concluded by the US, (28) and in the 2004 US Model BIT, which provides for two different choices of law. For claims relating to breaches of the treaty's investment protections, the sources of applicable law are the treaty itself and international law. For claims relating to investment authorizations and investment agreements, the source of applicable law is that which is specified in the authorizations and agreements or has been otherwise agreed to by the parties, or, if no law has been specified or agreed on, a combination of the law of the respondent state, the terms of the investment authorizations and agreements, international law and the treaty itself. (29) This type of twofold clause reflects a greater concern for applicable law issues, and thus, the perceived need to define with precision the sources of law applicable to investment disputes.

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A sixth and final type of clause is that which provides a list of sources of applicable law, and then adds, usually in a separate paragraph, that an interpretation of a provision of the IIA jointly made by the treaty contracting parties shall be binding on a tribunal resolving an IIA dispute. (30) For example, Article 15.21 of the investment chapter of the 2003 Singapore-US Free Trade Agreement (FTA) reads:

(1) Subject to paragraph 2, a tribunal shall decide the issues in dispute related to an alleged breach of an obligation in Section B in accordance with this Agreement and applicable rules of international law.

(2) A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 20.1.2 (Joint Committee) shall be binding on a tribunal established under this Section, and any award must be consistent with that decision.

Certain of these clauses limit the time period in which any such interpretation may be made with binding effects. For example, Article 8(2) of the Schedule of Mexico-Netherlands (1998) reads:

> An interpretation jointly formulated and agreed by the Contracting Parties of a provision of this Agreement shall be binding on any tribunal established under this Schedule. If the Contracting Parties fail to submit an interpretation within sixty days of the date of the request of either Contracting Party, the tribunal shall decide the issue.

Another variation is to provide that a tribunal must, at the request of a state party, ask for a joint interpretation. For example, Article 155, China-New Zealand FTA (2008), provides:

1. The tribunal shall, on request of the state party, request a joint interpretation of the Parties of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of delivery of the request.
2. A joint decision issued under paragraph 1 by the Parties shall be binding on the tribunal, and any award must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue on its own account.

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§2.5 Distinction from other clauses

Express choice of law clauses for investment disputes must be distinguished from two other types of clauses sometimes present in IIAs: the clause on the law applicable to the investment and the preservation of rights clause. (31)

Clause on the law applicable to the investment. The clause on the law applicable to the investment does not prescribe the proper law to investment disputes but the law applicable to the everyday operation of the investment. This clause is sometimes called the 'Sri Lanka clause' because it is found mainly in Sri Lanka BIT practice, (32) although it seems to have originated in BLEU-Singapore (1978). (33) Article 9, Korea-Sri Lanka (1980), entitled 'Laws,' provides, for example, as follows:

> For the avoidance of any doubt, it is declared that 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.

Variations of this clause are the omission of the 'for the avoidance of any doubt' language, (34) and the addition of international law to the 'subject to this agreement' caveat, (35) or to the host state law as governing law. (36) The clause, in its common reference only to host state law, seeks to make the obvious, though superfluous, point that investments, and the property or commercial rights associated with them, are generally subject to the law of the state in which they are made. This is different from the law by which an arbitral tribunal should be guided when settling an IIA dispute, which must necessarily include international law. IIAs and international law cannot govern the everyday business actions related to an investment, even if they become applicable once remedies under the IIA are pursued. Hence the caveat 'subject to this agreement' and (sometimes accompanied by 'international law') usually present in the clause, aimed at confirming the application of the IIA's substantive protections and remedies to protected investment.

Preservation of rights clause. The preservation of rights clause is a common IIA clause, often headed 'Application of other Rules,' (37) providing for the application to a given investor or investment of any rule of law more favourable than the provisions of the IIA. (38) This sort of clause does not contain a choice of law. It establishes a criterion to articulate the different legal sources that may be applicable as a result of the relevant choice of law rule. The principle is the primacy of the rule more favourable to the
P 85 investor. Thus, the clause does not designate the applicable law, but certainly has an impact on the way the relevant applicable legal sources are combined and applied by a tribunal to resolve a given dispute. (39)

§2.6 Choice of law clauses in arbitration rules

Provisions on applicable law for the resolution of IIA disputes are also found in the arbitration rules governing the IIA arbitral proceedings. Article 42(1) of the ICSID Convention, (40) for example, provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal

shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (41)

It may be argued that unless the relevant IIA contains an express choice of law clause (an agreement of the contracting parties as to applicable law), the second sentence of Article 42(1) provides the choice of law rule for IIA disputes submitted to ICSID arbitration. Some tribunals, however, have inferred an agreement of the parties on the applicable law arising from their consent to arbitration under the IIA and the rules of law invoked in their submissions. Thus, tribunals have found the IIA, international law and municipal law applicable under Article 42(1), first sentence, even in the absence of an express choice of law clause. (42) These same sources are applicable under Article 42(1), second sentence. In this context, little practical difference seems to exist, therefore, between the first and the second sentences of Article 42(1) with regard to the applicable law in IIA disputes. (43)

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The ICC Rules of Arbitration provide, in Article 17, that 'the parties shall be free to agree upon the rules of law to be applied by the tribunal to the merits of the dispute.''In the absence of such agreement,' which is arguably the case if the IIA provides no express choice of law rule, the tribunal 'shall apply the rules of law which it determines to be appropriate,' and 'in all cases take account of the provisions of the contract and the relevant trade usages.' Article 33 of the UNCITRAL Rules similarly provides that the tribunal shall apply the law designated by the parties, failing which it shall apply the law determined by the conflict of law rules that it considers applicable, and the terms of the contract and trade usages. Article 24(1) of the Rules of the SCC Institute provides that 'the Arbitral Tribunal shall decide the merits of the dispute on basis of the law or rules of law agreed by the parties' or, 'in the absence of such an agreement,''apply the law or rules of law which it considers to be most appropriate.' Under any of these clauses, whether an implicit agreement on applicable law is found to exist or not, the applicable law would still consist of the IIA, international law and domestic law, which are the laws relevant and thus 'appropriate' to the resolution of IIA disputes.

II Relevant Sources of Law in IIA Disputes

§2.7 Laws relevant to IIA disputes

Whichever choice of law rule is ultimately applied by the arbitral tribunal, there are four sources of substantive legal rules relevant, and thus to be applied, to the resolution of any IIA dispute: the treaty itself, the law of the host state of the investment, the terms of any underlying contract relating to the investment, and general international law. (44) *First*, as IIA disputes concern IIA protections (see above §2.2), the treaty itself necessarily applies. *Second*, since the treaty is an international agreement 'governed by international law' (Article 2(1)(a) of the Vienna Convention), general rules and principles of international law must also apply to supplement the treaty. *Third*, the underlying private, commercial and property rights and interests that constitute the protected investments are governed by the law of the state where the investment is made, and/or the terms of any contract relating to the investment including any choice of law provisions. Hence, domestic law and any contracts related to the investment also apply. As a result, the applicable law in IIA disputes is a hybrid of international and municipal law.

This explains why most express choice of law clauses in IIAs refer to a combination of international and municipal legal sources. Even in clauses referring only to the treaty itself and international law, municipal law and contract terms should be deemed
P 87 applicable by effect of a *renvoi* from international law to those sources, for the determination of issues relating to the commercial and property rights and interests that form the investment protected by the IIA and international law. (45)

The majority of IIA tribunals do not provide, in their awards, explicit expositions on the law applicable to the dispute at hand, although generally speaking a combination of domestic and international legal rules are usually resorted to in resolving the dispute. (46) When the issue is expressly referred to, tribunals recognize the hybrid nature of the applicable law. (47) The first tribunal to rule on an IIA dispute, for example, stated that the BIT on which the arbitration was based provided the 'primary source of applicable legal rules.' This was, in turn, to be complemented 'by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.' (48) In *Fedax N.V. v. Venezuela*, the tribunal referred to the 'broad framework of the applicable law,' which included the application of municipal and international law, as confirmed by the express choice of law clause of the BIT calling for the application of various legal sources. (49) In *Goetz*, the tribunal highlighted the hybrid nature of the applicable law, finding that the reference to the treaty and international law in an express choice of law clause could not have the effect of totally excluding the application of municipal law:

Il n'est pas sans intérêt a cet égard de noter que la référence assez fréquente,

dans des clauses de *choice of law* insérés 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
P 88 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 exclusive du droit international. Elle signifie seulement que ces relations relèvent simultanément – en parallèle, pourrait-on dire – de la maîtrise souveraine de l'Etat d'accueil sur son droit national et des engagements internationaux auxquels il a souscrit. (50)

In this case, the relevant BIT contained an express choice of law clause providing for the application of municipal law, the treaty, contract terms and international law. (51) But the reasoning of the tribunal appears equally applicable to clauses calling for the application only of the treaty and international law, such as Article 1131, NAFTA.

The hybrid nature of the law applicable to IIA disputes was also underlined by the tribunal in *CMS Gas Transmission Company v. Argentina*:

> More recently, however, a more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play. (52)

The tribunal rightly found that there was a 'close interaction between the legislation and the regulation' of Argentina, governing the industry in question, the underlying license contract, and international law 'as embodied both in the Treaty and in customary international law.' It then, however, failed to explain how the different sources would interact and what role each would play. It simply said: 'all these rules are inseparable and will, to the extent justified, be applied by the Tribunal.' (53)

§2.8 Law pleaded and *iura novit curia*

In determining the applicable law, tribunals have accorded relevance to the law pleaded by the parties in their submissions. These have been used to support an implicit agreement on choice of law, (54) but more often to confirm the tribunal's determination on applicable law which was arrived at independently from the parties' legal submissions. (55)

The question arises whether failure by the parties to plead a particular legal proposition of principle justifies not applying it. Often the question arises in relation to domestic law
P 89 issues. Both counsel and tribunals in IIA arbitrations ● (normally international lawyers) tend to consider the IIA and general international law as applicable law, and relegate national law to a factual issue on which evidence is to be provided. In *CME*, the tribunal found that it was not 'bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties and the Tribunal to be essential to the Tribunal's decision.' (56) Yet, the contrary would seem required under the basic principle in national and international law of *iura novit curia*, (57) according to which a court should, of its own motion, apply any rule of law relevant to the facts to resolve a given dispute, irrespective of whether such a rule is pleaded. In the words of Jan Paulsson:

> One fundamental issue appears not yet to have been considered in the depth it obviously deserves: whenever they are created by treaties which refer to the applicability of international law, are international tribunals in investment disputes organs of the international legal system and therefore bound to apply international law whether or not it is pleaded by the parties? The parallel with the ICJ and its Article 38 is obvious, and the implications are equally clear, as the ICJ put it in the Fisheries Jurisdiction cases:
>
> > The Court ... as an international judicial organ is deemed to take judicial notice of international law, and is therefore required ... to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court.
>
> In other words, a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two.

> Furthermore, as the PCIJ put it in Brazilian Loans, an international tribunal 'is deemed itself to know what law is,'... (58)

While referring to international law, Paulsson's remarks appear equally applicable to domestic law as part of the law applicable to investment disputes. In this context, ICSID
P 90 *ad hoc* committees hearing annulment cases have uniformly rejected ● the idea that tribunals, in drafting their awards, were restricted to the legal arguments presented to them by the parties. (59)

That said, *iura novit curia* cannot extend to the point that arguments not made, claims not advanced or defences not raised should be supplemented by the tribunal. As stated by the *ad hoc* committee in *Mr. Patrick Mitchell v. Congo*, referring to the failure by the tribunal to apply the so-called 'non-precluded measures clause' of the relevant BIT (a clause arguably exempting from liability measures required to protect essential security interests (60)):

> It is entirely conceivable that, in view of the specific circumstances of the intervention of the military forces against the [investor], the well known state of war in Congo, and the DRC's contestation of the qualification of the measures under dispute as an expropriation, the Arbitral Tribunal would have been welcome to address *ex proprio motu* the other provisions of the Treaty, which might potentially excuse taking such measures against the Claimant. A comparable approach would have been along the lines of the adage *jura novit curia*– on which the DRC leaned during the Annulment Proceedings – but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it. (61)

It is suggested that the committee reached the right conclusion here, although its reasoning is questionable. Discretion in applying the proper law is not germane to the judicial function. The point is that the tribunal could not be expected to raise a defence that had not been put forward by the respondent. *Iura novit curia* demands the application of the proper law to claims or defences made; it does not require, and indeed cannot lead to, supplementing *ex oficio* the parties' claims or defences: arguments not raised cannot be entertained and thus no law should be applied to it; simply there is no role of *iura novit curia* in this context. (62)

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III Role of the IIA

§2.9 The IIA as the primary source of law

The substantive provisions of an IIA are the primary source of applicable law in IIA disputes. IIAs grant foreign investors access to arbitration in order for those investors to be able to claim the substantive protections of the IIA itself. (63) IIA arbitration claims are based on IIA provisions; they are grounded in the investor rights and host state obligations granted by IIAs. Accordingly, the substantive standards of the IIA are *lex specialis* and the primary source of applicable law.

Tribunals have consistently underlined the central role of the IIA as applicable substantive law in IIA disputes. In *AAPL*, for example, the tribunal stated that the BIT on which the arbitration was based provided the 'primary source of applicable legal rules.' (64) The same principle is reflected in the award in *Wena*. The tribunal found that, as the case 'turns on an alleged violation' by Egypt of the BIT, 'the Tribunal considers the IPPA [Investment Promotion and Protection Agreement or BIT] to be the primary source of applicable law.' (65)

Antonio Parra, former Deputy Secretary General of ICSID, writing about the rules of law applicable to the substance of disputes brought under BITs, states:

> These mainly have been the rules set out in the substantive provisions of the treaties themselves. In most instances, this follows simply from the investor's invocation of those rules in bringing the claim, such reliance on the rules being explicitly or implicitly authorized by the investor-to-State dispute settlement provisions of the treaty. (66)

The primacy of the IIA is also implicit in the preservation of rights clause which is common in IIAs and provides investors the right to claim the application of any rule of law more favourable than the provisions of the IIA. (67) On this clause, the tribunal in *Middle East Cement* found that 'by argumentum *a contrario* it does not permit the application of provisions of national law limiting any claims found by the Tribunal to exist under the BIT.' (68) The same reasoning would appear to apply to any contrary and not more favourable provisions of international law. The IIA is the starting point, and in principle prevails over domestic and international law rules, except where those are

more favourable.

§2.10 The need to supplement the IIA

IIAs, however, contain only a basic set of state obligations and do not aim to exhaustively
P 92 define all aspects of the ● investor-state relationship. For example, the tribunal in *AAPL* found that the BIT was the primary source and added:

> … 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 juridical context in which rules from other sources are integrated through implied incorporation methods or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature. (69)

Similarly, after defining the BIT, as 'the primary source of applicable law,' the *Wena* tribunal added: 'however, the IPPA is a fairly terse agreement of only seven pages containing thirteen articles.' Thus Egyptian law and international law applied alongside the BIT. (70)

IV Role of Municipal Law

§2.11 Existence of the investment as a domestic law issue

As stated by a commentator: 'Investments disputes are about investments, investments are about property, and property is about specific rights over things cognisable by the municipal law of the host state.' (71) That is, whether a particular right, interest or asset held in the territory of a state party to an IIA is an investment protected by the IIA is a matter for the IIA not municipal law; but in order for a particular asset to be able to qualify as an investment under the IIA, it must first exist and such existence is owed to the law of the territory in which such asset is allegedly held. Thus, while IIAs designate which assets are to be considered investments for the purposes of the treaty, typically defining investment as 'any kind of asset' and providing a non-exhaustive enumeration of certain categories or types of assets, the preliminary question as to whether one of these types of investments exists is a matter primarily for the municipal law of the host state, not international law.

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The point was well made by the tribunal in *EnCana* stating that the substantial protections offered by IIAs apply to investments that exist under the domestic legal system:

> … for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the right affected must exist under the law which creates them, in this case, the law of Ecuador. (72)

Some IIAs make this explicit. For example, Article I(2) second paragraph, Argentina-Spain (1991) provides:

> The content and scope of the rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party in whose territory the investment is situated. (73)

Other IIAs make the same point by adding to the definition of protected investments a provision that investments must be duly made in accordance with the municipal law of the host state. (74) This does not mean that host state law determines or limits what qualifies as an investment for the purposes of the IIA. Rather, the existence of the asset that may qualify as an investment under the IIA, as well as its validity, is a matter of domestic law. (75)

§2.12 Other matters to which domestic law is relevant

In addition to the existence of an investment, host state law is also relevant to a number of related threshold issues. (76) For example, municipal law governs matters such as
P 94 whether ● the investment is held in the territory of the host state, (77) its validity, (78) the nature and the scope of the rights making up the investment and whether they vest on a protected investor, (79) the conditions imposed or assurances granted by national law for the operation of the investment, (80) as well as the nature and scope of the government measures allegedly in breach of the IIA. (81)

These issues constitute the circumstances against which the host state conduct allegedly in breach of international law is to be assessed. The relevance of municipal law in this regard is well expressed in the *MTD Award*:

> The 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. (82)

Hence, the tribunal applied Chilean law to establish whether there had been a breach of contract under that law, which could in turn constitute a breach of the BIT:

> The Tribunal accepts that the authorisation to invest in Chile is not a blanket authorization but only the initiation of a process to obtain the necessary permits and approvals from the various agencies and departments of the Government. It also accepts that the Government has to proceed in accordance with its own laws and policies in awarding such permits and approvals. Clause Four of the Foreign Investment Contracts would be meaningless if it were otherwise. Therefore, the Tribunal finds that Chile did not breach the BIT on account of breach of the Foreign Investment Contracts. (83)

The ICSID *ad hoc* annulment committee in this same case agreed with the tribunal's approach to applicable law, stating:

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> In considering the implications of the Foreign Investment Contracts for fair and equitable treatment, the Tribunal faced a hybrid issue. The meaning of a Chilean contract is a matter of Chilean law; its implications in terms of an international law claim are a matter for international law. (84)

§2.13 The *renvoi* of international law to domestic law

The role of domestic law in defining and regulating the investor's acquired rights is entirely logical. IIAs and general international law do not purport to regulate the complex problems of proprietary and contractual rights, or the legal nature of state measures. Further, the investment rights and state conduct at issue in IIA disputes arise in the context of legal relationships governed by domestic law. Hence the IIA and international law leave these questions to be decided, in principle, by the law of the host state. This may, at first sight, differ little from the well-established principle of international law that, before an international tribunal, the host state's domestic law is relevant only with respect to factual issues. (85) An important difference, however, is that being part of the proper law, a treaty tribunal may not treat domestic law as a fact that must be proven by the parties. The principle of *iura novit curia* requires a tribunal to establish, interpret and apply any legal rules relevant to the case before it, including any domestic law rules. (86)

§2.14 The relevance of domestic court decisions

Along with domestic law, any relevant decisions of national courts should be taken into consideration, as instances of interpretation and application of the domestic law, but cannot bind an IIA tribunal. (87) As noted by the ICJ in *ELSI*, 'where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts.' (88)

§2.15 Domestic law questions as jurisdictional issues

Domestic law questions often arise at the jurisdictional phase of IIA arbitration proceedings, as they are relevant to establishing the existence of the protected investment or the specific disputed contractual or proprietary right, and thus a tribunal's
P 96 jurisdiction *ratione materiae*. But, as has been suggested by commentators, (89) if the pleadings reveal complex and contentious issues of fact and law regarding the existence and scope of the investment or investment rights, then the matter is better left for the merits phase, when the tribunal will have been fully briefed by the parties on these points. In these instances, the domestic law analysis is incorporated into the examination of the host state's liability and forms part of the factual background against which the proper law on matters of state responsibility apply (the IIA and international law). To avoid confusion, some tribunals have thus rightly treated the preliminary domestic law issues in a separate section of the merits awards preceding the merits analysis itself. For example, in the *CMS Award* the tribunal stated first (and somewhat confusingly) that Argentine and international law were 'inseparable' and should be applied in conjunction; then proceeded to confine its Argentine legal analysis regarding the currency for the calculation of gas transportation tariffs and conditions for their adjustment in the initial part of the award, separate from the analysis regarding the application of the standards of protection of the BIT to the circumstances of the case, which was fully based on international law.

§2.16 Criticism of the attitude of IIA tribunals towards domestic law

It has been argued that IIA tribunals have not always paid sufficient attention to the relevant provisions of domestic law when faced with disputed issues as to the existence and scope of investment rights or the nature of the host state measures. (90) The award in *CME*, for example, has been criticized for assuming, rather than examining under Czech law, that certain changes in the joint venture agreement between the foreign investor and its local partner, imposed by a government agency, had weakened the position of the foreign investor thereby somehow paving the way for the local partner to terminate the

agreement. (91)

In *Wena*, the tribunal found that the seizure of two hotels by an Egyptian governmental entity amounted to expropriation and other BIT breaches by Egypt. Neither the tribunal nor the subsequent ICSID annulment committee considered the fact that the termination of two hotel leases by the Egyptian entity had been upheld as valid under Egyptian law in contractual arbitration proceedings. The question whether in these circumstances Wena's contractual rights could be expropriated, considering that it had previously, and regularly under Egyptian law, lost the right to continue operating the hotels, was never
P 97 addressed. No doubt the ● tribunal was influenced by the government's self-help take over and physical eviction of Wena's personnel from the hotels. (92)

§2.17 Limitations to the role of domestic law

Although some tribunals may have failed in sufficiently examining domestic law on the existence and scope of investment rights or the nature of the host state measures, it is important to note the limitations to the implicit *renvoi* of international law to domestic law, and thus of role of domestic law in IIA disputes.

Domestic law has a different role depending on the investment allegedly adversely affected and the treaty standard invoked by the claimant. Thus, the scope of the tribunal's duty to apply domestic law varies from case to case. The *Eureko v. Poland* case illustrates this point. (93) In this case, the claimant had acquired shares in 1999 in the partial privatization of the leading insurance group in Poland allegedly in the expectation, and arguably under the commitment later confirmed in certain contractual documents, of the State Treasury to complete the privatization in a public offering (the IPO) before the end of 2001. This completion of the privatization never took place. The tribunal found that Poland had disregarded Eureko's contractual rights to an IPO in breach of the umbrella clause of the BIT, and had been treated unfairly and inequitably as well as indirectly expropriated. The dissent and subsequent commentary highlights the failure of the tribunal to discuss the contractual rights in question under domestic law. (94) But if the claim and the decision, instead of framing the issue as the scope of contractual rights under domestic law (as protected investments) and contractual obligations (to be observed under the umbrella clause), had focussed on the initial shares acquired (as protected investment), the value of which had been adversely affected by political interferences and arbitrary acts (particularly in view of the various assurances as to the completion of the privatization), arguably the domestic law analysis required would have been of a different (and possibly more limited) scope altogether.

Further, the *renvoi* of international law to domestic law in matters pertaining to the existence and scope of investment rights, or the nature of host state measures, is not without limitations. Domestic law will apply provided it is not wholly unreasonable or leads to a result abhorrent to international law. (95) For example, having formally or *de*
P 98 *facto* recognized the validity of an investment ● contract by benefiting from it for a certain time, international law precludes a host state from denying, without more, its validity under domestic law and thus escape liability for breach or unilateral termination. (96) It is difficult to imagine that a domestic legal system would permit such a result, and recognize in these circumstances no intangible property rights including an acquired right to the operation of the contract or adequate compensation. In any case, it is suggested that such domestic law analysis will not be determinative. The IIA tribunal may reject such invalidity arguments by having direct recourse to well-established international law principles of good faith and estoppel. (97)

§2.18 Subsequent changes in the domestic law

The domestic law applicable in an IIA claim will be the law existing at the time the investment is made and any subsequent changes to that law. Naturally, subsequent changes in the domestic law may have a detrimental impact on the investment and these changes are often the subject of IIA claims. (98) These may be changes in taxation, minimum wages, environmental standards and other aspects of the regulatory framework for the investor's operations. Other changes may go as far as causing the complete termination of a contract, or the total destruction of the investment. In addition, changes applied to the investment may breach stabilization clauses agreed to between the investor and the host state, according to which the host state undertakes to leave the investor unaffected by subsequent changes of the local law. Although the host state law at the time of the investment and normal regulatory changes apply to determine the existence and scope of investment rights, subsequent adverse changes are likely to be relevant only as evidence of state measures that the IIA tribunal must assess against the standards of protection in the IIA. It will thus be open to the tribunal to find that the host state's law changes constitute a breach of the IIA (99) as interpreted under general international law, to which we now turn.

V Role of International Law

§2.19 International law as the law applicable to issues of liability

International law as embodied in the IIA applies to determine whether host state

conduct breaches the IIA and creates international responsibility. The principal matter in an IIA dispute, the issue of the liability of the host state for measures that breach the IIA, is a matter for international law, not domestic law.

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Although domestic law is relevant at the first stage of analysis (to determine the existence and scope of the investment, any governmental guarantees and commitments regarding the investment, and host state measures), these issues then need to be analyzed through the lens of international law. At this second stage of analysis the IIA regime and international law take over – the host state conduct must be assessed against the standards of protection in the IIA, and international law. That assessment determines first whether the host state has incurred international responsibility vis-à-vis the claimant investor by breaching the IIA. Second, it determines the content of international responsibility – the legal consequences of the IIA breach, such as reparation and compensation, which are also governed by international law. This is because the breach of an IIA standard by the host state creates a new obligation (a so-called secondary obligation) upon that state (i.e., essentially the obligation to provide reparation). That obligation arises in the international plane; it stems from the principle that a state's breach of an international obligation engages its international responsibility. Domestic law plays no part in any of these respects.

This role for international law follows from fundamental principles of public international law. IIAs are treaties and thus, according to the Vienna Convention, are 'governed by international law' and must be interpreted *inter alia* in the light of 'any relevant rules of international law applicable.' (100) Further, national law cannot excuse a breach of an international obligation, including a treaty obligation. Article 27 of the Vienna Convention provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' Article 3 of the International Law Commission (ILC) Articles on State Responsibility provides that 'the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.' (101)

The decision by the ICSID *ad hoc* annulment committee in the *Vivendi* case rightly described the role of international law in IIA disputes in the following terms:

> ... in respect of a claim based upon a substantive provision of that BIT [...] the inquiry which the [...] tribunal is required to undertake is one governed by [...] the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law [...] (102)

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The tribunal found that international law is 'the proper or applicable law,' i.e., the law that determines whether the conduct of the host state has breached the IIA. (103) Similarly, in the *MTD Award* the tribunal found that '[...] the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law,' (104) and that 'the breach of an international obligation will need, by definition, to be judged in terms of international law.' (105) Tribunals are consistent in applying the IIA itself, as *lex specialis*, complemented by customary international law where necessary, to adjudge the liability of the host state in IIA disputes. (106) Professor Prosper Weil, referring to this jurisprudence states:

> ... [these] cases are noteworthy illustrations of the trend – which can only grow stronger – toward ICSID arbitration governed by international law by virtue of the fact that the BIT implicitly or explicitly provides that disputes must be settled not only on the basis of the provisions of the treaty itself, but also, and more generally, on the basis of the principles and rules of international law. (107)

Other commentators agree. Antonio Parra, former Deputy Secretary General of ICSID, for example, writing about the rules of law applicable to the substance of disputes brought under BITs, states that the BIT is the primary applicable source of law and the 'treaty being an instrument of international law, it is I think also implicit in such cases that the arbitrators should have recourse to the rules of general international law to supplement those of the treaty.' (108)

§2.20 IIAs and international law as part of domestic law

Some tribunals have justified the application of the IIA and customary international law on the basis that the host state's legal order would, in any case, incorporate the IIA and international law as part of domestic law with priority over ordinary legislation on the basis of the hierarchy of legal sources or as *lex specialis*. (109)

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An example of the effects of IIAs in domestic law is the decision of an Argentine lower court in the *Desarrollos en Salud* case. (110) The court refused the conversion of the

currency of a private contract from US dollars to Argentine pesos, as prescribed by the Argentine January 2002 Emergency Law, holding that that would breach the rights of the claimant as a foreign investor in Argentina under Argentina-BLEU (1990) which is part of Argentine law with primacy over legislation.

There are risks, however, in relying exclusively on domestic law to justify the pre-eminence of IIAs and international law on issues of liability in IIA arbitrations. The status of treaties and general international law varies in each legal system. Domestic issues, such as the need for transformation of international law into domestic law or the doctrine of non-self-executing treaties, may compromise the role of the IIA and international law in a given case. (111) First and foremost, the application of international law in IIA disputes is required by fundamental principles of international law, even it is also consistent with principles of domestic law. Thus, nothing is gained by relying solely upon the incorporation of international law into domestic law, and it may well lead to unnecessary confusion and controversy.

§2.21 Domestic law applied alongside international law on issues of liability

Some IIA tribunals appear to have examined the merits of claims not only on the basis of international law, but also domestic law. (112) This seems to arise out of comity or a perceived need for courtesy towards the host state legal system, rather than a real requirement or duty to apply domestic law in matters of liability. Professor Prosper Weil states:

> The reference to the domestic law of the host State, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, the sole raison d'être of which is to avoid offending the sensibilities of the host State. (113)

In this approach, the exercise would be 'pointless' because, under fundamental principles of public international law, national law would be irrelevant in case of conflict
P 102 with international law. Thus, if it is international law that provides the rule ● of decision in IIA disputes, it would seem to be the law that must generally apply and cannot be reduced to a gap filling law. (114)

VI Applicable International Law

§2.22 Sources of international law in IIA disputes

IIA tribunals determine the liability of the host state by applying the specific terms of the IIA under which the claim is brought and other sources of international law to supplement the IIA. The sources of international law are set out in Article 38 of the *Statute of the International Court of Justice*: international conventions, whether general or particular; international custom; the general principles of law recognized by civilized nations; and judicial decisions and teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law. (115)

IIA tribunals have applied all these sources. Treaty provisions aside from those of the IIA have been often invoked and applied, (116) as have customary international law rules, (117) and general principles of international law. (118) Tribunals also make abundant reference to prior IIA decisions (as set out in the following section), ICJ and Permanent Court of International Justice (PCIJ) case law, (119) as well as decisions of inter-state arbitral commissions and mixed commissions. (120) The same is true for the writing of publicists. (121)

§2.23 Precedents

Counsel and tribunals in IIA cases regularly refer to and rely on IIA case law. (122)
P 103 Although it is well-established that there is no doctrine of ● precedent in international law (*stare decisis*), (123) and this is expressly stated in some IIAs, (124) and possibly in the ICSID Convention, (125) tribunals often refer to previous decisions as providing guidance. Although not always explicit in tribunal decisions, previous decisions appear to be taken into account as determinative or authoritative statements of the rules or principles of law applicable (rather than their establishment), as examples of how similar issues have been resolved in previous instances, or to highlight consistency between the tribunal's reasoning and previous decisions. As stated by the tribunal in *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (Ancillary Claim), referring to earlier decisions:

> ... the conclusions of the Tribunal follow the same line of reasoning, not because there might be a compulsory precedent but because the circumstances of the various cases are comparable, and in some respects identical. (126)

The use of prior decisions as guidance has become an issue in the Argentine IIA cases relating to Argentina's 2002 emergency legislation. (127) This has occurred mainly in the jurisdictional decisions, as Argentina has raised identical objections to jurisdiction in most of the cases. In *AES Corporation v. Argentina*, the claimant requested that the

tribunal dismiss Argentina's jurisdictional objections out of hand as moot given the prior case law. The tribunal rejected this radical approach though not the value of previous decisions as guidance:

> Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on an specific point of law, it is free to adopt the same solution. (128)

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The tribunal added that 'precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.' (129) In *SGS v. Philippines*, the tribunal underlined concerns regarding the consistency of decisions, while plainly rejecting the notion of compulsory precedent:

> In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent state. Moreover, there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. (130)

The tribunal in *Saipem* explained the role of precedent in light of 'a duty to adopt solutions established in a series of consistent cases' and '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.' (131) This approach echoes that of the ICJ in the *Libya/Malta Continental Shelf* case, referring to 'justice of which equity is a manifestation … should display consistency and a degree of predictability.' (132)

All this indicates that when (as is often the case) legal issues already addressed by a tribunal reappear in a subsequent case, litigating parties may rely on case law to support their legal arguments and tribunals may follow it as grounds for their findings. (133) This is inevitable and arguably desirable for reasons of consistency and predictability. However, it still remains that the circumstances under which international decisions may be used as precedents, in the absence of a hierarchy or clear relationship between the organs that produce them, are unclear and may consequently be subject to misuse. As noted by Jan Paulsson, 'there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths' and noting that the legal status of the corpus of decided cases 'will also doubtless turn out to be subject to the same
P 105 Darwinian imperative: the unfit will perish.' (134) But while this natural selection occurs, wrong law may be in the making by an uncritical reliance on precedent.

§2.24 Inconsistent decisions

In some cases, tribunals have critically reviewed, and disagreed with, precedents relevant to their decisions. The classical example is the *SGS v. Philippines* case, where the tribunal discussed the earlier *SGS v. Pakistan* case and expressed its disagreement with some of the holdings in that case, in particular those on the interpretation of the umbrella clause:

> As it will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises the question whether, nonetheless, the present tribunal should defer to the answers given by the *SGS v. Pakistan* Tribunal. […] In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover, there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision. (135)

There are other examples of decisions refusing to follow or distancing themselves from earlier decisions, such as on the interpretation of most-favoured-nation clauses in relation to dispute resolution matters. (136)

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Even if a tendency can be observed where '[t]he award becomes a showcase for legal erudition,' (137) and there is perhaps unnecessary acrimonious criticism of earlier decisions by some tribunals, this critical approach to precedent is unavoidable as well as desirable. As stated by Jan Paulsson, '[t]he corpus of decided cases in the field of international investment arbitration is of recent vintage.' Often a tribunal is on untested ground, faced with novel issues and sometimes not ideally equipped to address them; hence quality control is required.

An example in which critical appraisal of precedents would have been welcome is with regard to the law of necessity in the Argentine emergency cases. For instance, the *LG&E* award is at least partly inconsistent with the *CMS* award in relation to the express treaty exception and customary law defences of necessity and their operation, although the two cases concerned identical factual backgrounds (the Argentine 2002 crisis and related emergency legislation interfering with the tariff regime of privatized gas utilities), and the same applicable law (the Argentina-US BIT). Hence one would have expected the *LG&E* tribunal to refer to *CMS* and explain its disagreement. Yet there is not a single citation or allusion. (138) The same is true for the subsequent award in *Enron*, which is consistent with *CMS* but not with *LG&E*, yet cites neither. (139) Only the fourth award in this line of cases the *Sempra* case, referred to the prior conflicting decisions as follows:

> The Tribunal has examined with particular attention the recent decision on liability and subsequent award on damages in the *LG&E* case as they have dealt with mostly identical questions concerning emergency and state of necessity. The decision on liability has been contrasted with the finding of the tribunal in *CMS*. While two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew. This Tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*, lies in the assessment of the facts. While the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of
> P 107
> emergency and necessity, albeit for a limited period of time. This Tribunal however, is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity, although it also readily accepts that the changed economy conditions have an influence on the questions of valuation and compensation, as will be examined further below. (140)

More was to be expected given the critical issue at stake. Also, the *Sempra* award was issued three days after the decision on annulment in the *CMS* case, which was critical of the *CMS* award on the point. (141) However, the award in *Sempra* does not refer to the *CMS* annulment decision, and is unclear as to whether it took on board some of the criticism of the *CMS* award contained in that decision. Given the relevance of the *CMS* annulment case, the tribunal in *Sempra* presumably could have delayed its award to assess that decision. It is open to question whether the overlap of some arbitrators in these cases inhibited tribunals from criticising or openly endorsing prior decisions, or to the contrary should have helped or prompt tribunals to explain different approaches. (142) Perhaps the desire not to influence the *CMS* annulment proceedings pending around the same time also played a role. (143) Be that as it may, the net unfortunate result is that, by tribunals ignoring each other, several opportunities to clarify the law on necessity were missed.

§2.25 Human rights

As part of international law, human rights law may be applicable in IIA disputes. It may be possible for human rights claims to be brought to IIA tribunals, which may have jurisdiction over them depending on the terms of the IIA and, presumably, the extent to which such claims are connected to an underlying investment dispute. This point was well made by the tribunal in *Biloune and Marine Drive Complex Ltd. v. Ghana*, a contractual arbitration:

> In the final cause of action asserted, the claimant seeks recovery for alleged violation by the Government of Ghana of Mr Biloune's human rights. The Claimants assert that the Government's allegedly arbitrary detention and expulsion of Mr Biloune and violation of his property and contractual rights constitute an actionable human rights violation for which compensation may
> P 108
> be required in a commercial arbitration pursuant to the GIC Agreement. They assert that the Tribunal should consider this portion of the claim because this is the only forum in which redress for these alleged injuries may be sought.

> Long-established customary international law requires that a State accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law. Moreover, contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights (which, in the view of the Tribunal, include property as well as personal rights), which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.
>
> This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes 'in respect of' the foreign investment. Thus, other matters – however compelling the claim or wrongful the alleged act – are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights. (144)

The claims in *Biloune* were brought under a contract arbitration clause and the arbitration was formally a commercial one. However, the considerations of the tribunal are equally transposable to a case brought under an IIA: the jurisdiction of the tribunal to address human rights violations will largely depend on their relevance to the underlying investment dispute and on the terms of the IIA itself.

More often, however, human rights law may be invoked by respondent states to justify the measures complained of, and thus as defences against liability under the applicable IIA. The question is whether, and if so how, tribunals may balance IIA protections against human rights considerations. (145) So far human rights arguments have been rare, and the
P 109 impact of human rights law in IIA ● disputes is yet to be considered by tribunals. (146) In principle, human rights concerns may be treated as any other public purpose pursued by state measures. State measures taken to fulfill international human rights concerns may not, for this reason alone, be exempted from IIA obligations. Measures may still give rise to liability where contrary to specific commitments granted to investors. Thus the scope of the measures, and of the commitments at play in the context of human rights' considerations, is bound to be of significant importance, as will be in other cases the proportionality and reasonableness of the measures (i.e., the balancing of human rights' considerations and the protection of foreign investments). (147)

VII Interpretation of IIAs

§2.26 Treaty interpretation as the process of applying the proper law

Issues of applicable law and interpretation are obviously interconnected. Having determined the applicable law, tribunals interpret it in adjudicating on the underlying dispute. In IIA claims the applicable law on the merits is the IIA itself and international law, supplemented by municipal law. But the identification of international law as the proper law is not the end of the enquiry; international law is then to be applied to resolve the underlying dispute. The question is when and how to resort to general international law. In this context, it has been suggested that international law be introduced into the analysis of the IIA claim in the first place through treaty interpretation mechanisms. This ensures that the IIA is the centre of the enquiry and that general international law assists in the interpretation of the IIA under Article 31(3)(c) of the Vienna Convention, which establishes that, in interpreting a treaty:

> There shall be taken into account, together with the context:
>
> [...]
>
> (c) Any relevant rules of international law applicable in the relations between the parties

The suggestion is that this approach ensures that the IIA supplies the primary rule, which
P 110 takes precedence over custom or general principles if those provide a ● different rule or test; but also that IIAs are not regarded as self-contained with the risks of fragmentation in international law, but rather systemically integrated within the international legal system according to the 'constitutional norm' and 'fundamental principle' enshrined in Article 31(3)(c). (148)

§2.27 International law rules on treaty interpretation

IIA tribunals regularly begin the interpretation process by invoking Articles 31 and 32 (149) of the Vienna Convention, (150) often adding that those provisions reflect customary international law. (151) For example, in *Noble Ventures, Inc. v. Romania*, the tribunal stated:

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reference has to be made to Arts. 31 *et seq.* of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation. Accordingly, treaties have to 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 the object and purpose of the Treaty, while recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (*effet utile*), which, too plays an important role in interpreting treaties. (152)

§2.28 Methods of interpretation

The starting point of any analysis must be the ordinary meaning of the terms, as required by Article 31(1), Vienna Convention. (153) While this may prove sufficient in some cases, in others 'it may result in little more than an exchange of synonyms.' (154) When interpreting the standard of fair and equitable treatment, for example, the tribunal's decision in *MTD* began quoting the Oxford Concise English Dictionary and then noted that '[i]n their ordinary meaning, the terms "fair" and "equitable"... mean "just,""even handed,""unbiased,""legitimate."' (155) That did not appear to take the tribunal very far. (156)

Sometimes, tribunals have resorted to special principles or presumptions as supplementary means to determine ordinary meaning. (157) An example is the principle *expressio unius est exclusio alterious*, i.e., specific mention of an item excludes others. In *National Grid Plc v. Argentina*, for example, the tribunal referred to this rule as a starting point for the interpretation of the most-favoured-nation (MFN) clause of the applicable BIT and whether it covered dispute resolution. (158) The tribunal noted that the BIT enumerated certain exceptions to the clause, which did not include dispute resolution: 'dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius*
P 112 *est exclusio* ● *alterius*.' (159) However, this rule of logic has its limitations. As noted by a commentator: 'whether the mention of one item or a list of items in a provision really excludes the relevance of other items depends very much on the particular circumstances and cannot be answered in a generalized way.' (160)

Another principle of textual interpretation is the *ejusdem generis* doctrine, i.e., 'general words following or perhaps preceding special words are limited to the genus indicated by the special words.' (161) The principle derives from the fundamental rule of contract construction that the 'meaning of a term is determined not in the abstract but in its context.' (162) This principle has been followed by some international tribunals, (163) and could be used, for example, to interpret the so-called 'war and civil disturbance' or 'losses due to war' clause, present in some BITs. (164) These typically contain a list of situations covered by the clause including fairly specific and easily understandable expressions such as 'war or other armed conflict, revolution [...], revolt, insurrection or riot,' but which interject other terms of a more elusive nature such as 'state of national emergency.' (165) Arguably, the latter general expression could be interpreted as referring to another type of civil disturbance situation in the context of the former, more specific ones. Techniques of interpretation, including *expressio unius* and *ejusdem generis* and others, however, need to used with caution. They are guides to interpretation and should not be followed slavishly. (166)

Apart from focusing on the text and related rules of logical presumptions and grammar, other means of interpretation are available and are often resorted to by tribunals. Interpretation in accordance with the object and purpose of the IIA has been the most prevalent, and is dealt with in the following section. Another method that may be used,
P 113 given the large number of BITs often containing similar ● or identical provisions and the fact that many BITs are based on model treaties, is a comparative approach between the BIT in question and other BITs concluded by the host state, or the model BIT. For example, in the *National Grid* case, the tribunal examined whether the MFN clause in Argentina-UK (1990) extended to dispute resolution matters *inter alia* by comparing the language of the clause with that in UK Model BITs and signed UK BITs. Some of these provided the same MFN language but added 'for the avoidance of doubt it is confirmed that the treatment [...] shall apply to the provisions of Articles 1 to 11 of this Agreement,' (167) i.e., also dispute resolution. The terms 'for the avoidance of doubt' and 'it is confirmed' arguably demonstrated that even in BITs where such clarification was not specifically provided, the same MFN treatment language intended to cover all investment protection matters, including dispute resolution between investors and host states. (168) Further, in deciding on the irrelevance of the requirement of prior submission of disputes to local courts provided for in the BIT at hand, the tribunal examined other Argentine BITs and noted that 'the Argentine Republic has dispensed with it in its investment treaties concluded since 1994.' (169) In *CMS*, comparing the language of the emergency (or non-precluded measures) clause of the applicable BIT with other treaties and the US Congress debates on other BITs, helped the tribunal defeat

the allegation that such a clause was self-judging. (170)

The use of *travaux prépartoires* has been scarce. (171) The reason may be that 'the negotiating history of BITs is typically not documented,' and thus *travaux* are not readily available. (172) In *Aguas del Tunari*, the tribunal requested the parties to provide such material but was disappointed with the result: 'This sparse negotiating history thus offers little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation.' (173)

§2.29 Object and purpose, preambles and pro-investor or pro-state interpretations

Many tribunals have sought to interpret IIAs on the basis of their object and purpose,
P 114 typically by looking at their titles and preambles. (174) IIA ● preambles have been particularly influential in the development of the jurisprudence on fair and equitable treatment, requiring host states to maintain a stable investment environment and to create favourable conditions for investment. The first tribunal to make that link was that in the *Lauder* case, which noted that the preamble of the relevant BIT stated that the contracting parties agree 'that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment.' (175) This sort of preambular language was later noted by the tribunal in *Occidental* concluding that 'the stability of the legal and business framework is thus an essential element of fair and equitable treatment.' (176) The tribunal in *CMS* reached the same conclusion on the basis of the same type of statement in the preamble. (177) Other tribunals have followed suit. (178)

In looking at object and purpose and, with it, the title and preamble of BITs, tribunals have noted that the purpose of BITs is to protect investments and investors:

> The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty 'to protect' and 'to promote' investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favourable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative. (179)

Linked to the interpretation of IIA provisions in light of the protection of investments as its object and purpose, is the principle of effectiveness or *effet utile* of treaty provisions. This means that the interpretation which accords practical content to a treaty provision will be favoured over one that deprives it of such effect. (180) This principle has been
P 115 used in particular in the context of the interpretation of the ● umbrella clause, in order to reject restrictive interpretations which arguably leave the umbrella clause inoperative. (181)

Sometimes, it has been expressly stated that a teleological interpretation of IIAs leads to a principle of interpretation in favour of protected investors and investments:

> The object and purpose of the BIT supports an effective interpretation [...]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.' It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments. (182)

Commenting on this case law, it has been argued that the determination of object and purpose may be deceptive, and that the fact that IIAs commonly contain preambles stating that their purpose is to promote and protect investment should not be conflated with a general preference to protect the interests of the foreign investor over those of the host state. (183) To some extent this would seem correct: the object and purpose of a treaty are realized by its provisions; an interpretation that would result in the implementation of a treaty's purpose in a fashion not contemplated by the parties would be contrary to their intentions and, thus, should be rejected. As put by the tribunal in *Plama*:

> [T]he Tribunal is mindful of Sir Ian Sinclair's warning of the 'risk that the placing of undue emphasis on the "object and purpose" of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.' (184)

In this context, attempts have also been made to temper this pro-investor inclination by reading a more balanced statement of aims in the preamble of IIA's:

> The 'object and purpose' of the Treaty may be discerned from its title and preamble. These read [...].

This is a more subtle and balanced statement of the Treaty's aims that is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be
P 116 accorded to foreign investments may serve ● to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations. (185)

Some tribunals have expressly opted for a restrictive interpretation on the basis that treaty commitments are a derogation of sovereignty and thus the interpretation implying a lesser obligation should be favoured:

> The appropriate interpretive approach [...] is the prudential one summed up in the literature as *in dubio pars mitio est sequenda*, or more tersely, *in dubio mitius*. (186)

But the better view is that there is no such principle of restrictive interpretation of treaties. The classic authority is the *Wimbledon Case* in the following, often quoted, passage:

> The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty. (187)

With regard to teleological interpretations, it is clear that many IIAs 'have been drafted in narrow, uni-dimensional terms, with treaty preambles hailing the need to enhance economic cooperation and create a favourable investment climate, and often little else in the way of broader policy objectives.' (188) Thus, at the end of the day, pro-investor interpretations on the basis of the object and purpose of IIA would seem to be defensible readings. Critics must admit, as has been noted, that for their concerns 'the blame lies with governments which have negotiated treaties.' (189) In particular, a more balanced approach would be favoured by preambles which recognize not only the protection of investment but also the prerogative of states to regulate in the public interest. (190)

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§2.30 Interpretations and amendments to IIAs by the contracting states

Occasionally, state parties to an IIA may issue interpretations or clarifications of an IIA provision during the pendency of arbitral proceedings. Some choice of law provisions provide explicitly for the binding nature of those interpretations. (191) In any case, those interpretations may constitute evidence of a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' which, under Article 31(3)(a) of the Vienna Convention, must be taken into account when interpreting a treaty provision.

An example of such interpretive agreement is the NAFTA Free Trade Commission's Notes of Interpretation of 31 July 2001, which effectively interpreted or recast several NAFTA Chapter Eleven provisions. (192) These included Article 1105 on 'fair and equitable treatment', which early tribunals had found to have been breached by NAFTA states and viewed that standard as independent from the minimum standard required by customary international law, affording greater protection. (193) The NAFTA Commission's interpretation provided that Article 1105 prescribed the customary minimum standard of treatment and that 'fair and equitable treatment' and 'full protection and security' did not require treatment beyond or in addition to that customary standard. Not without some initial reluctance, (194) tribunals in pending NAFTA proceedings and in future cases have applied the interpretation which, in any case, left considerable leeway to tribunals insofar as the content of the customary standard still needed to be defined. (195)

Similarly, after the Partial Award in *CME*, the government of the Czech Republic and that of The Netherlands entered into consultations with regard to the correct interpretation of certain provisions of Czechoslovakia-Netherlands (1991). (196) The common positions reached by the two governments were then taken into consideration by the tribunal in its Final Award. (197)

Tribunals have rejected arguments by respondent states that their position is implicitly agreed to by the other contracting party to the BIT in question. For example, in *Aguas del Tunari*, the tribunal rejected the argument that the apparent coincidence between certain statements made by Dutch Ministers to Parliament in The Netherlands and
P 118 Bolivia's own arguments in the arbitration formed an ● agreement regarding the scope of certain provisions in Bolivia-Netherlands (1992):

> The coincidence of several statements does not make them a joint statement.

> And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement. (198)

In *Gas Natural*, the tribunal found that Argentina's position in the case and Spain's position as a defendant in another case could not reflect 'practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties' with regard to the Argentina-Spain BIT. (199) A similar Argentine argument, based on the position taken by the US in some NAFTA cases with regard to provisions equivalent to those in Argentina-US (1991), was dismissed in *Sempra Energy International v. Argentina*, finding that:

> Counsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State. (200)

Later in the case, Argentina submitted a letter from a US official at the US Department of State, dated 15 September 2006, to a former official authorizing him to testify in another pending Argentine BIT case, at the request of the claimant in that case, on the issue of whether essential security clauses in US BITs were 'self-judging.' The letter stated, in passing, that the US position was that those clauses were indeed self-judging. The tribunal noted that the letter did not address any specific BIT, and stated:

> Not even if this is the interpretation given to the clause today by the United States would this necessarily mean that such an interpretation governs the Treaty. The view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation or in a rather remote or general way as far as the very Treaty at issue is concerned. What is relevant is the intention which both parties had in signing the Treaty, and this does not confirm the self-judging interpretation. (201)

As opposed to interpretations, amendments of IIA provisions may not be given effect in pending disputes (but the distinction between amendment and interpretation may not be easy to draw in practice (202)). The *Sempra* tribunal made this point as a follow up to
P 119 the above-quoted holding:

> Moreover, even if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. (203)

§2.31 Interpretation and the adjudicative function under IIAs

The way in which arbitration tribunals approach interpretive issues may reveal (or in fact derive from) their views as to the nature and scope of their adjudicative function. In this context, it has been argued that tribunals act in three different ways in this respect: as commercial arbitrators; public international law adjudicators; or through the lens of individual (perhaps human) rights protection. It is also argued that a public law framework should be adopted, one that does not relegate public law and regulatory concerns to the hands of a pure commercial arbitration approach, or to the politics of inter-state public international law, or to the exaggerated emphasis on individual right protection resulting in a pro-investor approach to interpretation of IIA obligations. The public law framework would recognize instead the essentially regulatory character of IIA adjudication, by reference to the principles and practices of national administrative law adjudication. The proponents of this view essentially predict (and perhaps desire) a result that moderates state liability in order to preserve governmental discretion. (204)

Whether or not these approaches reveal a particular policy agenda and whether these categorizations accord to reality, and account sufficiently for the more fine-grained analysis that each case requires, may be open to question. However, they provide a useful framework as to the direction in which IIA case law may tend to develop, one in which the specific nature of this area of international law, which in many cases effectively substitutes national administrative law, is acknowledged, and with it the specific role
P 119 that IIA arbitrators are bound to perform.

References

1) For an example of domestic IIA litigation, see the Argentine court decision in *Desarrollos en Salud S.A S/Concurso preventivo/S/Incidente de Revisión* (N.V. NISSHO IWAI S.A. (BENELUX)) (Juzgado Comercial 26, Secretaría 51, 10 Nov. 2003). See, also on the possibility of domestic IIA litigation, *Occidental Exploration & Production Company v. Ecuador* (English Court of Appeal, 9 Sep. 2005) at para. 56.

2) If litigation proceeds under domestic law, other complex related issues may arise as to the status of the IIA and applicable international law in domestic law, and whether these sources of law are self-executing and can be invoked directly by individuals before courts.

3) *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, entered into force, 27 Jan. 1980, 1155 UNTS 331, *reprinted in* (1969) 8 ILM 679 [Vienna Convention].

4) Some IIAs provide explicitly for the application of the IIA itself and international law as the proper law in disputes between contracting parties. See, for example, the 1994 US Model BIT (Art. X(1)); the Danish Model BIT (Art. 10(6)); and the Greek Model BIT (Art. 9(5)). Conversely, some BITs provide only that such disputes shall be resolved 'in respect for the law' without indicating the legal sources to be applied. This clause is present for example in some Dutch BITs (Art. 10(5), Lebanon-Netherlands (2002)), and seems to have its origins in Art. 37 of the 1907 *Hague Convention for the Pacific Settlement of International Disputes*, (1907) 205 Con TS at 233 [1907 Hague Convention] (under Part IV 'International Arbitration', Chapter I 'The System of Arbitration'), which reads: 'International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law.' This clause cannot be considered a proper choice of law clause because it does not spell out the applicable law. The intention of the drafters appears to have been to exclude the resolution of disputes *ex aequo et bono*. *Cf.* H.-J. Schlochauer stating that this provision in the Hague Convention is intended to permit arbitrators to base their decisions upon equity. See H.-J. Schlochauer, 'Arbitration' in R. Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. I (Amsterdam: North-Holland Pub. Co, 1992) at 224. This view is questionable. For example, the Dutch BITs that incorporate this type of clause then provide for the possibility of decisions *ex aequo et bono* only if specifically agreed to between the parties. See Art. 10(5), Lebanon-Netherlands (2002); Art. 12(5), Gambia-Netherlands (2002); and Art. 12(5), Costa Rica-Netherlands (1999).

5) In this case, the applicable law will be similar, if not identical, to that concerning investor-state disputes, i.e., a combination of international and domestic law sources. Indeed, a dispute concerning whether a contracting party is liable for breach of an IIA for government measures allegedly adversely affecting a particular investment or investor could be the object of either, or both, investor-state or a state-to-state arbitration, with no reason for different choices of law potentially leading to conflicting decisions.

6) See *SGS Société Générale de Surveillance S.A. v. Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004) [*SGS v. Philippines*] at paras 130-135 and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (Decision on Jurisdiction, 23 Jul. 2001) [*Salini*] at para. 59. *Cf. SGS Société Générale de Surveillance S.A. v. Pakistan* (Decision of the Tribunal on Objections to Juridiction, 6 Aug. 2003) [*SGS v. Pakistan*] at paras 160-161. On the *SGS* cases, see E. Gaillard, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered' in T. Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) at 331. See also *infra* Chapter 9.

7) Art. 52 of the ICSID Convention provides, in the relevant part: '(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: [...] (b) that the Tribunal has manifestly exceeded its powers.' On the application of this standard to failure to apply the proper law, see E. Gaillard, 'The Extent of Review of the Applicable Law in Investment Treaty Arbitration,' in E. Gaillard & Y. Banifatemi, eds, *Annulment of ICSID Awards*, IAI International Arbitration Series No. 1 (New York: Juris Publishing, 2004) at 223; C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) at 943 *et seq.*; A. Broches, 'Observations on the Finality of ICSID Awards' (1991) 6 ICSID Rev 92. See also *Klöckner Industrie-Anlagen GmbH and others v. Cameroon (Klöckner I)* (Decision on Annulment, 3 May 1985) at paras 3, 60 and 83; *Amco Asia Corporation and Others v. Indonesia (Amco I)* (Decision on the Application for Annulment, 16 May 1986) at para. 23; *Maritime International Nominees Establishment v. Guinea* (Decision on Annulment, 22 Dec. 1999) at para. 4.04; *Wena Hotels Limited v. Egypt* (Decision on the Application by the Arab Republic of Egypt for Annulment, 22 Jan. 2002) [*Wena Annulment*] at paras 21 *et seq.*; *Mr. Patrick Mitchell v. Congo* (Decision on the Application for Annulment of the Award, 1 Nov. 2006) at paras 55 *et seq.*; *CDC Group Plc. v. Seychelles* (Decision of the *Ad Hoc* Committee on the Application for the Annulment of the Republic of Seychelles, 29 Jun. 2005) at paras 44 *et seq.*; *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (Decision on Annulment, 21 Mar. 2007) [*MTD Annulment*] at paras 44-48 and 58 *et seq.*; *Hussein Nuaman Soufraki v. United Arab Emirates* (Decision of the *Ad Hoc* Committe on the Application for Annulment of Mr. Soufraki, 5 Jun. 2007) at paras 83 *et seq.*; *Industria Nacional de Alimentos S.A., and Indalsa Perú, S.A. v. Peru* (Decision on Annulment, 5 Sep. 2007) at paras 97 *et seq.* and *CMS Gas Transmission Company v. Argentina* (Decision of the *Ad Hoc* Committe on the Application for Annulment of the Argentina Republic, 25 Sep. 2007) [*CMS Annulment*] at paras 48 *et seq.*

8) Under US law a 'manifest disregard' of the applicable law may be a ground to vacate an award even if this is not expressly provided for under the Federal Arbitration Act, 9 UCS §10(a). See *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997); and *International Thunderbird Gaming Corporation v. United Mexican States*, 473 F.Supp.2d 80, 83 (D.D.C. 2007). For other IIA awards challenged on applicable law grounds before national courts see, e.g., *Czech Republic v. CME Czech Republic B.V.* (Judgment of the Svea Court of Appeal, 15 May 2003) at 54 *et seq.*

9) *Elettronica Sicula S.p.A (ELSI)* (*US v. Italy*) [1989] ICJ Rep 15 [*ELSI*] at 51, para. 73.

10) *Antoine Goetz et consorts v. Burundi* (Award, 10 Feb. 1999) [*Goetz*] at para. 99, where the tribunal states: 'la question de la licéité des actes d'un Etat n'appelle pas nécessairement la même réponse selon qu'on l'envisage au regard du droit interne de cet Etat ou au regard du droit international.'

11) *Ibid.*, at paras 119, 130-133.

12) This choice of law clause is also common in Belgo-Luxembourg Economic Union (BLEU) BIT practice. A similar clause is present in Art. 9(5), 1994 *Colonia Protocol on the Reciprocal Promotion and Protection of Investments within MERCOSUR*, and Art. H(4), 1994 *Buenos Aires Protocol on the Promotion and Protection of Investments made by Countries that are not Parties to MERCOSUR*.

13) E.g., Art. 9(5), Netherlands-Venezuela (1991).

14) E.g., Art. 8(6), Czechoslovakia-Netherlands (1991).

15) E.g., Art. 9(4), China-Netherlands (2001).

16) See examples cited in P. Peters, 'The Semantics of Applicable Law Clauses and the Arbitrator' in M. Sumampouw *et al.*, eds, *Law and Reality: Essays on National and International Procedural Law* (The Hague: TMC Asser Institute, 1992), 231.

17) *Ibid.*, at 242.

18) See, e.g., *Lena Goldfields Arbitration*, (1939) 5 Annual Digest 3 at 3; *reprinted in* (1950) 36 CLQ 42 at para. 22. See also the comment on this arbitration, V.V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ 747 at 772. See generally for the role of 'principles of international law' in the internationalisation of contracts, O. Spiermann, 'Applicable Law,' in P. Muchlinski, F. Ortino & C. Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008). See *supra* Chapter 1, §1.18, for further references.

19) See W. Ben Hamida, *L'arbitrage transnational unilatéral* (Doctoral Thesis presented at the Université Panthéon-Assas (Paris II), 24 Jun. 2003) (on file with the authors) at 509, citing the PCIJ's holding in the *Lotus* case that 'the words "principles of international law," as ordinarily used, can only mean international law as applied between all nations belonging to the community of States.'*The Case of the S.S. 'Lotus' (France v. Turkey)* (1927) PCIJ Ser. A, No. 10 at 16. Ben Hamida notes also that Art. 42 of the French version of the ICSID Convention refers to 'principes de droit international' which the Report of the Executive Directors of the World Bank on the ICSID Convention interprets as covering all international law sources as established in Art. 38(1) of the *Statute of the International Court of Justice*. See the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 ICSID Rep 23 at para. 40. *Cf.*, B. Goldman, 'La *lex mercatoria* dans les contrats et les arbitrages internationaux: Réalités et perspectives' (1979) JDI 481.

20) Peters, *supra* note 16 at 245 and Ben Hamida, *supra* note 19 at 507.

21) *CME Czech Republic B.V. v. Czech Republic* (Final Award, 14 Mar. 2003) [*CME*] at para. 402 [emphasis in original]. Criticising the tribunal's conclusion on discretion, see C. Schreuer, 'Comments relating to Applicable Law of the Stockholm Tribunal's Final Award of 14 March 2003' (2005) 2 TDM (Schreuer provided expert testimony on this case on behalf of the respondent). Prior to the *CME* final award, the governments of Czech Republic and The Netherlands had issued 'Agreed Minutes' indicating *inter alia* that under Art. 8(6) of the BIT the tribunal 'must … take into account as far as they are relevant to the dispute' the sources of law set out in Art. 8(6), thereby indicating that resort to those sources was mandatory, not discretionary. *CME, ibid.*, at paras 87-93.

22) *CME*, *ibid.*, at paras 396-413.

23) See Parts III, IV and V below.

24) E.g., Canadian BITs such as Art. XII(7), Canada-El Salvador (1999), and Art. XII(7), Canada-Uruguay (1997); Mexican BITs such as Art. 14(1), Korea-Mexico (2000), and Art. 17, Austria-Mexico (1998); and Art. 9(3), France-Hungary (1986).

25) This reads: 'A tribunal established under para. 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'

26) Agreement between Colombia, Mexico and Venezuela. See *supra* Chapter 1, §1.35. Art. 17-20(1) reads:

> Any tribunal constituted under this Section shall decide the disputes submitted for its review in accordance with this Treaty and with the applicable rules of international law.

27) See Art. 9(2)(c)(iii), Denmark-India (1995).
28) See US-Uruguay (2005), the investment chapters of recent US FTAs with Chile (2003) and Morocco (2004), and the 2004 Central America-Dominican Republic-US FTA (CAFTA-DR).
29) Art. 10.21(2), Chile-US FTA (2003), provides for the default application of all these sources. Art. 10.22(2), CAFTA-DR (2004), and Art. 10.21(2), Morocco-US FTA (2004), provide for the default application of only the law of the respondent state and international law.
30) This provision is common in Mexican BITs. See Art. 16, Greece-Mexico (2000), which reads: '(1) A tribunal established under this Part shall decide the submitted issues in dispute in accordance with this Agreement and the generally acknowledged rules and principles of international law. (2) An interpretation jointly formulated and agreed upon by the Contracting Parties of a provision of this Agreement shall be binding on any tribunal established under this Part.'
31) See on this distinction, Ben Hamida, *supra* note 19 at 504-5.
32) Peters, *supra* note 16 at 239.
33) Art. 3, BLEU-Singapore (1978), provides that 'an investment ... shall be subject to the laws in force in the territory of the [host country].'
34) Art. 8, Finland-Sri Lanka (1985).
35) Art. 8, Sri Lanka-Switzerland (1981).
36) Art. 8, Finland-Sri Lanka (1985).
37) Art. 11, 1991 UK Model BIT.
38) See *supra* Chapter 6, §6.48, and *infra* Chapter 9, §9.28, on preservation of rights provisions.
39) See *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (Award, 12 Apr. 2002) [*Middle East Cement*] at para. 87 (finding that this provision gives primacy to the BIT since it 'does not permit the application of provisions of national law limiting any claims found by the Tribunal to exist under the BIT'). See also on this type of clause, *Goetz*, *supra* note 10 at paras 95 and 99.
40) On Art. 42(1) of the ICSID Convention, see Schreuer, *supra* note 7 at 549 *et seq.*, and references therein. See also E. Gaillard & Y. Banifatemi, 'The meaning of "and" in Art. 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 ICSID Rev 375; W.M. Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold' (2000) 15 ICSID Rev 362; I.F.I. Shihata & A.R. Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' (1994) 9 ICSID Rev 183; and A. Broches, 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application' (1993) 18 YBCA 627.
41) Art. 54, ICSID Additional Facility Rules, provides, similarly, as follows: 'The 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 Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.'
42) See *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (Final Award, 27 Jun. 1990) [*AAPL*] at paras 18-24 and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (Award, 25 May 2004) [*MTD* Award] at paras 86-87.
43) *Cf.* The dissenting opinion of arbitrator Asante in *AAPL*, *ibid.*, criticising the majority's inference of an agreement as to applicable law under Art. 42(1), first sentence, and regretting that that resulted in an insufficient full argumentation of the case on Sri Lankan law.
44) See Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151 at 194.
45) See, e.g., *EnCana Corporation v. Ecuador* (Award, 3 Feb. 2006) [*EnCana*] at para. 184 (domestic law applies to determine the existence of the rights affected even if the applicable law clause refers only to the BIT and applicable rules of international law). On choice of law clauses see *supra*§2.4.
46) *American Manufacturing and Trading, Inc. v. Zaire* (Award, 21 Feb. 1997); *Mr. Franz Sedelmayer v. Russia* (Arbitration Award, 7 Jul. 1998); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico* (Award, 1 Nov. 1999) [*Azinian*]; *Pope & Talbot Inc. v. Canada* (Interim Award, 26 Jun. 2000); *Metalclad Corporation v. Mexico* (Award, 30 Aug. 2000) [*Metalclad*]; *SwemBalt AB, Sweden v. Latvia* (Decision by the Court of Arbitration, 23 Oct. 2000); *Emilio Augustín Maffezini v. Spain* (Award, 13 Nov. 2000) [*Maffezini*]; and *S.D. Myers, Inc. v. Canada* (Partial Award, 13 Nov. 2000).

47) *Cf. Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia* (Award, 18 Jun. 2001) [*Genin*] at para. 350, holding that on the basis of Art. 42(1), second sentence, of the ICSID Convention, 'in the absence of any agreement by the parties to the contrary, it is the law of the Republic of Estonia that applies,' which would appear an incorrect conclusion; but adding that in any case 'there is no basis on which to conclude that the application of rules of international law would effect a result any different than that reached on the basis of Estonian law'.
48) *AAPL, supra* note 42 at paras 20-21.
49) *Fedax N.V. v. Venezuela* (Award, 9 Mar. 1998) at para. 30. Art. 9(5), Netherlands-Venezuela (1991), reads: 'The arbitral award shall be based on: (i) the law of the Contracting Party concerned; (ii) the provisions of this Agreement and other relevant Agreements between the Contracting Parties; (iii) the provisions of special agreements relating to the investments; (iv) the general principles of international law; and (v) such rules of law as may be agreed by the parties to the dispute.'
50) *Goetz, supra* note 10 at para. 69.

51) Art. 9(5), BLEU-Burundi (1989).
52) *CMS Gas Transmission Company v. Argentina* (Award, 12 May 2005) [*CMS Award*] at para. 116.
53) *Ibid.*, at para. 117.
54) *AAPL, supra* note 42 at paras 20-21.
55) *CMS Award, supra* note 52 at para. 118.
56) *CME, supra* note 21 at para. 411. See also, noting that the respondent itself 'devoted little attention to Czech law during the ... proceedings' and 'presented no evidence regarding Czech law,'*Czech Republic v. CME Czech Republic B.V.* (Judgment of the Svea Court of Appeal, 15 May 2003) at 54-55.
57) See discussion on the concept in R. Kolb, 'General Principles of Procedural Law,' in A. Zimmermann *et al.* eds *Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) at 820-822. For an instance of application of the principle of *iura novit curia* in an IIA case, albeit under Swedish law as the law applicable to the proceedings, see *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Moldova* (Arbitral Award, 22 Sep. 2005) at 9-10.
58) J. Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', in ICCA Congress Series No. 13 (The Hague: Kluwer, 2007), at 879.
59) See *Wena Hotels Limited. v. Egypt* (Award, 8 Dec. 2000) [*Wena*] at para. 70; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentina* (Decision on Annulment, 3 Jul. 2002) [*Vivendi Annulment*] at paras 82-85.
60) See *infra* Chapter 10.
61) *Mr. Patrick Mitchell v. Congo* (Decision on the Application for Annulment of the Award, 1 Nov. 2006) at para. 57.
62) This stems from the rule that judgments should not be *ultra petita*. See, e.g., the ICJ decision in *Request for the interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colombia v. Peru)* [1950] ICJ Rep 395 at 402 ('it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions').
63) Some dispute resolution clauses in IIAs have a wider scope. See *supra*§2.2.
64) *AAPL, supra* note 42 at paras 20-21.
65) *Wena, supra* note 59 at paras 78-79.
66) A. Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties' (2001) ICSID Rev 20 at 21.
67) See *supra*§2.6 and *infra* Chapter 6, § 6.48 on preservation of rights provisions.
68) *Middle East Cement, supra* note 39 at para. 87.
69) *AAPL, supra* note 42 at paras 20-21.
70) *Wena, supra* note 59 at para. 79, applying Art. 42(1) of the ICSID Convention.
71) Douglas, *supra* note 44 at 197. See also on this point C. Staker, 'Public International Law and the *Lex Situs* Rule in Property Conflicts and Foreign Expropriations' (1987) 58 BYIL 151 at 169-170.
72) *EnCana, supra* note 45 at para. 184.
73) Similar clauses, though with different wording, are found in many BITs. Art. 1(a), Argentina-UK (1990) provides '"Investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made admitted....'
74) E.g., Art. 1(1), second paragraph, Bolivia-France (1989), which, after defining the term 'investment' adds: 'It being understood that the said assets shall be or shall have been invested in accordance with the legislation of the Contracting Party in whose territory or maritime zone the investment is made....'

75) *Desert Line Projects LLC v. Yemen* (Award, 6 Feb. 2008) at 102-105; *Saipem S.p.A. v. Bangladesh* (Decision on Jurisdiction and Recommendation of Provisional Measures, 21 Mar. 2007) [*Saipem*] at para. 79 and note 11; *Inceysa Vallisoletana, S.L. v. El Salvador* (Award, 2 Aug. 2006) at paras 190 *et seq.*; *LESI S.p.A. et ASTALDI S.p.A. v. Algeria* (Decision, 12 Jul. 2006) at para. 83 (iii); *Salini, supra* note 6 at para. 46; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan* (Decision on Jurisdiction, 14 Nov. 2005) [*Bayindir*] at paras 105-110.

76) Domestic law will also be relevant to determining the nationality of the investor, though this issue is typically a jurisdictional one and not a point of applicable substantive law. For an application of domestic law on nationality, see *Hussein Nuaman Soufraki v. United Arab Emirates* (Award, 7 Jul. 2004) at paras 55 *et seq.*; *Hussein Annulment*, *supra*, note 7 at paras 83 *et seq.* On issues of nationality, see also *Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Egypt* (Decision on Jurisdiction, 21 Oct. 2003) and *Waguih Elie George Siag and Clorinda Vecchi v. Egypt* (Decision on Jurisdiction, 11 Apr. 2007).

77) See *Philippe Gruslin v. Malaysia* (Award, 27 Nov. 2000), at paras 14.1 *et seq.*, noting the parties' pleadings on whether investment by a Belgian national in a Luxembourg investment fund holding investments in the Kuala Lumpur Stock Exchange could be considered an investment in Malaysia, on the basis of Luxembourg law and contractual documents relating to ownership of the units in the fund and underlying investments (although the tribunal decided on other grounds). See also *SGS v. Pakistan, supra* note 6 at paras 136 *et seq.*; and *SGS v. Philippines*, *supra* note 6 at paras 99 *et seq.*, resolving the issue on the basis of contractual documents and the facts rather than domestic law rules.

78) See *Tokios Tokele? s v. Ukraine* (Decision on Jurisdiction, 29 Apr. 2004) at paras 83-86; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (Award, 16 Aug. 2007) at paras 344 *et seq.*; *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction, 6 Jul. 2007) at paras 142 *et seq.*

79) See *William Nagel v. Czech Republic* (Award, 10 Sep. 2003) at 158-162; and *CMS Award, supra* note 52 at paras 127-144.

80) See *Genin, supra* note 47 at paras 348 *et seq.*; and *Maffezini*, *supra* note 46 at paras 66-71.

81) See *Azinian*, *supra* note 46 at paras 105 and 120.

82) *MTD Award*, *supra* note 42 at para. 204.

83) *Ibid.*, at para. 118. See *infra* Chapter 6, §6.26, with respect to the tribunal's finding that there was a breach of fair and equitable treatment.

84) *MTD Annulment, supra* note 7 at para. 75. The *ad hoc* committee, however, stated that whether the tribunal properly interpreted Chilean law was not a matter falling within the jurisdiction of the committee. *Ibid.*

85) See R. Jennings & A. Watts, eds, *Oppenheim's International Law*, 9th edn (London: Longman, 1992), Vol. 1, at 83 ('From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law; and insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court'). See also, *Case Concerning Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) (1926) P[1] Ser. A, No. 3 at 19. See note 101.

86) See *supra*§2.8 above.

87) *Azinian*, *supra* note 46 at para. 86 and *Čexskoslovenská Obchodní Banka, A.S. v. Slovak Republic* (Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction, 1 Dec. 2000) at para. 35.

88) *ELSI*, *supra* note 9 at 47.

89) Douglas, *supra* note 44 at 212.

90) *Ibid.*, at 197-211.

91) See *CME*, *supra* note 21 and *CME Czech Republic B.V. v. Czech Republic* (Partial Award, 13 Sep. 2001). Although the tribunal has the responsibility to apply the proper law, it is also incumbent on the respondent states to fully brief the tribunal on applicable domestic law. In the *CME* case, the Svea Court of Appeal, noted that the respondent state 'devoted little attention to Czech law during the ... proceedings' and 'presented no evidence regarding Czech law', *supra* note 56. See *infra* Chapter 6, §6.26, for further discussion of the *CME* case.

92) See *Wena, supra* note 59. See also *infra* Chapter 7, §7.29, for further discussion of the *Wena* case.

93) *Eureko B.V. v. Poland* (Partial Award, 19 Aug. 2005) [*Eureko*].

94) See dissenting opinion by arbitrator Jerzy Rajski in *Eureko*, *ibid.*, For commentary, see Z. Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko* and *Methanex*' (2006) 22 AI 27 at 38 *et seq.*

95) The same principle applies in other areas in which international law leaves certain questions to be decided by municipal law. Thus, for example, in order to determine whether an individual is a national of a state, international law normally looks first at the law of that state, provided it is not wholly unreasonable. See P. Malanczuk, *Akehurst's Modern Introduction to International Law* (New York; London: Routledge, 2007) at 64.

96) See, e.g., the *Shufeldt Claim* (1930) II RIAA 1079 at 1094; T. Meron, 'Repudiation of Ultra Vires State Contracts and the International Responsibility of States' (1957) 6 ICLQ 273. See also *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction, 6 Jul. 2007) at paras 171 *et seq.* and *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador* (Award, 20 Feb. 2004) at para. 166.

97) See *infra* Chapter 9, §9.27, and Chapter 10, §10.27.

98) See *infra* Chapter 6, §6.26, on legitimate expectations with respect to regulatory treatment.

99) See *ibid.*

100) Arts. 2(1)(a) and 31(3)(c), Vienna Convention. See *infra*§2.26.

101) International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 at 11; 2001 YBILC, Vol. II, Part Two. The Articles and commentary are *reprinted in* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002). See also, e.g., *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) PCIJ Ser. A/B, No. 44 at 4 (municipal law, including the constitution of the state, in itself cannot form the basis for an international claim, nor can it form a defence to international liability; it merely constitutes the state actions that may violate the state's obligations under international law). See also *Greco-Bulgarian 'Communities'* (1930) PCIJ Sec. B, No. 17 at 32; *Case of the Free Zones of Upper Savoy and the District of Gex* (1930) PCIJ Sec. A, No. 24 at 12, and (1932) PCIJ Sec. A/B, No. 46 at 167.

102) *Vivendi Annulment, supra* note 59 at para. 102.

103) *Ibid.*, at para. 96.

104) *MTD Award, supra* note 42 at para. 87.

105) *Ibid.*, at para. 204. See also *Consorzio Groupement L.E.S.I. – Dipenta v. Algeria* (Award, 10 Jan. 2005) at para. 24; *Técnicas Medioambientales Tecmed S.A. v. Mexico* (Award, 29 May 2003) [*Tecmed*] at para. 120 (citing J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) at 84). See also K.J. Vandevelde, *United States Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992), at 78 ('because treatment of investment [under BITs] must never be less than that required by international law, international law provides the governing rules of decision, except where national law is more favourable').

106) E.g., *Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentina* (Award, 21 Nov. 2000) and *Middle East Cement*, *supra* note 39 at paras 85-87.

107) P. Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois' (2000) 15 ICSID Rev 401 at 412.

108) A. Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties' (2001) 16 ICSID Rev 20 at 21.

109) *Wena Annulment, supra* note 7 at paras 42 *et seq.*; *Goetz, supra* note 10 at para. 98.

110) *Desarrollos en Salud S.A. S/Concurso preventivo/ S/ Incidente de Revisión* (N.V. NISSHO IWAI S.A. (BENELUX)) (Juzgado Comercial 26, Secretaría 51, 10 Nov. 2003).

111) Lluís Paradell-Trius, 'International Law in National Legal Systems: Constitutional Obstacles and Opportunities' (2005) 2 TDM.

112) E.g., *Goetz*, *supra* note 10.

113) P. Weil, *supra* note 107 at 409. ICSID practice under Art. 42(1), second sentence, of the ICSID Convention clearly indicates that in ICSID cases international law is fully applicable and prevails over municipal law. In *Compañía de Desarrollo de Santa Elena, S.A. v. Costa Rica*, for example, the tribunal found that under Art. 42(1), international law would prevail over municipal law: it was 'controlling,' and governed the arbitration. *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica* (Final Award, 17 Feb. 2000), at paras 64-65.

114) See, e.g., *Eastern Sugar B.V. v. Czech Republic* (Partial Award, 27 Mar. 2007) at para. 196.

115) For commentary, see A. Pellet, 'Art. 38,' in A. Zimmermann *et al.*, eds, *Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) at 676.

116) *Metalclad*, *supra* note 46 at paras 75 *et seq.* on transparency obligations under NAFTA, not in Chapter Eleven.

117) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (Award, 20 Aug. 2007) [*Vivendi II*] at para. 8.2.5 on the principle of full compensation in lieu of restitution as a customary international law rule.

118) *Tecmed, supra* note 105 at para. 124 on the principle of good faith.

119) *Maffezini*, *supra* note 46 at paras 43-50, referring to the *Rights of Nationals of the United States of America in Morocco* on the scope of MFN protection; *Hussein Nuaman Soufraki v. United Arab Emirates* (Award, 17 Jul. 2004) at para. 45, referring to the *Nottebohm* case on nationality of the claimant; *Tokios Tokelė s v. Ukraine* (Decision on Jurisdiction, 29 Apr. 2004) at paras 53-56 and 66 referring to *Barcelona Traction* on piercing the corporate veil; *CMS Gas Transmission Company v. Argentina* (Decision of the Tribunal on Objections to Jurisdiction, 17 Jul. 2003) at para. 44 on the *ELSI* case for the standing of shareholders.

120) *Maffezini*, *ibid.*, referring to the *Ambatielos* case when deciding on the scope of MFN protection.
121) *Vivendi II*, *supra* note 117 at para 7.4.8 quoting one of the most commonly cited works on BITs, that of F.A. Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241.
122) On precedent in IIA disputes see G. Kaufmann-Kohler, 'Arbitral Precedent: Dream Necessity or Excuse?' (2007) 23 AI 357; P. Duprey, 'Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished in this Regard from Arbitration Based on Investment Treaties?' in P. Pinsolle, A.V. Schlaepfer & L. Degos, eds, *Towards a Uniform International Arbitration Law*, IAI International Arbitration Series No. 3 (New York: Juris Publishing, 2005), at 251; and D. Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?' (2007) 10 IALR 92; *Special Issue on Precedent in Investment Arbitration* (2008) 5 TDM.
123) E.g., M. Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996). See Art. 59 of the ICJ Statute. For a statement in IIA case law see *SGS v. Philippines*, *supra* note 6 at para. 97.
124) E.g., Art. 1136(1) NAFTA Chapter Eleven. See D.M. Price, 'Chapter 11-Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?' (2000) 26 Can-USLJ 107 at 111.
125) Art. 53(1), ICSID Convention. See Schreuer, *supra* note 7 at 1082. *Cf. SGS v. Philippines*, *supra* note 6 at para. 97 (arguing that this provision refers to res judicata rather than precedent).
126) *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (Ancillary Claim) (Decision on Jurisdiction, 2 Aug. 2004) [*Enron Jurisdiction*] at para. 25.
127) See discussion of the cases *infra* at Chapter 6, §6.26, and Chapter 10, §10.21-§10.23.
128) *AES Corporation v. Argentina* (Decision on Jurisdiction, 26 Apr. 2005) at para. 30, and see generally the analysis at paras 17-33.
129) *Ibid.*, at para. 31.
130) *SGS v. Philippines*, *supra* note 6 at para. 97.
131) *Saipem*, *supra* note 75 at para. 67. See also, *Gas Natural SDG, S.A. v. Argentina* (Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 Jun. 2005) [*Gas Natural*] at paras 36 and 52 (noting that the tribunal arrived at its conclusions independently but then checked them for consistency with other decisions) and *Bayindir*, *supra* note 75 at para. 76.
132) *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] ICJ Rep 13 at para. 45.
133) One author has identified the publication of awards and decisions, the existence of specialized scholarly journals, academic and professional fora and committees dedicated to IIA arbitration and email discussion lists (like OGEMID) as factors for the increase in the use of precedent. See C. McLachlan, 'Investment Treaties and General International Law' (2008) 57 *ICLQ* 361 at 379.
134) Paulsson, *supra* note 58 at 881.
135) *SGS v. Philippines*, *supra* note 6 at para. 97.
136) See *infra* Chapter 5 on MFN clauses. See also the different approaches (albeit not plain contradiction) between *EnCana, supra* note 45 and *Occidental Exploration and Production Company v. Ecuador* (Final Award, 1 Jul. 2004) [*Occidental*]. Of course, decisions may contradict themselves inadvertently in case of parallel proceedings, as the classical examples of the *CME* and *Lauder* cases demonstrates: *CME Czech Republic B.V. v. Czech Republic* (Partial Award, 13 Sep. 2001); *Ronald S. Lauder v. Czech Republic* (Final Award, 3 Sep. 2001). On inconsistent decisions, see J. Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?,' in F. Ortino, A. Sheppard & H. Warner, eds *Investment Treaty Law-Current Issues*, Vol. 1 (London: BIICL, 2006) at 23; S. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (2005) 73 FLR 1521.
137) N. Blackaby, 'Investment Arbitration and Commercial Arbitration,' in L.A. Mistelis & J. Lew, eds, *Pervasive Problems in International Arbitration* (Amsterdam: Kluwer, 2006) at 228.
138) *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina* (Decision on Liability, 3 Oct. 2006) [*LG&E*] and *CMS Award*, *supra* note 52. See *infra* Chapter 10, §10.21 *et seq.*, for a discussion of the necessity defence. For commentary on this inconsistency see, e.g., A. Reinisch, 'Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v. Argentina and LG&E v. Argentina*' (2007) 8 JWIT 191.
139) *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (Award, 22 May 2007) [*Enron*].
140) *Sempra Energy International v. Argentina* (Award, 28 Sep. 2007) [*Sempra*] at para. 46. In the one other award against Argentina to date, *BG Group Plc. v. Argentina* (Final Award, 24 Dec. 2007) [*BG*] at paras 407-412, the tribunal summarily rejected the defence of necessity, with an approving reference to *Enron* and distinguishing *LG&E* on the basis that the BIT at stake did not contain a treaty emergency clause which arguably was the basis of the *LG&E* award.
141) *CMS Annulment*, *supra* note 7.

142) The tribunal in *CMS* was Orrego Vicuña (president), and Lalonde and Rezek (arbitrators); in *LG&E*: de Maekelt (president), and Rezek and van den Berg (arbitrators); in *Enron*: Orrego Vicuña (president), van den Berg and Tschanz (arbitrators); and in *Sempra*: Orrego Vicuña (president), and Lalonde and Morelli Rico (arbitrators).

143) *CMS* annulment proceedings took place between 27 Sep. 2005 (date of registration of the application) and 25 Sep. 2007 (date of decision). The *LG&E* and *Enron* awards came out during that period.

144) *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (Award on Jurisdiction and Liability, 27 Oct. 1989) 95 ILR 184 at 203.

145) U. Kriebaum, 'Privatizing Human Rights – The Interface Between International Investment Protection and Human Rights' (2006) 3 TDM; M. Hirsch, 'Interactions between Investment and Non-Investment Obligations in International Investment Law' (2006) Research Paper No. 14-06, Faculty of Law of the Hebrew University of Jerusalem, submitted to the ILA Committee on International Law on Foreign Investment 31 Mar. 2006; L.E. Peterson & K.R. Grey, 'International Human Rights in Bilateral Investment Treaties and in Investment Arbitration' (2003) Research Paper of the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs (Apr. 2003).

146) See, e.g., only a reference in passing to this issue in *Azurix Corp. v. Argentina* (Award, 14 Jul. 2006) [*Azurix*] at paras 254 and 261. For arguments of a somewhat human rights' nature see the Argentine emergency cases *BG*, *supra* note 140; *Sempra*, *ibid.*; *Enron*, *supra* note 139; *LG&E, supra* note 138; *CMS Award, supra* note 52. Human rights arguments have been raised in the pending Argentine water cases: *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A., v. Argentina* (ICSID Case No. ARB/03/19); *AWG Group Ltd. v. Argentina* (UNCITRAL Arbitration), and in other pending cases, such as *Piero Foresti, Laura de Carli and others v. South Africa* (ICSID Case No. ARB(AF)/07/1).

147) See *infra* Chapter 6, §6.11.

148) McLachlan, *supra* note 133 at 365, 371 and 399. See also C. McLachlan, 'The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', (2006) 55 ICLQ 281 and A. van Aaken, 'Fragmentation in International Law: The Case of International Investment Protection' Working Paper No. 2008-1, Law and Economics Research Paper Series, University of St Gallen Law School.

149) Arts 31 and 32, Vienna Convention, read as follows:

> *Article 31 General rule of interpretation*
>
> (1) 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.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) any relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32 Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

150) E.g., *AAPL*, *supra* note 42 at paras 38-42; *MTD Award, ibid.* at para. 112; *Enron Jurisdiction, supra* note 126 at para. 32; *Plama Consortium Limited v. Bulgaria* (Decision on Jurisdiction, 8 Feb. 2005) [*Plama*] at paras 117 and 147-165; *Eureko*, *supra* note 93 at para. 247 and *Aguas del Tunari, S.A. v. Bolivia* (Decision on the Respondent's Objections to Jurisdiction, 21 Oct. 2005) [*Aguas del Tunari*] at paras 88-93, 226, 230, 239.

151) See *Tokios Tokelės v. Ukraine* (Decision on Jurisdiction, 29 Apr. 2004) at para. 27.

152) *Noble Ventures, Inc. v. Romania* (Award, 12 Oct. 2005) [*Noble Ventures*] at para. 50.

153) On treaty interpretation, see I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester: Manchester University Press, 1984). See also A. Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge: Cambridge University Press, 2007) and *Oppenheim's International Law*, *supra* note 85 at §629-634.

154) McLachlan, *supra* note 133 at 371.

155) *MTD Award, supra* note 42 at para. 105.

156) See *infra* Chapter 6, §6.26, on the *MTD* tribunal's approach to the interpretation of fair and equitable treatment.

157) *Oppenheim's International Law*, *supra* note 85 at §633, referring to a series of maxims and principles as supplementary means of interpretation. See also Aust, *supra* note 153 at 248-249.

158) See *infra* Chapter 5, Part III, applying MFN treatment to investor-state arbitration procedures.

159) *National Grid Plc v. Argentina* (Decision on Jurisdiction, 20 Jun. 2006) *[National Grid]* at para. 82.

160) C. Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) 3 TDM at 7.

161) I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003), at 604; A. McNair, *The Law of Treaties* (Oxford: Clarendon, 1961), at 393. The principle is regarded also as a basic principle for the interpretation of MFN clauses, according to which the clause operates only in matters covered by the basic treaty. See, e.g., *Emilio Agustín Maffezini v. Spain* (Decision of the Tribunal on Objections to Jurisdiction, 25 Jan. 2000) [*Maffezini Jurisdiction*] at paras 41-56. See *infra* Chapter 5 on MFN clauses.

162) *Oppenheim's International Law*, *supra* note 85 at 1273.

163) See, e.g., *Grimm v. Iran*, Case No. 71, Award, 18 Feb. 1983, 71 ILR 650, 652 (1986); *Payment of Various Serbian Loans Issued in France; Payment in Gold of the Brazilian Federal Loans Issued in France* (1929) PCIJ Ser. A, Nos. 20/21.

164) See *infra* Chapter 6, §6.47 and Chapter 10, §10.8.
165) E.g., Art. 4, Argentina-UK (1990), headed 'Compensation for Losses' reads in part: 'Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, state of national emergency, revolt, insurrection or riot [...] shall be accorded [...] treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. [....].'
166) Aust, *supra* note 153 at 249.
167) See, e.g., Albania-UK (1994).
168) *National Grid supra* note 159 at para. 85.
169) *Ibid.*, at 91. For other examples of such comparative interpretation see *Telenor Mobile Communications A.S. v. Hungary* (Award, 13 Sep. 2006) at paras 96-97; *Maffezini Jurisdiction, supra* note 161 at paras 58-66.
170) *CMS Award, supra* note 52 at paras 368-373.
171) But see *Inceysa Vallisoletana, S.L. v. El Salvador* (Award, 2 Aug. 2006) at paras 192-200.
172) Schrever, *supra* note 160 at 9. The exception is Chapter Eleven NAFTA, where the NAFTA parties have published online the trilateral negotiating draft texts. On the negotiating history of Chapter Eleven NAFTA, see M. Kinnear, A.K. Bjorklund & J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (The Netherlands: Kluwer Law International, 2006).
173) *Aguas del Tunari, supra* note 150 at para. 274.
174) E.g., *Ronald S. Lauder v. Czech Republic* (Final Award, 3 Sep. 2001) at para. 292; *SGS v. Philippines*, *supra* note 6 at para. 116; *MTD Award, supra* note 42 at para. 113; *Siemens A.G. v. Argentina* (Decision on Jurisdiction, 3 Aug. 2004) at paras 80-81; *CMS Award, supra* note 52 at para. 274; *Eureko*, *supra* note 93 at para. 248; *Noble Ventures, supra* note 152 at para. 52; *Aguas del Tunari*, *supra* note 150 at paras 240-241 and 247; *Continental Casualty Company v. Argentina* (Decision on Jurisdiction, 22 Feb. 2006) at para. 80; *Saluka Investments BV v. Czech Republic* (Partial Award, 17 Mar. 2006) at paras 299-300; *Azurix*, *supra* note 146 at paras 307 and 360.
175) *Ronald S. Lauder v. Czech Republic* (Final Award, 3 Sep. 2001) at para. 292.
176) *Occidental*, supra note 136 at para. 183. Also see *MTD Award, supra* note 42 at para. 113.
177) *CMS Award, supra* note 52 at para. 274.
178) E.g., *Azurix*, *supra* note 146 at para. 360 and *Siemens A.G. v. Argentina* (Award, 6 Feb. 2007) at para. 81.
179) *Siemens A.G. v. Argentina* (Decision on Jurisdiction, 3 Aug. 2004) at para. 81.
180) E.g., *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan* (Decision on Jurisdiction, 29 Nov. 2004) at para. 95; *Continental Casualty Company v. Argentina* (Decision on Jurisdiction, 22 Feb. 2006) at para. 80.
181) E.g., *SGS v. Philippines*, *supra* note 6 at para. 116; *Eureko*, *supra* note 93 at para. 248; and *Noble Ventures supra* note 152 at para. 52.
182) *SGS v. Philippines*, *ibid.*, at para. 116.
183) Douglas, *supra* note 44 at 51 and McLachlan, *supra* note 133 at 371.
184) *Plama, supra* note 150 at para. 193.
185) *Saluka Investments BV v. Czech Republic* (Partial Award, 17 Mar. 2006) at paras 299-300. See also *Azurix, supra* note 146 at para. 307 and *El Paso Energy International Company v. Argentina* (Decision on Jurisdiction, 27 Apr. 2006) at paras 68-70.
186) *SGS v. Pakistan*, *supra* note 6 at para. 171.
187) *Case of the S.S.'Wimbledon'* (1923) PCIJ Ser. A, No. 1 at 25. See J. Crawford, 'Treaty and Contract in Investment Arbitration' (2008) TDM at 4.
188) L.E. Peterson, 'Bilateral Investment Treaties and Development Policy-Making' (Winnipeg: International Institute for Sustainable Development, 2004) at 23.
189) *Ibid.*, at 24.
190) See A. Newcombe, 'Investment Treaty Law and Sustainable Development' (2007) 8 JWIT 357, reviewing new model IIAs that incorporate references to sustainable development in their preambles.
191) See *supra*§2.4.
192) As provided under Art. 2001, NAFTA, the NAFTA Free Trade Commission is composed of one representative of each NAFTA state and its functions include providing interpretations of the NAFTA provisions. Art. 1131 ('Governing Law') provides at para. (2) that '[A]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.' See *infra* Chapter 6, §6.22 *et seq.*
193) *S.D. Myers, Inc. v. Canada* (Partial Award, 13 Nov. 2000); *Metalclad*, *supra* note 46; *Pope and Talbot Inc. v. Canada* (Award on the Merits of Phase 2, 10 Apr. 2001).
194) *Pope & Talbot Inc. v. Canada* (Award in respect of Damages, 31 May 2002) [*Pope & Talbot*] at paras 8-69.
195) See *infra* Chapter 6.
196) Art. 9 of the BIT contemplates the possibility of the contracting parties 'to consult on any matter concerning the interpretation or application of the Agreement.'
197) *CME*, *supra* note 21 at paras 87-93.
198) *Aguas del Tunari, supra* note 150 at para. 251.
199) *Gas Natural, supra* note 131 at note 12.

200) *Sempra Energy International v. Argentina* (Decision on Objections to Jurisdiction, 11 May 2005) at para. 146.
201) *Sempra*, *supra* note 140 at para. 385.
202) *Pope & Talbot, supra* note 194 at paras 8-47.

203) *Sempra*, *supra* note 140 at para. 386.
204) See G.Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at Chapter 6; and G. Van Harten & M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 150.