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Arbitration of Investment Disputes Under the Rules of UNCITRAL and ICSID: Prerequisites, Applicable Law and Review of Awards

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1. ARBITRATING BILATERAL INVESTMENT TREATIES DISPUTES UNDER THE UNCITRAL RULES: THE CME/LAUDER AND THE CZECH REPUBLIC ARBITRATIONS (1999-2001)

A RECENT INTERNATIONAL INVESTMENT DISPUTE, the *CME/Lauder* and the *Czech Republic* arbitrations, has attracted widespread attention well beyond specialized circles for a number of reasons.

This was possibly the first publicly known investment dispute involving bilateral investment treaties (BITs), which was decided in international commercial arbitration proceedings governed by the UNCITRAL Arbitration Rules rather than within ICSID. The national courts of the country where the award was rendered, *in casu* Sweden, have had to decide on a challenge to set aside the award brought by the losing State party in accordance with the local arbitration statute. Had the case been brought under the ICSID Convention, no such control by national courts would have been possible. Last but not least, the same acts by the Czech Republic, alleged to be wrongful, were subject to two parallel arbitrations. This development has highlighted issues of conflict of procedures, of governing treaty law and of awards, which the intricate, non-coordinated network of BITs could entail in the field of international commercial arbitration, thus potentially bringing a backlash to the legal

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security surrounding international investments.[1] The speedy completion of both the arbitration proceedings (including the full payment by the State concerned) indicates that international commercial arbitration, when available under BITs, may be a practicable alternative avenue for aggrieved investors.

The dispute arose from the interference during 1996-1999 by Media Council, an agency of the Czech Government, with the contractual scheme under which CME Czech Republic BV (CME), a Dutch company controlled by Mr. Ronald Lauder, was operating in partnership with a local investor TV Nova. This interference resulted practically in the exclusion of CME and the destruction of its investment.

In 2000, CME initiated an arbitration proceeding against the Czech Republic in accordance with the provisions of Article 8 of the 1991 BIT between the Czech and Slovak Federal Republic and the Netherlands (Netherlands/Czech Republic BIT), claiming unfair treatment and expropriation without compensation. Article 8 of the treaty provides that disputes between a Contracting State and an investor of the other Contracting State concerning an investment of the latter shall be submitted to an *ad hoc* arbitral tribunal, which shall determine its own procedure "applying the arbitration rules of the U.N. Commission for International Trade Law (UNCITRAL)." This Article also includes a clause on applicable law and a reference to the Stockholm Chamber of Commerce; based on this link, the arbitration took place in Stockholm.

The arbitration proceeding between Mr. Lauder (a U.S. citizen) and the Czech Republic were likewise the result of another UNCITRAL arbitration, initiated in 1999 and carried out in London in conformity with similar provisions found in Article VI of the 1991 BIT between the Czech and Slovak Federal Republic and the United States (U.S./Czech Republic BIT), based on the fact that CME's investment was "controlled directly or indirectly" by Mr. Lauder. Unlike the Netherlands/Czech Republic BIT, the U.S./Czech Republic BIT provided to investors the alternative option of resorting to ICSID; Mr. Lauder, however, chose to proceed with an UNCITRAL Rules arbitration.

In its award of September 3, 2001, the tribunal carrying out the arbitration in London found no injury, although it concluded that the Government had acted unfairly in some respect. However, in a partial award of September 13, 2001, the tribunal carrying out the arbitration in Stockholm

[1] *See* Charles N. Brower, Charles H. Brower, and Jeremy Sharpe, The Coming Crisis in the Global Adjudication System, 19 Arb. Int'l 413, 424 (2003).

found that the Czech Republic had violated several articles of the Netherlands/Czech Republic BIT, thus causing *de facto* expropriation of CME's investment.

The Czech Government challenged this award before the competent Court of Appeal in Stockholm pursuant to the Swedish Arbitration Act of 1999,[2] claiming, *inter alia,* major procedural errors and lack of jurisdiction, in that the arbitrators had disregarded the principles of *lis pendens* and *res iudicata* in the light of the London proceedings and award. The award of the tribunal in the Stockholm arbitration was further challenged for "excess of mandate," in having failed to apply Czech law in accordance with Article 8(6) of the Netherlands/Czech Republic BIT, having relied instead on public international law, and for being *ex aequo et bono.* The Court of Appeal rejected all challenges against that award. Shortly thereafter, the arbitral tribunal in Stockholm concluded the *quantum* phase of the arbitration, awarding about US$ 250 million in damages to CME.[3]

2. DIRECT ARBITRATION IN BITs

These two arbitrations offer several interesting aspects for reflection. I will focus here only on some peculiarities involved in submitting claims for breach of BIT provisions to international commercial arbitration. The issues raised are mainly those of: (a) the identification and interpretation of the arbitration agreement when represented by the BIT itself; (b) the choice of the applicable law (especially international law); and (c) the competence of domestic courts in examining challenges against the award. In discussing these issues and their proper solution, I will highlight the differences between investment dispute settlement under the UNCITRAL rules and the ICSID Convention and rules, in order to evaluate in conclusion the respective advantages and disadvantages of one or the other method, in theory and from the parties perspective.

There have been recently other cases, particularly those under NAFTA, where domestic courts have been called upon to review non-ICSID awards rendered in investment arbitrations pursuant to treaties. They will be

[2] An English translation of the Act is reprinted *in* 17 Arb. Int'l 425 (2001); *see especially* Arts. 33 and 34 on invalidity and setting aside of awards.

[3] For the text of the *Lauder* award of September 3, 2001, see 14 World Trade and Arbitration Materials 35 (2002); for the *CME* partial award of September 13, 2001 see *id.* at 109; for the final award of March 14, 2003 see 15 World Trade and Arbitration Materials 83 (2003). For the Judgement of the Svea Court of Appeal in Case No. T 8735-01, rendered on May 15, 2003, see 42 ILM 919 (2003). All the decisions are also available at <http://www.cetv-net.com>.

also taken into account in this paper, especially in the part concering the competence of domestic courts in examining challenges against awards.[4]

The most important development in this respect has been undoubtedly the massive expansion of the number of BITs since the 1970s, now estimated to more that 2000. As stated in a leading U.N. publication:

> Given the controversy surrounding customary international law relating to foreign investment, international agreements could provide a source of clear and certain rules.... At the multilateral level, the adoption of agreements on investment has proved to be far more difficult.... Thus, over the years, for many countries BITs have provided the second best solution in the absence of a universal investment agreement.... BITs constitute at present a principal source of substantive and, especially, procedural rules for international protection of [foreign direct investment].[5]

The BITs lay down both the substantive standards for treatment of foreign investments made by nationals and companies of either of the BIT Parties in the territory of the other Party, and the procedural standards for the settlement by direct arbitration of possible investment disputes. The adoption of this approach by sectoral and regional agreements, such as the European Energy Charter Treaty and NAFTA, have contributed to the standardization of these features. However, failed attempts in 1990s at OECD, and later at WTO, for a multilateral approach to investment protection in general, and to direct investor-States arbitration, in particular, prevented such an approach from having evolved from a standard feature of international investment regulation to a "legal regime" of general application.[6]

On the one hand, the availability of direct arbitration against the host State by the aggrieved investor on the basis of the advance consent to such arbitration by the States parties to the BIT, has indeed become a standard feature and a basic element of the "protection" accorded to foreign investments

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[4] *See* Supreme Court of British Columbia, Reasons for Judgment of May 2, 2001, The United Mexican States v. Metalclad Corporation, 2001 BCSC 664, 119 I.L.R. 647 (2002); *also available at* <http://www.courts.gov.bc.ca>; Attorney General of Canada v. S.D.Myers, Inc., Federal Court of Canada, decision of January 13, 2004 (2004 FC 38), *available at* <http://decisions.fct-cf.gc.ca/fct/2004/2004fc38.html>, *summarized in* 98 AJIL 339 (2004).

[5] UNCTAD, Bilateral Investment Treaties in the Mid-1990s (1998), at 4.

[6] *See* Société française pour le droit international (SFDI), Un accord multilateral sur l'investissement : d'un forum de négociation à l'autre ? (1999).

and investors. To a large extent, this feature is among the fundamental rationale for these treaties. On the other hand, the exact regulation of arbitration is one of the areas where individual BITs differ most. This is a fact both as to the kind of disputes that can be brought to arbitration[7] (especially whether they are limited to claims for treaty breaches or include also claims for contract or local law violations) and as to the procedural requirements that they may impose (such as condition precedents for settlement negotiations or local remedies). Finally, the BITs defer as to the type of arbitration procedures that they make available for the settlement of investment disputes.

Since the entry into force of the 1965 Washington Convention establishing ICSID, direct arbitration between foreign investors and host governments has become the preferred method for resolving of investment disputes. Indeed, the main purpose of the Convention was that of "depoliticizing" the underlying conflicts by ensuring an impartial and efficient arbitral mechanism, administered by an international organisation, whereby disputes would be resolved by application of legal rules and with due respect for international legal principles.[8] Before and apart from ICSID, *ad hoc* arbitration based on relevant clauses of "State contracts" or "investment agreements" between major foreign investors and host States had been frequent.[9] Arbitral tribunals and authors have been striving to decide whether these relations, the law applicable to them and the resulting awards pertain to international or transnational law, rather than to the private law of contract and arbitration. Whatever the answer, private parties have often been prevented from pursuing effectively arbitral proceedings and from enforcing favourable awards due to State sovereign interference and immunity in respect to execution.[10]

Two features of ICSID arbitration deserve to be highlighted here as an effective solution to those difficulties.

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[7] *Compare* the Netherlands/Czech Republic BIT (Art.8(1)) covering "all disputes…concerning an investment" *with* the U.S./Czech Republic BIT, limited to claims alleging breach of the BIT itself or of an investment authorisation (Art.VI.1).

[8] *See generally* 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, *reprinted in* ICSID, ICSID Convention, Regulations and Rules (2003), paras. 37 and 40; *see also* Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Rec. des Cours 3 (1972-II).

[9] *See especially* the *Aramco* case, Arabian-American Oil Co. v. Saudi Arabia, 27 ILR 117 (1958); the Aminoil v. Kuwait award, 21 ILM 976 (1982); and the "Libyan oil" cases, Texaco v. Libya, 17 ILM (1978) and Llamco v. Libya, 20 ILM 78 (1981).

[10] *See* Karl-Heinz Bockstiegel, Der Staat als Vertragspartner ausländischer Unternehmungen, 1971; Giorgio Sacerdoti, I Contratti Tra Stati E Stranieri Nel Diritto Internazionale (1972); Charles Leben, Quelques réflexions théoriques à propos des contrats d'Etat, in Souveraineté Etatique Et Marches Internationaux A La Fin Du XX Siècle 119 (2000); M. Sornaraja, The Settlement of Foreign Investment Disputes 25 (2000).

First, while the procedure and its administration is guaranteed by international law (the ICSID Convention and the Centre established by the Convention as an international institution), the provisions on applicable law do not entail the internationalization of the investment relation, be it contractual or not. According to Article 42(1) of the ICSID Convention, the parties are free to agree on the applicable law. In the absence of such choice, the law of the State party to the dispute is to be applied by ICSID arbitral tribunals, as well as "such rules of international law as may be applicable." A limit to the application of the domestic law of the host State is thereby set forth, so to avoid giving effect to provisions contrary to internationally accepted legal principles, especially in the area of treatment of foreign investment. It would be unacceptable and contrary to the purpose of the ICSID Convention that awards issued under the aegis of an international institution would apply domestic provisions in breach of international standards, such as those, for example, of annulling retroactively investment contracts or providing for expropriation without compensation, to recall frequent contentious issues in the years when the ICSID Convention was being drafted. International law would also be applicable, so to say independently, when issues of international treaties and other international obligations would rise in a proceedings.

The second issue concerns the conditions for the acceptance of an obligation to settle future or existing disputes through ICSID arbitration and for initiating of ICSID arbitration proceedings. In this respect ICSID arbitration is completely optional; the jurisdiction of the Centre extends to investment disputes between a Contracting State and a national of another Contracting State, provided that those parties have consented in writing to submit such a dispute to the Centre. Article 25 of the ICSID Convention provides that consent is exclusive and may not be revoked unilaterally, thus ensuring legal security to the foreign investor once the host State has given its consent. The Convention does not specify how consent (especially advance consent) may be expressed. Thus, besides the classical instrument of a contract or an investment agreement, consent by the host State expressed in investment laws and in a BIT is fully operative under the Convention.[11] In these instances, the private investor's consent may be separately expressed, just by initiating arbitration in case of dispute relying on the advanced consent given to ICSID arbitration by a Contracting host State through a law or a treaty.

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[11] *See* Report of the Executive Directors, *supra* note 8, at para. 24.

3. ARBITRATION WITHOUT PRIVITY UNDER BITs

Direct investor-State arbitration provided for in BITs and in other treaties dealing with investments (such as NAFTA) has been encapsulated in the expression "*arbitration without privity.*"[12] The relevant treaty provision makes it unnecessary that the investor and the State consent explicitly in writing in a contractual clause or otherwise to submit an existing or eventual dispute to a given arbitration procedure, as it is the normal practice under domestic law and international conventions. The treaty provision constitutes the "advance consent" of the State, as some treaty clauses specify (such as Article 8(2) of the Netherlands/Czech Republic BIT). The consent of the private investor results from it starting an arbitration proceeding, thus "accepting" the "standing offer" made by the State in the treaty.[13] The investor thus may initiate an arbitration in a way "unilaterally," without having ever consented specifically beforehand to arbitration with the State concerned. Consent to arbitration of both parties is expressed by the convergence of these separate declarations made at different times. This kind of "arbitration without privity,"[14] which eliminates the need of a contractual arbitration undertaking (*compromis* in respect of an existing dispute or *clause compromissoire* in respect of future disputes), has become so relevant currently that most arbitrations pending at ICSID are based more frequently on such a BIT clause rather than on a contractual provision.[15]

The widespread participation of States in the ICSID Convention (about 140 ratifications presently) and the guarantees of efficient and impartial process surrounding the ICSID system of dispute settlement would seem to justify an almost exclusive reference to ICSID in BITs. However, this does not appear to be the case for a number of reasons. For example, if one or both States are yet to join the ICSID Convention at the time of concluding the BIT,

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[12] *See* Jan Paulsson, Arbitration Without Privity, 10 ICSID Rev.–FILJ 232 (1995).

[13] Antonio R. Parra, Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties, 16 ICSID Rev.–FILJ 20, 21-24 (2001) (mentioning 28 ICSID cases brought by investors under BITs and 8 under NAFTA, and examining five ICSID awards on the merits). Other relevant cases include Lanco International, Inc. v. Argentine Republic, Case No. ARB/97/6, Decision on Jurisdiction, Dec. 8, 1998, 40 ILM 457 (2001); Salini Costruttori S.p.A & Italstrade S.p.A v. Morocco, Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, 129 J. Droit Int'l 196 (2002); Antoine Goetz and others v. Republic of Burundi, Case No. ARB/95/3, Award Embodying the Parties' Settlement Agreement, Feb. 10, 1999, 15 ICSID Rev.– FILJ 457 (2000).

[14] Some BITs do require a separate consent to arbitration in writing by the investor. *See, e.g.,* U.S./Czech Republic BIT, Art. VI(3). This formality does not affect the qualification of the arbitration as "without privity," based in other words on "consentement dissocié." Brigitte Stern, Un coup d'arrêt à la marginalisation du consentement dans l'arbitrage international, Revue de l'arbitrage, 403 (3/2000).

[15] *See* News from ICSID, Summer (2003), at 2 (indicating that the latest 15 cases registered since January 2003 had all been based on BIT provisions).

providing for an alternative means for investment dispute settlement would be inevitable. Even in case both BIT Parties are also members of ICSID, the tendency is that the BIT lists other dispute settlement mechanisms, which the parties to a dispute, in practice the foreign investor as a claimant, can resort to.

As stated by the above-referred U.N. publication:

> The earliest investor-to-State dispute provisions contained each contracting party's consent only to ICSID arbitration. The recent trend is to give investors a choice of mechanisms. One choice authorized by some BITs is arbitration through some institutions other than ICSID or the affiliated Additional Facility. Other institutions include the International Chamber of Commerce or the Stockholm Chamber of Commerce.
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> Another choice is ad hoc arbitration, that is arbitration before a single individual appointed, or a tribunal specially constituted, for a particular dispute.
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> …
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> The decision to provide alternatives to ICSID arbitration is the result of a number of considerations. First, there was concern at one point that ICSID awards might be particularly vulnerable to annulment. Second, the successful use of UNCITRAL rules by the Iran-United States Claims Tribunals seemed to suggest that these rules were especially adaptable to investor-to-State dispute-settlement.[16]

The Netherlands/Czech Republic BIT appears peculiar in this respect as it does not allow ICSID arbitration, but provides only for international commercial arbitration in accordance with the UNCITRAL Arbitration Rules.[17]

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[16] UNCTAD, *supra* note 5, at 95.

[17] It is true that the Czech Republic was not yet a party to the ICSID Convention when it entered into the BIT with the Netherlands in 1991 (which entered in force in 1992). However, this fact did not prevent the Czech Republic from agreeing to the application of the ICSID Convention in the BIT with the United States in the same year, in light of its future adhesion to the ICSID Convention, which occurred in 1993.

Relevant BIT clauses not referring to ICSID normally provide for *ad hoc* arbitration under the UNCITRAL Arbitration Rule (with or without indication of an appointment authority in case of need) and/or arbitration under the rules of other administering arbitration institutions, such as the International Chamber of Commerce or the Stockholm Chamber of Commerce. All these models share the common feature of pertaining to the category of international commercial arbitration, whereby the arbitration is ultimately governed by municipal law, which often follows the 1985 UNCITRAL Model Law of International Commercial Arbitration (UNCITRAL Model Law). Awards are also subject to challenges and to control by the courts according to local arbitration statutes in the country where they are rendered, while their recognition and enforcement abroad is subject to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Awards rendered pursuant to the rules of the ICSID Additional Facility, which is also provided for in some BITs and in NAFTA Article 1130, are also subject to the New York Convention.[18]

Notwithstanding this variety of options usually made available, most if not all generally known investment arbitrations under BITs have so far been conducted within ICSID; as a result, questions of application of the model of international commercial arbitration to BIT investment dispute resolution have been subject to limited attention, if any at all.[19] The *CME/Lauder* cases seem the first instance of a major investment dispute arising under BITs being resolved in UNCITRAL arbitration (a term that I use here as synonymous to international commercial arbitration). These arbitrations have evidenced a number of specific questions, if not problems, that may arise from the combination of BIT clauses on arbitration with a recourse to standard international commercial arbitration.

As demonstrated by the *CME/Lauder* cases, such problems may be amplified by the possibility for investors to claim breaches of different BITs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same event (that is an allegedly tortuous conduct by the host State), leading thereby to

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[18] The ICSID Additional Facility was established as an optional arbitration mechanism, not subject to the Washington Convention, administered by ICSID, and set up for the settlement of investment disputes when either the host State or the home State of the investor is not a party to the ICSID Convention (as is the case, *e.g.,* for Canada and Mexico) or when the dispute does not arise directly out of an investment. The Additional Facility Rules are available at <http://www.worldbank.org/icsid>.

[19] On July 1, 2004, an award was issued in the dispute between Occidental Exploration and Production Co. and Ecuador based on the U.S./Ecuador BIT, providing for UNCITRAL rules arbitration (LCIA administered the arbitration in London). *See* Notice in 1 Transnational Dispute Management 3 (2004).

parallel proceedings and potentially conflicting awards. This result is due to the fact that many if not most BITs protect not only investments made by nationals, individual and corporations of one State directly into the other State, but also investments made indirectly through a company controlled by the investor in another State. Hence, the host State may face multiple arbitrations under different BITs in relation to the essentially same events.

4. INTERNATIONAL COMMERCIAL ARBITRATION FOR INVESTMENT DISPUTES UNDER BITs

By providing for recourse to arbitration under the UNCITRAL Arbitration Rules, BITs refer investor-State disputes to international commercial/trade/economic arbitration, which is the preferred method today for solving of most international disputes having an economic content between subjects of different countries. In providing for direct investor-State dispute settlement through this type of arbitration, BITs add some peculiar features to the otherwise applicable scheme of international commercial arbitration that must be taken into account.[20]

The instruments of international commercial arbitration, to which BITs refer directly or indirectly include:

- the New York Convention of 1958, dealing with the recognition by State courts of arbitration agreements and awards made in other countries or under foreign law;
- the European Convention on International Commercial Arbitration of 1961 (the Geneva Convention) on the same subject;
- the UNCITRAL Arbitration Rules, unanimously approved and commended by the U.N. General Assembly in 1974 for the conduct of *ad hoc* arbitration;
- the UNCITRAL Model Law on International Commercial Arbitration of 1985, also recommended by the U.N. General Assembly "in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international arbitration practice."

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[20] This is the case also for several articles of NAFTA Chapter 11.

The autonomy of international commercial arbitration has been recognized both in domestic laws and in the relevant international instruments, distinguishing it from purely domestic arbitration both at the seat and as to recognition of awards in other countries, especially for the purpose of limiting the interference by local courts.[21] The UNCITRAL Model Law was drafted, and has been used extensively, as a basis for enactment of national legislation addressing the regulation, recognition and enforcement of international arbitration taking place in the *forum* or abroad without distinction.[22] States have now come to accept, and view with favour, the existence of this widespread practice. They tend to facilitate and support the effectiveness of this type of arbitration within their territories and cross-border through appropriate special domestic legislation and the aforementioned international instruments.

Article 1(3) of the UNCITRAL Model Law defines arbitration as international if, in the first instance, "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States." The New York Convention does not rely on a definition of the "international" character of arbitration. In fact, in conformity with its title, its Article I(1) focuses on the "recognition and enforcement of foreign arbitral awards," *i.e.,* those "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons whether physical or legal." The New York Convention does not regulate the proceedings either directly or indirectly; therefore, it does not deal with the prerequisites, if any, that make the choice of arbitration to settle a given dispute admissible. In addition, the Convention is neither concerned with the constitution of an arbitral tribunal nor with the conduct of the proceedings. These matters, which fall within the responsibility of the parties and the arbitrators, are covered by other instruments (such as the applicable arbitration rules, UNCITRAL Model Law), mostly on an optional basis.

There is an unanimous recognition that disputes between a State or a State entity, on the one hand, and private businessmen or enterprises of another State, on the other hand, can also be properly subject to dispute resolution

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[21] Giorgio Bernini, The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability, *in* The Art of Arbitration: Essays on International Arbitration, Liber Amicorum Pieter Sanders 51, 59 (Jan C. Schultz & Albert Jan van den Berg, eds., 1982).

[22] The Swedish Arbitration Act of 1999 has taken the UNCITRAL Model Law into account, however, it does not follow it in all respects, as is the case, for instance, with the German Arbitration Act of 1998. *See* Kaj Hobér, Arbitration Reform in Sweden, 17 Arb. Int'l 351, 352 (2001).

procedures of international commercial arbitration. This practice has, indeed, been an important feature of international economic intercourse for decades.[23]

> In principle, there can be little doubt, if any, that international arbitration arising from a dispute between States and foreign subjects, under a contractual relationship between the parties, should be put on the same level as arbitrations between two private parties, and not as arbitrations between States, which are governed as such by public international law…. [T]here is no reason to believe that the general legal principles applying to international commercial arbitration… do not apply when one of the parties is a State or another public entity, only in view of this particular circumstance. As far as the applicable international conventions are concerned, this does not seem to be open to doubt, especially in view of the broad wording, and even more the broad policy of the New York Convention. The practice of courts and arbitral tribunals confirms this assumption.[24]

Even if the dispute is not contractual (as in the case of investment disputes based on BITs), "[a]rbitration of a dispute arising in the course of an international economic transaction involving one or more public entities will be considered as commercial, particularly where the arbitration takes place between a state, a state-owned entity, and a foreign private undertaking."[25] The fact that the dispute at issue cannot be properly defined as "commercial," as the term is used in civil law, is immaterial. It is generally agreed that the term "commercial" found in most international instruments on arbitration is intended to have a purely economic meaning, not a restrictive meaning, so that it does not prevent recourse to arbitration in respect of relationships that would not be defined as "commercial" under the commercial law or statutes of a given country.[26] This understanding explains why the terms "trade" or "economic" arbitration are preferred by many authors, when such a qualification

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[23] The Annual Report of the International Chamber of Commerce for 2001 reported that almost 10% of the new arbitral proceedings under the ICC Rules of Arbitration in that year involved at least one State or State entity.

[24] Riccardo Luzzatto, International Commercial Arbitration and the Municipal Law of States, 157 Hague Rec. des Cours 87-88 (1977).

[25] Fouchard, Gaillard, Goldman On International Commercial Arbitration 40, para. 69 (Emmanuel Gaillard & John Savage, eds., 1999).

[26] *Id.* at 41, para. 70.

is intended to distinguish these procedures from those applied in inter-State arbitration.[27]

As to the UNCITRAL Model Law, a note to the official edition by the United Nations regarding its Article 1 (which provides that "[t]his law applies to international commercial arbitration") specifies that "[t]he term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." Article I(3) of the New York Convention follows the same approach in that it requires the Contracting States to make a specific declaration (which very few have made), if they want to restrict its application to arbitration of disputes "arising out of legal relationships, whether contractual or not, which are considered as commercial" under their national law.

On the other hand, not all commercial disputes, related or not to a contractual relation between a State and a foreign company, involve an investment, even if the typical for an investment duration element is present. If this is the case, neither the substantive provisions nor the direct arbitration clauses of BITs apply. Since the ICSID Convention contains no definition of the notion of "investment," and BITs normally contain broad definitions, the defence of lack of jurisdiction because of the absence of an investment, though often raised, has rarely if ever prevailed.[28] It could happen that the subject

[27] Under the NAFTA treaty of 1994, establishing the North American Free Trade Area, arbitration of investment disputes between one of the Parties (Canada, Mexico and the United States) and investors of another Party can be settled, based on the Contracting Parties' advance consent expressed in the treaty, by international commercial arbitration with application (beside ICSID and its Additional Facility) of the UNCITRAL Arbitration Rules. *See* NAFTA Article 1120(b). The arbitral tribunal "shall hold an arbitration in the territory of a Party that is a party to the New York Convention" (Art. 1130) and all claims submitted to arbitration "shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention" (Art. 1136(7)).

Following the same principles, the awards rendered in disputes between aggrieved U.S. investors and Iran by the Iran-U.S. Claims Tribunal in the Hague, established by the Algiers Agreement of 1981 between these two countries, are generally held to pertain to international commercial arbitration, both because private claimants are parties and in view of the application of the UNCITRAL Arbitration Rules to the proceedings. A French court, before which an U.S. investor sought recognition of an award, has held that the French provisions on recognition of international/foreign (economic) awards were applicable. *See* Golshani v. Iran, Cour d'appel de Paris (June 28, 2001), Revue de l'arbitrage 163 (1/2002); for a summary of the decision and noting the particular features of the Iran-U.S. Claims Tribunal and the effect those features have on the applicability of provisions of French law dealing with foreign arbitral award, see also 2 Cahiers de l'arbitrage 13-14 (2004).

[28] This defense has notably been rejected in the Decision on Jurisdiction rendered in Salini v. Morocco, *supra* note 13 (involving a highway construction contract), in SGS v. Pakistan, ICSID Case No. ARB/01/13, Decision of Objections to Jurisdiction, Aug. 6, 2003, and SGS v. The Republic of the Philippines, Case No. ARB/02/6, Decision of Objections to Jurisdiction, Jan. 29, 2004, both decisions are available at <http://www.worldbank.org/icsid/cases>, and involve import evaluation services. *See also* Tokios Tokelès v. Ukraine, Case No. ARB/02/18, Decision on Jurisdiction, July 29, 2004, at para. 89, and the Dissenting Opinion of the Tribunal's President Prosper Weil, available at <http://www.worldbank.org/icsid/cases>.

matter of a dispute qualifies as an investment under a BIT, but does not qualify as such for the purposes of ICSID jurisdiction.[29] This might explain the reference to arbitration under the UNCITRAL Arbitration Rules or to the rules of some private arbitral institution in provisions of BITs, even when both States are parties to the ICSID Convention. Under those rules, the qualification of the dispute as arising out of an investment would be immaterial for competence purposes. The ICSID Additional Facility also do nor require that the dispute arises out of an investment, although it excludes from it coverage disputes relating to "ordinary commercial transactions."[30]

5. MODIFICATIONS BY BITs OF APPLICABLE ARBITRATION RULES

The lack of contractual privity in the arbitration clauses of BITs highlights that BIT protections may be invoked even in the absence of any contractual or other relationship between the investor and the host State. Not being based on private law, the treaty-based investment arbitration has some additional peculiarities, altering "the private nature of the dispute by introducing certain aspects of inter-State disputes."[31] The treaty involved may include provisions that complement or modify, by enlarging or restricting, access to arbitration and/or may contain features different in respect to the otherwise applicable rules, be they found in the ICSID Convention, the New York Convention, the UNCITRAL Arbitration Rules or in other texts. Thus, for example, NAFTA Article 1120(2) explicitly states that the arbitration rules chosen by the claimant (either the ICSID Convention, the ICSID Additional Facility or UNCITRAL) shall govern the arbitration "except to the extent modified by this Section B."

Many BITs prescribe a compulsory preliminary negotiations for an amicable settlement or a defined period of time (for example, six months from

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[29] There may be a difference between the terminology of Art. 25(1) of the ICSID Convention, which applied to "any legal dispute arising directly out of an investment" and the terminology found in many BITs, which may refer to disputes "in connection with an investment."

[30] *See* Introduction to the ICSID Additional Facility Rules, Arts. 2(b). As to ICSID, reference is generally made to the Report of the Executive Directors, *supra* note 8. On the issue, see generally Farouk Yala, La notion d'"investissement" dans la jurisprudence du CIRDI, Nouveaux développements dans le contentieux arbitral transnational relatif à l'investissement international, Colloque de l 'Institut des Hautes Etudes Internationales (forthcoming).

[31] Phillipe Pinsolle, The Annulment of ICSID Arbitral Awards, 1 J. World Investment 243, 257 (2000). *See also* Bernardo M. Cremades & David J.A. Cairnes, The Brave New World of Global Arbitration, 3 J. World Investment 173, 183-84 (2002), describing a "new field of arbitral activity—a hybrid between private arbitration and inter-State arbitration" arising from investor-State arbitrations).

the formal notice of the dispute by the investor to the host State[32]) before the actual commencement of the arbitration proceeding. Another example is NAFTA Article 1135, which provides for the possibility of consolidating connected arbitration, a unique and innovative feature. The coordination between the multilateral instrument and the bilateral might create difficulties. There is no doubt that bilaterally the ensuing modifications are valid in accordance with Article 41 of the 1969 Vienna Convention on the Law of Treaties concerning "[a]greements to modify multilateral treaties between certain of the parties only." This development might be viewed rather as a selective application of some provisions of the multilateral instrument to a different context by a separate treaty.

Another kind of modification is represented by treaty clauses indicating the applicable law. Such clauses are present in some BITs, as illustrated by Article 8(6) of the Netherlands/Czech Republic BIT.[33] This kind of modification affects the procedural and substantive rules that would otherwise be applicable. On the one hand, the applicable law provisions "pre-empt" any choice of law that the parties to the dispute could have otherwise made; on the other hand, they indicate to the arbitrators the applicable law(s) in the absence of choice by the parties, instead of having them follow the otherwise applicable arbitration rules in this respect.

Thus, despite the specific commercial arbitration procedures invoked, the investor-State arbitration has a "quasi-public character, or at least an inescapably public element,"[34] which is relevant from various points of views. The jurisdiction of the tribunal in such arbitrations is not based on a private agreement by the parties to the dispute, but is predetermined by the two States. Possibly, it cannot be restricted by the will of the parties to the dispute, nor can the rights stemming from the treaty (including for obtaining a decision once the procedure has been set in motion), be reduced by the operation of other normative texts, including other BITs. The right of action to commence arbitration is given to the foreign investor directly by the BIT, and the investor can make use of it in the event of a dispute, thus displacing the jurisdiction of domestic courts that might be otherwise competent on the same subject matter. The arbitral jurisdiction provided for by the treaty is exclusive

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[32] NAFTA Article 1119 requires the claimant to deliver to the Disputing Party a written notice of its intention to submit a claim to arbitration, at least 90 days before the claim is actually submitted.

[33] Only a few of the Dutch BITs include such a provision, which is not typical in BITs. For example, choice of law provisions have only been used "occasionally" by Switzerland. *See* Jean-Christophe Liebeskind, State-Investor Dispute Settlement Clauses in Swiss Bilateral Investment Treaties, 20 ASA Bull. 27, 51 (2002). The practice of the United States is not to include choice-of-law provisions in BITs.

[34] Cremades and Cairnes, *supra* note 31, at 184-85.

as to claims based on the treaty, as it was held in various precedents on the point.[35]

6. THE APPLICATION OF PUBLIC INTERNATIONAL LAW INSTEAD OF DOMESTIC LAW IN UNCITRAL INVESTMENT DISPUTES ARBITRATIONS

On the basis of the generally accepted in international commercial arbitration notion of "party autonomy,"[36] the disputing parties may not only choose the applicable substantive law among different national laws, be they objectively connected in some way to their contract or not. They may choose even rules not part of a definite legal system, such as trade usages or "merchant law" *(lex mercatoria), i.e.,* the principles of commercial law commonly used and recognised in international trade.[37] Further, the choice of public international law, alone or in combination with other sources, is also admitted, especially when a State is party to the arbitration.[38]

The purpose and features of BITs explain the prominent role of international law as the law to be applied in case of investor-State arbitration of disputes under the treaty.[39] Private investors bringing BIT claims normally allege that their rights established under the applicable treaty have been breached by the host State.[40] The breach of treaty provisions is obviously a

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[35] *See, e.g.,* Lanco v. Argentina and Salini v. Morocco, *supra* note 13, so holding notwithstanding contractual clauses providing for the competence of domestic courts. For a partially different solution see SGS v. The Philippines, Decision on Objections to Jurisdiction, *supra* note 28.

[36] Fouchard, Gaillard, Goldman, *supra* note 25, at 785, paras. 1421 *et seq.*

[37] Ole Lando, The Law Applicable to the Merits of the Dispute, *in* Contemporary Problems in International Arbitration 101, 104-05 (Julian D. M. Lew, ed., 1986); René David, Arbitration In International Trade (1985), at 344-47 (describing the flexible application of national laws).

[38] *See* Prosper Weil, Principes généraux du droit et contrats d'Etat, *in* Le droit des relations économiques internationales: études offertes à Berthold Goldman 387 (1982); Ibrahim F.I. Shihata & Antonio R. Parra, Applicable Substantive Law in Disputes between States and Private Foreign Parties: The case of Arbitration under the ICSID Convention, *in* Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration 294, 298 (International Council for Commercial Arbitration, Congress Series No. 7, 1996); Stephen M. Schwebel, The Law Applicable in International Arbitration: Application of Public International Law, *in* Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration 562 (International Council for Commercial Arbitration, Congress Series No. 7, 1996); David, *supra* note 37, at 347-49. Professor Schreuer also considers the choice of public international law admissible for contractual claims submitted to ICSID arbitration. Internationalization of the State-foreign investor agreement is recommended as, "[i]n most situations, a more realistic way to protect the investors' interests against the vagaries of the host State's law." Christoph H. Schreuer, The ICSID Convention: A Commentary 562 (2001). [hereinafter ICSID Commentary].

[39] Cremades and Cairns, *supra* note 31, at 183.

[40] Treaty violations may be the only subject matter of an investor's complaint: thus, under NAFTA Article 1116, an investor can allege a breach only of the investment protection listed in section A of Chapter 11.

matter of international law; the existence of any such breach has to be determined by application of its rules and principles.

As already mentioned above, one of the basic features of BITs is that the standard of treatment and protection agreed by the two Contracting States for the benefit of their respective investors can be directly invoked by any such aggrieved investor of a Contracting State against the other (host) State through the agreed means for direct investor-State dispute settlement. In the absence of such a procedural right, it would be for the home State of the investor to raise the question with the other State by making use of the right of diplomatic protection. Thus, BITs do not only grant procedural remedies to investors, but also allow them to invoke directly in arbitration the relevant norms and standards of public international law.

How does this feature interact with UNCITRAL arbitration? Article 33(1) of the UNCITRAL Arbitration Rules provides that:

> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

The approach is thus typical of private law. This would not prevent, however, a tribunal set up under a BIT to apply, in the absence of any indication as to the applicable law, public international law to an alleged treaty breach as the law properly applicable to such State conduct under the BIT, which represents the "terms of reference" of the tribunal.[41]

The *CME v. the Czech Republic* arbitration was different because the relevant BIT includes a clause on applicable law. Article 8(6) of the Netherlands/Czech Republic BIT provides as follows:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

[41] As the Institut de Droit International, in its "Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises," stated in 1989, "[t]he parties have full autonomy to determine the procedural and substantive rules that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law and the usage of international commerce." Annuaire de l'institut de Droit International 330 (1990).

(1) the law in force of the Contracting Party concerned;

(2) the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;

(3) the provisions of special agreements relating to the investment;

(4) the general principles of international law.

This clause, as agreed upon by the Contracting Parties in the BIT, is equivalent to a choice of law clause agreed upon by the disputing parties. Since Article 8(5) have subjected the procedure to the UNCITRAL Arbitration Rules, Article 8(6) would fit into the first sentence of Article 33(1) of these Rules which provides that "[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute." The above BIT clause is binding upon the Tribunal. However, the basis of its application is not a choice of law by the parties to and for the dispute. This results from the initiation by one of the parties of an arbitration under the BIT, which in turn implies the acceptance of all relevant provisions of the treaty, including Article 8(6) on applicable law.

In an arbitration without privity, such as in the case of BITs, an indication of the applicable law made directly in the treaty by the Contracting Parties displaces and renders inapplicable altogether the choice of law provisions of the applicable arbitration rules, in the discussed case, Article 33(1) of the UNCITRAL Arbitration Rules, including those which apply in case the parties have made no choice. Article 8(6) of the Netherlands/Czech Republic BIT thus replaces the second sentence of Article 33(1), which provides that "[f]ailing such designation by the parties, the arbitration tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

The same approach was taken in what appears to be the only precedent for an arbitration of an investment dispute based on a BIT containing a similar to the cited above choice of law provision, namely the ICSID award in the *Goetz v. Burundi* case.[42] In that case, the arbitral tribunal considered that the provision on applicable law in the applicable Belgium/Burundi BIT was an indirect choice of law by the parties, and that the criteria to be applied under Article 42(1) of the ICSID Convention in case of absence of parties' choice

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[42] *Goetz v. Burundi,* Award, *supra* note 13.

("the law of the Contracting State party to the dispute and such rules of international law as may be applicable") were therefore irrelevant.[43]

Article V of the Algiers Agreement establishing the Iran-U.S. Claims Tribunal, which was also to apply the UNCITRAL Arbitration Rules, is another interesting precedent in that it indicated directly the applicable law(s) derogating from Article 33 of the UNCITRAL Arbitration Rules. The Iran-U.S. Claims Tribunal adopted the content of Article V in its own Rules for the selection in each case of the applicable law.[44] A commentator has noted that "[i]n some respects the Tribunal's modified rule places limits on the extensive party autonomy so insistently pursued by the UNCITRAL drafters."[45]

A further peculiarity of provisions such as Article 8(6) of the Netherlands/Czech Republic BIT is that they must, of course, be interpreted as treaty provisions in accordance with the principles of interpretation of treaties under public international law, and not as contract clauses. The main difference in this respect is that an objective interpretation of the treaty provision is required rather than one seeking to determine the intent of the parties to a contract. It is also worth observing that Article 8(6) of the Netherlands/Czech Republic BIT is peculiar in respect of the discretion it grants to the tribunal in selecting the legal rules to be applied. The arbitration tribunal is directed by the BIT to "decide on the basis of the law, taking into account in particular though not exclusively" particular sources of law. Thus, the fundamental requirement of the treaty is that any award must be based on legal rules and principles. However, the provision grants to the tribunal a remarkable discretion as to which law to apply. It must "take into account" but not "exclusively" the set of rules listed thereafter.[46]

It is worth noting that the list includes both items, which are "law" in the sense of a definite legal system (such as "the law in force of the Contracting Party concerned"), and specific legal provisions or "rules of law," such as the BIT itself ("this Agreement") and "other relevant Agreements between the Contracting Parties." The list refers also to contractual provisions, which are not by themselves "law" ("the provisions of special agreements relating to the

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[43] *Id.* paras. 94-99.

[44] *See* Article 33(1) of the Rules of Procedure of the Iran-U.S. Claims Tribunal, which states: "The arbitral tribunal shall decide all cases *on the basis of respect for law, applying* such choice of law rules and principles of commercial and international law as the arbitral tribunal determines to be applicable, *taking into account* relevant usages of the trade contract provisions and changed circumstances." (Emphasis added)

[45] Stewart Abercrombie Baker & Mark David Davis, The UNCITRAL Arbitration Rules in Practice– the Experience of the Iran-U.S. Claims Tribunal 177 (1992).

[46] There is a difference between an obligation to "take into account" and an obligation to "apply." A basic example of this distinction is found in Article 33(1) of the Iran-U.S. Claims Tribunal Rules, which direct the Tribunal to *apply* certain rules and to *take into account* others. *See supra* note 44.

investment").[47] In accordance with the explicit discretion in the clause, there is no order nor priority between the various categories of law listed in Article 8(6) of the Netherlands/Czech Republic BIT that the tribunal has to take into account "particularly though not exclusively" to decide "on the basis of the law." As recognized by the Court of Appeal of Stockholm no indication is given as to the respective roles of "the law in force of the Contracting Party concerned" (the Czech law) on the one hand, and the provisions of the BIT and "the general principles of international law," on the other hand.[48]

In a case where claims are for treaty violations, international law alone is relevant because international obligations of States are governed exclusively by international law. If the "cause of action" at issue arises under international law, then international law applies to evaluate the lawfulness of the State's conduct even if the legal relationship (or a contract where applicable) is governed, as is normally the case, by domestic law.[49]

In its challenge of the *CME v. the Czech Republic* award rendered in Stockholm before the Stockholm Court of Appeals, the Czech Republic complained that the arbitrators had breached Article 8(6) the Netherlands/Czech Republic BIT in not having applied Czech law. In rejecting this challenge the Court stated that:

> The wording that the arbitral tribunal shall "take into account in particular although not exclusively" must be interpreted such that the arbitrators may also use sources of law other than those listed. [...] The un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied. If the case concerns an alleged violation of the investment Treaty, it might be rele-

[47] Professor Schreuer, in his Commentary of the ICSID Convention in relation to Article 42(1), which discusses the freedom of the parties to select "rules of law" of their choice, states that the sentence "refers to 'rules of law' rather than to systems of law." Therefore, it is generally accepted that the parties are not restricted to accepting an entire system of law tel quel but are free to combine, to select and to exclude rules or set of rules of different origin." *See* ICSID Commentary, *supra* note 38, at 565.

[48] Based on a textual interpretation, the last expression is equivalent to "international law" or "customary/general international law," which is of course relevant for the interpretation of the BIT provisions, including Article 8(6). As a Dutch author has observed based on a comparison of many BITs, expressions such as "general principles of international law," "general rules and principles," "generally accepted/recognized rules and principles" of international law are common in these BIT clauses. *See* Paul Peters, Dispute Settlement Arrangements in Investment Treaties, 22 Neth. Y.B. Int'l L. 113 (1991) (stating that "[m]ost of these presumably mean the same thing: all rules and principles of general international law and customary international law which the tribunal considers applicable").

[49] See the case of Certain Norwegian Loans (France v. Norway), 1957 I.C.J. Rep. 9 (Judgment of July 6, 1957), at 37 (Sep. Op. Lauterpacht).

> vant first of all to apply international law, in light of the Investment Treaty's purpose of affording protection to foreign investors by prescribing norms in accordance with international law…The interpretation which can be given to the wording of the clause is thus hereby confirmed, namely that the clause leaves to the arbitral tribunal to take into account Czech law and other sources of law insofar as such are relevant to the dispute.[50]

The Court observed further that "if the case concerns an alleged violation of the Investment Treaty, it might be relevant first of all to apply international law, in light of the Investment Treaty's purpose of affording protection to foreign investors by prescribing norms in accordance with international law."

The irrelevance of internal law in such a situation is reinforced by two basic principles of international law, namely that: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty";[51] and, more generally, that in case of international responsibility for a wrongful act (namely for an act "which is attributable to the State under international law," and which "constitutes a breach of an international obligation of the State") "[t]he characterization of an act as internationally wrongful is governed by international law." Additionally, "[s]uch characterization is not affected by the characterization of the same act as lawful by internal law."[52]

The same principle is spelled out by the International Law Commission (ILC) Articles on State Responsibility. In Part II of the text, regarding the consequence of wrongfulness, namely the obligation to make "full reparation" for the injury caused, which "includes any damage, whether material or moral, caused by the internationally wrongful act of the State."[53] As stated in Article 32: "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations

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[50] Judgement of the Svea Court of Appeal, *supra* note 3, at 93.

[51] Vienna Convention on the Law of Treaties, Art. 27.

[52] International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 2 and 3. These Articles have been included as Annex by the U.N. General Assembly to its resolution 56/83 of December 12, 2001 and commended to the attention of the U.N. Member Governments. As the Commentary by the ILC to Article 3 makes it clear, the principle that domestic law cannot prevent wrongfulness under international law is a basic customary principle. *See* James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary 86 (2002).

[53] ILC Articles on State Responsibility, Article 31.

under this part." All the above provisions by the ILC reflect basic principles of customary international law.[54]

What is then the relevance of the reference to the domestic law of the Party concerned in Article 8(6) of the Netherlands/Czech Republic BIT? The answer can be found in the text of Article 8(4) of the treaty which, as mentioned before, and differently from some other BITs (notably those of the United States), submits to direct arbitration not just the disputes stemming from a claim for breach of the BIT obligations, but also any dispute between a Contracting State and an investor of the other State "concerning an investment of the latter."[55]

Disputes having as their object contractual or legal rights of the foreign investor under domestic law, as was in part the case in the *Goetz v. Burundi* dispute, are thus also amenable to arbitration under the BIT and would have to be decided applying the law of the host State involved, should the investor also bring such a claim against the host State. The breach of domestic law may not necessarily entail breach of international law, as held by the International Court of Justice in the *ELSI* case.[56] On the other hand, by violating some provision of its domestic law in respect of the foreign investor, the host State may also have committed, at the same time, a breach of the treaty (or of customary international law) and, therefore, be liable under international law. In such a case, the arbitral tribunal may have to interpret and apply domestic law as a preliminary step in order to pinpoint the exact conduct of the State. This step may be required even if the relevant BIT provision does not mention domestic law as a law to be taken into account. However, domestic law in either case is considered as a fact from the point of view of international law, when the latter has to be applied in order to evaluate the lawfulness or unlawfulness of the State's conduct under international law.[57]

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[54] Ian Brownlie, Principles of Public International Law 34 (5th ed., 1998).

[55] *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 Hague Rec. Des Cours 261, 445 (1997) ("BITs' clauses that direct the tribunal to apply both domestic and international law indicate…that the arbitral dispute settlement procedure is not only applicable to disputes concerning an alleged breach of international law (including the BITs' provisions). Depending upon the language of the text as to the types of disputes covered, arbitration may be available for other disputes between the investor and the host State arising under its domestic law with respect to a covered investment").

[56] *Case concerning* Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), 1989 I.C.J. Rep. 4 (Judgment of July 20, 1989), para. 124.

[57] Brownlie, *supra* note 54, at 39.

7. APPLICABLE LAW: A COMPARISON WITH ICSID ARBITRATION

Even when Article 42(1) of ICSID Convention is applicable, and the parties have made no choice of law,[58] the reference to the host State's law and "such rules of international law as may be applicable,"[59] has consistently been interpreted and applied as requiring that ICSID tribunals, being international in that they are constituted and operate pursuant to an international convention, apply rules of international law in lieu of any domestic law provision that would be contrary to international law.[60] Decisions based on Article 42(1), second sentence, have given precedence to international law whenever some otherwise applicable provision of domestic law have been found contrary to rules of international law on the treatment of foreigners. Conflicting domestic law was not applied, neither concurrently nor otherwise.[61] Thus, in the *Amco v. Indonesia* case (in which the parties did not agree upon the applicable law), the *ad hoc* Committee found that Article 42(1) of the ICSID Convention empowers the tribunal to apply the rules of international law in order to fill a *lacuna* in the municipal law, and also to ensure the prevalence of the norms of international law when there is a contradiction with municipal law.[62] The *ad hoc* Committee in *Klockner v. Cameroon* (the first and controversial annulment under the ICSID Convention), where also the parties had not selected the applicable law, similarly decided that Article 42(1) granted precedence to the rules of international law in cases in which the municipal law could not be reconciled with the principles of international law.[63] Statements in a similar vein were made by the tribunal in the case of *Letco v. Liberia.*[64]

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[58] Article 42(1) of the ICSID Convention states:

> 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.

[59] For the contentious *travaux préparatoires* of this text, see Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of other States, 136 Rec. Des Cours 345 (1972), at 390. Mr. Broches was at the time the General Counsel of the World Bank and became the first Secretary-General of ICSID.

[60] Shihata & Parra, *supra* note 38, at 312-13.

[61] In our opinion, the contrary view of Professor Reisman, who would limit the precedence of international law in case of conflicts to peremptory norms *(ius cogens),* is not supported neither by practice nor by systemic considerations. *See* Michael Reisman, The Regime for *"Lacunae"* in the ICSID Choice of Law Provisions and the Question of its Threshold, 15 ICSID Rev.– FILJ 362 (2000).

[62] Amco v. Indonesia, Case No. ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment, May 16, 1986, 25 ILM 1439, at 1445, para. 20 (1986).

[63] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Case No. ARB/81/2, *Ad hoc* Committee Decision on Annulment, May 3, 1985, 2 ICSID Rep. 95 (1994), para. 69 (1994).

[64] Liberian Eastern Timber Corporation v. Republic of Liberia, Case No. ARB/83/2, Award, Mar. 31, 1986, 26 ILM 647, 658 (1987).

This is also the conclusion of Professor Schreuer in his book, ICSID Convention: A Commentary, based on his analysis of an impressive list of ICSID awards: "ICSID tribunals have frequently applied rules of customary international law either under the first or second sentence of Article 42(1)."[65] Other commentators have taken the same position in all instances where there was a conflict between domestic law and international law, sharing the view that international law rules are preferentially and solely applicable in case of breach of international law by domestic law. Thus, Broches lists among the cases of application of international law by an ICSID tribunal the case "where the law of the contracting State party to the dispute, or action taken under that law, violates international law. In this instance international law operates as a corrective to national law."[66] As stated by Hirsch, "[t]he arbitral awards of the Centre and the works of prominent scholars have determined that when there is a contradiction between the municipal law of the host State and international law, the latter prevails."[67]

More generally, in case of arbitration on the basis of a BIT, international law, *in primis* the very BIT provisions and the standards of treatment and protection they refer to, have to be applied, including when the BIT does not contain any indications as to the applicable law. As Broches points out "an ICSID tribunal will have occasion to apply international law… (iii) where the subject matter or issue is directly regulated by international law, for instance by a treaty between the State party to the dispute and the State whose national is the other party to the dispute."[68] Antonio R. Parra has drawn the following conclusion from his analysis of the 28 ICSID cases submitted on the basis of a BIT, which had led then to five published awards:

> The cases that have come to ICSID under these treaties have had a number of important dimensions. Not least among these concerns the rules of law applicable to the substance of the dispute. 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 authorised by the investor-to-State dispute-settlement provisions of the treaty. The treaty being an instru-

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[65] ICSID Commentary, *supra* note 38, at 612.

[66] Broches, *supra* note 8, at 392.

[67] Moshe Hirsch, The Arbitration Mechanism of the International Centre for The Settlement of Investment Disputes 140 (1993).

[68] Broches, *supra* note 8, at 392.

> ment 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. The NAFTA and some BITs leave none of this to inference. They specifically require the investor–to-State disputes to be settled by the arbitrators in accordance with the treaty and the applicable rules of international law – the BITs often also referring in this context to the law of the State party to the dispute.[69]

A number of ICSID awards confirm this. As Parra has stressed, in *AAPL v. Sri Lanka,* for instance, which was based on the UK/Sri Lanka BIT and did not include a clause on the applicable law, the tribunal applied the international standard of "full protection and security."[70] In *AMT v. Zaire,* the tribunal applied the standard referred to in the relevant BIT of "protection and security… not less than that recognised in international law."[71]

In *Fedax v. Venezuela,* the issue was whether Venezuela was liable to pay certain promissory notes that the Dutch claimant had acquired through endorsement from the original holder. Here too the tribunal applied directly the BIT for the purpose of determining that Venezuela had "to honor the specific payments established in the promissory notes" concerned.[72] It was only for the purpose of ascertaining preliminarily the rights of a holder and whether the notes were endorsable and how, that the Tribunal had to turn to Venezuelan law in order to ascertain the legal regime of these private law instruments governed by Venezuelan law. Having done that, as required by the particularities of that case, the tribunal applied the BIT and international law in order to decide the merits of the case.

This is consistent with the principle of international law that, except when and in so far as international tribunals may be called upon to decide a claim on the basis of domestic law – which may and does happen as mentioned in direct arbitration of investment disputes on the basis of BIT clauses or Article 42(1) of the ICSID Convention – municipal laws are merely "facts"

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[69] Parra, *supra* note 13, at 21 (emphasis added).

[70] *See* Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka, Case No. ARB/87/3, Award and Dissenting Opinion, June 27, 1990, 6 ICSID Rev.– FILJ 526, 533, para. 21 (1991).

[71] American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo, Case No. ARB/93/1, Award, Feb. 21 1997, 36 ILM 1534, paras. 6.05-6.14 (1997).

[72] *See* Parra, *supra* note 13, at 23, referring to the Award of March 9, 1998 rendered in Fedax N.V. v. Republic of Venezuela, Case No. ARB/96/3.

to be ascertained.[73] The *Maffezzini v. Spain* case is another example of a treaty claim where, even though brought under ICSID, the tribunal distinguished the types of claims made and their legal basis in order to ascertain whether or not "the claim seeks the vindication of rights guaranteed in a treaty, for example, which empowers the tribunal to interpret and to apply the treaty." The tribunal decided the case on the basis of the treaty, having found that "here the parties have a treaty right to obtain a final determination from the international tribunal on the scope of their rights under the treaty."[74]

The *Goetz v. Burundi* case is an example of BIT arbitration based on a choice of law provision in the treaty. In that case, the Belgian claimants requested the Tribunal to order that a ministerial decision revoking certain tax and customs privileges originally granted to the investor be annulled; that the taxes and duties paid as a result of the withdrawn privileges be reimbursed; and that the damages suffered because of consequential interruption of activity be indemnified. In accordance with the terms of the BIT, the Tribunal was required to examine the claims under both Burundi law and international law, and in case of conflict, the parties agreed that the law most favorable to the investor would apply.[75] Having concluded that the revocation and other connected actions by the State authorities were not in violation of Burundi law,[76] the Tribunal examined the actions at issue under international law and the BIT. The Tribunal took the view that national law and international law each have their own sphere of application,[77] rather than relying on any hierarchy or applying international law only to fill gaps or if in contradiction to local law. It concluded that the actions of the government were tantamount to an expropriation but Burundi would not be liable if it withdrew the measure or paid compensation as stipulated in the BIT.

In conclusion, while Article 42 of the ICSID Convention has no bearing on the selection of the applicable law in non-ICSID arbitration, whether a choice of law provision is or is not included in the relevant BIT, the results tend to be the same: international law must be applied where relevant to decide the claim and it prevails over conflicting domestic provisions.

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[73] Certain German Interest in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, 4, at 19 (25 May 1926); Brownlie, *supra* note 54, at 39-41.

[74] Emilio Agustín Maffezini v. Kingdom of Spain, Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000, 16 ICSID Rev.–FILJ 223 (2001) (emphasis added).

[75] Goetz v.Burundi, Award, Feb. 10, 1999, *supra* note 13, at para. 99.

[76] *Id.* at paras. 117 and 119.

[77] *Id.* at para. 97.

8. CONTROL BY NATIONAL COURTS OF UNCITRAL AWARDS IN BIT ARBITRATIONS

(a) The Distinction between Local and International Arbitration

The basic effect of the distinction between arbitration settling domestic disputes (purely local arbitration) and international commercial arbitration as to judicial control on the awards is the more limited control to which the latter proceedings and awards may be subject, in conformity with the principle of party autonomy in international commercial arbitration, especially when the only connection between the arbitration and the State of the seat of the arbitration is just the fact that the parties have decided to hold the proceedings there.

The dominant approach is that of restricting the intervention of the State to the protection of basic principles of due process, while otherwise granting the broadest competence to the arbitrators in conformity with the principle of party autonomy. Review of the merits in particular has never been admitted.[78]

As a result of the harmonisation of domestic laws brought about by international instruments on arbitration, a comparative approach now prevails in commentaries and treatises, and interpretative criteria applied by courts of different countries are remarkably homogeneous. In the last twenty years or so, many States have revised their laws on arbitration, specifically with the aim to facilitate arbitration of an international character taking place within their borders. A tendency has developed whereby State laws regulating arbitration taking place in the *forum* make a distinction between "purely domestic" arbitration and international arbitration. As to the second category, the interference and control by local courts is reduced in accordance with the above aim.

The definition of what makes an arbitration international differs from country to country although the decisive criteria are not far apart. For example, the special chapter on international arbitration of the Swiss statute on private international law of 1978 (Article 178 *et seq.*) is applicable when "international tribunals have their seat in Switzerland, provided that at the moment of the making of the arbitration agreement one of the parties was not domi-

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[78] Klaus Peter Berger, International Economic Arbitration (1993), at 655 ("Therefore, the tribunal's decision on the substantive law and factual issues may not be brought before a domestic court by an action to have the award set aside as would be the case in ordinary appeal procedures before national courts"). *See also* Fouchard, Gaillard, Goldman, *supra* note 25, at 923, para. 1603 (describing the position in France under the New Code of Civil Procedure). The Belgian statute on international arbitration of 1985 goes so far as to empower non-Belgian parties to agree that an award rendered in Belgium and not otherwise connected with this country shall be exempted from any control by Belgian courts.

ciled or habitually resident in Switzerland." The French arbitration law of 1981, which is considered a notable example of the distinction between purely domestic and international regulation, has established a special regime concerning the latter: the relevant provisions apply whenever the dispute "concerns interests related to international trade." The Italian arbitration statute of 1995 has introduced a special regulation of international arbitration taking place in Italy (Article 832 *et seq.* of the Code of Civil Procedure) depending upon whether at least one party is resident outside Italy "or if a notable part of the obligations arising from the relationship in dispute has to be performed abroad." The Swedish Arbitration Act of 1999 also follows this trend where it lays down special rules in Articles 46-51 as to arbitration on "international matters," namely in case of arbitral agreements and proceedings having "an international connection."

Even if States' control over international awards is limited, these awards are nevertheless connected for the purpose of annulment challenges to the juridical regime of the seat. This conclusion does not affect the widespread holding that international commercial arbitration is a "social institution," recognised and adopted within the world business community in order to administer justice in a sphere largely independent from States' rules (transnational law, *lex mercatoria)*.[79] Thus, an international award made in Sweden, as in the case of the Stockholm award discussed here, is subject to certain provisions of the Swedish Arbitration Act and may be considered as having a preferential link to the Swedish legal system. Based on the same principle, an award made in England, such as the *Lauder v. Czech Republic* award rendered in London, has a preferential link with English law. This link is even more evident as to the London award since the U.K. Arbitration Act of 1996 applies without distinction to all arbitrations having their seat in England and distinguishes only marginally between purely local and international arbitration and awards.[80] As a consequence, the conclusion has been drawn that "England remains the only national jurisdiction to have taken a stand favouring the continued integrity of national substantive law in the era of a national arbitration."[81]

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[79] *See generally,* Berger *supra* note 78;. and David, *supra* note 37.

[80] This is based on the traditional idea that "if parties wish to come to London to conduct their arbitration, they are likely to do so under English law." According to Section 85 of the Act, if none of the parties are foreign to the U.K., the arbitration agreement is defined as a "domestic arbitration agreement" for certain limited purposes, but the ensuing distinction under Section 86 has not been brought in force. Harold Crowter, Introduction to Arbitration 14 (1998).

[81] Thomas E. Carbonneau, Cases and Materials on the Law and Practice of Arbitration 25 (2nd ed., 2000).

One consequence of this link between an international arbitration and the seat of that arbitration is that international commercial arbitrations taking place in different countries are not connected *inter se.* These awards do not pertain to a definite international legal order nor to the same domestic legal system within which the concepts of *lis pendens* and *res iudicata* have the role of avoiding conflicting proceedings and decisions. There is no coordination nor hierarchy between the awards. This may be relevant in respect of the disputed applicability of these concepts in the transnational context: The issue was raised in the before the Court of Appeal of Stockholm but is not being examined here.[82]

(b) Controls are Limited to Conflicts with "International Public Order"

The general harmonization of arbitration law world-wide results, among other things, in the universally recognized limitation of domestic court control on international arbitral awards both locally made and rendered abroad to "international public order" principles. It is recognized in legal writings and by courts that not all local mandatory rules, though of a public law nature and implying restrictions to the contractual freedom of local business ("national public order"), necessarily form part of the "*ordre public international,"* which is the only one the international arbitrator has to take into account in decision-making.[83] Besides those local law principles that achieve the status of international public order, arbitrators in deciding international disputes may have to respect certain other international public order principles, such as those of the applicable law on the merits or possibly those of a universal character.[84] The latter, in view of their very nature, should

[82] The Svea Court of Appeal did not express a definitive view on the issue, but it found that the requirements of identity of the parties between Mr. Lauder and CME where in any case not met, see Judgment of the Svea Court of Appeal, *supra* note 3, at 98.

[83] Berger, *supra* note 78, at 688; Fouchard, Gaillard, Goldman, *supra* note 25, at 953-54, para. 1645.

[84] As an example, in recent years questions have been raised as to whether arbitrators must apply mandatory competition law rules, either of the law applicable to the merits or of the country where the relevant contract was to be executed; or whether they have to apply mandatory U.N. embargoes. Both questions have been answered in the affirmative. *See* Berger, *supra* note 78, at 689. *See generally* Pierre Lalive, Ordre public transnational (ou réellement international) et arbitrage international, Revue de l'arbitrage 329 (3/1986).

typically be part of the international public order of the seat of the arbitration.[85]

As to procedure in arbitration, the concept includes "violation of public policy, which would include serious departures from fundamental notions of procedural justice" as stated in the official Note to the UNCITRAL Model Law on International Commercial Arbitration.[86] Besides these genuinely international concepts or rules of *"ordre public réellement international,"* courts may include some local paramount principles of national public order, such as exchange control regulation, trading with the enemy restrictions in case of war and alike (which are all irrelevant in the context examined here) within international public order.[87]

These principles are not directly laid down by public international law, although some principles may be common with it, such as respect for fundamental human rights. Instead, the term "international" underlines that these principles, while pertaining to the local national system, are those that may properly be invoked in the context of international commercial relations and intercourse in order to prevent the application or recognition in the *forum* of decisions and rulings based on, or carrying out principles repugnant to basic tenets of the local legal order. Therefore, the "international public order" under consideration in review of arbitral awards is understood to be much narrower than "public order" as generally invoked within a municipal system. The former is only a subset of the latter.

Swedish law subscribes to this approach when it provides that local awards are invalid and recognition will therefore be denied to foreign awards when they are "clearly incompatible with the basic principles of the Swedish legal system."[88] One commentator also stated that "[a]ccording to the prevail-

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[85] Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 360 (1981): "It may suffice to draw the attention to the important *distinction between domestic and international public policy.* This distinction is gaining increasing acceptance in matters of arbitration as well. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. The distinction is justified by the differing purposes of domestic and international relations." (Emphasis in original)

[86] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, para. 42.

[87] Julian D.M. Lew, Applicable Law in International Commercial Arbitration 535, 534-35 (1978) (by contrast to judges, "an international arbitration tribunal is a non-national institution; it owes no allegiance to any sovereign State; it has no *lex fori* in the conventional sense").

[88] Swedish Arbitration Act, Arts. 33(2) and 55(2). The requirement that recognition can be denied only when the conflict with local public policy is *"manifest"* has been added in Article 34(1) of the EC Regulation 44/2001 on jurisdiction and recognition of judgments in the EC, thus further restricting the role of public policy as an obstacle to the free circulation of judgments in the EC in conformity with the case law of the European Court of Justice. This qualification was not included in the parallel article 27(1) of the Brussels Convention of 1968, which has been replaced by Regulation 44.

ing international doctrine the term covers flagrant abuses of law and natural justice in substantive as well as procedural respects."[89] The public policy concept could be limited to substantive violations of the principles of *pacta sunt servanda, bona fides,* prohibition of *abus de droit,* or if issues such as bribery, corruption, smuggling or drug trafficking arise.

The New York Convention follows the same approach as to the grounds for denying recognition and enforcement to a "foreign arbitral award." Article V(2) of the Convention lists two other grounds that pertain to a possible conflict between the award and the fundamental principles of the country where recognition is sought: "(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country." As to "public policy" *(ordre public)* authors and case law stress that public order in this context includes only fundamental principles of the State and of its legal system from which no derogation, not even by a foreign judgement, would be admissible. Such public order is defined generally as "international public order" and has the same character as highlighted above as to the country of the seat of the award. The rich case law developed under Article V(2) of the New York Convention can therefore be used to determine the international public order at the place of the arbitration. This provision's public policy ground for refusal should be construed narrowly, since it introduced a "circumscribed public policy doctrine," as stated by a U.S. Court of Appeals.[90] Review of the merits and challenge of the arbitrators' choice and interpretation of applicable law are even more inadmissible.

The Stockholm Court of Appeal referred to the approach described above in rejecting the Czech Republic challenge against the award based on an alleged error in the selection and application of the laws referred to in article 8(6) of the Netherlands/Czech Republic BIT. It is worth quoting the reasoning of the Court *in extenso:*

> Generally regarding challenges and
> enforcement of international awards
>
> In line with what might be deemed to be an expression of the legal situation in many other countries, by virtue of the

[89] Berger, *supra* note 78, at 676.

[90] Parsons & Whittemore Overseas Co. Inc. (U.S.A.) v. Société Générale de l'Industrie du Papier (RAKTA) (Egyptian), Bank of America (U.S.A.), 508 F. 2d 969, 975 (2d Cir. 1974); *in* I Y.B. Com. Arb. 205 (1976).

> Arbitration Act the Swedish legislature has adopted a restrictive approach towards to the possibilities to successfully have an arbitration award declared invalid or set aside based on a challenge (see Government Bill, pp. 142, 148, and 234). The same approach characterizes the rules in the aforementioned Recognition and Enforcement of Foreign Arbitration Awards Act and the underlying reasons given therefore. This has also been expressed in decisions of the Supreme Court when applying corresponding older provisions (see the cases reported in NJA 1979, p. 527 and 1992, p. 733). On the international plane, this restrictive approach has been expressed in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in UNCITRAL's Model Law. In this context, it may be noted that, in a judgment cited in this case, the European Court of Justice stated that "…it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances."[91]

(c) Controls as to the Correctness of the Proceedings ("Excess of Mandate" by the Arbitrators)

As to violations of "procedural justice" by arbitrators that may bring about the setting aside of an award, specifically by the courts of the country where it was rendered, reference must be made to the UNCITRAL Model Law. The text contains, in Article 34, "an exclusive list of limited grounds on which an award can be set aside" in the country of the seat of the arbitration. This list is the same as the one in Article 36(1) for non-recognition of foreign awards and is taken from that contained in Article V of the New York Convention as grounds on which courts of other countries "may" rely (to the exclusion of any other), for refusing recognition to foreign awards.

The list includes fundamental irregularities that are not at issue here, such as (i) incapacity of the parties; (ii) lack of proper notice of the arbitration; (iii) irregularity in the composition of the tribunal. The list of grounds found in Articles 33 and 34 of the Swedish Arbitration Act are not substantially different notwithstanding certain linguistic changes. The Swedish Arbitration Act's reference to excess of mandate, for example, finds its closest

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[91] Judgment of the Svea Court of Appeal, *supra* note 3, at 85.

parallel in the UNCITRAL Model Law and New York Convention's references to setting aside an award as far as it "contains decisions on matters beyond the scope of the submission to arbitration."[92]

Under the generally accepted concepts of limited review, as described above, only the following challenges of serious disregard of their mandate by the arbitrators could be entertained:

- exceeding their competence in passing upon matters not within the subject-matter of the dispute submitted to them by the arbitral agreement or mandate; and
- exceeding their competence in issuing decisions for which they had not been empowered: for example, ordering specific performance when this power had been excluded, or awarding damages when their mandate was limited to issuing only a declaratory judgement, and alike.

The growing consensus, and in my view the proper rule, is that, in order for an annulment or setting-aside of a locally made international award to obtain international recognition, courts of the place of arbitration must be careful to restrict their control to the respect by the arbitrators of very basic universally accepted principle of due process and to matters of international public order not specific just to the local court's "home" legal system. If this limitation is not respected, a peculiar situation may ensue, namely that an award, while having been annulled or set aside in the country where it was issued and being without effect there, may be considered valid and enforceable in other countries in view of the lack in the New York Convention of a requirement that a foreign award be recognized also in the country of origin.[93]

A further argument can be made that the courts of the place of arbitration are especially constrained by BITs in their examination of a challenge against an international award based on such a treaty. Disregard of the BIT's provisions on arbitration, including those on the finality of the award (cf. Article 8(7) of the Netherlands/Czech Republic BIT), and certainly any substitution of a domestic court's review of the merits for that of the competent

[92] Article V(1)(c) of the New York Convention and Articles 34 and 36(1)(iii) of the UNCITRAL Model Law.

[93] This is the so-called *Hilmarton* doctrine from the well-known French case where an award annulled in the country of origin (Switzerland) was nevertheless recognized in France (and thereafter also in England). *See Cour de Cassation* (10 June 1997), 124 J. Droit Int'l 1033 (1997). The same position was taken in the United States in Chromalloy, Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996). *See generally* Philipp Wahl, Enforcement of Foreign Arbitral Awards Set Aside in their Country of Origin: The Chromalloy Case Revisited, 16 J. Int. Arb. 131 (2000).

arbitral tribunal's review (including the selection, interpretation and application of the law to the substance) would impact on the sovereignty of the Contracting Parties of the BIT. It seems that no State court has ever intervened to overturn a decision of a tribunal formed under a BIT regime.[94] These limits would stem from the general principle of respect of foreign States sovereignty: *"par in parem non habet jurisdictionem."*

9. NO REVIEW BY LOCAL COURTS OF THE CHOICE OF LAW DETERMINATION BY THE ARBITRATORS IN RESPECT OF UNCITRAL AWARDS

The *CME v. the Czech Republic* ward rendered in Stockholm belongs to a *genus* of international commercial awards and the criteria applicable to them. "Excess of powers" or "excess of mandate" is described restrictively in Article 34(2)(iii) of the UNCITRAL Model Law and in Article V(1)(c) of the New York Convention: An arbitral award may be set aside and recognition and enforcement of the award may be refused "only if…the award…contains decisions on matters beyond the scope of the submission to arbitration."

The text of the provision refers only to the arbitrators exceeding their mandate in deciding an issue that was not included in their mandate, that is, which the parties have not agreed to submit to their competence to decide. In disputes under BITs the subject matter is circumscribed by the test of the treaty which the parties to the dispute cannot disregard. This ground (deciding *ultra petita*) concerns deciding on issues not submitted to arbitration and does not relate to how the arbitrators have decided the issues submitted to them.[95] An incorrect determination of the applicable law, or the misapplication of law is beyond the scope of this ground for setting aside an award or refusing its recognition. It would imply a review of the merits of the matter

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[94] The review of NAFTA awards is distinguishable as such review "to revise, set aside or annul" an award is envisaged by virtue of an express treaty provision (Art. 1136(3)(b)). The award in Metalclad Corporation v. United Mexican States, Case No. ARB(AF)/97/1, of December 30, 2000, *reprinted in* 16 ICSID Rev.– FILJ 168 (2001) has been partially annulled in 2001 by the Supreme Court of British Columbia (where it was rendered) for excess of jurisdiction consisting in misinterpretation of the NAFTA treaty and international law. *See* The United Mexican States v. Metalclad Corporation, Supreme Court of British Columbia, Reasons for Judgment of May 2, 2001, 2001 BCSC 664; 5 ICSID Rep. 238 (2002); and The United Mexican States v. Metalclad Corporation, Supreme Court of British Columbia, Supplementary Reasons for Judgment of October 31, 2001, 2001 BCSC 1529; 6 ICSID Rep. 53 (2004).Such a review of the application of international law by the arbitrators appears to be unique. The debate and case law at ICSID and as to international commercial arbitration rather focus on choice of law between domestic and international law (see *infra*, para. 9-10).

[95] van den Berg, *supra* note 85, 269-73.

that is out of the scope of review by domestic courts.[96] As one commentator stated, "international treaty law exclude[s] the merits review of the awards."[97]

An error of law committed by the arbitral tribunal is not covered by any of the reasons listed in Article V of the New York Convention.[98] As René David, one of the leading authorities in the field, wrote in 1985 when many now existing national statutes on arbitration had not yet been enacted (such as in England, Italy, Germany and Sweden):

> [O]nly in a few countries does the mistake of law committed by the arbitrators allow a party to challenge the award. In most countries the duty to apply the law is only a *lex imperfecta:* a duty imposed on the arbitrators, but, as a rule, no sanction is attached to any breach of this duty – provided only that the arbitrators have not made clear in their award that they were disregarding the law.[99]

The law and practice in major domestic systems follows this approach also in respect of domestic awards of an international character, including in countries that have not adopted the UNCITRAL Model Law, as is the case of Germany, for instance. Challenges on account of the "application of the wrong law" by arbitrators are generally not admitted, except in the most extreme instances of abuse or bad faith. This error would not be procedural,

> …but…one that pertains to substantive law since the choice of law clause or the arbitrators' decision on the applicable law provides the tribunal with the substantive basis for the decision on the merits of the case. If the choice of law clause is ambiguous and open to interpretation by the tribunal or if there is no choice of law at all, the arbitrators enjoy a substantial amount of freedom in the determination of the applicable law. The setting aside of the award for violation of international public policy or excess of the tribunal's mandate is justified only in those very rare cases where the arbitrators' determination of the applicable law is arbitrary and totally unfounded because

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[96] *See* Fouchard, Gaillard, Goldman, *supra* note 25, at 947, para. 1637 ("Where the arbitrators examine the sources and content of the law which the parties have declared to be applicable, they do so in their entire discretion and their conclusions are not subject to review by the courts").

[97] Carbonneau, *supra* note 81, at 25.

[98] David, *supra* note 37, at 397.

[99] *Id.* at 396.

> the system of law designated by the tribunal has no connection whatsoever with the transaction or the tribunal applies a system of law other than that which would apply under any test of choice of law. These cases will be almost impossible to prove and the principle of insulation of the arbitrators' determination from any judicial review will ultimately prevail in the great majority of cases.[100]

State courts' practice fully supports these conclusions both with respect to the review of international awards rendered locally and the recognition of foreign awards (with reference to article V(1)(c) of the New York Convention), since the grounds tend to be the same as explained before.[101] These courts do not question the choice of law as an excess of mandate or as violating international public policy, and a reason for this has been to prevent a review of the merits of an international commercial award by domestic courts.

In the United States, "[t]he record in U.S. courts is one of consistent enforcement of foreign awards based on a restrictive reading of the exceptions under the New York Convention."[102] U.S. courts have consistently rejected the defence of "excess of authority" with reference to the selection and application of legal principles based on a "narrow construction," stating that the Convention "does not sanction second-guessing the arbitrator's construction of the parties' agreement" (in our case of the BIT provision).[103] The court rejected "the allegation that the arbitrators exceeded their authority by failing to base the award on the evidence presented and instead acting as *'amiables compositeurs.'* "[104] The U.S. courts have refused to apply to international commercial awards a defence based on a *dictum* of the U.S. Supreme Court, of a "manifest disregard of the law" applicable (in theory at least) to purely domestic awards. Even in domestic arbitration, "this principle…is often cited but evidently has never actually been applied. In order for it to be invoked suc-

[100] Berger, *supra* note 78, at 681-683 (emphasis added).

[101] *See supra* notes 95-97 and accompanying text (comparing the UNCITRAL Model Law with the New York Convention).

[102] David P. Stewart, National Enforcement of Arbitral Awards Under Treaties and Conventions, *in* International Arbitration in the 21st Century: "Judicialization" and Uniformity? (Richard B. Lillich & Charles N. Brower, eds., 1994), at 165 (citing the U.S. Supreme Court in the landmark case on arbitration Scherk v. Alberto Culver Co., 417 U.S. 506 (1974).

[103] *Id.* at 181 (citing the 1974 decision in Parsons & Whittemore Overseas Co. Inc. (U.S.A) case, *supra* note 90).

[104] *Id.* at 181 (citing National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Delaware (1990)).

cessfully, it appears the arbitrators would have to exceed their authority not merely by committing demonstrable legal error but by having correctly understood and intentionally ignored a well-defined, explicit, and clearly applicable governing law in reaching their decision."[105]

In another well-known case, the U.S. District Court for the Southern District of New York refused to apply this doctrine in an international award since the "Plaintiff has not demonstrated, as it must, that the majority arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."[106]

In Italy, the law does not admit challenging an international award rendered in Italy for violation of legal principles, while this is one of the grounds for setting aside awards rendered in purely domestic disputes.[107]

In France, "[a]n error of fact or law by the arbitral tribunal, however blatant, will not constitute a ground on which an award can be set aside or refused enforcement."[108] Even where arbitrators required by the parties to rule in law have wrongly assumed the powers of amiable compositors: "the French courts have adopted a very liberal approach. They have held that the fact that the arbitrators made reference to principles of equity is not sufficient to establish that they have exceeded their powers.… Similarly, the fact that arbitrators required to rule in law have not identified the rules of law on the basis of which they reach their decision is not sufficient for their award to be set aside."[109]

An arbitrator's failure to apply the chosen substantive law does not provide grounds for an appeal under Swiss law either, as Article 190(2)(e) of the Swiss Private International Law Act of 1978 does not provide for any ground to do so.[110]

Similarly, in the United Kingdom, "[t]he Arbitration Act 1996 reinforces the current trend in English law to allow judicial scrutiny of the merits of arbitral awards only on exceptional basis. …[O]nly when the court believes

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[105] *Id.* at 194-95.

[106] Sidarma Societá Italiana di Armamento SPA v. Holt Marine Indus., Inc., 515 F. Supp. 1302, 1308-9 (SDNY 1981) *cited in* Stephen M. Schwebel & Susan G. Lahne, Public Policy and Arbitral Procedure, *in* Public Policy in Arbitration 205, 223 (International Council for Commercial Arbitration, Congress Series No. 3, 1987).

[107] Article 829(2), Italian Code of Civil Procedure (as amended in 1994).

[108] Fouchard, Gaillard, Goldman, *supra* note 25, at 943, para. 1634.

[109] *Id.* at 944-45, para. 1635.

[110] Claude Reymond, La Nouvelle Loi Suisse et Le Droit de l'Arbitrage International: Réflexions de Droit Comparé, Revue de l'arbitrage 385, 410 (3/1989); Wolfgang Kühn, Express and Implied Choice of the Substantive Law in the Practice of International Arbitration, *in* Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration 379, 389 (International Council for Commercial Arbitration, Congress Series No. 7, 1996).

the legal issues raise fundamental legal concerns and the public interest demands judicial intervention."[111]

In Germany, in respect of international arbitration the application of the wrong substantive law would be evaluated under public policy, but "German courts, similar to courts in many other nations, have held that not every violation of public policy will be fatal, and that only in extreme cases will enforcement of an award be refused."[112]

In the famous *Norsolor* case, the Austrian Supreme Court in 1982 reversed a lower court holding that application of "international *lex mercatoria*" by international arbitrators sitting in Vienna was an infringement of mandatory provisions and a violation of public policy. The Supreme Court held that in applying that body of law and the principle of good faith, the arbitral tribunal had merely "applied a principle inherent in the private law systems that in no way is contradictory to strict legal regulations of the countries here concerned."[113]

Already in 1986, a comprehensive work on arbitration mentioned among the legal systems denying "judicial review of the merits of the award…the attitude of American law, the recent French law on international trade arbitration and Swedish law."[114]

The Stockholm Court of Appeal followed these principles as to the challenge against the Stockholm award in the light of Art 8(6) of the Netherlands/Czech Republic BIT for [f]ailure to take into consideration applicable law." The Court stated:

> In Sweden, there is probably a unanimous view that arbitrators should base their awards primarily on governing law, unless the parties may be deemed to have decided differently. In light of the desire to restrict the possibilities of challenge, in favor of the finality of an arbitration award, there exist predominant reasons against the implementation of any rule as to the legal premises on which a dispute shall be determined. However, the aforesaid does not prevent the parties from entering into an agreement that the dispute shall be determined in accordance with the law of a particular country or that the arbitrators shall determine the dispute based on reasonableness. Where it is evi-

[111] Carbonneau, *supra* note 81, at 25.

[112] Kühn, *supra* note 110, at 389.

[113] Norsolor S.A. v. Pabalk Ticaret Ltd. (18 Nov. 1982), IX Y.B. Comm. Arb. 159 (1984).

[114] Clive M. Schmitthoff, Finality of Arbitral Awards and Judicial Review, *in* Contemporary Problems in International Arbitration 230, 235 (Julian D.M. Lew, ed., 1986) (emphasis added).

dent that the arbitrators have applied the law of a different country in violation of such an agreement, upon application to the Court, the award may be set aside on the ground that the arbitrators have exceeded their mandate. On the other hand, in conjunction with a challenge, the Court should not, of course, determine whether the arbitrators erroneously applied the law agreed upon by the parties. Such a fact can still not lead to the arbitration award being set aside (Government Bill 1998/99:35 p. 123).

A general conclusion which may be drawn from that which is stated in the legislative history is that the legislature has sought to reduce the possibilities to challenge an arbitration award on the ground that the arbitrators have applied the wrong law. The arbitrators may be deemed to have exceeded their mandate only where they have applied the law of a different country in violation of an express provision that the law of a particular country shall govern the dispute; in the opinion of the Court of Appeal, an almost deliberate disregard of the designated law must be involved. There is no excess of mandate where the arbitrators have applied the designated law incorrectly. Nor can there hardly be any question of excess of mandate where the arbitrators have been required to interpret the parties' designation of applicable law and, in so doing, have interpreted the designation incorrectly. […]

In the opinion of the Court of Appeal, an excess of mandate may be involved only where the arbitrators' interpretation of the choice of law clause proves to be baseless such that their assessment may be equated with the arbitrators almost having ignored a provision regarding applicable law. […] In the Court of Appeal's opinion, when assessing whether the arbitrators have exceeded their mandate, it is sufficient to clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal has not based its decision on any law at all but, rather, judged in accordance with general reasonableness.[115]

[115] Judgment of the Svea Court of Appeals, *supra note 3* at 91, 92, 93, 94.

10. THE REVIEW OF NAFTA AWARDS BY DOMESTIC COURTS: THE *METALCLAD* AND *MYERS* CASES

An examination by way of comparison of the approach taken by two Canadian courts at the highest level in reviewing awards rendered according to NAFTA Chapter 11 arbitral tribunals is instructive, both as to the grounds of annulment and the scope of review under the UNCITRAL Model Law as enacted in Canada.[116] The comparison may cover cases under the UNCITRAL Arbitration Rules and the ICSID Additional Facility Rules since the latter also are proceedings pertaining to international commercial arbitration covered by the New York Convention and specific NAFTA provisions.

In the first instance, in 2001, the Supreme Court of British Columbia had no difficulty in considering itself competent to review the *Metalclad v. Mexico* award rendered by an arbitral tribunal under the ICSID Additional Facility (seat Vancouver), in conformity with the International Commercial Arbitration Act of British Columbia (based on the UNCITRAL Model Law), since the statute expressly considers as commercial arbitration arising out of an investment.

In dealing with the main challenge before it, that the arbitral tribunal had exceeded its mandate or rather its jurisdiction by deciding matters outside NAFTA Chapter 11, the Court interestingly enough cites commercial arbitration precedents , ultimately based on the reasoning of the U.S. *Mitsubishi* case upholding restraint in the exercise of judicial review of the decision of the arbitrators, "concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensivity to the need of the international commercial system for predictability in the resolution of disputes."[117] The Court went on "to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia."[118]

Thereafter, however, the judgment goes on into a detailed discussion of whether it was correct for the arbitral tribunal to find that NAFTA Article 1105 on fair and equitable treatment included an obligation of transparency by host State authorities, which is textually found in a different NAFTA provision (for example in NAFTA Article 102) and is not included among those that are subject to direct arbitration. It is apparent that the examination of the interpretation and possible content of various NAFTA provisions, taking into

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[116] For the court decisions in the *Metalclad* and *Myers* cases, see *supra* note 4.
[117] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).
[118] *See id.* para. 51.

account several NAFTA arbitral precedents, brought the Court to re-examining the legal soundness of the treatment of the subject matter of the dispute by the arbitration tribunal.[119] Our understanding is that this amounted to *de novo* review, equivalent to a full appeal to correct any alleged error in the selection, interpretation and application of the law by the arbitral tribunal. It did not correspond to that limited review of excess of mandate by the arbitrators, *i.e.,* whether they have examined a matter not subject to the dispute, recognized by the UNCITRAL Model Law and the New York Convention, as generally understood and applied by the jurisdictions referred to in the preceding section 9.

The Federal Court of Canada in its 2004 review of the *Myers v. Canada* award, rendered in arbitration governed the UNCITRAL Arbitration Rules also called attention to its limited jurisdiction to review awards under the Canada's Commercial Arbitration Code, stating that "the Code does not allow for judicial review if the decision is based on an error of law or on an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal."[120] The Court rejected the claim that the tribunal had exceeded its jurisdiction by hearing a dispute allegedly not involving an investment by the claimant in Canada. In so doing, the Court did not impose its own interpretation of the relevant provisions on which the tribunal had relied upon to affirm its jurisdiction *ratione personae.* It rather adopted a standard of correctness to review the interpretation and of those provisions and of "reasonableness" as to their application to the facts of the case.[121] In so doing, the federal Court appears to have applied standards current in other jurisdiction to appreciate any excess of mandate or jurisdiction by an arbitral tribunal, though approaching the issue form a different angle than, for instance, the Court of Stockholm.

This brief analysis shows that even within the same country, courts may apply the prescribed standards of review differently and engage either in restricted or in more expansive scrutiny. National courts are not only competent under the relevant statutes but also experienced and equipped to review of procedural correctness, that is respect of due process by arbitral tribunals. The limits set to their reviewing the proper application of the law is on the other hand especially justified when international law is involved. Carefully selected experienced international arbitrators should be more competent; there

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[119] *See id.* paras. 57-74.

[120] *Id.* para. 39. The Commercial Arbitration Code, also based on the Model Law, applies to claims brought against Canada. It was amended in order to include NAFTA Chapter 11 proceedings within "commercial arbitration."

[121] *Id.* at para. 58-61.

is no evident reason to defer to domestic courts when there is no issue of application of international law within their jurisdiction, the usual context in which domestic courts are called to deal with it.

11. A COMPARISON WITH THE SELF-CONTAINED REVIEW MECHANISM OF ICSID

ICSID includes a peculiar mechanism of limited review of awards rendered under the Washington Convention. Professor Schreuer has highlighted in his commentary on the ICSID Convention the fundamental role that the annulment mechanism has in the self-contained system of ICSID:

> Under the Convention, Art. 52 is the only way of having the award set aside. In particular, domestic courts have no power of review over ICSID awards. During the Convention's drafting…the proposal to maintain the system embodied in the draft, providing for purely internal review, was carried with no opposition.[122]

As another commentator has stressed:

> [T]he Convention prohibits the parties from having recourse to municipal courts in order to obtain additional relief. This prohibition is consistent with the aim of creating an autonomous judicial mechanism, independent of municipal legal systems (in order to ensure the neutrality of the arbitration proceedings at the Centre). […] The intention of the drafters of the Convention that the arbitration proceedings conducted at the Centre be independent of municipal courts prescribed the provisions of the Convention prohibiting recourse to remedies outside the Centre. However, the pro-

[122] ICSID Commentary, *supra* note 38, at 889 (footnote omitted). As to the "self-contained" character of ICSID, see also Shihata & Parra, *supra* note 38, at 296. The specificity and uniqueness of the annulment challenge against an award provided by the ICSID Convention is also stressed by Philippe Kahn. Philippe Kahn, Le contrôle des sentences arbitrales rendues par un tribunal CIRDI, *in* La juridiction internationale: Colloque de Lyon 363, 366 (Soc. Française de Droit International, 1987). *See also id.* at 371 ("les objectifs des Tribunaux nationaux comme ceux de la Convention de New York ne sont pas les mêmes que ceux poursuivis par la Convention de Washington") [the objectives of national tribunals as those of the New York Convention are not the same as those pursued by the Washington Convention].

> scription of external remedies obliged the Centre to supply, concurrently, alternative legal remedies necessary for the conduct of proper legal proceedings. [This] enables the losing party to challenge the validity of the arbitral award by means of the Centre's internal control mechanism.[123]

The grounds for annulment listed in Article 52(1) of the ICSID Convention are the following: (a) the Tribunal was not properly constituted; (b) the Tribunal has manifestly exceeded its powers; (c) corruption; (d) serious departure from a fundamental rule of procedure; and (e) lack of reasons in the award. It is immediately apparent that these grounds do not correspond (except for the improper constitution of the tribunal) to those listed in Article V of the New York Convention and in Articles 34 and 36 of the UNCITRAL Model Law for setting aside or annulling an international arbitral award by a judicial authority of the State where it was rendered or where recognition is sought. Specifically, the "international public order" limit of the *forum* is, of course, not listed in article 52(1) of the ICSID Convention, while the ground found there as to the "manifest excess of powers" by the arbitral tribunal is broader than any corresponding ground in the instruments dealing with international economic arbitration. Moreover, annulments of ICSID awards are decided by *ad hoc* Committees of three persons appointed by the ICSID Secretary-General, a body unknown in international commercial arbitration, which highlights again the self-contained character of ICSID system of arbitration.

The special self-contained character and the public international law nature of the annulment procedure at ICSID makes it irrelevant as a model for setting aside international commercial awards by competent domestic courts, although the function performed by both types of limited review (that of redressing major breaches of fundamental due process requirements) may be approached. This character explains also the peculiar importance within ICSID arbitration of paying respect to the law of the State party to the dispute as indicated in Article 42 of the ICSID Convention, so that:

> [A] manifest excess of power can take the form of the failure to apply the law applicable under Article 42 of the Convention. This article is of prime importance in the system of the Convention in that resolution of the dispute on the basis of the

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[123] Moshe Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 31, 25 (1993).

law indicated in Article 42 is one of the main justifications of the typical effects of the mechanism: the non-exercise of diplomatic protection on the part of the private investor's national States (Article 27) and the automatic recognition and enforcement of ICSID awards in all the Member States (Articles 53-54)."[124]

Both these ICSID concerns, according to which a failure properly to apply Article 42 of the Convention can lead to an excess of power annulment under Article 52, are peculiar to ICSID only. However, as to the failure to apply the proper law to the merits of a case the discussions and precedents under ICSID have dealt with some of the considerations and concerns raised as to control and annulment of international commercial awards by municipal courts.

The first ICSID annulment decisions annulled the awards challenged for alleged grave breaches of fundamental principles of procedural justice finding *vitium in procedendo* rather than *in judicando.* However the first two annulment procedures (Klöckner and Amco-1), "have been criticised severely for crossing the line between annulment and appeal by re-examining aspects of the cases before them that lay outside the narrow confines of annulment" in that "[t]he focus of the criticisms has been the decisions of the two annulment Committees to find that 'the tribunal has manifestly exceeded its powers' (Article 52.1.(b)) in applying 'the wrong law', that is for failure to apply the proper law under article 42.1 ICSID."[125]

Another commentator has pointed out that:

> The annulment decisions of the ICSID ad hoc Committees in the ICSID arbitration Klöckner v. Cameroon and Amco Asia v. Indonesia reveal the potential dangers connected with the introduction of a disguised control of the tribunal's application of the law under the pretext of an alleged failure to state reasons in the award. [...] The Committee could only arrive at this conclusion by a detailed investigation into the arbitrator's

[124] Andrea Giardina, ICSID, A Self-Contained, Non-National Review System, *in* International Arbitration in the 21st Century: "Judicialization" and Uniformity? (Richard B. Lillich & Charles N. Brower, eds., 1994), at 207 (emphasis added).

[125] ICSID Commentary, *supra* note 38, at 893. *See also id.* at 558 ("The two *ad hoc* Committees' line of reasoning blurs the line between an error in the interpretation or application of the governing law and a failure to apply the applicable law. In this way, the distinction between an incorrect choice of law and a misapplication of the correctly chosen law becomes tenuous").

> application of the law. [...] [T]he Committee established a dangerous line of precedents in that it entered into a detailed examination of the arbitrators' application of the substantive law to determine an error in *judicando*, thus equating the non-application with the misapplication of the law.[126]

Even if those annulment decisions would reflect accurately the object and purpose of the review of ICSID tribunals awards, this would reflect the specific features of the ICSID framework[127] The annulment procedure aims at balancing the lack of any review of ICSID awards by State courts. This was an intentional choice of the drafters in establishing a self-contained system of State-private investor dispute settlement mechanism to avoid politically motivated interference by governments in these relations.[128]

The criticism voiced at some of the first annulments may have contributed to the absence of annulment challenges from 1992 to 2001. Subsequent decisions have shown more self restraint and have focused on the specificity of ICSID arbitration and of BITs provisions, stimulating reflections on the function of the mechanism and of its features.[129] While initially annulment was mostly pursued by unsatisfied investors, States have been worried lately by the flow of investment disputes addressed against them. Several circles have disputed the appropriateness of attributing to "private" *ad hoc* judges, such as arbitrators, the resolution through confidential proceedings of disputes that may involve sizable public interests of States and the payment from public funds of large amounts of indemnifications. Publicity of proceedings and especially the possibility of a full appeal would of course add a completely new dimension to arbitration against States by foreign investors.[130]

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[126] Berger, *supra* note 78, at 680.

[127] *See generally* Emmanuel Gaillard (ed.), Annulment of ICSID Awards (2004).

[128] UNCTAD, *supra* note 5, at 4.

[129] *See* Wena Hotels Limited v. Arab Republic of Egypt, Case No. ARB/98/4, Decision on Application for Annulment, Febr. 5, 2002, 41 ILM 933 (2002), and Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Case No. ARB/97/3, Decision on Application for Annulment, July 3, 200241 ILM 1135 (2002); Christopher Schreuer, ICSID Annulment Revisited, 30 Legal Issues of Economic Integration 103 (2003).

[130] We refer to the "Statement of the Free Trade Commission on Non-Disputing Parties Participation" of October 7, 2002 by the NAFTA Commission, allowing *amicus curiae* briefs, but foremost to the initiative of the U.S. Congress for establishing an appeal mechanisms for investment dispute awards. *See* U.S. Trade Act of 2002, Section 2102(b)(3)(G)(iv). *See generally* the materials of the Second Conference of the British Institute of International Investment Treaty Forum (May 7, 2004), Appeals and Challenges to Investment Treaty Awards: Is It Time for an International Appellate System?, available at <http://www.biicl.org>.

12. CONCLUSIONS: CHOOSING BETWEEN ICSID AND UNCITRAL ARBITRATION FOR SETTLEMENT OF INVESTMENT DISPUTES, OR THE "PRIVATIZATION" OF INTERNATIONAL ARBITRATION

The above review highlights some similarities but also the differences of review of awards in investment disputes under the ICSID Convention and rules and by domestic courts in case of UNCITRAL awards. ICSID presents at the outset definite advantages from the point of view of legal security and predictability of process. The mechanism is specific for foreign investors-host States disputes, it benefits from a dedicated administering institution, consistent practice and well tested arbitration rules. Procedure is reasonably speedy, although there is not unanimity of views on this point, and costs are kept under control. It is impermeable to State interference, decisions are truly international and are not subject to challenge and control, not even for the purpose of execution, by courts of any countries. However, the uncertain criteria applied by *ad hoc* annulment Committees under Article 52 of the ICSID Convention has raised some doubts as to the efficiency of the process especially by investors and their lawyers. On the other hand, host States, which are normally the defendants and are at risk of being found in breach of treaty commitments, might welcome, and are now actively advocating, a somehow broader control on awards.

The advantages of ICSID should correspond to weakness in international commercial arbitration but this is necessary always so, since the evaluation depends on a number of factors. *Ad hoc* arbitration, while procedurally more complicated, allows flexibility including for instance confidentiality.[131] In order to be run efficiently and speedily, these proceedings have to be managed professionally and some cooperation between the parties appear to be required. The *CME/Lauder* arbitrations show that commercial arbitration can be quite speedy, leading to the awarding and payment of a substantial monetary award. Uncertainty derives from the possibility of challenges before national courts, both as to annulment proceedings where the award is rendered and, if recognition is sought in other countries, mainly where assets of the defendant State may be found. However, if the country of seat selected by the parties and the arbitrators, such as Sweden in the *CME v. Czech Republic* case

[131] Notice must be taken of the recent policy of the USA to include in Free Trade Agreements and in BITs provisions for publicity of investor- State arbitration and admissibility of *amicus curiae* interventions.

on the basis of a BIT's provision,[132] has a competent and efficient judicial system, correctness and speed is guaranteed as shown in that case.

Legislation on the conduct and control of commercial international arbitral proceedings features a remarkable uniformity based on harmonization, doctrinal development pointing to self-restraint in admitted grounds for annulment. The same can be said for the application of the New York Convention as to recognition and enforcement in other States of international commercial awards. It is therefore for the investor envisaging to initiate a proceedings, since the investor generally has the option, to make a careful analysis, as far as the relevant BIT or other applicable treaty allows a choice, taking into account not only the written law, but also local practice and standards.

At the end of our comparative analysis, direct investment arbitration does not appear so far apart from international commercial arbitration, notwithstanding the its public international law features and the national public interest often involved in international investment disputes. The reference to ICSID, UNCITRAL arbitration or other private arbitration rules in BITs and NAFTA point in this direction. One wonders whether this is the result of a "commercialization/ privatization" of economic relations carried out by States with private parties in the global economy, or whether this points to the "neutrality" that private arbitration mechanisms may achieve and guarantee, irrespective of the nature of the parties involved.[133] While half a century ago arbitration between States and private entities raised the worry that the private party would be raised to the level of subjects of international law, we assist now to a kind of privatization of these relations.

Indeed, ICSID and other types of arbitration share common features and problems as this short review of issues indicates.[134] The selections of arbitrators appears to be made from the same pool of international legal experts with similar background, as can be seen from the information on cases published by ICSID. Public international lawyers are not so dominant among the arbitrators in these cases as one would expect; should the "art of arbitration" prevail over subject matter expertise? On the other hand, States tend to rely more and more on private lawyers and law firms when involved in investment (and even inter-State) disputes, and probably rightly so.[135] Questions of stan-

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[132] The Netherlands/Czech Republic BIT did not mandate Sweden, but indicates the Stockholm Chamber of Commerce as the appointing authority of arbitrators should the need arise.

[133] Several BITs subject also the resolution of disputes between the Contracting Parties to arbitration under the UNCITRAL Arbitration Rules.

[134] *See also* Luca G. Radicati di Brozolo, Mondialisation, juridiction, arbitrage: vers des règles d'application semi-nécessaire?, 92 Revue critique de Droit International privé (2003), at 1.

[135] This is now admitted also in WTO Panel and Appellate Body proceedings.

dard of conducts and possible conflicts of interest for arbitrators and lawyers are common; they do not appear to have been fully covered yet in either forum.[136] Advocacy and defensive techniques, rules of evidence issues are also common to all arbitration not strictly subject to State regulation;[137] beyond the application of specific procedural rules, proceedings at ICSID and in other arbitral contexts necessarily rely on common transnational developments in the legal profession that assist in closing bridges, including cultural gaps, and reducing formal differences.[138] We should not forget, however, the warning of Pierre Lalive that the "commercialization" of international arbitration may entail the risk of transforming this form of justice into a commercial product.[139]

[136] ICSID lacks rules in this respect such as the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the WTO on December 11, 1996, or the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association of 1977 and revised in 2003. On this issue in international arbitration see generally Catherine Rogers, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, 23 Michigan J. Int'l L. 341 (2002); and *id.* Context and International Structure in Attorney Regulation: Constructing and Enforcement Regime for International Arbitration, 39 Stanford J. Int'l L. 1 (2003).

[137] *See* R. Doak Bishop (ed.), The Art of Advocacy in International Arbitration (2004); Cesare P. Romano, The Americanization of International Litigation, 19 Ohio State J. Dispute Resolution 89 (2003).

[138] See, for instance, the widespread use of the IBA Rules of Evidence in international arbitration.

[139] Pierre Lalive, Sur une "commercialisation" de l'arbitrage international, Liber Amicorum Claude Reymond, Autour de l'Arbitrage, 167 (1998).