The International Law of Investment Claims

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application of international law to the specific issue of the international legitimacy of the Ordinance as a public act. The choice of law rule is an objective one that exists independent of the will of the contracting parties. Thus, whether or not there was a reference to international law in the contract, the tribunal was bound to apply it to the specific issue identified.

Rule 4. The law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law.[45]

A. PROPERTY RIGHTS AND THE MUNICIPAL LAW OF THE HOST STATE

101. Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognisable by the municipal law of the host state. General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights *in rem* over tangibles and intangibles.[46]

102. Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.[47] Insofar as investment treaties require a territorial nexus between the investment and one of the contracting state parties, that property law is the municipal law of the state in which the claimant alleges that it has an investment.

103. Take the example of an investment in shares. The protection of an investment treaty is contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated. If the investment in shares is made in England, legal ownership arises upon

[45] *AIG v Kazakhstan* (Merits) 11 ICSID Rep 7, 48/10.1.4; *Zhinvali v Georgia* (Preliminary Objections) 10 ICSID Rep 3, 69/301; *EnCana v Ecuador* (Merits) 12 ICSID 427, 476–7/184–8; *Nagel v Czech Republic* (Merits) ('the terms 'investment' and 'asset' in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under the law of the Czech Republic'); *SwemBalt v Latvia* (Merits) para. 35; *Saluka v Czech Republic* (Merits) para. 204; *Bayview v Mexico* (Preliminary Objections) paras. 98, 102, 118; *Fraport v Philippines* (Preliminary Objections) para. 394; *Azinian v Mexico* (Merits) 5 ICSID Rep 272, 289/96; *BG v Argentina* (Merits) paras. 102, 117; *Casado v Chile* (Merits) paras. 179–230.

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

[47] The same principle applies in the context of Article 1 of Protocol 1 of the European Convention on Human Rights: *Kopecky v Slovakia* (Case 44912/98, 28 September 2004).

entry onto the share register.[48] Thus, in order for a Russian investor in England to perfect its investment in the shares of an English company and attract the protection of the UK/Russia BIT, it would not be sufficient to accept delivery of share certificates, as would be the case in other jurisdictions such as New York.[49]

104. Once a right *in rem* has been recognised by the municipal law of the host state in accordance with Rule 4, and is adjudged to fall within the relevant definition of an investment pursuant to Rule 5, the protection afforded by the investment treaty comes into operation. It is then open to the claimant to plead that subsequent changes to that municipal law, or other acts attributable to the host state that affect the bundle of rights *in rem* that constitute the investment, are incompatible with the minimum standards of protection in the investment treaty. This follows from the rule of state responsibility that:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[50]

105. The host state cannot, therefore, escape liability to a claimant under the investment treaty regime by passing a law to the effect that title to shares obtained by the acceptance of share certificates shall no longer be valid if the claimant had previously acquired shares on that (lawful) basis. This would amount to an expropriation of the shares. Likewise, if the claimant's title to the shares remains static pursuant to the municipal law of the host state but various measures of the host state have the *de facto* effect of rendering those shares worthless, the claimant might assert that there has been an expropriation of its shares or that such measures breach another minimum standard of treatment in the investment treaty.

106. A related problem arises where the host state alleges that the claimant has violated its law in the acquisition of its investment. If that allegation is substantiated before the investment treaty tribunal, then that must be fatal to the jurisdiction of the tribunal.[51] But the temporal limitations of such a plea must be recognised: it can only be raised in respect of the acquisition or establishment of the investment and not with regard to the subsequent conduct of the claimant in the host state, even in relation to the expansion or development of the original

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

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

[50] Art. 3 of the ILC's Articles on State Responsibility: Crawford, *ILC's Articles*, 61.

[51] *Fraport v Philippines* (Preliminary Objections) paras. 396–404. (*Semble*): *Kardassopoloulos v Georgia* (Preliminary Objections) para. 182.

investment. The caveat to this statement of principle is that a violation of international public policy by the claimant might render its claim inadmissible before an investment treaty tribunal[52] or incapable of being resolved in arbitration.[53]

107. The relevant principle was stated with lucidity by the tribunal in *Fraport v Philippines*:[54]

> [T]he effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of its investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.[55]

108. In contradistinction, a plea by the respondent host state to the effect that its municipal law was violated by itself or one of its emanations during the course of the claimant's acquisition of its investment in the host state cannot be relevant to the admissibility of the claims or the jurisdiction of the tribunal.[56]

109. Rule 4 refers *exclusively* to the municipal law of the host state, including its rules of private international law. This exclusive reference is justified due to the territorial requirement imposed by the investment treaty for qualified investments. Quite simply, the claimant must invest in the territory of the host state;

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[52] The tribunal would be exercising an adjudicative power by ruling upon the respondent state's preliminary objection based upon international public policy in circumstances where the existence or scope of that adjudicative power is not in doubt and hence it is best to characterise this objection as going to the admissibility of the claim rather than to the jurisdiction of the tribunal. See Chapter 3 for a full discussion of the distinction between jurisdiction and admissibility.

[53] It is possible that where the entire investment is nothing but a façade for a criminal enterprise that a tribunal might conclude that its adjudicative power is tainted as an extension of that enterprise so that jurisdiction must be declined *ab initio*: *Soleimany v Soleimany* [1999] QB 785 (the example was given of bank robbers agreeing to arbitrate the proceeds of their crime). Alternatively, the subject-matter of the dispute may be deemed incapable of being arbitrated: Award in ICC Case No. 1110 (1963) of Judge Lagergren, reported in (1994) 10 *Arbitration Int* 282–94.

[54] (Preliminary Objections).

[55] *Ibid*. para. 345. See also: *Vanessa v Venezuela* (Preliminary Objections) para. 5.3.4; *TSA Spectrum v Argentina* (Preliminary Objections) para. 175. In *Inceysa v El Salvador* (Preliminary Objections), the tribunal found that the claimant's fraud during the bidding process for the acquisition of the investment violated the 'principle of good faith' (para. 252), the principle of 'unlawful enrichment' (para. 256) and deprived the putative investment of a legal basis under Salvadorean law (para. 264). The last of these conclusions would have been sufficient to dispose of the point pursuant to Rule 4. In *Plama v Bulgaria* (Merits), the tribunal ruled that the claimant's misrepresentation in relation to the existence of its consortium partners (which were alleged to have had the relevant expertise and financial resources) during the course of obtaining approval for the investment from the Bulgarian Privatisation Agency deprived the claimant's investment of investment protection under the ECT. Illegality thus appears to have been accepted as a substantive defence. See also: *Rumeli Telekom v Kazakhstan* (Merits) paras. 319–20.

[56] *Kardassopoloulos v Georgia* (Preliminary Objections) paras. 177–84.

capital must be committed or expended in exchange for rights over property either factually or legally sited in the host state.

110. In relation to tangible property, the factual situs of the property in the host state compels the application of the law of the host state by virtue of the ubiquitous *lex situs* choice of law rule.[57] Where, for instance, an issue arises about the scope of a mortgagee's right over land which comprises the investment, it is the municipal law of the country where the land is situated which applies.[58] In relation to intangible property, it is only possible to conceive of a legal or fictitious *situs* by reference to the private international law rules of the host state.[59] A debt, for example, might be deemed to have a *situs* at the domicile of the debtor or creditor depending upon the private international law of the host state.[60] If the former approach is applied, and the debtor is domiciled in the host state, an investment has been made in the territory of that state if a debt is capable of falling within the relevant definition of an investment in the treaty and Rule 4. Similarly, if the host state's rules of private international law determine the *situs* of shares as the place where the share register is maintained, and the company in question keeps its register in the host state, the acquisition of shares in that company may qualify as an investment in that state.[61] Private international law does not create a fictional *situs* for all types of intangible property; such is the case with intellectual property rights.[62] In these circumstances one must proceed straight to the substantive property rules of the putative host contracting state party, and, applying these rules, determine whether the municipal law of the host state recognises the intangible rights in question or is compelled to do so by a relevant international convention. Investment treaties do not oblige the host state to protect intangible property rights that are not cognisable in the legal order of the host state.

111. The clearest endorsement of the principle in Rule 4 is the award in *EnCana v Ecuador*.

111C. EnCana Corporation v Republic of Ecuador[63]

EnCana's claim was for VAT refunds arising out of four contracts for the exploration and exploitation of oil and gas reserves in Ecuador entered into

[57] E. Rabel, *The Conflict of Laws: A Comparative Study* (Vol. IV, 1958) 30. *Bank of New York and Trust Company et al. (USA v Germany)* 8 RIAA 42; *Chemin de fer Bužau-Nehoiaşi (Germany v Romania)* 3 RIAA 1829; *Rio Grande Irrigation and Land Company (UK v USA)* 6 RIAA 131; *George Rodney Burt (USA v UK)* 6 RIAA 93.

[58] *Dicey, Morris and Collins on the Conflict of Laws* (2006, 14th edn by L. Collins *et al.*) 1190, 1112–13.

[59] *Ibid.* 1116–30; *Cheshire and North's Private International Law* (1999, 13th edn by P. North and J. Fawcett) 955–6.

[60] *Ibid.*; E. Rabel, *The Conflict of Laws: A Comparative Study* (Vol. III, 1958) 3–8, 14–16.

[61] *Cheshire and North's Private International Law*, 969–973.

[62] *Dicey, Morris and Collins on the Conflict of Laws*, 1288.

[63] *EnCana v Ecuador* (Merits) 12 ICSID 427.

by its indirect wholly owned subsidiaries (AEC and COL) with Petroequador (the Ecuadorian State oil company).[64]

The definition of an investment in the BIT included 'claims to money' and the tribunal found that an accrued entitlement to a VAT refund was capable of meeting this definition.[65] With respect to the applicable law, Article XIII (7) of the Ecuador/Canada BIT stated that the tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.[66] Despite the absence of a reference to the municipal law of the host state,[67] the tribunal ruled that 'for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador'.[68] Implicit in this conclusion, which is entirely consistent with Rule 4, is the notion that international law does have its own choice of law rules for issues arising out of an investment dispute. Only the law of Ecuador could provide an entitlement to a VAT refund and hence the 'claim to money' asserted by EnCana must be established under the law of Ecuador. Once established, international law must determine whether a state measure abrogating the 'claim to money' is violative of a BIT obligation. Hence the tribunal's characterisation of the two distinct questions:

> Here there are two questions: (a) did the EnCana subsidiaries have a right under Ecuadorian law to VAT refunds in respect of purchases of goods and services during [the relevant] periods? And if so: (b) was that right expropriated by Ecuador?[69]

112. A similar statement of principle can be found in *Thunderbird v Mexico*:[70] 'compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited'.[71]

113. There have been notable cases of failure to apply a choice of law rule equivalent to Rule 4. Two awards are scrutinised in the pages that follow to demonstrate how misfeasance or nonfeasance in deciding the law applicable to issues relating to the existence or scope of the bundle of rights comprising the investment inevitably leads to errors in dealing with other issues such as the host

[64] *Ibid*. 431/23, 433/27–30.
[65] *Ibid*. 475–6/182–3.
[66] *Ibid*. 476/184.
[67] A similar provision is contained in Article 1131 of NAFTA. See Appendix 3.
[68] *Ibid*. 476/184.
[69] *Ibid*. 477/188.
[70] (Merits).
[71] *Ibid*. para. 208.

state's liability for a breach of an investment treaty obligation. The two cases are *Wena v Egypt* and *CME v Czech Republic*.[72]

113C. Wena Hotels Ltd v Arab Republic of Egypt[73]

Wena alleged that Egypt breached several provisions of the UK/Egypt BIT when a state-owned company, the Egyptian Hotel Company ('EHC'), seized two hotels (the 'Luxor Hotel' and the 'Nile Hotel') which were the subject of separate lease agreements between Wena and EHC.

The lease agreements between Wena and EHC stipulated that disputes between the parties must be submitted to *ad hoc* arbitration in Cairo.[74] Following the seizure, Wena had brought a contractual arbitration against EHC for breach of the Nile Hotel lease on 2 December 1993.[75] Wena was awarded EGP 1.5 million in damages as compensation for the seizure of the Nile Hotel by the *ad hoc* tribunal, which simultaneously ordered that Wena surrender the hotel to EHC due to its own breaches of the lease agreement.[76] Wena continued to operate the Nile Hotel until 1995 when it was evicted pursuant to the tribunal's decision.

Wena brought similar contractual arbitration proceedings against EHC with respect to the Luxor Hotel lease on 12 January 1994. The second *ad hoc* tribunal also found in favour of Wena and awarded EGP 9.06 million in damages and also ordered Wena to surrender the hotel to EHC.[77] The award was subsequently annulled by the Cairo Court of Appeal.[78] Wena remained in occupancy until 1999, when the Luxor Hotel was placed in judicial receivership on account of Wena's failure to pay rent.

In the ICSID arbitration later commenced by Wena, the tribunal did not take into account the findings of the contractual arbitral tribunals in its award on the merits. This became one of the grounds for annulment alleged by Egypt in the subsequent annulment proceedings. The *ad hoc* committee upheld the *Wena* tribunal's award in full and found that the previous arbitral decisions relating to the leases were of no import to claims arising under the BIT:

> The dispute before the Tribunal involved different parties, namely the investor and the Egyptian State, and concerned a subject matter entirely different from the commercial aspects under the leases …[79]

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[72] See also: *Eureko v Poland* (Merits) 12 ICSID Rep 335 and the analysis in Z. Douglas, 'Nothing if not Critical in Investment Treaty Arbitration' (2006) 22 *Arbitration Int* 27, 38–46.
[73] (Merits) 6 ICSID Rep 89.
[74] *Ibid*. 94/17.
[75] *Ibid*. 106/60.
[76] *Ibid*. 106–7/61.
[77] *Ibid*. 107/62.
[78] *Ibid*. 107/62.
[79] *Wena v Egypt* (Annulment) 6 ICSID Rep 129, 136/29.

> The leases deal with questions that are by definition of a commercial nature. The [BIT] deals with questions that are essentially of a government nature, namely the standards of treatment accorded by the State to foreign investors.[80]

A simple dichotomy between 'commercial' and 'BIT' questions is untenable. Far from having an 'entirely different' subject matter, the contractual arbitrations and the investment treaty arbitration all concerned Wena's investment in Egypt. That investment was in the form of leaseholds over two hotels. If Wena had breached its obligations under the lease agreements such that EHC was entitled to terminate the leases in accordance with their governing law, then there would have been no investment to expropriate. In response to Egypt's submission to this effect, the *ad hoc* committee found opaquely that:

> It is sufficient for this proceeding simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases.[81]

This was not sufficient at all. The tribunal was bound to analyse the nature and extent of Wena's investment under the lease agreements at the time of the seizure of the hotels. In conducting this analysis the tribunal should have considered the previous determinations made by the contractual tribunals or made its own findings on the status of Wena's investment in accordance with the governing law of the lease agreements. Both the tribunal and the *ad hoc* committee dismissed the relevance of the lease agreements under Egyptian law to the question of Egypt's liability under the BIT, even though the lease agreements were the sole foundation of Wena's investment.[82] The tribunal and the *ad hoc* committee did, however, consider that the lease agreements were relevant to establishing the tribunal's jurisdiction and to the question of damages flowing from Egypt's substantive violation of the BIT.[83] On the first point, the *ad hoc* committee stated:

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

[80] *Ibid*. 136/31.

[81] *Ibid*. 134/19. The approach of the tribunal in *Helnan v Egypt* (Merits) paras. 106, 124–6, 163–8, is to be preferred (an international tribunal will defer to a domestic tribunal on questions of domestic law unless 'no deficiencies in procedure or substance are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the view point of international law, such as in the case of a denial of justice').

[82] The *ad hoc* committee stated with respect to the tribunal's consideration of this issue: '[T]he Tribunal declared it irrelevant to consider the rights and obligations of the parties to the leases for the purpose of reaching a decision on the dispute submitted to it. The Award confirms that Wena has been expropriated and lost its investment, and this irrespective of the particular contractual relationship between Wena and EHC. The explanation thus given for not determining the respective obligations of Wena and EHC under the leases is sufficient to understand the premises on which the Tribunal's decision is based in this respect.' *Ibid*. 147/86.

[83] *Wena v Egypt* (Merits) 6 ICSID Rep 89, 94/17 (leases as investment), 126/127 (damages).

> investment. But this is simply a condition precedent to the operation of the [BIT].[84]

Thus, the *ad hoc* committee relied upon the factual existence of the leases to establish Wena's credentials as a qualified investor under the terms of the BIT, then suppressed their significance for its decision on the merits, only then to resurrect the leases in its assessment of damages. The tribunal and the *ad hoc* committee were prepared to give effect to the damages component of the Nile Hotel award, but not to the finding that the lease had been validly terminated:

> It is here where the relationship between one dispute and the other becomes relevant. The ultimate purpose of the relief sought by Wena is to have its losses compensated. To the extent this relief was partially obtained in the domestic arbitration, the Tribunal in awarding damages under the [BIT] did take into account such partial indemnification so as to prevent a kind of double dipping in favour of the investor. The two disputes are still separate but the ultimate result is the compensation of the investor for the wrongdoings that have affected its business.[85]

The tribunal in *Wena v Egypt* was not bound to follow the decisions of the *ad hoc* tribunals constituted pursuant to the arbitration clauses in the lease agreements. It was at liberty to decide for itself the issue of the existence of Wena's rights over the two hotels pursuant to Egyptian law before the alleged expropriation. The tribunal was not, however, at liberty to ignore this issue of fundamental importance.

114. A far more complex problem of applicable law confronted the tribunals in *CME v Czech Republic* and *Lauder v Czech Republic*. Neither tribunal addressed the problem squarely in relation to the critical issue of the nature of CME's or Lauder's rights to the television licence. The result is notorious: each tribunal came to a diametrically opposed assessment of the Czech Republic's liability in respect of the same basic investment treaty obligations.

114C. CME Czech Republic BV (The Netherlands) v Czech Republic[86]

Ronald S. Lauder v Czech Republic[87]

Summary of the facts. A public broadcasting licence was granted by the Czech Media Council in 1993 to CET 21,[88] a Czech legal entity, which,

[84] *Wena v Egypt* (Annulment) 6 ICSID Rep 129, 137/35.
[85] *Ibid*. 140/49. *Wena v Egypt* (Merits) 6 ICSID Rep 89, 126/127.
[86] (Merits) 9 ICSID Rep 121.
[87] (Merits) 9 ICSID Rep 66.
[88] Central European Television.

together with a German company, CEDC,[89] formed a Czech television services company called ČNTS.[90] Article 1.4.1 of the Memorandum of Association and Investment Agreement of ČNTS ('MOA'), executed on 4 May 1993,[91] stated that 'CET shall contribute to [ČNTS] unconditionally, unequivocally, and on an exclusive basis the right to use, benefit from, and maintain the Licence held by CET'[92] in return for a 12% ownership interest in ČNTS.[93] CEDC's contribution was in the form of 75% of ČNTS's capital in exchange for 66% ownership interest in ČNTS.[94] The Media Council characterised this arrangement as allowing ČNTS to perform all acts relating to the development and operation of TV Nova without CET 21 actually transferring its licence to ČNTS.[95] The other stakeholder was Czech Savings Bank ('CSB'), who contributed 25% of ČNTS's capital in exchange for an ownership interest of 22%.[96]

On 28 July 1994, CEDC assigned its interest in ČNTS to CME Media Enterprises BV, a Dutch legal entity.[97] The claimant in the *Lauder v Czech Republic* arbitration, Ronald S. Lauder, exercised control over both CEDC and CME Media Enterprises BV.

The Czech Media Law was amended in 1996 with the effect that the Media Council lost its primary means of regulating the activities of television licence holders – the enforcement of mandatory conditions for broadcasting set out in the licence at the time of its issue.[98] The day after these amendments came into force, CET 21 exercised its new right to have the licence conditions removed upon petition to the Media Council.[99]

In response to alleged public concern over foreign control of Czech broadcasting, the Media Council investigated the relationship between CET 21 and ČNTS to determine whether the latter was effectively conducting television broadcasting without holding a television licence.[100] As a result of the

[89] Central European Development Corporation GmbH. Ronald S. Lauder had indirect voting control over this company: *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 73/47.
[90] *Ibid*. 67/6; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 142/94.
[91] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 75/69.
[92] *Ibid*. 102/265.
[93] *Ibid*. 75/69; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 126–7/12, 142/94, 203/448.
[94] *Ibid*.
[95] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 75/75; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 139/82–3.
[96] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 142/94.
[97] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 76/77.
[98] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 127/15; *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 76/79.
[99] *Ibid*. 76/80.
[100] *Ibid*. 76/84. The *Lauder* and *CME* tribunals came to opposite conclusions as to whether this investigation was *bona fide*. According to the *Lauder* tribunal: 'Several objective facts existed which could cast doubt on whether CET 21 or ČNTS was actually operating the broadcasting of TV Nova. For instance, ČNTS's entry into the Commercial Registry stated that its business activity was "*operating television broadcasting on the basis of the license no. 001/1003*". ČNTS had also directly entered into agreements with other companies for the dissemination of

pressure exerted upon ČNTS in connection with this investigation, ČNTS and CET 21 entered into a new agreement on 23 May 1996 setting forth their legal relationship.[101]

Soon after the agreement was signed, on 17 July 1996, CME Media Enterprises BV purchased CSB's 22% interest in ČNTS for over USD 36 million.[102] As a result, CME held 88% of ČNTS's stock, whereas CET 21 maintained its equity interest of 12%.[103]

On 23 July 1996, the Media Council commenced administrative proceedings against ČNTS and two other service providers[104] for television broadcasting without authorisation.[105] In response to this renewed pressure from the regulator, ČNTS and CME Media Enterprises BV entered into a new agreement on 4 October 1996, which affirmed CET 21's exclusive responsibility for the programming as the licence holder.[106] Later, on 14 November 1996, Article 1.4.1 of the MOA was amended to read:

> [ČNTS] is granted the unconditional, irrevocable, and exclusive right to use and maintain the know-how and make it the subject of profit to [ČNTS], in connection with the License, its maintenance, and protection.[107]

In addition, ČNTS was granted the right to acquire the television licence from CET 21 in the event that the transfer became permissible under Czech law.[108]

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broadcasting. In addition, Mr. Železný held at that time the position equivalent to that of a Chief Operating Officer of both companies. Finally, most activities in connection with TV Nova were performed from ČNTS's large premises in Prague with an important staff, whereas CET 21 had a much smaller organization. All these facts lead to a confusion of the roles actually played by ČNTS and CET 21, and the Media Council could legitimately fear that a situation had arisen where there had been a *de facto* transfer of the License from CET 21 to ČNTS.' *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 101/252–3.

101 *Ibid*. 77/89.

102 *Ibid*. 77/93.

103 *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 144–5/106.

104 Namely: Premiéra TV and Rádio Alfa. *CME v Czech Republic* (Merits) 9 ICSID Rep 121,169/237.

105 *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 78/97. The *Lauder* and *CME* tribunals came to opposite conclusions on whether this was *bona fide* administrative action. According to the *Lauder* tribunal: '[T]he initiation of the administrative proceedings for unauthorized broadcasting in 1996 was not inconsistent with any prior conduct of the Media Council. At that time, the Media Council had objective reasons to think that ČNTS was violating the Media Law, i.e. that it was the broadcaster of TV Nova in lieu of CET 21, the holder of the License. The Media Council's duties were, among others, to ensure the observance of the Media Law. There cannot be any inconsistent conduct in a regulatory body taking the necessary actions to enforce the law, absent any specific undertaking that it will refrain from doing so.' *Ibid*. 108/296–7.

106 *Ibid*. 79/104.

107 *Ibid*. 79/107. The *CME* tribunal inferred that the purpose of this new wording was to sustain an interpretation of the investment structure whereby CET 21 did not make a contribution in kind to the share capital of ČNTS: *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 208/470.

108 *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 79/107.

At the relevant time CME Media Enterprises BV had expressed concern about the amendment to the MOA because it might be interpreted as allowing CET 21 to cancel the exclusive arrangement for the provision of services from ČNTS.[109] Nevertheless, CME Media Enterprises BV consented to the amendment and, in December 1996, increased its participation in ČNTS by acquiring 5.2% of CET 21's interest for consideration of approximately USD 5.3 million.[110]

On 21 May 1997, ČNTS and CET 21 entered into the 'Contract on cooperation in ensuring service for the television broadcasting' which replaced all previous agreements between the parties (the 'Service Agreement').[111] The agreement confirmed that CET 21 was the holder of the licence, the operator of television broadcasting and the party with exclusive responsibility for programming, whereas ČNTS had the exclusive right to arrange services for television broadcasting.[112] On the same day, CME Media Enterprises BV transferred its interest in ČNTS to CME Czech Republic BV ('CME') for consideration of USD 52,723,613.[113] CME Czech Republic BV later became the claimant in the *CME v Czech Republic* arbitration. In August 1997, CME increased its participation in ČNTS to 99% by acquiring a 5.8% interest in ČNTS originally held by shareholders of CET 21.[114]

On 16 September 1997, the Media Council suspended the administrative proceedings against ČNTS for unlawful television broadcasting because, in its view, the ambiguities in the relationship between ČNTS and CET 21 had been resolved.[115]

Mr Železný was at all material times the general director and chief executive of ČNTS and the general director of CET 21.[116] During the same period when CME Media Enterprises BV (and, from 21 May 1997, CME) was increasing its ownership interest in ČNTS, Mr Železný had been increasing his share in CET 21. On 4 July 1994, the respective shareholdings in CET 21 were:[117]

Mr Železný: 16.66%

Remaining Czech individual founders: 80.84%

CEDC (later CME): 1.25%

CSB: 1.25%

[109] *Ibid*. 79/106.
[110] *Ibid*. 79/111; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 144–5/106.
[111] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 80/117.
[112] *Ibid*. 80/117.
[113] *Ibid*. 80/118.
[114] *Ibid*. 80/120; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 144–5/106.
[115] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 80/121.
[116] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 127/12.
[117] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 76/76.

By 1 August 1996, Mr Železný had increased his share in CET 21 to 60% by purchasing 47% of CET 21's shares from the individual Czech shareholders.[118] CME Media Enterprises BV funded Mr Železný's acquisition by extending a loan to him,[119] which was subsequently forgiven.

At some point in time leading up to a meeting of the board of representatives of ČNTS on 24 February 1999, Mr Železný had decided to terminate CET 21's relationship with ČNTS and its principal shareholder, CME. At that board meeting, Mr Železný opined that the Service Agreement between ČNTS and CET 21 was not exclusive and hence CET 21 could request any services provided by ČNTS from another company, which it intended to do.[120] He also offered to resign as the chief executive and general director of ČNTS.[121] On 3 March 1999, Mr Železný sought confirmation of his position with respect to the non-exclusivity of the relationship between CET 21 and ČNTS by writing to the Media Council.[122] The Media Council responded with a letter dated 15 March 1999, by which it supported the principle of non-exclusivity.[123]

On 5 August 1999, CET 21 terminated the Service Agreement on the basis that ČNTS had failed to deliver a programming day-log on the previous day.[124] This termination paved the way for ČNTS's former joint venture partner to pursue more lucrative contracts with other services providers.[125] CME's interest in ČNTS became worthless for want of a licence to operate the now highly profitable TV Nova.[126]

On 19 August 1999, Mr Lauder commenced proceedings against the Czech Republic pursuant to the USA/Czech Republic BIT.[127] On 22 February 2000 CME commenced proceedings against the Czech Republic pursuant to the Netherlands/Czech Republic BIT[128] and also brought an ICC arbitration against Mr Železný.

Applicable law. The *CME* and *Lauder* cases provide an excellent illustration of the importance of identifying the rights *in rem* comprising the investment that are alleged to have been impaired by acts or omissions attributable to the host state. One of the key lessons from these cases is that the question of the liability of the host state under the substantive treaty obligations is very closely interrelated with the question of the scope and nature of the rights that comprise the investment. If a tribunal adopts an expansive conception of

[118] *Ibid*. 78/98.
[119] *Ibid*. 78/98.
[120] *Ibid*. 81/127.
[121] Mr Železný was dismissed from these positions at ČNTS on 19 April 1999: *ibid*. 82/132.
[122] *Ibid*. 82/129.
[123] *Ibid*. 82/130.
[124] *Ibid*. 83/138; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 128/18.
[125] *Ibid*.
[126] *Ibid*.
[127] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 83/142.
[128] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 125/2.

such rights, then it is more likely that state measures will be found to have interfered with those rights, as in *CME*, and vice versa, as in *Lauder*.

For the *CME* tribunal, the right attaching to CME's investment that was impaired by the Media Council's actions in 1996 was memorialised in Article 1.4.1 of ČNTS's MOA, which governed the legal relationship between ČNTS and CET 21's television licence. Before the Media Council's actions in question, Article 1.4.1 specified that CET 21 would contribute 'the right to use, benefit from, and maintain the Licence […] on an unconditional, irrevocable and exclusive basis' in return for a 12% ownership interest in ČNTS.[129] According to the *CME* tribunal, the Media Council coerced CME to accept the following modification of Article 1.4.1:

> [ČNTS] is granted the unconditional, irrevocable, and exclusive right to use and maintain the know-how and make it the subject of profit to [ČNTS], in connection with the License, its maintenance, and protection.[130]

For the Media Council's alleged coercion to constitute a breach of the BIT, it was necessary for CME to establish that this amendment to Article 1.4.1 was the proximate cause of the destruction of its investment in ČNTS. The test can be narrowed even further. Insofar as the amendment to Article 1.4.1 produced no immediate effect on ČNTS's commercial performance, there was no *de facto* impairment to CME's investment. (It is surely relevant in this respect that CME Media Enterprises *increased* its shareholding in ČNTS after this amendment to the MOA was executed and then sold its entire shareholding to the claimant CME at full market value thereafter.) Instead, to establish a causal link between the amendment to Article 1.4.1 of the MOA in 1996 and the loss of ČNTS's exclusivity to provide broadcasting services to CET 21 in 1999, it was necessary for CME to establish there was *de jure* impairment to its investment. In other words, did the amendment to Article 1.4.1 at the behest of the Media Council in 1996 alter the legal basis of ČNTS's right to use CET 21's television licence so that ČNTS was left exposed should CET 21 decide to repudiate the exclusivity of the arrangement? This was precisely the case advanced by CME and the ground for the *CME* tribunal's decision on causation:

> In 1999, the *legal* weakness of the 1996 arrangements materialised. On 5 August 1999, CET 21 terminated the Service Agreement …[131]

> The negative effects of the loss of *legal* security of the investment materialized and surfaced in 1999 which is roughly 30 months later.[132]

[129] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 75/69; *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 126–7/12.
[130] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 79/107.
[131] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 209/474.
[132] *Ibid*. 217/527.

A legal assessment of ČNTS's rights in relation to CET 21's television licence before and after the Media Council's coercion in 1996 was critical to CME's case on causation because it was ultimately the acts of a third party, Mr Železný, that triggered the destruction of CME's investment and those acts were not attributable to the Czech Republic.[133] The tribunal hearing the ICC arbitration between CME Media Enterprises BV and Mr Železný found that: 'Dr Železný's actions to replace CNTS with AQS, Czech Production 2000 and MAG Media 99 had almost caused the complete destruction of CNTS.'[134] The ICC tribunal ordered Mr Železný to pay CME Media Enterprises BV USD 23,350,000 in damages.[135] If Mr Železný had no *legal* basis to cancel the exclusive arrangement between ČNTS and CET 21 in 1999 when, as general director of CET 21, he terminated the Service Agreement with ČNTS, then CME's case against the Czech Republic under the BIT would have to fail unless ČNTS then suffered a denial of justice in the Czech courts in its endeavours to remedy CET 21's breach of contract. In other words, it must have been the case that Mr Železný exercised a *legal* right to terminate the Service Agreement and the exclusive arrangement with ČNTS and that the source of that legal right was the amendment to Article 1.4.1 of the MOA. That is so because it cannot be the function of the BIT to indemnify investors against breaches of contract committed by their private counterparties unless the host state's system of justice fails in its adjudication of the resulting disputes between those private parties.[136]

In addition to the amendment of the MOA, the second alleged violation of the BIT was the Media Council's letter of 15 March 1999, by which it

[133] The *Lauder* tribunal found that Mr Železný was the cause of the loss to the investment in ČNTS rather than acts attributable to the Czech Republic: *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 98/234–5, 104/274, 106/286, 109/304, 111/313. The tribunal hearing the ICC arbitration between CME Media Enterprises BV and Mr Železný found that: 'Dr Železný's actions to replace ČNTS with AQS, Czech Production 2000 and MAG Media 99 had almost caused the complete destruction of ČNTS.' *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 257. The ICC tribunal ordered Mr Železný to pay CME Media Enterprises BV USD 23,350,000 in damages: *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 274.

[134] *CME v Czech Republic* (Dissenting Opinion) 9 ICSID Rep 243, 257.

[135] *Ibid*. 274.

[136] The *Lauder* tribunal stated the obvious in this respect: '[T]he Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability … The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between two companies over the nature of their legal relationships.' *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 110/308, 110–1/314. The claimant CME had argued to the contrary: 'The Treaty further requires that, "[m]ore particularly, each Contracting Party shall accord to such investments full security and protection" … Under this provision, each State is required to take all steps necessary to protect investments, regardless of whether its domestic law requires or provides mechanisms for it to do so, and regardless of whether the threat to the investment arises from the State's own actions or from the actions of private individuals or others. The provision imposes an *obligation of vigilance* under which the State must take all measures necessary to ensure the full enjoyment of protection and security of the foreign investment. The State may not invoke its own legislation to detract from any such obligation.' *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 157/159–60.

supported the principle of non-exclusivity in the relationship between the service provider (ČNTS) and the licence holder (CET 21). The *Lauder* tribunal found that, insofar as the letter had no legal effect in Czech administrative law, it could not have affected the contractual relationship between ČNTS and CET 21, and hence could not amount to a 'measure' attributable to the Czech Republic under the BIT.[137] In contrast, the *CME* tribunal found that:

> The 15 March 1999 letter, a regulatory letter of the broadcasting regulator, was fabricated in collusion between Dr Železný and the Media Council behind the back of CNTS (TV NOVA) to give CET 21 a tool to undermine the legal foundation of CME's investment.[138]

But a 'tool' that is capable of undermining the *legal* foundation of CME's investment must by definition be an instrument of a legal nature. And if the Media Council's letter had no legal effect in the system of law that governed the legal foundation of CME's investment,[139] how could its issuance impair the legal basis of that investment?[140] The *CME* tribunal was, however, careful to find that the causal basis for CME's loss was directly related to the 1996 modification rather that the 1999 letter, describing the latter as only 'compound[ing] and complet[ing] the [Media] Council's part in the destruction of CME's investment'[141] rather than the proximate cause of the 'destruction'.[142]

International law governed the issue of the Czech Republic's liability under the Netherlands/Czech Republic BIT pursuant to Rule 10. It should be obvious, nevertheless, that a decision on the incidental question of causation

[137] *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 105–6/282–4, 109/303–4.

[138] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 225/555.

[139] For the Media Council to act with legal effect it must commence administrative proceedings. According to CME's submission before the Svea Court of Appeals: 'CME did not argue that the letter of March 15, 1999 was a formal act and did not claim that the letter had any legal consequences under Czech law.' *Czech Republic v CME Czech Republic B.V.* (Svea Court of Appeals, 15 May 2003), 9 ICSID Rep 439, 481. In light of this revelation, the *CME* tribunal's characterisation of the Media Council's letter as a 'regulatory letter' is rather curious. It is, moreover, a characterisation that it repeated in the Final Award: '[T]he Media Council's letter of March 15, 1999 was not just simply a policy letter. It was a regulatory letter which requested further changes of the contractual relation between ČNTS and CET 21.' *CME v Czech Republic* (Damages) 9 ICSID Rep 264, 362/463.

[140] The *CME* tribunal stated: 'The basic breach by the Council of the Respondent's obligation not to deprive the Claimant of its investment was the coerced amendment of the MOA in 1996. The Council's actions and omissions in 1999 compounded and completed the Council's part in the destruction of CME's investment.' *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 235/601.

[141] *Ibid*.

[142] It is unclear whether the CME tribunal found that the issuance of the letter in 1999 was, in and of itself, an act of expropriation. In concluding its remarks on the letter itself, the tribunal held that '[t]his interference by the Media Council in the economic and legal basis of CME's investment carries the stigma of a Treaty violation' (*ibid*. 223–4/551) without specifying which provision of the Treaty was thereby violated. On the other hand, the tribunal concludes its section on expropriation by stating: '[t]his qualifies the Media Council's actions in 1996 and actions and inactions in 1999 as expropriation under the Treaty', thus suggesting that the expropriation consisted of composite acts (*ibid*. 237/609).

in these circumstances required a *renvoi* to Czech law. Only Czech law could possibly determine whether the amendment to Article 1.4.1 of the MOA or the Media Council's letter altered the substance of ČNTS's rights over CET 21's television licence. To answer this question by reference to international law is tantamount to deciding *ex aequo et bono* for there are no principles or rules in the corpus of international law that could be of assistance. And just as the International Court of Justice might attract the opprobrium of international lawyers should it decide an international maritime boundary dispute by reference to Czech law, the failure of investment treaty tribunals to take notice of applicable municipal laws cannot escape criticism either. Criticism of the *CME* tribunal must be tempered, however, by the Czech Republic's failure to plead Czech law on these substantive issues until the quantum phase of the arbitration, by which time, as a matter of procedure, it was too late.[143]

We turn now to the *CME* tribunal's actual decision on causation.

As previously stated, the *CME* tribunal found that the Media Council had coerced ČNTS (and CME) to amend Article 1.4.1 of the MOA and that this had the effect of leaving ČNTS vulnerable to the loss of exclusivity with respect to the use of CET 21's television licence at the behest of CET 21.[144] Of paramount importance to the tribunal's reasoning was its determination that the amended formulation in Article 1.4.1 – referring to the 'right to use and maintain the know-how' attaching to the licence – was 'meaningless and worthless'.[145] If, to the contrary, this change in wording in ČNTS's Memorandum of Association had no effect on ČNTS's rights, then the Media Council's coercion could not have been the cause of CME's loss.[146]

The *CME* tribunal did not refer to any law in making this determination but instead sought refuge in the repetition of its 'meaningless and worthless' assertion, a sample of the variations upon which are reproduced below:[147]

> The amendment of the MOA by replacing the licence-holder's contribution of the Licence by the worthless 'use of the know-how of the Licence' is nothing else than the destruction of the *legal* basis … of the Claimant's investment.[148]
>
> …The Media Council requested a complete change of the basic *legal* protection of CME's investment by substituting for 'use of the licence' contributed by CET 21 to ČNTS the (useless) 'use of the know-how of the licence'.[149]

[143] *CME v Czech Republic* (Damages) 9 ICSID Rep 264, 349/400.
[144] *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 207/468.
[145] *Ibid*. 208/470. See also: *ibid*. 208/469, 218/535, 234/593, 234/595.
[146] As was found by the *Lauder* tribunal: *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 92/202.
[147] The assertion was repeated ten times. In addition to the quotations reproduced in the text, see also: *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 208/469, 208/470, 234/595, 234/598.
[148] *Ibid*. 233/593 (emphasis added).
[149] *Ibid*. 219/535 (emphasis added).

> …The contribution of the use of the Licence under the MOA is *legally* substantially stronger than the Service Agreement [150]

> …The Media Council violated the Treaty when dismantling the *legal* basis of the foreign investor's investments by forcing the foreign investor's joint venture company ČNTS to give up substantial accrued legal rights.[151]

In each quotation there is a reference to the 'legal' basis of CME's investment but no accompanying analysis of the law. The tribunal might have been correct in its hypothesis, but it was a hypothesis that deserved to be tested by reference to the applicable law. It was, after all, a USD 270 million dollar question.[152]

The law applicable to this question of the legal effect of the amendment to Article 1.4.1 of the MOA could only have been Czech law. For this reason the *CME* tribunal's statement that it is 'not [its] role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law'[153] is problematic. The tribunal did pass a decision upon the legal protection granted to CME but neglected to consider the only law that could have informed this decision.[154]

This aspect of the *CME* tribunal's decision was reviewed by the Svea Court of Appeals in Stockholm upon a challenge to the award by the Czech Republic.[155] The Czech Republic relied upon section 34(6) of the Swedish Arbitration Act, which provides that an award rendered in Sweden can be wholly or partially set aside at the request of a party if 'through no fault of the party, an irregularity has occurred in the course of the proceedings which probably has influenced the outcome of the case'.[156]

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150 *Ibid*. 208/473 (emphasis added).

151 *Ibid*. 216/520 (emphasis added).

152 *CME v Czech Republic* (Damages) 9 ICSID Rep 264, 411/650.

153 *CME v Czech Republic* (Merits) 9 ICSID Rep 121, 209/476.

154 The *Lauder* tribunal, in coming to the opposite conclusion, did not impress with its analysis of Czech law either: 'All property rights of the Claimant were actually fully maintained until the contractual relationship between CET 21 and ČNTS was terminated by the former. It is at that time, and at that time only, that Mr. Lauder's property rights, i.e. the use of the benefits of the License by ČNTS, were affected. Up to that time, ČNTS had been in a position to fully enjoy the economic benefits of the License granted to CET 21, even if the nature of the legal relationships between the two companies had changed over time.' *Lauder v Czech Republic* (Merits) 9 ICSID Rep 66, 92/202.

155 *Czech Republic v CME Czech Republic B.V.* (Svea Court of Appeals, 15 May 2003) 9 ICSID Rep 439. The Czech Republic submitted that the following issues should have been determined by application of Czech law: the protection afforded the original investor pursuant to the 1993 MOA, the commencement of the administrative proceedings in 1996, and the alleged coercion in conjunction therewith, the relationship between the 1996 MOA and the 1993 MOA, the service agreement, what transpired when CME acquired the interests in ČNTS from CME Media Enterprises B.V. in 1997, the Media Council's letter of 15 March 1999 and the alleged collusion with Železný, the obligation of the Media Council to intervene, and the termination of the service agreement (*ibid*. 455).

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

In marked contrast to the sophisticated pleadings presented by both parties on the question of the *CME* tribunal's choice of law, the Svea Court of Appeals positioned itself as close as possible to the precipice of judicial abdication.[157] It found that the *CME* tribunal had complied with the applicable law clause in Article 8(6) of the Netherlands/Czech Republic BIT by applying relevant sources of law: 'primarily international law'.[158]

As previously stated, neither investment treaties nor general international law purport to regulate the complex problem of proprietary or contractual rights over a television licence. The Svea Court of Appeals' finding that the tribunal discharged its mandate by applying 'primarily international law' is question begging to say the least, especially when coupled with its statement that:

> The Court of Appeal does not believe that the various sections in the arbitral award are to be reviewed in order to ascertain which of the sources of law listed in Article 8.6 of the Treaty have been applied by the arbitral tribunal.[159]

Thus, to dispose of the Czech Republic's challenge to the *CME* award, the Svea Court of Appeals at once found that the *CME* tribunal applied 'primarily international law' but that such a finding was unnecessary to its decision. This schizophrenic approach explains what must be described as the ultimate failure of the Svea Court to give coherent reasons for its decision on this question.

B. THE FALLACY OF MUNICIPAL LAWS AS FACTS BEFORE AN INVESTMENT TREATY TRIBUNAL

115. The principle that municipal laws are to be treated as facts before an international court or tribunal[160] is, according to Jenks, 'at most, a debatable proposition the validity and wisdom of which are subject to, and call for, further discussion and review'.[161] There are, nevertheless, situations which do not generate controversy, such as when the International Court decides a maritime boundary dispute and takes cognisance of municipal laws asserting rights over the disputed area to determine whether the doctrine of acquiescence in international law can be invoked by one of the state litigants. Municipal laws are treated as facts in this context because the legal issues to be determined by the

[157] In the Svea Court of Appeal's judgment, the summary of the parties' pleadings runs to 46 pages, whereas the Court limited its reasoning to 13 pages. The former rewards a careful study; unfortunately the same cannot be said for the latter.

[158] *Czech Republic v CME Czech Republic B.V.* (Svea Court of Appeals, 15 May 2003) 9 ICSID Rep 439, 499.

[159] *Ibid*.

[160] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* 1926 PCIJ (Ser. A) No. 7 (Merits) 19.

[161] W. Jenks, *Prospects of International Adjudication* (1964) 552.