



Issue : Vol. 2 - issue 5  
Published : November 2005

# Transnational Dispute Management

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## Case T 8735-01-77, The Czech Republic v. CME Czech Republic B.V. - Expert Opinion of Professor Sacerdoti

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**EXPERT OPINION OF PROFESSOR SACERDOTI**

**Case T 8735-01-77**

**The Czech Republic**

**v.**

**CME Czech Republic B.V.**

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## **LEGAL OPINION**

**15 October 2002**

### **Introduction**

I have been asked by Counsel for CME Czech Republic B.V. (hereinafter “CME”) for a legal opinion on certain points of international law, as specified hereunder, in connection with the Claim submitted by the Czech Republic (“CR”) to the Svea Court of Appeal in Stockholm for the declaration of invalidity and challenge pursuant to the Swedish Arbitration Act of 1999 (“Arbitration Act”) of a Partial Award (the “Stockholm Award”) rendered in Stockholm on 13 September 2001 by an Arbitral Tribunal (the “Tribunal”) in a dispute between CME (“Claimant” in arbitration) and the Czech Republic (“Respondent” in arbitration).

I have accordingly agreed to supply the present legal opinion as an opinion *pro veritate* based on my competence and experience in public international law, with special reference to the legal status of foreign investments under bilateral and multilateral treaties, and in the field of international contracts and international commercial arbitration, as evidenced by my attached professional curriculum and list of publications (attached at Annex 1).

My legal opinion deals specifically with the following issues that have been raised by the Czech Republic in its challenge to the validity of the Award:

- 1) Application by the Tribunal of law other than that agreed by the parties and/or properly applicable;

- 2) Disregard by the Tribunal of the principles of *lis pendens* and of *res iudicata*, based on which, according to the CR, the Tribunal should not have proceeded with the issuance of its award, and/or its award is invalid, in view of the prior issuance (on 3 September 2001 in London) of another award (“London Award”) by a different arbitral tribunal in a dispute between Mr. R. Lauder, an indirect controlling shareholder of CME, and the CR having allegedly the same object and ground (“parallel proceedings”);
- 3) Application by the Tribunal of erroneous principles in respect of the responsibility of the Czech Republic in causing certain damages to CME, as a “joint tortfeasor” with a private person;
- 4) Standing of CME in respect of a claim relating to acts occurring before CME took over the investment.

In support of its claim under these points, the Czech Republic has submitted to the Svea Court of Appeals two legal opinions:

- the first by Professors Christoph Schreuer and August Reinisch, both of the University of Vienna, dealing with the first three issues above; and
- the second by Professor F. De Ly of Utrecht dealing with the deliberation process of the Tribunal, the relationship between the London proceedings and award and the Stockholm proceedings and award, and the issue of whether CME had standing to sue the CR as an assignee of another enterprise, namely CME Media Enterprises B.V.

In my opinion, I deal specifically with the arguments raised by these colleagues in support of the arguments of the CR as far as they appear relevant to the issues before the Svea Court of Appeal.

In dealing with some relevant international legal aspects of the challenge, I will follow in part a different order than the one found in the Claim by the Czech Republic and/or followed in the legal opinions mentioned above. My organization reflects what I believe is a proper and logical approach to the various issues involved.

Because the nature of the arbitral proceedings, of the jurisdictional basis of the Tribunal and of the Stockholm Award are relevant to most issues raised by the CR in its challenge, I will treat these points globally at the outset, without prejudice to a detailed examination later in the opinion. The examination of these general or preliminary points entails as a consequence a discussion of the type of control that a domestic court may exert on international commercial awards, distinguishing the ICSID annulment proceedings, and identifying the object and purpose of Bilateral Investment Treaties (“BITs”), such as the one between the Netherlands and the CR.

In fact, I believe that many of the conclusions of Professors Schreuer and Reinisch and of Professor De Ly are not relevant support for the grounds of the CR’s Claim that the award be set aside or annulled because they are based on mistaken premises as to the nature of the arbitration and of the award(s) involved, namely:

- they rely on ICSID jurisprudence, which is based on the annulment grounds stated in article 52 of the ICSID Convention, with respect to the alleged disregard of the choice of the applicable law by the arbitrators, while the Stockholm Award is not issued pursuant to ICSID, but arises from an UNCITRAL arbitration procedure, which, as such, is not subject to the ICSID annulment procedures and standards, but to the controls that will be discussed below;
- they refer to the principles of *res iudicata* and *lis pendens* as allegedly accepted in general public international law, but, first, these concepts are of no or of limited relevance with respect to international commercial arbitrations taking place in different countries, second, even the public international law concept of *res*

*iudicata* invoked is mischaracterized and, third, even if the allegedly applicable concept did apply, it would have no effect under the facts of this case.

**I. GENERAL AND PRELIMINARY REMARKS: THE NATURE OF THE INTERNATIONAL ARBITRAL PROCEEDINGS, OF THE AWARD BETWEEN CME AND THE CZECH REPUBLIC, AND OF THE CHALLENGES MADE AGAINST THE AWARD**

As appears from the Stockholm Award, and as is acknowledged by the parties, the dispute between CME and the CR was submitted by CME to arbitration in accordance with the provisions of article 8 of the BIT of 1991 between the Netherlands and the Czech and Slovak Federal Republic. This article 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)”.

The proceedings and the award between Mr. Lauder (a U.S. citizen) and the CR, mentioned above, are likewise the result of an UNCITRAL arbitration initiated and carried out in conformity with similar provisions found in article VI of the BIT of 1991 between the USA and the Czech and Slovak Federal Republic.

By adopting the UNCITRAL Rules, both treaties refer investor-State disputes to “international commercial / trade / economic arbitration”, the preferred method by which most international disputes having an economic content between subjects of different countries are solved today. While BITs frequently provide for the direct settlement of investment disputes between States and foreign investors 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.

These features are best understood in the context of the nature and purpose of BITs. As a leading UN publication on BITs states in its Introduction:

*“For nearly 40 years, countries have been concluding bilateral treaties with a view towards promoting and protecting foreign investment. These treaties, known*

*generically as bilateral investment treaties (BITs), impose certain obligations on the contracting parties with respect to the treatment of foreign investment, and they create dispute-resolution mechanisms to enforce those obligations. ... BITs are one of the policy instruments available to provide legal protection for foreign investments under international law and thus to reduce as much as possible the non-commercial risks facing foreign investments in host countries.”<sup>1</sup>*

More specifically, starting with the 1970’s, it was felt necessary to specify the standard of treatment and to provide specific dispute settlement procedures bilaterally between those home and host countries that were interested in promoting private investments by providing the legal security sought by investors to enter a foreign market. This was so because the exact standards of protection to which foreign property was entitled under customary international law (especially but not only in respect of expropriation and nationalisation) and the procedures to apply and enforce them had become uncertain due to the critical attitude expressed by communist countries and many developing States in the United Nations and other *fora*.<sup>2</sup>

BITs follow a standard pattern in ensuring legal protection to investors of either party as to their investments in the territory of the other party:

First, they provide an extended definition of investor.<sup>3</sup>

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<sup>1</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT , BILATERAL INVESTMENT TREATIES IN THE MID-1990S, 1-2 (1998) [hereinafter UNCTAD].

<sup>2</sup> BITs thus amount to a specific, bilateral rejection of limited compensation for expropriation, as proposed, for example, in General Assembly Resolution 3281(XXIX), the Charter of Economic Rights and Duties.

<sup>3</sup> Natural and legal persons are included. As to legal persons, constitution under the laws of one party suffices, without any requirement as to the origin of the funds or as to the nationality of the shareholders (cf. article 1(b)(ii) of the Dutch-CR BIT).

Second, BITs also contain a non-exclusive enumeration of what is considered an investment protected by the treaty, as specified, for example, in article 1(a) of the Dutch-CR BIT.<sup>4</sup>

Third, BITs provide for a series of standards of treatment to which covered investments of protected investors are entitled. These include some traditional standards of general application found in customary international law.<sup>5</sup> The substantive protections further include other treatment obligations specific to certain situations.<sup>6</sup>

These typical provisions carry out the basic object and purpose of BITs, which are those of protecting foreign investors by extending to them in clear terms the protection of public international law. As stated in the UN publication quoted above:

*“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*

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<sup>4</sup> A non-exclusive “*asset-based*” list of types of investment is usually given that includes property rights, rights arising out of contracts or concessions, monetary claims generally, intellectual property rights. Investments made “*either directly or through an investor of a third State*” qualify. The corresponding text in the US-CR BIT is “*investment...owned or controlled directly or indirectly*” (article 1(a)).

<sup>5</sup> These standards include both absolute, such as, in the Dutch-CR BIT: “*fair and equitable*”, prohibition of “*unreasonable or discriminatory measures*” (article 3(1)), “*observe any obligation ... entered into with regard to investments of investors of the other Contracting Party*” (article 3(4)); and relative, that is referring to obligations taken in similar circumstances or subject matter in relation to other persons, such as, in the Dutch-Czech BIT: “*national treatment*”, and “*most favoured nation treatment*” (article 3(2)), as well as more favourable treatment provided currently or in the future under domestic law or in accordance with “*obligations under international law*” (article 3(5)).

<sup>6</sup> Such as the obligations for the host country to allow monetary exchange transfers connected with an investment (article 4), and especially not to expropriate directly or indirectly a covered investment except for public purpose, under due process and against just compensation (article 5).

*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].”<sup>7</sup>*

The strong international public policy in favour of settlement of investment disputes by means of international commercial/economic/trade arbitration (instead of resorting to State courts) is evidenced not only by the growth in adoption of BITs with arbitration designated as the means of dispute settlement, but also by the impressive body of multilateral conventions and other international instruments in the field, a selection of which are listed below. Through the establishment of intergovernmental obligations and harmonization requirements, these instruments are aimed at facilitating both the conclusion of arbitral agreements among interested parties and the smooth functioning of arbitration in case of disputes, as well as the avoidance of unnecessary interference by States’ courts and the recognition and enforcement of awards in the country where they may have been issued as well as in other countries.

These instruments include:

- New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards” (“New York Convention”), dealing with the recognition by State courts of arbitration agreements and awards made in other countries or under foreign law;
- the European Convention of 1961 on International Commercial Arbitration (“Geneva Convention”) on the same subject;

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<sup>7</sup> UNCTAD, *supra* note 1, at 4.

- 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*”.

The UNCITRAL Model Law was drafted, and has been used extensively, as a basis for national legislation addressing the regulation, recognition and enforcement of international arbitration taking place in the *forum* or abroad without distinction.<sup>8</sup>

As a result of the harmonisation of domestic laws brought about by these instruments, a comparative approach now prevails in commentaries and treatises, and interpretative criteria applied by courts of different countries are remarkably homogeneous. The examination that follows will take these concepts into account.

#### **A. The International Commercial Nature of UNCITRAL Arbitrations**

UNCITRAL arbitration of disputes between States and private parties relating to economic/trade matters falls within the domain of international commercial arbitration procedures (1). For the purposes of domestic court review, it is necessary to distinguish between “international” and “domestic” procedures (2). In particular, party autonomy in international arbitration limits the role of the law of the seat of the arbitration (3). The control (with respect to domestic law) exercised by State courts over international arbitration is itself constrained to those rules that arise to the level of international public

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<sup>8</sup> The Swedish Arbitration Act of 1999 has taken the UNCITRAL Model Law into account, though not followed 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).

order (*ordre public international*) (4). The recognition abroad of the municipal court control is contingent on the court's respect of its limited role in the process (5).

**1. The international, commercial nature of arbitration as recognised by international instruments and practice, including arbitration between States and private parties.**

The internationality of this type of arbitration relates to the objective fact that it is a method for settling disputes concerning international trade, involving parties from different countries and transnational movements of goods, services, and capital.

International arbitration in this sense has been considered as a “social institution”, recognised and adopted within the world business community in order to administer justice in a sphere largely independent from States' rules.<sup>9</sup> 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.

Thus 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*” (article 1(3)).

The New York Convention does not rely on a definition of the “international” character of arbitration. In fact, in conformity with its title, it focuses on the “*recognition and enforcement of foreign arbitral awards*” (emphasis added), 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*” (article I(1)). The Convention does not regulate the proceedings either directly or

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<sup>9</sup> See generally, RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* (1985); KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* (1993).

indirectly: it does not deal therefore with the prerequisites, if any, that make the choice of arbitration to settle a given dispute admissible, nor with the constitution of an arbitral tribunal, nor with the conduct of the proceedings. These matters, which are within the responsibility of the parties and of the arbitrators, are covered by the other instruments (Arbitral Rules, UNCITRAL Model Law), mostly on an optional basis.

Therefore, contrary to Professor De Ly's opinion (at para. 70), the provisions of the New York Convention dealing with the recognition of foreign awards are not directed to arbitral tribunals. The only preoccupation (not strictly a duty) of the arbitrators is "*to take into consideration the requirements of conformity with the international public policy of the seat of the arbitration to the extent necessary to avoid having their award set aside, and the same is true with respect to the various States in which the award likely to be enforced*".<sup>10</sup>

There is unanimous recognition that disputes between government or State entities on the one hand and private businessmen or enterprises of another country, on the other hand, can also properly be subject to the dispute resolution procedures of international commercial arbitration. This practice is indeed current and has been an important feature of international economic intercourse for decades.<sup>11</sup>

*"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*

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<sup>10</sup> Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules*, in *PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION* 570, 582 (International Council for Commercial Arbitration, Congress series No. 7, 1996).

<sup>11</sup> The Annual Report of the International Chamber of Commerce for 2001 reports 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.

*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.”*<sup>12</sup>

On the contrary, even if the dispute is not contractual (as in the case of investment disputes based on BITs), “*Arbitration 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*”.<sup>13</sup>

The fact that the dispute at issue cannot be properly defined as “commercial” as the term is used in civil law is immaterial, since 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.<sup>14</sup> This understanding explains why the terms “trade” or “economic” arbitration are preferred by many authors, when such a

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<sup>12</sup> Riccardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 HAGUE REC. DES COURS 87-88 (1977).

<sup>13</sup> FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 40, para. 69 (Emmanuel Gaillard & John Savage, eds., 1999) [hereinafter FOUCHARD, GAILLARD, GOLDMAN].

<sup>14</sup> *Id.* at 41, para. 70.

qualification is intended to distinguish these procedures from those applied in inter-State arbitration.<sup>15</sup>

As to the UNCITRAL Model Law, a note to the official edition by the United Nations regarding Article 1, which provides “*This 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”. The New York Convention (article I(3)) follows the same approach in that it requires contracting States to make a specific declaration (which very few have made) if they want to restrict it to arbitration of disputes “*arising out of legal relationships, whether contractual or not, which are considered as commercial*” under their national law.

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<sup>15</sup> For example, inter-State dispute resolution under article 10 of the Dutch-CR BIT is not subject to UNCITRAL Rules and relies on the President of the International Court of Justice, rather than the Stockholm Chamber of Commerce, as appointing authority. Also under the NAFTA Treaty of 1994 establishing the North American Free Trade Area, arbitration of investment disputes between one of the Members (US, Canada, Mexico) and investors of another member can be settled, based on the Contracting States advanced consent expressed in the treaty, by international commercial arbitration with application of the UNCITRAL Rules (Chapter 11, article 1130(b)). The arbitral tribunal “*shall hold an arbitration in the territory of a Party that is a party to the New York Convention*” 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*” (article 1136(7)).

Following the same principles, the awards rendered between aggrieved US investors and Iran by the Iran-US 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 Rules to the procedure. A French court, before which a US investor sought recognition of an award, has held that the French provisions on recognition of international/foreign (economic) awards were applicable: *Golshani v. Iran*, Cour d’appel de Paris (June 28, 2001), REVUE DE L’ARBITRAGE 163 (2002/1); *see also* 2 CAHIERS DE L’ARBITRAGE 13-14 (2002) (summarizing the decision and noting the particular features of the Iran-US Claims Tribunal and the affect those features have on the applicability of provisions of the French code dealing with foreign arbitral awards).

**2. International v. purely national (domestic) arbitration under the law of the States where arbitration is conducted.**

The specificity (autonomy) of international commercial arbitration has been recognised both in domestic laws and in the relevant international instruments, distinguishing it from purely domestic arbitration both at the seat and as to recognition in other countries, especially for the purpose of limiting interference by local courts.

As to domestic laws 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 ff) 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 domiciled or habitually resident in Switzerland*”.

The French 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 statute of 1995 has introduced a special regulation of international arbitration taking place in Italy (article 832 ff 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*”.

Thus an international award made in Sweden, as in the case of the Stockholm Award, 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-CR London award, 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.<sup>16</sup> 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.*”<sup>17</sup>

Even if State control over international awards is limited, such awards are nevertheless considered grounded in the juridical regime of the seat. One consequence of this link between an international arbitration and the seat of that arbitration is that when international commercial arbitrations take place in different countries, they do not pertain to the same legal order: there is no coordination nor hierarchy between them. The awards

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<sup>16</sup> 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).

<sup>17</sup> THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 25 (2<sup>nd</sup> ed., 2000).

are not automatically relevant one for the other, nor are they automatically relevant in States other than the one of their respective seat.<sup>18</sup>

It follows, as demonstrated further below, that the concepts of *lis pendens* and *res iudicata* are inapplicable in such a situation where the different proceedings and awards are not subject to the same jurisdiction.

As discussed hereunder, also in public international law, arbitral tribunals and permanent jurisdictions established to solve disputes between States are not subject to coordination or subordination, except where a treaty explicitly (and exceptionally) so provides in view of the decentralized, non-organised structure of the community of States.<sup>19</sup> In fact, since the 1950's, there has been no follow-up to “*abortive plans to create a permanent review procedure for international arbitral awards to be administered by the [Permanent Court of International Justice] and later the [International Court of Justice]*”.<sup>20</sup>

### **3. The relevance of “party autonomy” typical of international arbitration as a limit to the application of the law of the seat of the arbitration.**

The basic effect of the distinction between arbitration settling domestic disputes (purely local arbitration) and international commercial arbitration is the more limited

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<sup>18</sup> This fundamental issue of hierarchy and coordination between legal orders is irrespective of the further point that distinct arbitration proceedings and awards based on separate arbitral agreements or other jurisdictional bases are independent from one another. It applies even without considering the peculiar nature of arbitration without privity based on different BITs entered into by different countries, which I address below.

<sup>19</sup> See Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 245, 247ff (Ernst-Ulrich Petersmann, ed., 1997).

<sup>20</sup> CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 888 (2001) [hereinafter “ICSID Commentary”]. See also Georges Abi-Saab, *De l’arbitrage dans ses rapports avec la justice internationale* in ETUDES DE DROIT INTERNATIONAL EN L’HONNEUR DE PIERRE LALIVE 377, 381 (Christian Dominicé, Robert Patry & Claude Reymond, eds., 1993).

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 country 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 limiting 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 is never admitted.<sup>21</sup>

Ever since the adoption of the New York Convention, a debate has ensued on the exact limits of State control depending on the recognition of the underlying link. The necessity of a link of State control in international commercial arbitration has been put into question, as well as whether parties can establish proceedings completely disconnected from the application of local substantive and/or procedural law and not subjected to the control of local courts in respect of international contracts and disputes.

Based on the generally accepted notion of “party autonomy” it has been advocated successfully, as evidenced by arbitration practice,<sup>22</sup> that parties can, as to substantive law, not only choose among different national laws, be they objectively connected in some way to their contract or not, but also that they may choose even applicable rules not part of a definite legal system, such as just trade usages, or “merchant law” (*lex mercatoria*), i.e. the principles of commercial law commonly used and

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<sup>21</sup> Berger, *supra* note 9, 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 13, 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.

<sup>22</sup> Gaillard, *supra* note 10, at 579-81.

recognised in international trade.<sup>23</sup> Further, the choice of public international law, alone or in combination with other sources, is admitted—especially when a State is party to the arbitration.<sup>24</sup> According to a number of views, international arbitration could also be free from the requirement to apply mandatory provisions of the law that are applicable to the contract, by choice of law of the parties or otherwise.

As to procedural law, it is widely recognised that arbitration proceedings may be carried out relying (almost) exclusively on pre-established arbitral rules, either of specialized institutions, such as the International Chamber of Commerce, that professionally administer arbitration proceedings, or those drafted for use in any *ad hoc* arbitration, as is the case of the UNCITRAL Rules. In this respect, it is acknowledged that, when the parties have not chosen the law applicable to the substance of the dispute, international arbitrators are competent to select it, following the applicable arbitral rules (such as article 33 of the UNCITRAL Rules) or, failing such rules, in their prudent evaluation of which law is more closely connected with the contract. In so doing they are

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<sup>23</sup> 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); David, *supra* note 9, at 344-47 (describing the flexible application of national laws).

<sup>24</sup> See Prosper Weil, *Principes généraux du droit et contrats d'Etat*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ETUDES 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 9, at 347-49.

Professor Schreuer also considers the choice of public international law admissible for contracts submitted to ICSID arbitration, where internationalisation 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”. ICSID Commentary, *supra* note 20, at 562.

not bound by the provisions of local law, since, unlike for local courts, for international arbitral proceedings this body of law does not constitute the *lex fori*.<sup>25</sup>

A further consequence of this approach is the freedom of arbitrators not to apply local procedural law, but those rules of procedure directly chosen by the parties or by reference to a set of arbitration rules, except for mandatory provisions binding on arbitrators (not necessarily derived from those of the seat, as they might be those of the possibly different *lex arbitratus*). Thus Article 1(2) of the UNCITRAL Rules provides that:

*“These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail”.*

The above general framework from a comparative point of view is not, of course, an explication of Swedish law, but is in my opinion relevant given the general harmonisation of arbitration law world-wide. Among other things, it results in the universally recognised limitation of domestic court control on international arbitral awards both locally made and rendered abroad as clarified hereunder.

#### **4. Further consequences: the limits to control of local courts over international arbitral awards with respect to “international public order” principles.**

It is recognised 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

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<sup>25</sup> JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 535 (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.*”).

in his decision-making.<sup>26</sup> 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.<sup>27</sup> The latter, in view of their very nature, should typically be part of the international public order of the seat of the arbitration.

**(a) “International public order” as to the content of the award does not address the relationship between different arbitral proceedings.**

It is generally held that the notion of “public order” relevant as a yardstick for testing the compatibility of international commercial awards with national legal orders is that of “international public order”, aimed at preserving the local social and legal system from foreign values if truly incompatible with them, while taking into account that such an award may deal with matters (and be between parties) unconnected or only loosely connected with the forum.<sup>28</sup>

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.

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<sup>26</sup> Berger, *supra* note 9, at 688; FOUCHARD, GAILLARD, GOLDMAN, *supra* note 13, at 953-54, para. 1645.

<sup>27</sup> 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 9, at 689. See generally Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 3 REVUE DE L'ARBITRAGE 329 (1986).

<sup>28</sup> 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).

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 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*”.<sup>29</sup> 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*.”<sup>30</sup>

“*According to the prevailing international doctrine the term covers flagrant abuses of law and natural justice in substantive as well as procedural respects.*”<sup>31</sup> The public policy concept could be limited to substantive violations of the principles of *pacta*

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<sup>29</sup> 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 judgements in the EC, thus further restricting the role of public policy as an obstacle to the free circulation of judgements 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 Reg. 44.

<sup>30</sup> 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).

<sup>31</sup> Berger, *supra* note 9, at 676.

*sunt servanda, bona fides*, prohibition of *abus de droit*, or if issues such as bribery, corruption, smuggling or drug trafficking arise.<sup>32</sup>

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.<sup>33</sup> 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 for the case at issue) within international public order.<sup>34</sup>

In my opinion, and contrary to the CR Statement of Claim and the Schreuer Opinion including *lis pendens* and *res iudicata* within this concept, international public policy of the *forum* cannot be understood to include the relationship between different arbitral proceedings. No list of grounds among those found in the writings mentioned above includes these concepts as they may relate to parallel or connected international commercial arbitration in different countries within those relevant in ascertaining a conflict between an international commercial award and the international public policy of the country where it was rendered. No principle underlying the concept of international public policy is relevant to the question of parallel proceedings.

None of the challenges made by the CR against the Stockholm Award conform to the requirements of international public policy both as to the subject matter and as to the gravity of the alleged violations by the arbitrators.

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<sup>32</sup> *Id.*

<sup>33</sup> *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, para. 42.

<sup>34</sup> Lew, *supra* note 25, at 534-35.

**(b) As to the correctness of the proceedings (alleged “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 that deals specifically (and only) with “International Commercial Arbitration”, as its very title indicates. 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 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*”.<sup>35</sup>

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

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<sup>35</sup> Article V(1)(c) of the New York Convention and Articles 34 and 36(1)(iii) of the UNCITRAL Model Law.

- 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.

In my opinion, it is clear that none of the challenges made by the CR are covered by these grounds.

Even if it were the case here (and, as described below, I do not believe it is), misapplication of the applicable law or wrong selection of the applicable law among those listed as applicable in article 8(6) of the BIT could never fall within the grounds for setting aside the award under the accepted understanding of excess of mandate. The same holds true for an allegedly wrong appreciation of causation and alleged misallocation of responsibility for damages between Dr. Železný and the CR, and for having found the CR responsible for damages suffered by the foreign investment before it was acquired by CME.

Moreover, under the above standards, all these claims formulated by the CR and described in these sections 4(a) and 4(b) involve the merits. Addressing them as proposed by the CR does not imply merely comparing the Stockholm Award to the objective facts that pertain to the claims and the jurisdictional clause, but re-examining the merits of the case in fact and/or in law, which is impermissible in a domestic procedure of annulment or setting aside of international commercial awards.

**5. International effects of the preferential link between an international award and the State where it was rendered: recognition abroad of control exercised by the courts of the seat of arbitration.**

Contrary to the views of Professor De Ly, the New York Convention does not regulate the control over either awards or the arbitration process taking place locally by the country where the award was made or under whose law it was made. Instead, the Convention addresses the recognition of “foreign arbitral awards”. The New York Convention regulates the cases of non-recognition of awards in other countries by listing in article V(1) a definite series of procedural grounds (listed above), having to do with basic due process considerations, that allow non-recognition. Article V(2) lists grounds for non-recognition that are peculiar to the country where recognition of the foreign award is sought (non-arbitrability of the dispute under the local law and conflict of the award with public order).

According to article V(1) of the New York Convention, recognition and enforcement of such an award may be refused by a contracting State, *inter alia*, “*if ... the composition of the arbitral authority (tribunal) or the arbitral procedure was not... in accordance with the law of the country where the arbitration took place; or ... the award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*”.

A preferential link with the “country of origin” and a special competence of its courts is thus recognised. However, the New York Convention does not go so far as to require that, in order to be recognised and enforced abroad, foreign awards must have been formally recognised in the country where they were made (i.e., no double *exequatur* is required). By the same token, there is debate as to whether annulment or setting aside

for whatever reason in the country where an award was rendered can block recognition abroad, thus resulting in a kind of “extra-territorial” effect of these decisions.<sup>36</sup>

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 should 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, is considered valid and enforceable in other countries.<sup>37</sup>

In article V(2), the New York 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*”.

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<sup>36</sup> The drafters of the Geneva Convention, adopted in 1961 only three years after the New York Convention, took a restrictive view, which has usually been followed thereafter: only if the annulment in the “country of origin” has been based on the core grounds admitted by article V of the New York Convention for denial of recognition abroad will such annulment be taken into account abroad. Moreover, according to article V(1) of the New York Convention, foreign courts “may”, but are not obliged to, take into account annulment in the country of origin.

The UNCITRAL Model Law has also followed the same approach by adopting the grounds of the New York Convention both for the annulment of locally made international awards (in article 34) and for denial of recognition to foreign awards (in article 36).

<sup>37</sup> 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 recognised in France (and thereafter also in England). See *Cour de Cassation* (10 June 1997), J. DROIT INT’L 1033 (1997/1). The same position was taken in the U.S. in *Chromalloy* (a 1996 decision of the U.S. District Court of the District of Columbia). *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).

As to “public policy” (*ordre public*) in recognition of foreign awards, the same considerations discussed in Section 4(a) above apply. Authors and case law also unanimously 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) 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 US Court of Appeals.<sup>38</sup> The doctrine of distinguishing between international and domestic public policy is generally accepted – for foreign and domestic international awards – by national judiciaries and by legal doctrine.<sup>39</sup> Review of the merits and challenge of the arbitrators’ choice and interpretation of applicable law are even more inadmissible.

## **B. The Public International Law Nature of Bilateral Investment Treaty Protections**

Investor-State, UNCITRAL arbitration of BIT disputes encapsulates the characteristics of international commercial arbitration discussed above, but BITs themselves add their own peculiarities to this process. As State-State arrangements, BITs create situations where a State consents in advance to the arbitration of disputes arising under the BIT between that State and an investor of the other State – obviating the need for an arbitration agreement directly between the State and the investor (1). BITs further

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<sup>38</sup> 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 (2d Cir. 1974), *in* I Y.B. COM. ARB, 205 (1976).

<sup>39</sup> 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).

present modifications to arbitration rules and consequently limit State court review (2). The purpose and object of BITs is to provide specific, substantive protection to investors under public international law (3). This differentiates BITs from ICSID, which provides only procedural rules without substantive protections (4).

**1. Special features of State-investor arbitration under BITs: “arbitration without privity”.**

Most BITs, when providing for direct arbitration of disputes between an investor of one of the signatory States and another contracting State, make various arbitration procedures available at the investor’s option. Among these, UNCITRAL arbitration appears to be the preferred one, along with ICSID arbitration, which is special because it is a “self-contained” mechanism, as explained hereunder, available only for investment disputes between a Contracting Party to the ICSID Convention and a foreign investor of another Contracting Party. The Dutch-CR BIT appears peculiar in that it does not allow ICSID arbitration, but provides only for international commercial arbitration in accordance with the UNCITRAL Rules, thereby making a definite choice for a dispute settlement mechanism within the general framework of international economic arbitration.<sup>40</sup>

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*”.<sup>41</sup> The relevant treaty provision makes it unnecessary that the investor and the State consent explicitly in writing in a contract clause or otherwise to submit an existing or eventual dispute to a given arbitration procedure, as is normal practice under

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<sup>40</sup> It is true that the CR was not yet 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 CR from agreeing to the application of the ICSID Convention in the BIT with the US in the same year, in light of its future adherence to ICSID, which occurred in 1993 and is a prerequisite for having recourse to it.

<sup>41</sup> See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. – FOREIGN INVESTMENT L. J. 232 (1995).

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 Dutch-CR BIT); the consent of the private investor results instead from it starting an arbitration proceeding thus “accepting” the “standing offer” made by the State in the treaty.<sup>42</sup> Thus the investor may start arbitration “unilaterally”, without having ever consented specifically beforehand to arbitration with the country concerned.<sup>43</sup> Consent of both parties is expressed by the convergence of these separate declarations made at different times.

## **2. Modification of rules on arbitration in BITs and consequent limitations to the controls by the State where the award is made.**

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 State. Not being based on private law, or even administrative law, arrangements, arbitration based on treaty clauses have some additional peculiarities, altering “*the private nature of the dispute by introducing certain aspects of inter-State disputes*”.<sup>44</sup> The treaty may include provisions that complement or modify, enlarging or restricting, access to arbitration and / or other features of arbitration

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<sup>42</sup> Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID REV.-FOREIGN INVESTMENT L.J. 20, 21-24 (2001) (mentioning 28 ICSID cases brought by investors under BITs and 8 under NAFTA and examining the five awards rendered on the merits). Other relevant cases include: *LANCO International Inc. v. Argentine Republic* (Preliminary Decision on Jurisdiction of the Tribunal), 8 December 1998, 40 I.L.M. 457 (2001); *Salini Costruttori S.p.A & Italstrade S.p.A v. Morocco*, J. DROIT INT’L 196 (2002/1); *Antoine Goetz and others v. Republic of Burundi* (Case No. ARB/95/3), 15 ICSID REV.-FOREIGN INVESTMENT L.J. 457 (2000).

<sup>43</sup> Some BITs do require a separate consent to arbitration in writing by the investor. *See, e.g.*, U.S.-Czech BIT, article VI(3). This formality does not affect the qualification of the arbitration as “without privity”.

<sup>44</sup> 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).

in respect to the otherwise applicable rules, be they found in the ICSID Convention, the New York Convention, the UNCITRAL Rules or in other texts.

BITs and other treaties, such as NAFTA, may, for example, amend substantive and procedural rules. Article 1135 of NAFTA thus provides for the possibility of consolidating different but connected arbitrations.

Another kind of modification is represented by treaty clauses indicating the applicable law, such as article 8(6) of the Dutch-CR BIT, which is peculiar since provisions as to applicable law in case of dispute are not common in BITs.<sup>45</sup> This modification represents a notable infringement on 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 (a choice that would be difficult to make since there is most often no separate arbitration agreement); 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.

The effect of article 8(6) on the applicable law in the Stockholm Award will be discussed hereafter. What is important to stress here at the outset is that, despite the commercial arbitration procedures invoked, this investor-State arbitration has a “*quasi-public character, or at least an inescapably public element*”.<sup>46</sup> This “quasi-public” or “public element” is relevant in three respects:

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<sup>45</sup> 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 U.S. is not to include choice of law provisions in BITs.

<sup>46</sup> Cremades, *supra* note 44, at 184-85.

- 1) The jurisdiction of the tribunal is not based on a private agreement by the parties to the dispute, but is predetermined by the two States. It cannot be restricted unilaterally, nor can the rights stemming from the treaty, including obtaining a decision once the procedure has been set in motion, be reduced by the operation of other normative texts, including other BITs: the arbitral tribunal constituted between CME/CR could not have suspended the proceedings or rejected CME's claim by virtue of a different arbitration under another BIT (the Lauder/CR arbitration under the US-CR BIT), not even invoking *lis pendens* or *res iudicata*. Such a suspension or rejection would run against the specific object of the dispute settlement mechanism of the bilateral treaty between the Netherlands and the CR in addressing disputes concerning the investments covered by that treaty according to its own terms.
- 2) The right of action to start arbitration is given directly to the foreign investor by the BIT, and he can make use of it in the event a dispute arises, thus displacing the jurisdiction of domestic courts that might be otherwise competent on the same subject matter. The arbitral jurisdiction anticipated under the treaty is exclusive as to claims based on the treaty, as was held in various precedents on the point.<sup>47</sup> The contracting State party to the dispute cannot have the dispute settled by its own courts first, contrary to the arguments made by the CR in its Claim.<sup>48</sup>
- 3) 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

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<sup>47</sup> See, e.g., *Lamco-Argentina* and *Salini-Morocco*, *supra* note 42 (so holding notwithstanding the competence of domestic courts provided by the national law of the host State for disputes between the parties under domestic law).

<sup>48</sup> “[T]he Stockholm Tribunal was obliged to analyse the extent of the protection offered by the Czech legal system to the results of such legal acts under Czech law.” CR Statement of Claim, at 26.

the award (cf. article 8(7) of the Dutch-CR BIT), and certainly any substitution of a domestic court's review of the merits for that of the competent arbitral tribunal's review (including the selection, interpretation and application of the law to the substance) directly impacts on the sovereignty of the Contracting Parties of the BIT, and could be viewed by the Netherlands, in this case, as an improper interference in its Treaty affairs by the State to which such courts belong (in this case the Kingdom of Sweden). This constraint is particularly obvious in cases such as the one at issue where there is no objective connection between the subject matter and the *forum*, this seat having been chosen by the arbitrators in light of the provisions of the BIT itself (cf. the reference to the Chamber of Commerce of Stockholm in article 8(4)), and obviously due to the tradition of impartiality of Sweden in international trade disputes. I am not aware of any other situation in which a national court has been requested to review an award of a BIT tribunal. *A fortiori*, to my knowledge, no State court has ever intervened to overturn a decision of a tribunal formed under a BIT regime.<sup>49</sup> The limits imposed on the Swedish courts in this respect would stem from the general principle of respect of foreign States sovereignty: "*par in parem non habet jurisdictionem*".

**3. The purpose and object of BITs: providing protection to foreign investors by laying down standards of treatment under public international law.**

Bilateral investment treaties, which establish the right of investors to pursue the rights granted to them by the treaty through international commercial arbitration against the State where they have made an investment (and similarly in the case of the Algiers Agreement between the U.S. and Iran mentioned above), add some important peculiarities that have been highlighted in the preceding section, but that do not alter

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<sup>49</sup> The review of NAFTA awards is distinguishable as such review is permitted by virtue of an express treaty provision (article 1136(3)(b)).

fundamentally the nature of the proceedings and of the awards, and the respect due to party autonomy and the arbitrators' competence in the event these awards are challenged.

In the past, difficulties have sometimes arisen that undermine the effectiveness of international commercial arbitration involving governments, such as the requirement to exhaust local remedies, sovereign immunity as a bar to enforcement of an award against a State or a State entity, political interference and the need to have recourse to diplomatic protection. Precisely these difficulties led to the conclusion in 1965 of the ICSID Convention, specifically aimed at establishing a different, special, optional public international legal framework for the arbitral settlement of investment disputes between States and foreign investors.<sup>50</sup>

Notwithstanding the availability of ICSID arbitration, recourse to non-ICSID, international commercial arbitration mechanisms, even exclusively (such as in the Dutch-CR BIT at issue) or within various options granted to the foreign investor, have remained a feature of BITs for the direct settlement of investment disputes.

As stated by a leading UN 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.*

*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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<sup>50</sup> Luzzatto, *supra* note 12, at 94-97.

*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.*<sup>51</sup>

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.<sup>52</sup> As will be addressed more fully below, complaints of private investors against the host State invoking the treaty protections have necessarily as their object the claim that rights established under the treaty have been breached by the host State. The breach of treaty provisions is obviously a matter of international law; the existence of any such breach has to be determined by application of its rules and principles.

In fact, one of the basic features of BITs is that the standard of treatment and protection to which the two contracting States have agreed 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 direct investor-State arbitral dispute settlement mechanism. In the absence of such a procedural right typically granted to private investors under the BITs, it would be for the home country of the investor to raise the question with the other country 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.

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<sup>51</sup> UNCTAD, *supra* note 1, at 95 (emphasis added).

<sup>52</sup> Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INVESTMENT 183 (2002).

**4. The different, specific purpose of the ICSID Convention: guaranteeing the carrying out of agreed arbitration of investment disputes at a special public international law institution.**

The multilateral ICSID Convention, by contrast to BITs, does not provide for any right or standard of protection, whether absolute or relative, whether new or already existing under international law, in favour of foreign investors of the contracting Parties. The ICSID Convention is purely procedural. The “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” adopted in Washington, D.C., in 1965, as it is called officially:

*“created the International Centre for Settlement of Investment Disputes (ICSID), an affiliate agency of the World Bank. The purpose of ICSID is to provide a facility for the conciliation or arbitration of investment disputes between a private investor and a host country. According to article 25(1) of the Convention, ICSID’s jurisdiction exists where both the home and host countries are parties to the Convention, and the host country and the investor have consented to ICSID jurisdiction.”<sup>53</sup>*

As one of the drafters of the ICSID Convention has pointed out, the purpose of the initiative, promoted by the World Bank, was to overcome the difficulties highlighted above in the absence of any bilateral or multilateral effective treaty protection, as was the case in the mid-1960’s, namely, difficulties for the private investor to obtain redress for grievances against the host government; discretionary granting of diplomatic protection by the home government; uncertainty as to the effectiveness of judicial remedies and the limited enforceability of arbitral awards against sovereign States. Broches has thus noted:

*“The analysis of the problem pointed out the way to the solution, namely arrangements, embodied in a treaty,*

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<sup>53</sup> UNCTAD, *supra* note 1, at 94 (emphasis added).

*which would ensure that arbitration agreements voluntarily entered into would be implemented.”<sup>54</sup>*

The above purpose explains some other basic features of the ICSID system: that an agreement to arbitrate cannot be unilaterally revoked (article 25.1); that arbitration (of the *ad hoc* type) is held at and administered by a public international institution, namely the ICSID Centre (article 1.2 and 18 ff); that all awards must be recognised as binding and enforceable by the Contracting States without any possibility to challenge them in State courts (article 54). On the other hand, ICSID awards are subject to proceedings of interpretation, revision and annulment at the Centre in accordance with the Convention (article 50 ff).

This highlights the peculiar nature of the ICSID mechanism in respect to international commercial arbitration. 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 proscription 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*

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<sup>54</sup> Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 REC. DES COURS 345 (1972-II). Mr. Broches was at the time the General Counsel of the World Bank and became the first Secretary General of ICSID.

*the validity of the arbitral award by means of the Centre's internal control mechanism.”<sup>55</sup>*

Professor Schreuer has highlighted in his well-known 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.”<sup>56</sup>*

The grounds for annulment listed in article 52(1) are (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 State authority of the State where it was rendered or where recognition is sought. Specifically the “international public order”

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<sup>55</sup> MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 31, 25 (1993).

<sup>56</sup> ICSID Commentary, *supra* note 20, at 889. As to the “self-contained” character of ICSID, *see also* Shihata & Parra, *supra* note 24, 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].

limit of the *forum* is not listed in article 52(1) of ICSID, while the ground found there as to the “manifest excess of powers” by the arbitral tribunal is much 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 Secretary-General of ICSID, a body unknown in international commercial arbitration that highlights again the self-contained character of ICSID arbitration.

The annulment proceedings at ICSID are clearly a specific remedy that cannot be invoked to draw precedents for a non-ICSID award challenged according to the procedures of international commercial arbitration in front of a municipal court such as in the case at issue.

The above explains further why there are no restrictions *ratione materiae* as to the type of disputes that parties can agree to submit to ICSID arbitration, provided that they are “legal disputes” and that they arise “directly from an investment”, neither term being defined in the Convention (article 25(1)). These disputes may concern any legal question under domestic or international law (both treaty and customary law) depending upon the object of the arbitration agreement and the claims made.

By contrast, disputes that can be submitted to arbitration pursuant to a BIT first concern the respect of the rights granted in the treaty itself. Some BITs restrict the right of an investor to institute arbitral proceedings against the host States to those disputes that imply a violation of a treaty standard or equivalent specific undertaking.<sup>57</sup>

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<sup>57</sup> This is also the case for investment disputes under NAFTA. See article 2204 (“...*the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.*”).

Thus the US BITs (such as the one with the CR at article VI(1)) have a precise definition of what constitutes “investment disputes” that may be submitted to the arbitration procedures provided for in the same article (UNCITRAL or ICSID): those involving (a) an investment agreement between the parties, (b) an investment authorisation by the host government, or (c) “*an alleged breach of any right conferred or created by this treaty with respect to an investment*”.

The Dutch-CR BIT, on the other hand, has a wider definition, in that under article 8, “*All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter*” may be subject to UNCITRAL arbitration if not settled amicably.

It is clear, as shall be elaborated hereafter, that the type of claim made (contractual right, right under the law of the host State or breach of the treaty) has a decisive influence as to the legal provisions (contractual, statutory or international) that must be resorted to by the arbitral tribunal in order to pass upon the claim and solve the dispute.

### **C. Conclusion**

In sum, the nature of the Stockholm Award of September 13, 2001 and the legal regime to which it is subject can be described as follows:

- 1) As matters stand before the Swedish courts, the CME/CR proceedings and the award (as well as those in the parallel proceedings) must be understood as an example of international commercial/economic arbitration subject to the UNCITRAL Rules and recognised by the New York Convention and other international instruments on international commercial arbitration;

- 2) International commercial arbitral tribunals constituted by separate agreements (including those established under BITs), and seated in different countries do not pertain to a single legal order, and therefore are independent from one another;
- 3) Both the Stockholm and London awards are the result of proceedings connected through a preferential link, which is internationally recognised, with the legal systems of Sweden and England, respectively;
- 4) In case of international commercial arbitration taking place in a given country, as distinguished from purely local/national arbitration, the extent of control attributed to local courts over the arbitral awards is limited to basic due process requirements and to the respect of the fundamental principles of “international public order”; this limitation excludes review of the merits as well as challenges concerning the applicable law and issues of *lis pendens* or *res iudicata* in respect of other arbitrations in other countries;
- 5) Also disputes between private parties and foreign States in matters of investments may be subject to, and are commonly settled in accordance with international commercial arbitration, by agreement between the parties or in conformity with BITs (as in the CME/CR dispute); BITs may include provisions that modify some of the rules that would otherwise be applicable to the arbitration (as is the case of the Dutch-CR BIT) and these modifications must be respected by the courts of the place of arbitration in setting aside proceedings;
- 6) Unlike ICSID, BITs lay down standards of substantive protection for covered investments drawn from public international law, and grant a right to the investors of a Party to enforce them through direct arbitration with the host State;
- 7) ICSID rules, as well as its case law relating to annulment, are immaterial and irrelevant for the Stockholm Award under the Dutch-CR BIT, which is not the result of an ICSID arbitration.

## II. THE CHALLENGE CONCERNING THE PROPER APPLICATION OF LAW TO THE DISPUTE

### A. Introduction

The CR sets out its reasoning in this respect before the Svea Court of Appeals at 9 and 24 ff of its Statement of Claim, and at 9 and 34 ff of its Reply. Professors Schreuer and Reinisch address the issue in their Legal Opinion at 4-48. Some of the points raised by Professor De Ly also relate to the issue and will be dealt with as appropriate.

In this section, I first recall the main arguments made in the Statement of Claim and Reply in support of the claim that the Tribunal in its Partial Award failed to apply the law properly applicable in such a way that this failure “*constitutes an excess of powers and is a ground for annulment*”:<sup>58</sup>

- a) Any arbitral tribunal must apply the law chosen by the parties.
- b) Under the Dutch-CR BIT, the choice, though not made by the parties but by the two States in article 8(6), refers first (and “gives primacy”) to Czech law and then to the general principles of international law.
- c) Article 8(6) must be applied by the tribunal as law chosen by the parties in accordance with article 33 of the UNCITRAL Rules.
- d) The Tribunal was obliged to apply first Czech law and international law only to “fill any gap” in Czech law, or where Czech law would violate fundamental norms of international law (Statement of Claim, at 26; Reply, at 44).

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<sup>58</sup> Schreuer Opinion, at 19, para. 51. Professor Schreuer’s terminology (“excess of powers” and “annulment”) are based on ICSID language and, as described already, differ from “excess of mandate” and “setting aside” under Swedish and other national law.

- e) The Tribunal failed to apply the law in accordance with the above order, and in particular to apply Czech law where it was appropriate. The Statement of Claim lists a number of issues where Czech law was applicable to the investment and related contractual arrangements and in other instances (Statement of Claim, at 28 ff).
- f) In reality (the majority of) the Tribunal based its awards “*on their general feelings of justice*” and thus acted as “*amiable compositeur*” (Statement of Claim, at 27), contrary to the obligation under article 8(6) of the BIT to “*apply the law*”, including both Czech and international law (Statement of Claim, at 42; Reply, at 47-48).
- g) While parties have no right of appeal of an award because of misapplication of the applicable law, the award should be set aside for excess of mandate where the Tribunal fails entirely to apply the proper law (Statement of Claim, at 24; Reply, at 34) and this has an impact on the outcome of the proceedings (Reply, at 45).

It is my opinion that fundamental elements of this reasoning in support of the CR challenge are ill-founded in law or irrelevant for the following reasons.

**B. The Choice of Law Clause in this Case**

Article 8(6) of the BIT provides as follows:

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

*(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.”*

Both the Statement of Claim and the Opinion acknowledge that this clause, which was agreed in the BIT by the Contracting Parties, is equivalent to a choice of law clause agreed upon by the parties to a contract or to the dispute. Since article 8(5) subjects the procedure to the UNCITRAL Rules, article 8(6) would fit into the first sentence of article 33(1) of the Rules (*“The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.”*).

It is correct that the above clause is binding upon the Tribunal. However, the basis of its application is not the indirect choice of law by the parties alone. As stated above and generally acknowledged, this choice results from the initiation of an arbitration under the BIT, which in turn implies acceptance of the relevant provisions of the Treaty, including article 8(6).

Moreover, in 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 our case article 33(1) of the UNCITRAL Rules, including those which apply in case the parties have made no choice. Article 8(6) replaces therefore also the second sentence of article 33(1) (*“Failing 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 view has been expressed in the ICSID award in the *Goetz – Burundi* case quoted in the Opinion.<sup>59</sup> I will also refer to that award, notwithstanding some

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<sup>59</sup> *Goetz v. Burundi*, *supra* note 42, at 454.

important legal differences in respect of the CME – CR dispute, because it is the only “precedent” for direct arbitration of an investment dispute based on a BIT which contained a choice of law clause similar to (although nevertheless with significant differences from) that in the Dutch-CR BIT. In that case, the arbitral tribunal considered that the clause on applicable law in the 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 (“*the law of the Contracting State party to the dispute and such rules of international law as may be applicable*”) were therefore irrelevant.<sup>60</sup>

Article V of the Algiers Agreement establishing the Iran-US Claims Tribunal, which was also to apply the UNCITRAL Rules, is another useful precedent to article 8 of the Dutch-CR BIT, in that it indicated directly the applicable law(s) derogating from article 33 of the UNCITRAL Rules. The Iran-US Claims Tribunal adopted the content of article V in its Rules for the selection in each case of the applicable law.<sup>61</sup> 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.”<sup>62</sup>

I believe that it is important to emphasize the above, in order to point out that:

- article 8(6) is not the result of a free choice of law by the parties but rather of their adhesion to a pre-established determination;

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<sup>60</sup> *Id.* paras. 94-99.

<sup>61</sup> See article 33(1) of the Rules of Procedure of the Iran-U.S. Claims Tribunal: “*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.)

<sup>62</sup> STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE – THE EXPERIENCE OF THE IRAN-US CLAIMS TRIBUNAL*, 177 (1992).

- provisions contained in the applicable arbitration rules (UNCITRAL Rules here, article 42(1) in ICSID arbitration) have no role with respect to the applicable law when the applicable BIT contains the relevant indications as to the law to be applied by the tribunal.

Article 8(6) has to be interpreted as a treaty clause in accordance with the principles of interpretation of treaties under public international law. The relevant principles of treaty interpretation are laid down in article 31 ff. of the Vienna Convention on the Law of Treaties of 1969, which codifies customary international law on the matter, and to which both the Netherlands and CR are parties. The basic rule in article 31(1) (“general rule of interpretation”) is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

The Czech Republic and Professors Schreuer and Reinisch fail to analyze the content of article 8(6) in accordance with these rules of treaty interpretation, namely, in the order of article 31(1), textual interpretation and interpretation based on the object and purpose of the treaty.

As for textual interpretation, I point out to the following elements:

*the arbitration tribunal is directed to “decide on the basis of the law, taking into account in particular though not exclusively...”*

Thus, the fundamental requirement (indeed, the only 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.<sup>63</sup>

It is worth noting that the list includes both items which are a “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 investment*”).<sup>64</sup>

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) that the tribunal has to take into account “*particularly though not exclusively*” to decide “*on the basis of the law.*” In particular, no indication is given as to the respective roles of “*the law in force of the Contracting Party concerned*” (Czech law) on the one hand, and the provisions of the BIT and “*the general principles of international law,*” on the other hand.<sup>65</sup>

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<sup>63</sup> It is important to note the difference between an obligation to “take into account” and an obligation to “apply”. A basic example of this distinction is in the Iran-US Claims Tribunal Rules, cited above at note 61, which direct the Tribunal to apply certain rules and to take into account others.

<sup>64</sup> Professor Schreuer, in his Commentary to the ICSID Convention in relation to article 42(1), which spells out 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*”. ICSID Commentary, *supra* note 20, at 565.

<sup>65</sup> 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 / recognised rules and principles” of international law are common in these BIT clauses:

I understand that the Netherlands and the CR have confirmed what I consider to be the proper reading of article 8(6) of the Treaty. In the Agreed Minutes of a recent article 9 consultation (a copy of which has been provided to me), they stated that article 8(6) provides a non-exclusive list of sources and that no source has primacy over any of the other sources of law listed. The parties confirmed: *“When making its decision, the arbitral tribunal shall take into account, in particular, though not exclusively, the four sources of law set out in Article 8.6. The arbitral tribunal must therefore take into account as far as they are relevant to the dispute the law in force of the Contracting Party concerned and the other sources of law set out in Article 8.6.”*<sup>66</sup> According to this interpretation of the States parties, the Tribunal therefore was required to consider what body of law was relevant for the dispute before it and to take that law into account in each relevant instance.

Discretion to take sources of law into account does not, of course, mean an invitation to arbitrariness. Under article 8(6), the tribunal should be properly guided by the object and purpose of the treaty in general and of the provisions on the direct arbitration mechanism in particular.

As stated before, the object and purpose of BITs is to provide standards and obligations of treatment upon either Party in respect of investments of the other Party’s investors in order to provide legal security under international law and thereby promote those investments. The object and purpose of including provisions for the direct arbitration of investment disputes at the initiative of the foreign investor is, similarly, to

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*“Most of these presumably mean the same thing: all rules and principles of general international law and customary international law which the tribunal considers applicable”*

Paul Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETH. Y.B. INT’L L. 91, 113 (1991).

<sup>66</sup> Agreed Minutes, at 2 (emphasis added).

allow such investor directly to obtain protection of those treaty rights and redress for any breach through binding impartial arbitration without any need to resort to diplomatic protection.

It stems logically therefrom that claims made in the CME – CR arbitration by CME, based on those treaty standards and obligations and claiming alleged infringements thereof, must be evaluated and decided by the tribunal “on the basis” of international law, represented by the BIT, any other agreement between the parties and the general principles.

In a case where claims are for treaty violations, as here, international law alone is relevant because international obligations of States are governed exclusively by international law. As stated in 1989 by the prestigious “Institut de Droit International” in its “Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises”:

*“The 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.”<sup>67</sup>*

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.

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<sup>67</sup> Article 6, *Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises*, II ANNUAIRE DEL ’INSTITUT DE DROIT INTERNATIONAL 330 (1990).

This was forcefully stated almost 50 years ago by Judge Lauterpacht in his separate opinion in the *Norwegian Loans* case at the International Court of Justice:

*“National legislation... may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law.”*<sup>68</sup>

The irrelevance of internal law in such a situation is reinforced by two basic principles of international law, namely that:

1. “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”;<sup>69</sup> and, more generally,
2. 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”.<sup>70</sup>

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<sup>68</sup> *Case of Certain Norwegian Loans*, (Fr. v. Nor.) 1957 I.C.J. Rep. 9 (6 July 1957), at 37 (Sep. Op. Lauterpacht).

<sup>69</sup> Article 27, Vienna Convention of the Law of Treaties.

<sup>70</sup> International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, arts. 2 and 3. These Articles, finalized as “Draft Articles” in 2001 by the ILC, an official organ of the U.N. entrusted with the codification and progressive development of international law under article 13 of the UN Charter, have been included as “Articles” in an Annex by the UN General Assembly to its

The same principle is spelled out by the ILC Articles in Part II of its 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*”.<sup>71</sup> This is stated in article 32: “*The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part*”. All the above provisions by the ILC reflect exactly basic principles of customary international law.<sup>72</sup>

What is then the relevance of the reference to the domestic law of the Party concerned in article 8(6) of the BIT? The answer lies in the text of article 8(4) which, as mentioned before, and differently from some other BITs (notably those of the U.S.), submits to direct arbitration not just the disputes stemming from a claim of breach of the BIT’s obligations but any dispute between a Contracting State and an investor of the other State “*concerning an investment of the latter*”.<sup>73</sup>

Disputes having as their object contractual or legal rights of the foreign investor under domestic law are thus also amenable to arbitration under the BIT and would have

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resolution 56/83 of 12 December 2001 and commended to the attention of the UN Member Governments. As the Commentary by the ILC to article 3 makes clear, the principle that domestic law cannot prevent wrongfulness under international law is a basic customary principle. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY* 86 (2002).

<sup>71</sup> Article 31, ILC Articles on State Responsibility.

<sup>72</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 34 (5th ed., 1998).

<sup>73</sup> 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.*”).

to be decided applying the law of the State involved, that is Czech law in the present case, had CME brought such a claim against the CR.<sup>74</sup>

This approach, according to which domestic or international law, respectively, is applicable depending on the legal basis (“cause of action”) of the claim, is fully consistent with the position of the International Court of Justice in the *ELSI* case.<sup>75</sup> In that case, the U.S. invoked, through diplomatic protection of two U.S. companies, the international responsibility of Italy for allegedly not having respected the obligations of the U.S.-Italy Treaty of Friendship, Commerce and Navigation of 1948 in relation with the treatment of ELSI, an Italian subsidiary of the two U.S. companies.

The Court held *inter alia* that the fact that certain measures taken by local Italian authorities in respect of the assets of the Italian company had subsequently been held illegal under Italian law by Italian courts was not controlling for deciding whether or not Italy had breached the bilateral treaty by having taken those very measures. The Court stated that an act of a public authority may have been illegal under domestic law without implying necessarily thereby that the act is also illicit under international law, as a breach of a treaty or otherwise.<sup>76</sup> In fact, the Court held in its decision that Italy had not breached the treaty by taking control for public purposes through local authorities of ELSI when (and since) this company was already *de facto* bankrupt.

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

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<sup>74</sup> This view is reinforced by the opinions of the Parties expressed in the Agreed Minutes that the “arbitral tribunal must therefore take into account as far as they are relevant to the dispute the law in force of the Contracting Party concerned and the other sources of law set out in Article 8.6”. Agreed Minutes, at 2 (emphasis added).

<sup>75</sup> *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. REP. 4 (20 July 1989).

<sup>76</sup> *Id.* at 74, para. 124.

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 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 State conduct under international law.<sup>77</sup>

**C. The Application of Article 8(6) by the Tribunal**

From an examination of the Stockholm Award, it is evident that the claims (allegations) made by CME against the CR are all and solely based on the alleged breach by the CR of the treatment obligations of the BIT. CME alleged that the Czech Republic breached each of the following provisions of the Treaty:

- those contained in article 3(1) of the BIT (*“fair and equitable treatment to the investments”, “shall not impair, by unreasonable or discriminatory measures, the operation...thereof”*);
- those contained in article 3(2) (*“full security and protection which shall in no case be less than that accorded either to investments of its own investors or to investments of investors of any other State”*);

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<sup>77</sup> BROWNLIE, *supra* note 72, at 39.

- those listed in article 5 (“*Neither Contracting Party shall take any measures depriving, directly or indirectly; investors of the other Contracting Party of their investments unless...*”).<sup>78</sup>

The Tribunal therefore correctly applied article 8(6) of the BIT, *in casu* relying solely on international law in order to pass judgment upon the claims of CME based on the BIT in order to decide whether CR had committed the alleged breaches and was liable therefor.

The CR, however, contends that the Stockholm Tribunal did not really apply international law. Although it is acknowledged that the BIT was applied, the opinion of Professors Schreuer and Reinisch states that “*occasional and selective references to certain sources of international law are not proof that the Tribunal applied international law*” because it “*was required to apply international law systematically, consistently and fully to all issues to which Czech law is not applicable.*”<sup>79</sup>

It should first be pointed out that Professors Schreuer and Reinisch do not cite any authority in support of this position. The position is, moreover, an entirely unworkable standard for it would require the Svea Court of Appeal to examine the merit and the structure of the Award. Such an operation would be highly improper in a procedure for annulment or setting aside of an international commercial award, and starts from the incorrect assumption that arbitral awards must set out all reasoning and authority underlying the decision.

In any event, in my opinion the Tribunal quite clearly did “*decide on the basis of law*”, as instructed by the Treaty. It applied international law, including the terms of the

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<sup>78</sup> Stockholm Award, para. 25, 145 ff. *See also id.* para. 403: “*The Claimant’s position is that the Czech Republic, represented by the Media Council, violated its duties under the treaty in various ways.*”

<sup>79</sup> Schreuer Opinion, at 44.

BIT, and did not rule *ex aequo et bono*. The approach of the Tribunal as to the treatment of Czech law was sound and consistent with the fact that the claims by CME relied solely on violations of the BIT by the CR. The Award states logically and correctly that “*it is not the Tribunal’s role to pass upon the legal protection granted to the foreign investor for its investment under Czech Civil Law and civil court system*”.<sup>80</sup>

At para. 478, the Stockholm Tribunal correctly stated its mandate: “*The Arbitral Tribunal is charged with assessing whether the amendment of the legal structure of the Claimant’s investment in 1996 prejudiced the protection of the Claimant’s investment in the Czech Republic and whether this was a breach of the Treaty*.”<sup>81</sup> I notice here that, as a logical precondition for the evaluation of the conformity of the CR’s acts and conduct with respect to the BIT, the Award correctly examines in hundreds of paragraphs the exact facts and the evolution of the relationship between CME (and its predecessors) and the CR authorities, with lengthy references to Czech law directly governing this relationship and opinions and determinations made under the CR domestic law. This analysis, however, relates to the facts to be held up to the legal standards. The need to analyse these facts does not change the legal basis of the claim, or “cause of action”.

From para. 591 onward, the Award examines the (non-)conformity of the conduct of the CR authorities with the BIT and specifically with the various obligations undertaken thereby by the host State as to the treatment of foreign investment that the Claimant had invoked. In respect of each claim and obligation breached by the CR, the Award specifies facts and relevant rules and principles of international law.

Thus, first, with respect to “the obligation not to deprive the Claimant of its investment” (Treaty Article 5) (paras. 591- 609), this being the major breach found by the

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<sup>80</sup> Award, at para. 476.

<sup>81</sup> Emphasis added.

Tribunal, after having pinpointed the facts that gave rise to the deprivation of the investment and the causation of damage (paras. 601, 602 ff), the Award distinguishes regulatory measures from deprivation – a well known distinction in international law as to the protection of foreign property – and refers extensively to authors and cases in support of the finding that “de facto” expropriation is also illegal under international law. In paras. 603-609, where the legal determination is contained, the award cites a number of awards of the ICJ (one), of the Iran-US Tribunal (four) including a long quotation, of ICSID (three) such as *Tradex*, *SPP* and *Metalclad* (the latter submitted to ICSID under NAFTA) to which the Opinion also refers, and of an international commercial arbitration between a State and a foreign enterprise (one).

Second, with respect to “the Reparation Claim” (paras. 615-618), the Award does not only discuss Article 5 of the BIT (para. 615). After having stated that the principle that “[t]he respondent, as a consequence of the breach of the treaty, is under an obligation to make full reparation for the injury caused derives also from the generally accepted rules of international law” the Award goes on to support this very basic tenet with appropriate references and quotation to sources: the ILC Articles on State Responsibility;<sup>82</sup> and two major judgments of the Permanent Court of International Justice. Further citations of sources of law, including specific provisions of the BIT, as relevant, are found in other paragraphs of the Award (paras. 384; 398 (citing the *Fedax* award); 409, 526, etc.).

I cannot see how this method of supporting the conclusions by the Stockholm Tribunal can be characterized in Professor Schreuer’s opinion as merely “*occasional and*

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<sup>82</sup> Contrary to the unsupported opposing statement in the Schreuer Opinion, the ILC Articles are for the most part a restatement and codification of existing law after more than 40 years of deliberation by the most authoritative jurists in the field mandated by the UN for this purpose. The ILC Articles have been repeatedly cited in international awards, including ICSID, even before having been approved by the UN General Assembly in late 2001, notably even by the ICJ in the *Gabcikovo-Nagymaros Project* judgement of 1997.

*selected references to certain sources*". On the contrary, I note that some of the ICSID awards referred to in that opinion rely on very few citations or quotation of sources. Thus the *Goetz-Burundi* award, that bears some similarities with the CME-CR case as to the indication of the applicable rules of law in a BIT, cites no authority whatsoever in support of its finding that the withdrawal of the free zone regime that was challenged by the investor "could be considered as a measure equivalent to a deprivation of property under Article 4 of the BIT."<sup>83</sup>

As to the competence of the members of the CME-CR and *Goetz* tribunals in matters of international law, I will note that both had as a member a former President of the International Court of Justice ("ICJ"), the highest authority on international law: Judge Stephen Schwebel in the CME-CR tribunal, and Judge Mohamed Bedjaoui in the *Goetz* case. While arbitral awards must generally be "reasoned," there is no requirement under international law that decisions of international courts and awards of arbitral tribunals support their holdings with a particular methodology or quantity of citations. Article 38(1) of the ICJ Statute lists the generally accepted sources for the determination of the content of the law,<sup>84</sup> but international tribunals normally follow the rule of

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<sup>83</sup> *Goetz v. Burundi*, *supra* note 42. In the whole *Goetz* award four articles (three on ICSID), three judgments of the World Court and five ICSID awards are cited.

<sup>84</sup> Article 38(1) of the ICJ Statute reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

“judicial notice” regarding international law (*iura novit curia*): the parties are not under a strict obligation to give evidence of the law, the tribunal is supposed to know the law and to ascertain it directly as it considers fit.<sup>85</sup>

In short, the Stockholm Tribunal plainly made its decision on the basis of law. In accordance with the accepted methodology, it found the content of the law by referring to the terms of the Treaty and to judicial precedents, learned writings and general principles. It then applied that law to the facts when it found that the CR was responsible for the loss suffered by CME.<sup>86</sup>

In view of the above, the argument that the Tribunal has in reality not applied international law but decided *ex aequo et bono* is, in my opinion, groundless. It would be for the CR to substantiate this argument by pointing out, positively, to specific instances where the decision does not rest on international law but on certain equitable rules divergent from international law. In fact, *aequitas* may be distinguished as *infra legem* (within the law) or *praeter legem* (beyond or against the law). Equitable principles in the first sense are common in international law, and are even an integral part of it as stated several times by the ICJ.<sup>87</sup> The Opinion does not indicate a single instance where the

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<sup>85</sup> *The S.S. Lotus* (Fr. v. Turk.), P.C.I.J., Ser. A, No. 10, 4, 45 (7 Sept. 1927) (“The Court ... observes that in the fulfillment of its task of itself ascertaining what the international law [is] ...”); *Case concerning Brazilian Loans*, P.C.I.J., Ser. A, Nos. 20/21, 93, 124 (12 July 1929).

<sup>86</sup> As described in detail in Part IV, below, under international law, such a finding must be based on acts (facts) attributable to the State, that are in breach of an international obligation, with a causal link between the wrongful act and the damage sustained. The Stockholm Tribunal established the facts with respect to the acts of the Media Council. There was no dispute between the parties with respect to the attributability of these acts to the Czech State. The Tribunal considered the acts of the Media Council to be in breach of the Treaty (which is the relevant application of the applicable, international law to the facts of the case) and considered those acts to have caused the loss – applying a legal reasoning consistently grounded in international law.

<sup>87</sup> *See, e.g., Fisheries Jurisdiction Cases* (U.K. v. Ice.), ICJ REP. (1974), 3, 34, para. 78; *North Sea Continental Shelf Cases*, ICJ REP. (1969), 3, at 47, para. 85; *Frontier Disputes Case* (Burk. Faso-Mali) ICJ. REP. 554, 631-33 (1986) (expressly applying “equity *infra legem*” to the division of a frontier pool). As to case-law under ICSID, *see Amco Asia Corporation and others v. Republic of Indonesia* (Case No. ARB/81/1), Ad hoc Committee Decision of 16 May 1986, 25 ILM 1439, 1442,

Stockholm Tribunal would have disregarded a rule of international law applying instead some *praeter legem* equitable principle. I therefore consider myself dispensed from arguing the point further.<sup>88</sup>

#### **D. Irrelevance of ICSID**

In their opinion, Professors Schreuer and Reinisch have expressed the view, based on various awards and on the clause of the ICSID Convention, article 42(1), that applies in the absence of the parties' choice of law, that international law has only a residual role to the domestic law of the host State, either to "fill gaps" of domestic law or "to remedy any inconsistency between domestic law and international law." According to their argument, the exclusive application of international law by the Stockholm Tribunal would be inadmissible and would entail an "excess of power" such as would bring about annulment of an ICSID award under article 52 of the ICSID Convention.<sup>89</sup>

In order to support its conclusions, the Opinion relies on different "sources", such as:

1. the provision of article 42(1), second sentence of the ICSID Convention, applicable when the parties have not chosen the applicable law,

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1446-1447, para. 26 (1986) ("*equitable considerations may indeed form part of the law to be applied by the Tribunal, whether that be the law of a given State or public international law*"). Similar principles apply in international commercial arbitration. See GERARDO BROGGINI, *II L'EQUITÀ NELL'ARBITRATO COMMERCIALE INTERNAZIONALE*, SCRITTI IN ONORE L. MENGONI 1416 (1995).

<sup>88</sup> At para. 134, Professor Schreuer's opinion criticizes the award for having commented that Dr. Železný had violated certain duties under corporate and civil law without references to Czech or other laws. This comment in the Award has nothing to do with the finding of CR liability, but it is an issue of fact obviously based on general concepts of duty of care of managers and directors, which has nothing to do with applying equity instead of international law in deciding the case.

<sup>89</sup> See Schreuer Opinion, at 19 (noting in para. 51 that "*application of a law other than that agreed to by the parties constitutes an excess of powers and is a ground for annulment*" and immediately proceeding to discuss the annulment procedures under the ICSID Convention in para. 52 *et seq.*).

2. ICSID awards not based on BIT choice of law clauses,
3. ICSID awards based on BIT choice of law clauses.

I will deal with each of the items separately in order to demonstrate that those sources and precedents are irrelevant here and that the arguments are inapplicable. In addition, I will explain why ICSID annulment decisions are similarly irrelevant to this case.

### 1. Article 42(1) ICSID is irrelevant

Article 42(1) provides:

*“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”* (Emphasis added.)

First of all, on its face, and as Professor Schreuer concedes, the second sentence would not apply here even if it were an ICSID arbitration, because the Dutch-CR BIT contains a choice of law clause binding upon the parties. Faced with a similar situation the arbitral tribunal in the *Goetz-Burundi* case also concluded that “[l]a présente affaire se situe dans le cadre de la première phrase de cette disposition (l’art 42.1) puisque l’article 8, paragraphe 5, de la Convention belgo-burundaise d’investissement dispose comme suit ...”<sup>90</sup>

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<sup>90</sup> *Goetz v. Burundi*, *supra* note 42, at para. 94 (emphasis added) [the present case is situated within the framework of the first sentence of this provision (art. 42.1) since article 8, para. 5, of the Belgium-Burundi Convention provides as follows...]. Article 8(5) provides:

*“L’organisme d’arbitrage statue sur base:  
- du droit national de la partie contractante partie au litige, sur le territoire de laquelle l’investissement est situé, y compris les règles*

Moreover, and as described in Section I.B.4 above, ICSID article 42(1) reflects a different object and purpose from choice of law BIT clauses. Article 42 is part of ICSID's aim to secure direct arbitration for investment disputes (especially in relation to investment contracts), irrespective of the existence of a bilateral or multilateral treaty protecting foreign investment and providing for arbitration. ICSID is primarily aimed at providing impartial arbitration when no such treaty commitment exists and when applicable law and applicable forum for disputes are uncertain and such as to give way to political conflicts and legal insecurity, especially in the relationship between industrialised and developing countries as was the case in the mid 1960's.

The ICSID Convention was the result of multilateral negotiations under the auspices of the World Bank between member countries belonging to those two groups with a view to find an acceptable compromise. Broches recalls that the second sentence of article 42 "*caused considerable difficulty during the negotiations leading up to the final formulation of the Convention.*"<sup>91</sup> An earlier draft said that "*a Tribunal should apply such rules of national and international law as may be applicable.*"<sup>92</sup> This draft

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*relatives aux conflits de lois;*  
*- des dispositions de la présente Convention;*  
*- des termes de l'engagement particulier qui serait intervenu au sujet*  
*de l'investissement;*  
*- des règles et principes de droit international généralement admis."*

[The arbitral tribunal shall decide on the basis of: the national law of the Contracting Party that is party to the arbitration, on the territory of which the investment is located, including the rules relating to the conflict of laws; the provisions of the present Convention; the terms of the particular agreement that may have been entered into with respect to the investment; the generally recognised rules and principles of international law.] One must note that the list of sources in this provision is very similar to article 8(6) of the Treaty. The provisions differ, however, to the extent that a tribunal under article 8(5) of the Belgium-Burundi BIT must decide "*on the basis of*" the listed sources, whereas the Tribunal under article 8(6) of the Treaty must decide "*on the basis of the law, taking into account in particular though not exclusively*" the listed sources.

<sup>91</sup> Broches, *supra* note 54, at 390.

<sup>92</sup> *Id.*

ran into very strong opposition on the part of many developing countries, however, including those not opposed to the application of international law. This group felt that the applicable national law would be of necessity the law of the host country, as that is the place of the investment.<sup>93</sup> Thus, in the end, “*the vaguer formulation*” of the present text emerged.<sup>94</sup> This text recognizes that the domestic law to which an investment is subject is normally the law of the country where the investment is made. Of course, if the law to be applied as relevant to the specific dispute has not been chosen by the parties, directly or indirectly, and if there is no independent source of substantive rules of applicable law, it is indeed natural that the case be examined first in the light of the domestic law of the State where the investment has been made.

On the other hand, the reference to “*such rules of international law as may be applicable*” 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.<sup>95</sup>

In any event, in the case of BITs, the above considerations of political balance and *a priori* uncertainty regarding the types of disputes that would be made subject to ICSID arbitration do not apply, in view of the different object and purpose of BITs of providing substantive protection under international law, while not ruling out that direct arbitration in conformity with their provisions on direct dispute settlement may be available for other types of disputes.

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<sup>93</sup> *Id.*

<sup>94</sup> Hirsch, *supra* note 55, at 138.

<sup>95</sup> Shihata & Parra, *supra* note 24, at 312-13.

It is therefore incorrect to claim that article 42(1), second sentence, “*leads to a situation on applicable law that is very similar to the one in the present case.*”<sup>96</sup> To the contrary, the basic presumption in article 42(1) of ICSID is very different from that in article 8(6) of the BIT. Article 42(1) ICSID starts with the principle that the tribunal should apply “*the law of the Contracting Party to the dispute*”, with the addition of “*such rules of international law as may be applicable*” as a subsidiary element. Article 8(6) of the Dutch-CR BIT, which is part of a treaty that sets out substantive international law rules applicable to investments, includes international law of one of many sources of “the law” that the tribunal should apply. Thus, if application of international law could be viewed as the exception under ICSID, it is not disputable that application of international law is fundamental to the BIT.

**2. All cited decisions based on article 42(1), second sentence, have given precedence to international law over conflicting domestic law**

Even were there some reason to superimpose onto the BIT this materially different provision from an inapplicable treaty, all decisions cited in the Opinion based upon the second sentence of article 42(1) have given precedence to international law whenever some otherwise applicable provision of domestic law was found contrary to rules of international law on the treatment of foreigners. As a result, in these cases international law prevailed and conflicting domestic law was not applied, either concurrently or otherwise. Thus, in the *Amco v. Indonesia* case (in which the parties did not agree upon the applicable law), the *ad hoc* Committee (upon annulment) found in its decision that article 42(1) 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.<sup>97</sup> The *ad hoc*

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<sup>96</sup> Schreuer Opinion, at 11.

<sup>97</sup> *Amco v. Indonesia*, *supra* note 87, at 1445, para. 20.

committee in *Klockner v. Cameroon* (the first and controversial annulment under the ICSID Convention), where again the parties had not selected the applicable law, similarly decided that article 42(1) grants precedence to the rules of international law in cases in which the municipal law cannot be reconciled with the principles of international law.<sup>98</sup> Statements in a similar vein were made by the tribunal in the case of *Letco v. Liberia*.<sup>99</sup>

Effectively, in all these cases, which are referred to by Professors Schreuer and Reinisch in support of the argument that the Stockholm Award should have applied Czech law (first), the awards have in fact been based on international law because of its breach by the State in dispute in respect of the investor.

Thus, whether because of parties' choice, or because domestic law was either missing a relevant provision or was in conflict with international law, even under ICSID, tribunals regularly apply international law. Professor Schreuer in his ICSID Commentary under article 42 has an impressive list of ICSID awards in support of the point that "*ICSID tribunals have frequently applied rules of customary international law either under the first or second sentence of Article 42(1)*".<sup>100</sup>

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*

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<sup>98</sup> *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 of 3 May 1985, 2 ICSID REP. 95 (1994), at para. 69.

<sup>99</sup> *Liberian Eastern Timber Corporation v. Republic of Liberia* (Case No. ARB/83/2), 26 ILM 647, 658 (1987).

<sup>100</sup> ICSID Commentary, *supra* note 20, at 612.

*action taken under that law, violates international law. In this instance international law operates as a corrective to national law.”*<sup>101</sup> 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.”<sup>102</sup>

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*”.<sup>103</sup>

Antonio Parra (currently the deputy Secretary-General of ICSID) has drawn the following conclusion from an 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 treaty 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*

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<sup>101</sup> Broches, *supra* note 54, at 392.

<sup>102</sup> Hirsch, *supra* note 55, at 140.

<sup>103</sup> Broches, *supra* note 54, at 392.

*dispute-settlement provisions of the treaty. The treaty being an instrument of international law, it is I think also implicit in such cases that the arbitrators should have recourse to the rules of general international law to supplement those of the treaty. 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”.*<sup>104</sup>

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*”.<sup>105</sup> 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*”.<sup>106</sup>

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.<sup>107</sup> Contrary to the argument made in the Schreuer Opinion, it was only for the purpose of ascertaining preliminarily the rights of a holder and

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<sup>104</sup> Parra, *supra* note 42, at 21 (emphasis added).

<sup>105</sup> See *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (Case No. ARB/87/3), Award and Dissenting Opinion of 27 June 1990, 6 ICSID REV. – FOR. INVESTMENT L.J. 526, 533, para. 21 (1991).

<sup>106</sup> *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo* (Case No. ARB/93/1), Award of 21 Feb. 1997, 36 ILM 1534, paras. 6.05-6.14.

<sup>107</sup> See Parra, *supra* note 42, at 23 (referring to the March 1998 decision of *Fedax N.V. v. Republic of Venezuela*).

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 case (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) ICSID – municipal laws are merely “facts” to be ascertained.<sup>108</sup>

The *Maffezini v. Spain* case, also cited in the Professor Schreuer’s opinion, 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*”.<sup>109</sup>

### **3. BIT arbitration with choice of law provisions in the treaty**

The *Goetz-Burundi* case involved the application of a specific BIT provision on applicable law similar to Article 8(6) of the Dutch-CR BIT, while presenting a significant difference that confirms my conclusions.

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<sup>108</sup> *Certain German Interest in Upper Silesia*, PCIJ, Ser. A, No. 7, 4, at 19 (25 May 1926); Brownlie, *supra* note 72, at 39-41.

<sup>109</sup> *Emilio Agustín Maffezini v. Kingdom of Spain* (Case No. ARB/97/7), Decision on Jurisdiction, 25 Jan. 2000, 16 ICSID REV – FOREIGN INVESTMENT L.J. 223, para. 30 (2001) (emphasis added).

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 favourable to the investor would apply.<sup>110</sup> Having concluded that the revocation and other connected actions by the State authorities were not in violation of Burundi law,<sup>111</sup> 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,<sup>112</sup> 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.

Since in our case the claims by CME were clearly and exclusively based on breaches of the BIT, it would have been incongruous to try to decide them under Czech law. The correctness of the course of action of the Stockholm Tribunal is confirmed by applying the same approach as the *Goetz-Burundi* tribunal.

In conclusion, in accordance with the explicit discretion granted in article 8(6) of the Dutch-CR BIT, the Stockholm Tribunal correctly chose to apply international law from among the various sources of law specified in the Treaty. Article 42 of the ICSID Convention has no bearing on the choice of applicable law under the Dutch-CR BIT. The

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<sup>110</sup> *Goetz-Burundi*, *supra* note 59, at 502.

<sup>111</sup> *Id.* at paras. 117 and 119.

<sup>112</sup> *Id.* at para. 97.

application of international law was completely appropriate in view of the fact that the claims were exclusively based on alleged infringements by the defendant host country of international law principles set forth in the BIT. The Stockholm Tribunal acted completely within its mandate in this regard.

#### **4. Irrelevance of the grounds of annulment applied within ICSID**

The special self-contained character of the annulment procedure at ICSID has been highlighted before, in order to show that it is not a relevant comparison for setting aside international commercial awards by competent domestic courts. 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, 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 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).”<sup>113</sup>*

Both these ICSID concerns, according to which a failure properly to apply ICSID article 42 can lead to an excess of power annulment under ICSID article 52, are entirely irrelevant to the CME-CR dispute.

The ICSID annulment decisions relied on by the CR are further irrelevant as precedents because the criteria applied in those proceedings exceeded the limits of an annulment as mandated even in ICSID article 52(1). It is therefore doubtful that they can

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<sup>113</sup> Andrea Giardina, *ICSID, A Self-Contained, Non-National Review System*, in INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: “JUDICIALIZATION” AND UNIFORMITY? 199, 207 (Richard B. Lillich & Charles N. Brower, eds., 1994) (emphasis added).

be considered authoritative precedents even only within the “ICSID system”. The contested decisions were annulled because of alleged grave breaches of fundamental principles of procedural justice (*vitium in procedendo* and not *in iudicando*). As Professor Schreuer records in his ICSID Convention Commentary, 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.*”<sup>114</sup>

Professor Schreuer reports 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.”

Professor Schreuer himself seems to share the widespread criticism, when he states:

*“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.”*<sup>115</sup>

Reference to those decisions as good precedents even in an ICSID case would therefore be unjustified and even surprising. As eloquently stated by Professor Berger:

*“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*

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<sup>114</sup> ICSID Commentary, *supra* note 20, at 893.

<sup>115</sup> *Id.* at 558.

*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 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.”<sup>116</sup>*

The CR's pleadings and the Schreuer Opinion enter exactly in this field: they examine in detail the merits of the legal reasoning and the references in support thereof in the Stockholm Award, in order to find “shortcomings” that may justify setting it aside. They advocate thereby, and carry out themselves, an inadmissible re-examination of the merits, that in no case can sustain the setting aside or annulment of the award by a domestic court in respect of an international arbitral award.

**E. The Limits on State Control of Choice of Law Decisions**

Even if the Stockholm Award had not applied the rules of law set forth in article 8(6) of the BIT, its decision would not be subject to challenge. Both the CR in the Statement of Claim, the Reply and the Opinion argue that the Tribunal has committed an “excess of power” by not applying Czech law (besides international law) and by having judged *ex aequo et bono* rather than based on international law. In their opinion, the consequence thereof is annulment of the award, as evidenced by the “precedents” under article 52 of the ICSID Convention.<sup>117</sup>

Even if this accusation were founded (which as stated above in my opinion is not the case) it would be improper to support the consequence of the setting aside or annulment of the award with ICSID case law. As already mentioned and discussed, the

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<sup>116</sup> Berger, *supra* note 9, at 680.

<sup>117</sup> Schreuer Opinion, at 48.

annulment procedure is specific to ICSID and 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. The standards used within the ICSID annulment procedure cannot be resorted to here, especially since, as was already mentioned, the ICSID annulment procedure has become in practice, at least initially, an appeal which, for this reason, has been strongly criticized and has diverted many disputes from being submitted to ICSID.

The Stockholm Award belongs to a *genus* of international commercial awards and the criteria there applicable must be followed. I have already recalled that the UNCITRAL Model Law, the most general international instrument relevant in this field, admits a limited number of challenges in municipal courts against those awards, and that this internationally-accepted list of grounds is consistent with those recognised under most national laws. This list has been drawn from the grounds admitted by the New York and Geneva Conventions on international commercial awards for non-recognition of foreign awards.

The matter that the opinion of Professors Schreuer and Reinisch refers to generically as “excess of powers” or “excess of mandate” is described restrictively as follows in article 34(2)(iii) of the Model Law and in article V(1)(c) of the New York Convention:

*“an arbitral award may be set aside/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 clearly 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. Absent such a common intent of the parties, in this case circumscribed by the BIT and the parties’ submissions,

the arbitrators lack authority to decide. This explains why this ground (deciding *ultra petita*) concerns only deciding on issues not submitted to arbitration and does not relate to how the arbitrators have decided the issues submitted to them.<sup>118</sup> An incorrect determination of the applicable law, or the misapplication of law is clearly 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 that is out of the scope of domestic courts.<sup>119</sup> “[I]nternational treaty law exclude[s] the merits review of the awards.”<sup>120</sup>

A mistake of law committed by the arbitral tribunal is not covered by any of the reasons listed in article V.<sup>121</sup> 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):

*“only 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”.*<sup>122</sup>

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<sup>118</sup> ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 269-273 (1981).

<sup>119</sup> “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.” FOUCHARD, GAILLARD, GOLDMAN, *supra* note 13, at 947, para. 1637.

<sup>120</sup> Carbonneau, *supra* note 17, at 25.

<sup>121</sup> David, *supra* note 9, at 397.

<sup>122</sup> *Id.* at 396.

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 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, as K. P. Berger has pointed out in detail. 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 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.”<sup>123</sup>*

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

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<sup>123</sup> Berger, *supra* note 9, at 681-683 (emphasis added).

be the same as explained before.<sup>124</sup> As I show below, 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.

As to 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.”<sup>125</sup> US 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).<sup>126</sup> Specifically, the case is cited where 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.”<sup>127</sup>

The same author mentions that 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) for 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*

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<sup>124</sup> See *supra* notes 118-120 and accompanying text (comparing the UNCITRAL Model Law to the New York Convention).

<sup>125</sup> David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, in *INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: “JUDICIALIZATION” AND UNIFORMITY?* 163, 165 (Richard B. Lillich & Charles N. Brower, eds., 1994) (citing the U.S. Supreme Court in the landmark case on arbitration *Scherk v. Alberto Culver Co* (1973)).

<sup>126</sup> *Id.* at 181 (citing the 1974 decision of *Parsons & Whittemore*).

<sup>127</sup> *Id.* at 181 (citing *National Oil Corp. v. Lybian Sun Oil Co.*, 733 F. Supp. 800 (D. Delaware 1990)).

*successfully, 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.”*<sup>128</sup>

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:

*“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.”*<sup>129</sup>

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.<sup>130</sup>

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.”<sup>131</sup> Even where arbitrators required by the parties to rule in law have wrongly assumed the powers of *amiable compositeurs*:

*“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*

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<sup>128</sup> *Id.* at 194-95.

<sup>129</sup> *Sidarma Società 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).

<sup>130</sup> Article 829(2), Italian Code of Civil Procedure (as amended in 1994).

<sup>131</sup> FOUCHARD, GAILLARD, GOLDMAN, *supra* note 13, at 943, para.1634.

*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.”<sup>132</sup>*

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.<sup>133</sup>

Also, in the United Kingdom:

*“The 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 the legal issues raise fundamental legal concerns and the public interest demands judicial intervention”.*<sup>134</sup>

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.”<sup>135</sup>*

In the famous *Norsolor* case, the Austrian Supreme Court in 1982 reversed a lower court holding that application of “international *lex mercatoria*” by international

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<sup>132</sup> *Id.* at 944-945, para. 1635.

<sup>133</sup> Claude Reymond, *La Nouvelle Loi Suisse et Le Droit de l'Arbitrage International: Réflexions de Droit Comparé*, 3 REV. ARBITRAGE 385, 410 (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).

<sup>134</sup> Carbonneau, *supra* note 17, at 25.

<sup>135</sup> Kühn, *supra* note 133, 389.

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.*”<sup>136</sup>

In conclusion, even if the reliance by the Stockholm Award on international law as applicable to CME’s claims of Treaty breaches, in accordance with article 8(6), were wrong, review of this choice and the setting aside of the Award on this ground would be in contradiction with the practice of courts in those countries that are the major centers of arbitration.

I believe that this conclusion is relevant for the procedure pending in front of the Svea Court also in view of the fact that the Swedish Arbitration Act provisions appear to be quite restrictive and, with minor and irrelevant exceptions, to follow the approach of the New York Convention and the Model Law.<sup>137</sup>

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<sup>136</sup> *Norsolor S.A. v. Pabalk Ticaret Ltd.* (18 Nov. 1982), IX Y.B. COMM. ARB. 159 (1984).

<sup>137</sup> Schmitthoff writing in 1986 observed that already at that time Swedish law like US and French legislation denied a judicial review of the award on the merits. Schmitthoff, *supra* note 30, at 235.

**III. THE CHALLENGE THAT “THE STOCKHOLM TRIBUNAL LACKED COMPETENCE BY REASON OF *LIS PENDENS* AND *RES IUDICATA*”**

In its Statement of Claim before the Svea Court of Appeal, the CR raises the issue of *lis pendens* and *res iudicata* beginning at 49, and Professors Schreuer and Reinisch in their opinion deal with the matter at 66-107. I also refer to the opinion of Professor De Ly as to the alleged relevance of the issue in international commercial arbitration.

The main arguments made by the CR in support of the submission that “*the Stockholm Tribunal lacked competence to rule on the merits of the case by reason of lis pendens and res iudicata*” are as follows:

1. *Res iudicata* is applicable between international courts and tribunals (Schreuer Opinion, at 71f.);
2. the London Proceedings were commenced before the Stockholm Proceedings (Statement of Claim, at 9; Schreuer Opinion, at 90f.);
3. the London and Stockholm Proceedings “*concerned the same subject matter and gave rise to the same cause of action*” (Statement of Claim, at 51; Reply, at 77-79);
4. the parties to the London and Stockholm Proceedings were identical on the Respondent side and were for all practical purpose the same on the Claimant side (Statement of Claim, at 9; Reply at 70-77);
5. the Final Award by the London Tribunal was rendered before the Partial Award by the Stockholm Tribunal (Statement of Claim, at 9 ff. Reply, at 63-64; Schreuer Opinion, at 91).

The conclusion reached by the CR in its Statement of Claim is that the Stockholm Tribunal not having dismissed the dispute on grounds of *res iudicata* and *lis pendens*, it is appropriate “to either annul or set aside the second award”.<sup>138</sup>

I disagree with various arguments made by the CR in that they appear to be unsubstantiated and/or irrelevant for the following reasons. *First*, in the specific context of international commercial arbitration, *res iudicata* and *lis pendens* rules do not apply as between arbitral tribunals. *Second*, there are no public general international law principles of *res iudicata* or *lis pendens* as between two tribunals constituted under separate treaties each hearing an underlying dispute on the merits. *Third*, even if some generic rule of international *res iudicata* were relevant here, it could not have effect as a matter of law because the identity criteria for its applicability are not met.

**A. In the Context of International Commercial Arbitration, Res Iudicata and Lis Pendens Rules Do Not Apply as Between Arbitral Tribunals**

**1. In general**

First of all, one has to define the concepts of *res iudicata* and *lis pendens* in international commercial arbitration.

*Res iudicata* of an award implies three different aspects:

*“First, the effect of an award as regards existing disputes between the parties themselves; secondly, its effect on subsequent disputes between the parties; and, thirdly, its effect on third parties”.*<sup>139</sup>

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<sup>138</sup> Statement of Claim, at 57.

<sup>139</sup> ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 396 (2<sup>nd</sup> ed., 1991).

Firstly thus, “*the award disposes of those disputes between the parties which were submitted to arbitration*”.<sup>140</sup> It means that the terms of the award are definitive and binding (obligatory) on the parties to the dispute.<sup>141</sup> As far as the other aspects of *res iudicata* of an award are concerned, Redfern and Hunter recognise that: “*the previous decision of an arbitral tribunal should have no relevance to any subsequent disputes that arise between the same parties*”<sup>142</sup> and that “*An arbitral tribunal has no power to make orders or to give directions against someone who is not a party to the arbitration agreement*”.<sup>143</sup>

The concept of *res iudicata* applies when there is an identity of the parties and of the question at issue.<sup>144</sup> The second element of identification, the identity of the question, is deemed to refer to both the grounds invoked (*causa petendi*) and the object of the dispute (*petitum*).<sup>145</sup>

*Lis pendens* also refers to disputes between the same parties about the same question at issue simultaneously pending before different jurisdictions. Its purpose is the same as *res iudicata*, that is avoiding the outcome of conflicting decisions on the same issue.

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<sup>140</sup> *Id.* at 396 (emphasis added).

<sup>141</sup> Berger, *supra* note 9, at 613.

<sup>142</sup> Redfern & Hunter, *supra* note 139, at 396

<sup>143</sup> *Id.* at 397.

<sup>144</sup> As to public international law, *see, e.g., Pious Fund Case* (U.S. v. Mexico), [1902] Hague Ct. Rep. 1; *Trail Smelter case* (U.S. v. Canada), (1941) 3 R.I.A.A., 1906, at 1910; *Polish Postal Service in Danzig case* (1925) P.C.I.J., Ser. B, No. 11, 4, at 30; *Chorzów Factory Case No. 11 (Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzów)*, (1927) P.C.I.J., Ser. A, No. 13, 2 (Dissenting Op. of President Anzilotti, at 23).

<sup>145</sup> *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 340 (1987).

The concepts of *res iudicata* and *lis pendens*, however, work only within the same legal order. As van Houtte asserts:

*“It is a basic rule of procedural law that parallel proceedings, i.e. same legal actions between the same parties, cannot be brought before the same court or before different courts within the same jurisdiction. Otherwise contradictory judgments risk to emanate, which would undermine the legal certainty the courts strive after. Therefore principles such as lis (alibi) pendens have been developed under which courts refuse to hear a case, already pending before a different jurisdiction.*

*Arbitration statutes have developed similar mechanisms to avoid that a same case would be pending in the same country before the courts and before the arbitrators.”<sup>146</sup>*

When domestic legal systems deal with the *res iudicata* effect of arbitral awards, the rule is primarily directed to domestic courts, which cannot decide upon the same dispute between the same parties.<sup>147</sup>

For international commercial arbitral tribunals linked with different domestic legal systems because they have their seat in different countries, *lis pendens* and *res iudicata* concepts do not apply. The following reasons support this view:

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<sup>146</sup> Hans van Houtte, *Parallel Proceedings before State Courts and Arbitration Tribunals. Is there a Transnational lis alibi pendens-exception in Arbitration or Jurisdiction Conventions?*, in ARBITRAL TRIBUNALS OR STATE COURTS. WHO MUST DEFER TO WHOM?, ASA Special Series No. 15, January 2001, p. 35 (emphasis added).

<sup>147</sup> FOUCHARD, GAILLARD, GOLDMAN, *supra* note 13, at 779-80, para. 1419 (citing the position in Belgium, the Netherlands, Germany and France).

1) Since the two arbitral proceedings do not belong to the same legal system, specific treaty provisions would have been necessary in order to provide for suspension of proceedings or to attribute to the arbitrators the competence to decide upon *lis pendens* or *res iudicata* issues.

2) The second ground for irrelevance of the two concepts is that arbitration has a contractual basis. As stated by Professor G. Bernini (a former chairman of the International Council of Commercial Arbitration):

“... proceedings, such as arbitration, which have a contractual basis, do not allow an arbitrator to interfere into the competence of another arbitrator. Nor can the arbitrator, autonomously, suspend the proceedings for which he holds the competence to adjudicate...”<sup>148</sup>

3) In the case at issue, the jurisdiction of the two arbitral tribunals is provided at a higher level by two different BITs. For the purposes of *lis pendens* and *res iudicata*, however, the arbitration provisions in the two treaties are equivalent to contractual arbitration clauses, as mentioned before. As with the Dutch-Czech BIT’s arbitration clause, arbitral clauses in BITs do not typically provide for suspension of proceedings in case of *lis pendens* nor for lack of competence in case of *res iudicata*. It would be contrary to the object and purpose of the BIT at issue to deny to an investor on these grounds the right to pursue arbitration in order to seek protection against breaches under the terms of the treaty.

Any review of an arbitral award by national courts cannot go so far as to interfere with agreements between sovereign States, such as the Czech Republic, the Netherlands

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<sup>148</sup> GIORGIO BERNINI, L’ARBITRATO. DIRITTO INTERNO E CONVENZIONI INTERNAZIONALI 375 (1993) (translated from Italian original). Of course, the concepts of *lis pendens* and *res iudicata* would prevent a party from resubmitting to arbitration a dispute already decided by a tribunal properly constituted under the same dispute resolution clause.

and the United States. D. Reichert, an author cited in the CR's Statement of Claim<sup>149</sup> has stated clearly:

*“When a court or arbitral tribunal is created on the basis of a treaty between States, the international tribunal is considered to be hierarchically superior to any national court or private arbitral tribunal (the generally international composition of private arbitral tribunals does not affect this status). Such supranational tribunals typically determine that their jurisdiction takes precedence, and is not subject to the litispendence principle.”*<sup>150</sup>

The question of the effect of *lis pendens* and *res iudicata* between tribunals of different countries and between State courts and international tribunals has been extensively discussed. The dominant view among authors is, as recalled above, that the *lis pendens* and *res iudicata* principles have no relevance to international commercial arbitration, both because there is no coherent and single international legal system and because the jurisdiction of arbitral tribunals has a consensual basis and is not provided by law as is the case for municipal courts.<sup>151</sup>

Also arbitral case law points to the same direction: various arbitral awards have stated that litispendence, also between State courts and arbitral tribunals, is irrelevant for the latter.<sup>152</sup> At the most, arbitrators have a discretion to stay arbitral proceedings in such

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<sup>149</sup> CR Statement of Claim, at 49, note 30.

<sup>150</sup> Douglas D. Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration*, 8 ARB. INT'L 237, 249 (1992).

<sup>151</sup> *Id.* at 242 (noting that “many authors contend that the litispendence principle has no relevance to arbitration”); Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191, 198 (1999).

<sup>152</sup> ICC Case No. 6142 (1990), 1990 J. DE DROIT INT'L 1039, note Derains; ICC Case No. 5103 (1988), 1988 J. DE DROIT INT'L 1206. Both cases are discussed in Reichert, *supra* note 150, at 243-44.

a situation. It is not for State courts to review arbitral tribunals' decisions in this regard.<sup>153</sup>

## 2. The absence of regulation in international conventions and in domestic laws

Regulation through international conventions is therefore necessary in order to give effect to the principles of *lis pendens* and *res iudicata* as they are recognised in domestic law within international commercial arbitration.

However, such regulations, where they exist, as indicated hereunder, deal with the relations between State courts and arbitration. Contrary to Professor De Ly's view, no regulation exists internationally to apportion competence and regulate proceedings between different arbitral tribunals having their seat in different countries, and articles II and III of the New York Convention are completely irrelevant and immaterial to this question. Treaty provisions are intended to prevent States' courts from adjudicating disputes that have already been brought before the other contracting States' courts (which in absence of such treaties would not constitute a bar to jurisdiction by the *forum*), as well as to prevent recognition of foreign judgments contrary to domestic judgements that have become *res iudicata* between the parties.<sup>154</sup>

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<sup>153</sup> Thus the Supreme Court of Cyprus has ruled on 28 April 1999 that:

*“the Arbitrators decided whether there was a lis alibi pendens or not, and they decided whether by exercising their discretionary power they should stay the proceedings before them or not. There is therefore no margin to examine whether this award is contrary to the provisions of the public order of Cyprus.”*

*Attorney General of Kenya v. Bank für Arbeit und Wirtschaft*, XXV Y.B. COMM. ARB. 692, 704 (2000).

<sup>154</sup> Even an exemplary international treaty for the protection of human rights, like the European Convention on Human Rights, did not immediately require the contracting Parties to provide in their criminal law for such a principle—and did not so require until the adoption of the 7<sup>th</sup> Protocol in 1984. Article 4(1) of Protocol 7 to the ECHR provides: “*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has*

The Brussels and Lugano Conventions “on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters” deal specifically with this point, but only between the European countries that are parties to them and only in respect of State court judgements, not arbitral awards.<sup>155</sup>

It is interesting to note that when these Conventions are inapplicable, the contracting States apply different rules—sometimes giving precedence to domestic jurisdiction or, to the contrary, bowing in some instances to foreign litigation and judgements when proceedings have started abroad first. Thus, in the UK, the principle of “*forum non conveniens*” gives discretion to the court whether to suspend or not the domestic proceedings because the same dispute is pending abroad.<sup>156</sup> In the Netherlands, the Supreme Court has ruled that “*in the absence of an international convention a Dutch court should not decline jurisdiction in favor of a foreign court that has been previously seized*”.<sup>157</sup> It has been generally observed that: “*Lis pendens is seen by many States as*

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*already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*” (emphasis added). Article 14(7) of the U.N. International Covenant on Civil and Political Rights provides for a wider *ne bis in idem* rule: “*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*” This provision, however, has been interpreted narrowly by the Human Rights Committee so that the *ne bis in idem* rule embodied in it has been considered as applying only between tribunals of the same country. *See A.P. v. Italy*, Communication No. 204/1986, U.N. Doc. CCPR/C/31/D/204/1986 (11 Nov. 1987).

In its opinion regarding the *Boehringer v. Commission* case, the advocate-general Mayras, while recognizing the existence of the *ne bis in idem* rule in every legal system of the member States of the European Community, denied explicitly that it was “*a general principle of law in international relations.*” (*BoehringerMannheim GmbH v. Commission*, Case 7/72 (14 Dec. 1972) II E.C.R. 1281, 1296 (1972) (Op. Mayras)).

<sup>155</sup> See article 21, which deals with *lis pendens*, and article 27(3) and (5), which address *res iudicata*. The Brussels Convention has been replaced since the 1<sup>st</sup> of March 2002 by EC Reg. 44/2001, which deals with *lis pendens* at article 27 and with *res iudicata* at article 34.

<sup>156</sup> Such discretion will be exercised to prevent injustice. *See* DICEY AND MORRIS ON THE CONFLICT OF LAWS 395-97 (Lawrence Collins, ed., 12<sup>th</sup> ed., 1993).

<sup>157</sup> *Hoge Raad*, 22 Dec. 1989. *See Legal Opinion on Certain Effects of the Brussels and Lugano Conventions in the Relationship to Non-Contracting States (France, Germany, Italy, the Netherlands,*

*being essentially a problem relating to the recognition and enforcement of foreign judgments*”.<sup>158</sup>

In Italy, the Court of Appeal of Milan has recently held that two conflicting international commercial awards between the same parties, rendered in two different countries, are both recognizable in Italy, since there is no *res iudicata* as to either of them under Italian law.<sup>159</sup> By contrast, in 1994, arbitration reform undertaken introduced a new ground of nullity of domestic awards, namely where the domestic award is contrary to a previous award (as well as a previous judgment) that has become *res iudicata* between the same parties. This challenge will only succeed if the defence of *res iudicata* has been raised in those proceedings.<sup>160</sup> Authors have remarked that *res iudicata* is not automatic and could never practically be raised when, as in the case at issue, the two awards are rendered almost at the same time.<sup>161</sup>

Similarly, under French law, the effect attributed to *res iudicata* by articles 1476 and 1500 of the code of civil procedure to domestic and foreign awards relates only to the

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*Switzerland*) (Swiss Institute of Comparative Law, Note 02-013, para. 149 (Mar. 15, 2002) (citing HR 22 Dec. 1989, NJ No. 689 (1990)).

<sup>158</sup> J.J. FAWCETT, *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* 28 (1995).

<sup>159</sup> Decision of the Court of Appeal of Milan (2 July 1999), *RIV. DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 2000 165-169, with a comment: Ferruccio Tommaseo, *Sul riconoscimento in Italia di lodi stranieri plurimi “de eadem re”*, at 29ff.

<sup>160</sup> Article 829(8), Italian Code of Civil Procedure (as amended in 1994).

<sup>161</sup> COMMENTARIO BREVE AL CODICE DI PROCEDURA CIVILE 638 (F. Carpi, ed., 3<sup>rd</sup> ed., 2001).

jurisdiction of French courts.<sup>162</sup> Moreover, the defence of *res iudicata* is not deemed to have a public policy character as to arbitral awards.<sup>163</sup>

The matter is not regulated in respect of arbitral tribunals *inter se*, so that the extension, by analogy or otherwise, of those coordination principles is not generally admitted. The Brussels/Lugano Conventions do not cover arbitral awards. Van Houtte concludes his survey on transnational *lis pendens* as follows:

*“There does not yet exist a clear and global transnational lis alibi pendens – exception in the arbitration and jurisdiction conventions. Arbitration and court proceedings belong to separate worlds with their own jurisdiction and enforcement conventions, which have neglected the interface between arbitration and court jurisdiction.”*<sup>164</sup>

The international instruments on international commercial arbitration (such as the New York Convention, the UNCITRAL Rules and the UNCITRAL Model Law) do not, contrary to Professor De Ly’s opinion, regulate *lis pendens* and *res iudicata* as between arbitral tribunals at all. These conventions do not even mention these principles among those listed in detail as a bar to recognition of arbitral awards in the country where they have been rendered or in other countries. With reference to the New York Convention, Poudret rightly observes that *“the difficult problem of the res iudicata effect of an award*

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<sup>162</sup> See FOUCHARD, GAILLARD, GOLDMAN, *supra* note 13, at 780, para. 1419 (“*This means that once an award has been made, the same dispute between the same parties cannot be submitted to the courts. Before the award is made, the courts are obliged to decline jurisdiction where they find that an arbitration agreement exists.*”).

<sup>163</sup> MATHIEU DE BOISSESON, LE DROIT FRANCAIS DE L’ARBITRAGE: INTERNE ET INTERNATIONAL 811-12 (1990).

<sup>164</sup> Van Houtte, *supra* note 146, at 53.

*towards another Arbitral Tribunal ... is not contemplated by the NY Convention, as the latter imposes obligations only on States*".<sup>165</sup>

Under article II.3 of the New York Convention a different, specific issue of *lis pendens* (which is immaterial for our case) may arise between an arbitral tribunal in one country and a court of another country, namely when the latter, having international jurisdiction under the Convention, has been seized first in order to decide whether the arbitral agreement "*is null and void, inoperative or incapable of being performed*".<sup>166</sup>

From a general point of view, *lis pendens* is irrelevant under article II.3. As Albert Jan van den Berg has stated in his major (and up to now sole existing) commentary of the New York Convention:

*"the possibility of conflicting awards or courts decisions in related cases must be deemed not to render the arbitration agreement 'inoperative' or 'incapable of being performed'."*<sup>167</sup>

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<sup>165</sup> Jean-François Poudret, *Concluding Remarks on Relationship between State Courts and Arbitral Tribunals*, in *ARBITRAL TRIBUNALS OR STATE COURTS. WHO MUST DEFER TO WHOM?*, ASA Special Series No. 15, January 2001, at 157.

<sup>166</sup> This issue, concerning the challenge to the jurisdictional basis of the arbitral tribunal, was subject to a decision of the Swiss Federal Tribunal. *Fomento de Construcciones y Contratas SA (Spain) v. Colon Container Terminal SA (Panama)*, Swiss Federal Tribunal, 1<sup>st</sup> Civil Court (14 May 2001) 2001/3 ASA BULL. 555. In that case, a court in Panama having proper jurisdiction in accordance with the New York Convention (at least potentially) was deciding whether to enforce an arbitration clause based on which an arbitral tribunal was proceeding in Switzerland. The Swiss court found that the arbitral tribunal should have ordered a stay of the arbitral proceedings because, under article 9 of the Swiss Statute on Private International Law, the arbitral tribunal could not take jurisdiction. This issue is clearly quite different from the one discussed here between the two arbitral tribunals allegedly having to decide the same subject matter between the same parties but on different jurisdictional bases. Professor De Ly's reference thereto (at para. 60) is thus irrelevant. Further, the Swiss court overturned the arbitral award not on the grounds of violation of *ordre public*, but only on the grounds of lack of jurisdiction (LDIP 190(2)(b), not LDIP 190(2)(e)).

<sup>167</sup> Jan van den Berg, *supra* note 118, at 168.

Jan van den Berg deals with the issue from the point of view of the solution that may be given to “Multi-party Disputes and Referral to Arbitration”. He notes that:

*“The problem essentially arises where there are more than two parties, one of whom is not bound by the same arbitration agreement or no arbitration agreement at all, and the disputes to be referred to, or pending before, two different arbitrations, or an arbitration and a court, concern the same or similar subject matter, common questions of fact and law, and substantially similar issues and defences. The problem involves, from the legal point of view, procedural questions such as the consolidation of arbitrations into one arbitration; the joinder of a third party...and the intervention of a third party.”<sup>168</sup>*

Consolidation, however, is problematic in arbitration, especially in international commercial arbitration when not agreed upon by all parties concerned, because of the normal lack of competence by a single court. Compulsory consolidation may take place only:

- when ordered by a court of competent jurisdiction, which is generally unlikely to exist when arbitration is pending or is to take place in different countries and would be legally impossible for any State court to order in an instance such as the present one when the jurisdictional basis of the arbitrations are treaties between different States, or
- when an international treaty so provides, the only known case being article 1126 of NAFTA on consolidation of related State-investment arbitration proceedings under that regional treaty.

Outside of these special instances, as Jan van den Berg again points out:

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<sup>168</sup> *Id.* at 161.

*“The essence of arbitration being its voluntary nature, the joinder or intervention of a third party can, in principle, take place only if both the third party and the parties who are bound to the arbitration agreement consent to the joinder or intervention.”*<sup>169</sup>

In this respect, I understand from the description of the proceedings in the Stockholm and London Awards that it was the CR that refused suggestions to consolidate and/or coordinate the proceedings. In light of the principles stated above, however, if the CR wished to avoid the existence of or potentially differing effects of parallel proceedings, consolidation or some other agreed coordination between the parties was the only means available to it.

As a conclusion from the point of view of international commercial arbitration, in view of the conflicting position of major domestic jurisdictions on the issue, and the limited coverage – both as to territory and subject matter – of existing treaties dealing with connected arbitral and/or State courts proceedings in different countries, one can exclude that there is a general principle, and certainly not of “international public order”, that would require a dismissal of proceedings between two different arbitral tribunals operating in different countries and with different jurisdictional bases.

**3. No “international public policy” requirement imposes recognition of *res iudicata* or *lis pendens* in this case.**

The Stockholm Award has violated no mandatory principle pertaining to “transnational public policy” (which according to certain views exist and have to be taken into account by arbitral tribunals), by not taking into account the London proceedings and award, even if the required criteria of identity had been met. In listing such principles, such as due process and procedural fairness, respect for basic human rights, abstention

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<sup>169</sup> *Id.* at 163.

from corruption, application of binding UN embargoes etc., no author who has dealt with this topic has included *res iudicata/lis pendens* as far as I am aware of.<sup>170</sup>

On the contrary, the paramount principle being that it is for the arbitrators to determine their own competence, it is inadmissible for courts to review the motivation on which an arbitral tribunal has refused to decline its jurisdiction, rejecting any plea of *res iudicata* or *lis pendens* (if at all made). Courts would otherwise review the merits of an award contrary to a universally accepted limitation of their competence on both domestic and foreign awards in matters of international trade and economic intercourse.<sup>171</sup>

As a consequence, there is in my opinion, from a comparative point of view, also no ground for setting aside the Stockholm Award by the Svea Court of Appeal by invoking public order.<sup>172</sup> The general rule is indeed that absent treaty obligations in matters of recognition of foreign judgements, most civil law jurisdictions give precedence to their own proceedings and judgments in case of conflict with foreign ones.<sup>173</sup>

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<sup>170</sup> See, e.g., Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION*, 227 (International Council of Commercial Arbitration, Congress series No. 3, 1987); Lalive, *supra* note 27, at 335-42.

<sup>171</sup> See *Société Inter Arab Investment Guarantee Corporation (IAIGC) v. Banque arabe et internationale d'investissements*, French Supreme Court (Cassation) (June 14, 2000), *REVUE DE L'ARBITRAGE*, 729, 730-31 (2001/4).

<sup>172</sup> Perusal of reported cases in which domestic courts have annulled or denied recognition to international commercial arbitration awards for reasons of violation of public order (which are quite rare) do not show any case where *res iudicata* or *lis pendens* have been successfully invoked. See Albert Jan van den Berg, *Refusals of Enforcement under the New York Arbitration Convention of 1958: The Unfortunate Few* (ICC 75th Anniversary Congress, Geneva, 1998). Moreover, in the present case, there would not even be any ground for raising a public order question in Sweden, because the London Award is in no way connected to the Swedish legal system.

<sup>173</sup> GERHARD WALTER & SAMUEL P. BAUMGARTNER, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS* 33 (2000). See also Berger, *supra* note 9, at 614 (“*The reference to the ‘binding’ effect of the award can be seen as primarily directed towards foreign res iudicata provisions.*”).

I conclude therefore that the London proceedings and award were and are irrelevant in respect of the Stockholm proceedings and award and that no existing applicable principle of *lis pendens* or *res iudicata* as to international commercial awards has been violated by the Stockholm Tribunal in not deferring to the London Tribunal, even if the required identity criteria had been met.

**B. There Are No General International Law Principles of *Res Iudicata* and *Lis Pendens* as Between Two Tribunals Constituted Under Separate Treaties.**

For the reasons already stated, the principles of *res iudicata* and *lis pendens*, even if they were applied by international tribunals in disputes between States, are not relevant here because the London and Stockholm arbitral tribunals are not tribunals established to decide disputes directly between sovereign States. Even if the mixed nature of BIT arbitrations (affording substantive, public international law protections in the context of treaty-based commercial arbitration) leads one to consider the application of public international law concepts of *res iudicata* and *lis pendens*, however, international law does not recognize *lis pendens* or *res iudicata* in the sense claimed by the CR.

As stated by the Permanent Court of International Justice in 1939, in public international law:

*“Recognition of an award as res iudicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.”*<sup>174</sup>

*Res iudicata*, therefore, is assumed to have two effects: one, which is positive in character, on the parties to abide by the judgement;<sup>175</sup> the other, which is negative in character, on other tribunals not to consider again a matter between the same parties that has already been solved.

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<sup>174</sup> *Société Commerciale de Belgique* (1929), P.C.I.J., Series A/B, No. 78, p. 160, 175 (June 15, 1939).

First, then, *res iudicata* is considered when determining the possibility of some form of recourse against an existing decision—for example, by bringing an appeal against the decision or by seeking the reopening of a case. With respect to recourse, the concept of *res iudicata* is accepted as directly pertinent in international law. (See section B.1 hereunder.)

Secondly, *res iudicata*, as far as its *ne bis in idem* effect is concerned – and, by extension to the time before the decision is rendered, the preventive *lis pendens* effect – is a guarantee for the defendant not to be prosecuted again for the same fact. The *lis pendens* and *ne bis in idem* effects of *res iudicata* in this context have not acquired the status of a rule of general international law, that is, they are not generally recognised at the international level. (See section B.2 hereunder.)

Since the concept of *res iudicata* in the first sense, that is, in the context of recourse against a decision, is different from the concept of *res iudicata* in its *lis pendens* and *ne bis in idem* forms, it is improper to use jurisprudence and doctrine with respect to the first application of *res iudicata* to justify an application of *ne bis in idem* and *lis pendens*. It is therefore considered helpful to clarify the distinction briefly in this opinion.

#### **1. Recourse against an award (*res iudicata*)**

Most of the jurisprudence cited in Professors Schreuer and Reinisch's discussion to support the applicability of the principle of *res iudicata* in the case at issue refers to the first aspect of the principle, i.e., to the question whether an award is binding on the parties and to what extent the parties have the possibility of recourse against an existing decision.

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<sup>175</sup> Cheng, *supra* note 145, at 338.

The general rule, accepted in doctrine and jurisprudence, is that once a State has granted the authority to a tribunal to issue a final and binding decision, then that State must accept and fully execute the tribunal's award.<sup>176</sup>

The Tribunal in the *Orinoco Steamship Case* emphasized the importance of this rule, stating:

“... it is assuredly in the interest of peace and the development of the institution of International Arbitration, so essential to the well-being of nations, that on principle, such a decision [issued by an international tribunal] be accepted, respected and carried out by the Parties without any reservation...”<sup>177</sup>

Similarly, when the General Assembly of the United Nations submitted to the International Court of Justice the question of whether it had “*the right on any grounds to refuse to give effect to an award of compensation made by [the United Nations Administrative Tribunal] in favour of a staff member of the United Nations whose contract of service has been terminated without his assent,*” the Court stated as a matter of principle that, a decision of the United Nations Administrative Tribunal being *res iudicata* between the parties to a proceeding, the parties had to carry out the decision.<sup>178</sup>

For the purposes of the case at hand, the only relevance of this most basic application of *res iudicata* is that the parties to the Stockholm Proceeding are bound to abide by the Stockholm Tribunal's Partial Award, and the parties to the London Proceeding are bound to abide by the London Tribunal's Final Award.

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<sup>176</sup> See, e.g., JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 598-99 (3<sup>rd</sup> ed., 1997); NGUYEN QUOC DINH ET AL, DROIT INTERNATIONAL PUBLIC 868ff (6th ed., 1999); ANGELO PIERO SERENI, IV DIRITTO INTERNAZIONALE. CONFLITTI INTERNAZIONALI 1723 (1965).

<sup>177</sup> *Orinoco Steamship Case* (U.S. v. Venez.), 11 R.I.A.A. 227, 238 (25 Oct. 1910).

This general rule, however, does not exclude the possibility that the grant of jurisdiction to a tribunal to decide a case may include a right of recourse against the decision—either in the form of a right of revision, a right of appeal or of annulment. Thus, for example, the Statute and Rules of the International Court of Justice expressly contemplate that parties may request revision of a decision of the Court.<sup>179</sup>

Annulment in ICSID is a peculiar, indeed exceptional, instance of limitation of the *res iudicata* of an international award, which is provided by the specific provisions of the Washington Convention.

Cases relating to recourse proceedings, which have for their object the review not of the same underlying dispute, but rather of an earlier decision (whether taken by the same tribunal or another tribunal), have no applicability to the question of the effect of the London proceedings on the Stockholm proceedings—for the Partial Award of the Stockholm Tribunal does not purport to have any effect on the Final Award of the London Tribunal, which remains *res iudicata* between Mr. Lauder and the Czech Republic as to the question of whether the U.S.-CR Treaty was breached.

Even if a final and binding decision of a tribunal has *res iudicata* effect and excludes appeals and nullity proceedings, unless such proceedings were expressly contemplated in the original source of jurisdiction, international law nevertheless admits the possibility of a dispute arising out of the application or execution of an award, and therefore accepts that the parties may decide to submit the new dispute over the

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<sup>178</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion, 13 July 1954) I.C.J. REP., 47, at 53.

<sup>179</sup> ICJ Statute, article 61; ICJ Rules, article 99; see GENEVIEVE GUYOMAR, COMMENTAIRE DU REGLEMENT DE LA COUR INTERNATIONALE DE JUSTICE 628 (1983) (“*Comme, cependant, il y a là une atteinte grave portée à l’autorité de la chose jugée, il parut indispensable de réglementer de façon assez détaillé l’exercice de ce droit*”) [As, however, there is there a serious attack brought against the authority of a binding decision, it seemed indispensable to regulate the exercise of this right in a fairly detailed fashion.].

application of a prior award to another (or the same) tribunal. This new tribunal can be given the power to set aside the previous award, totally or partially, and to decide *de novo* on the merits regarding that portion of the previous award that has been set aside.

Thus, the tribunal in the *Orinoco Steamship Company Case*, for instance, after stating the principle of the finality (*res iudicata*) of international arbitral awards, quoted above, accepted the possibility that a special agreement between the parties could confer upon the tribunal the power to rule on the validity of a previously-issued award. The tribunal proceeded to annul a portion of the previous award and to decide anew on the merits.<sup>180</sup>

As with appeals, nullity and interpretations, there is also an application of the concept of *res iudicata* with respect to the review of an award at a later stage in the same proceeding. Thus, for example, in the *Trail Smelters Case*, also quoted by Professors Schreuer and Reinisch, the Tribunal was asked in the course of the second phase of a proceeding (concerning a regime to prevent further injury) to “reconsider its decision” in an earlier phase (regarding compensation). The tribunal refused, on the grounds that its earlier decision was *res iudicata* and that revision would therefore not be permitted (absent extreme circumstances not present in the case).<sup>181</sup> If the *Trail Smelter Case* may have some relevance to the question of whether the Stockholm Tribunal can revisit in the quantum phase a decision it already made in the liability phase, it has no bearing on the effect of the London Tribunal’s award on the Stockholm Tribunal’s jurisdiction.

If cases involving recourse against an award, interpretation of an award or a dispute arising out of the execution of the award could have some bearing on the question

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<sup>180</sup> *Orinoco Steamship Company Case*, *supra* note 177, at 238. The *res iudicata* character of the previous decision, however, is not affected by the possibility, provided for by procedural rules of international tribunals, for the parties to ask for an interpretation of the decision.

<sup>181</sup> *Trail Smelter Case*, *supra* note 144, at 1948, 1957.

of whether any tribunal (municipal or international) has any authority to review either the London Tribunal's award or the Stockholm Tribunal's award, they are not relevant to the question of the alleged effect of the London Tribunal's award on the Stockholm Tribunal, which was neither hearing an appeal of or a nullification request relating to the former award, but rather was deciding in its own right an underlying dispute.

## **2. Effect of a proceeding or award on separate tribunals**

The ability of the Stockholm Tribunal to hear CME's claims and render an award does not involve the question of recourse against the London Award—the Stockholm Arbitration was not an appeal of the London Arbitration, a rehearing or interpretation action, or a challenge to the validity of the London Award. Rather, the question raised in this respect relates to the questions of parallel proceedings (*lis pendens*) or, after the first decision was issued, succeeding proceedings (*res iudicata* in its *ne bis in idem* form).

To understand the interaction between proceedings or an award of one international tribunal on proceedings or an award of a separate tribunal, it is necessary to consider the general organization of international tribunals. Unlike well-structured domestic judicial systems, the international dispute settlement system consists of an increasing number of permanent and *ad hoc* tribunals, each of which is autonomous and not linked by a system of hierarchy to other tribunals. It is thus not correct, as Professors Schreuer and Reinisch propose,<sup>182</sup> to consider the international legal order as a homogeneous and hierarchical system of law, without taking into consideration the different sources of jurisdiction of tribunals constituted under different treaties.

The lack of hierarchy between jurisdictions, the absence of any form of appeal except in very few specific instances is due to the reluctance of States to restrict their sovereignty also in this respect as underlined also by Professor Schreuer in his writings:

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<sup>182</sup> Schreuer Opinion, para. 218.

*“In arbitration between States there is no institutionalised review. A claim by one State party that an award is void may be submitted to international adjudication by mutual consent.”*<sup>183</sup>

There has been a recent “proliferation” of international tribunals established under different treaties and organizations (such as the International Tribunal of the Law of the Sea under the UN Convention on the Law of the Sea - UNCLOS, arbitration mechanisms under various environmental treaties, the dispute settlement bodies of the WTO), many of them having, in some instances, compulsory jurisdiction between Contracting Parties over disputes arising under the relevant instruments. This has raised concern because overlapping jurisdictions may result in parallel proceedings and conflicting decisions.<sup>184</sup>

Given the lack of centralized means of attributing jurisdiction in the international legal system and of a hierarchy between different international tribunals, the general opinion is that those conflicts can be avoided only by specific treaty clauses providing for precedence or exclusivity.<sup>185</sup> If there are no such provisions, different international tribunals may be called to adjudicate substantially the same dispute applying the provisions of different treaties and may reach conflicting and even opposite conclusions.

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<sup>183</sup> ICSID Commentary, *supra* note 20, at 891; Abi-Saab, *supra* note 20, at 381.

<sup>184</sup> See Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 3 NEW YORK J. INT'L L. & POLICY 679, 680-88 (1999).

<sup>185</sup> An example of coordination contained in the US–Canada Free Trade Agreement (the predecessor of NAFTA) is given by Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1081, 1111 (2001) (“Article 1801 FTA envisaged that disputes arising under both FTA and GATT... could be settled in either forum at the discretion of the complaining party, but that once a matter has been brought before either forum, the procedure initiated shall be used to the exclusion of any other. The purpose of this rule was not to recognize the existence of res iudicata as such ... but to introduce certainty and avoid multiple dispute settlement proceedings.” (emphasis added)).

**(a) Parallel proceedings are not barred by *lis pendens***

In any case, disputes involving States can be resolved judicially or by arbitration only with the consent of the disputant States. The fundamental character of the international dispute settlement function is still undisputed: a party that has not consented to the jurisdiction of an international tribunal, cannot be bound by its decisions. A *fortiori*, the consent (whether embodied in a contract, a unilateral declaration, a bilateral or a multilateral treaty) is limited to the jurisdiction of that particular tribunal and does not extend to, and is unaffected by, the jurisdiction of a separate tribunal established under a distinct international instrument.

The general rule that applies when the same dispute (even between the same parties) has been brought before two separate international tribunals is that each tribunal seized of the matter looks to the source of its competence to determine whether it should continue to hear the case. If the matter falls within its competence, the tribunal will hear the affair notwithstanding any parallel proceeding. International tribunals in various contexts have addressed this rule regarding parallel proceedings.

The one time this question arose before the Permanent Court of International Justice, the Court questioned “*whether the doctrine of litispendence ... can be invoked in international relations.*”<sup>186</sup>

In the *American Bottle Company Case*, the United States had brought a dispute before the Mexico-United States Special Claims Commission. While that case was pending, the United States filed the same claim with the Mexico-United States General Claims Commission. In light of Mexico’s objection that the General Claims Commission

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<sup>186</sup> Having been seized of the case concerning the factory at Chorzow while a dispute relating to that factory was pending before the Germano-Polish Mixed Arbitral Tribunal, the PCIJ did not consider itself barred by the existence of the separate proceeding because *inter alia* “*the Mixed Arbitral Tribunal and the Permanent Court of International Justice are not courts of the same character*”. *Certain German Interests in Polish Upper Silesia, Jurisdiction* (1925), P.C.I.J., Ser. A, No. 6, at 20.

should not act until the Special Claims Commission had decided on its jurisdiction, the General Claims Commission held:

*“There is ... no rule in international law, nor no provision in the Conventions entered into between the United States and Mexico or in the rules of this Commission, that precludes the United States from presenting a claim to this Commission because of its having been previously filed by Memorial before the Special Claims Commission. And the Commission is of the opinion that the present claim is within its jurisdiction.”*<sup>187</sup>

Similarly, one can mention the recent dispute between Chile and the EC concerning the fishing of swordfish. This dispute was brought by Chile before the International Tribunal of the Law of the Sea and by the EC before the WTO dispute settlement bodies. The parties invoked respectively the environmental provisions of the UNCLOS and the free trade provisions of the GATT. They then reached a negotiated agreement. It has been noted that failing such an agreement: *“there is no international norm establishing criteria of ‘lis pendens’ that can affirm the prevalence of one dispute settlement mechanism over the other”*.<sup>188</sup>

This rule, established in State-to-State dispute resolution, holds true for arbitrations between private entities and States, as well. The *SPP* case, cited by Professors Schreuer and Reinisch as the only jurisprudential support for the argument that *res iudicata* applies between international tribunals in mixed arbitrations involving investors and host States, clearly states:

*“When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of*

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<sup>187</sup> *American Bottle Company (U.S.A.) v. United Mexican States* (2 April 1929), 4 R.I.A.A. 435, 437.

<sup>188</sup> P. Vigni, *The Overlapping of Dispute Settlement Regimes: an Emerging Issue of International Law*, ITALIAN Y.B. INT’L L. (2001) (forthcoming).

*international law which prevents either tribunal from exercising its jurisdiction.*”<sup>189</sup>

The *SPP* tribunal merely determined that “*in its discretion and as a matter of comity,*” it could “*stay the exercise of its jurisdiction pending a decision by the other tribunal.*”<sup>190</sup>

The jurisprudence on this issue is reaffirmed in the practice of States in formulating international agreements. The United States itself recognised the lack of any *lis pendens* between tribunals established under different sources of jurisdiction and the resulting necessity to incorporate a specific rule on parallel proceedings should a *lis pendens* effect be desired. Thus, unlike the Dutch-Czech BIT (and most other BITs), the United States’ bilateral investment treaty with the CR contains explicit language that permits claims to be arbitrated only if “(i) *the dispute has not been submitted by the national or the company for resolution in accordance with any applicable previously agreed dispute resolution procedures; and (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.*”<sup>191</sup> The necessity and the rarity of a specific clause to avoid parallel proceedings for the same

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<sup>189</sup> *SPP(ME) Ltd. v. Egypt* (First Decision on Jurisdiction, 27 Nov. 1985), 106 I.L.R. 502, 529, para. 84.

<sup>190</sup> *Id.* (emphasis added). I note here that the quotation in para. 220 of the opinion by Professors Schreuer and Reinisch is immaterial. They quote as a precedent the International Court of Justice’s recent decision in the boundary dispute between Qatar and Bahrain to demonstrate that *res iudicata* exists between decisions of international courts and tribunals. The quotation, however, appears not in the judgment of the Court, but in the dissenting opinion of Judge Torres Bernardez. The quoted sentence is aimed solely to specify what constitutes a final judicial finding (*res iudicata*), and, moreover, it relates to the treatment of an earlier decision that was not considered by the Court to be a judicial finding.

<sup>191</sup> U.S.-Czech BIT, article VI(a)(3).

dispute before different jurisdictions demonstrates the absence of a general principle of *lis pendens* in the BIT regime.<sup>192</sup>

Rather than suggest any general principle to a similar effect applied in respect of the Dutch-CR BIT, the Agreed Minutes between the CR and the Netherlands confirm that the question of parallel proceedings under different investment protection agreements was not addressed in their treaty.<sup>193</sup> The Netherlands further took the position that “*neither written, nor unwritten international law at present deals with this question*”.<sup>194</sup> In line with international jurisprudence, the Netherlands also affirmed the view that an arbitral tribunal is to decide on its own jurisdiction.

The lack of a general principle of *lis pendens* is further confirmed by the practice of human rights monitoring bodies. When the Optional Protocol to the International Covenant on Civil and Political Rights (“ICCPR”) was drafted, granting individuals the right to bring cases before the United Nations Human Rights Committee, it was considered necessary to include a specific provision incorporating a *lis pendens* rule into the Committee’s procedure. Article 5(2)(a) of the Optional Protocol provides that “*The Committee shall not consider any communication from an individual unless it has ascertained that ... [t]he same matter is not being examined under another procedure of international investigation or settlement*”. This provision was included at the request of the Council of Europe because of the possibility that individual claims would be brought under the ICCPR at the same time that they were being heard under the European Convention on Human Rights (“ECHR”). As the provision applies to claims brought by individuals only, however, leaving States the possibility of bringing parallel claims, the

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<sup>192</sup> About the dispute settlement clauses contained in the US BITs, *see* RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 147 (1995); KENNETH J. VANDEVELDE, *UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE* 163-64 (1992).

<sup>193</sup> Agreed Minutes, at 3.

<sup>194</sup> *Id.*

Council of Europe further found it necessary to recommend to European States that they bring human rights cases against other European States only before the ECHR.<sup>195</sup>

In cases where simultaneous proceedings have been brought, the U.N. Human Rights Committee considers article 5(2)(a) of the Optional Protocol to be the only limit on its ability to hear the case before it. If it finds that the parallel proceeding is not literally covered by the restrictively interpreted words of article 5(2)(a), then the Committee proceeds to hear the case without consideration of any general principle of *lis pendens*. Thus, for example, in the *Baboeram-Adhin v. Suriname* case, the Committee acted on the communications of eight individuals despite Suriname's objection that numerous international human rights organizations were already investigating the cases. The Committee considered that numerous "studies" of the situation in Suriname (including a study by the Committee on Freedom of Association of the ILO) did not amount to "examinations" of the case for the purposes of article 5(2)(a). It further determined that "*a procedure established by non-governmental organizations does not constitute a procedure of international investigation or settlement within the meaning of Article 5(2)(a) of the Optional Protocol.*" It decided this even with respect to an investigation by the International Committee of the Red Cross, "*irrespective of the latter's standing in international law.*" Finally, it decided that "*although the individual cases of the alleged victims had been submitted to [Inter-American Commission on Human Rights] (by an unrelated third party) and registered before that body, ... that case was no longer under consideration*" and therefore did not amount to a case "being examined" for the purposes of Article 5(2)(a).<sup>196</sup>

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<sup>195</sup> Resolution (70)17, adopted by the Committee of Ministers of the Council of Europe on 15 May 1970.

<sup>196</sup> *Baboeram-Adhin and others v. Suriname* (Comm. Nos. 146/1983 and 148 to 154/1983, 4 April 1985), U.N. Doc. CCPR/C/24/D/148/1983, para. 9.1.

The U.N. Human Rights Committee's refusal in the *Baboeram-Adhin* case to consider a case that had been completed in front of the Inter-American Commission on Human Rights as a bar to its hearing the same matter demonstrates not only its narrow construction of the *lis pendens* rule agreed to in the Optional Protocol, but also demonstrates the Committee's position that there is no general rule of *lis pendens*, or even *res iudicata* in its *ne bis in idem* form, as between international bodies.

**(b) Effect of award on future proceedings: *res iudicata* is recognised only pursuant to specific treaty provisions**

Just as there is no general principle of *lis pendens* in international law that prevents separately constituted tribunals from hearing the same matter at the same time, there is no general principle of *res iudicata* that prevents the later-seized tribunal from hearing the same matter as the formerly-seized tribunal or that would render the award of the later-seized tribunal ineffective. Rather, the *res iudicata* principle, described above, attaches to the decision of each tribunal, making its decision final and binding as between the parties for each case and not subject to any recourse—including review by the other tribunal.<sup>197</sup>

In international legal practice, when two treaties organize two different proceedings, the final decision of the first proceeding cannot interfere with the second proceeding absent a specific agreement to the contrary. The United States-Germany Claims Commission applied this rule explicitly in a 1930 decision. During a request for rehearing after a final award of the Commission had been rendered, one party argued that, among new evidence justifying a rehearing was a decision of the Tripartite Claims Commission between the United States, Austria and Hungary. Although the tribunal

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<sup>197</sup> See, e.g., U.N. Charter, article 94(1) (“Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”); ICJ Statute, article 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case”).

found that the earlier decision had “*a very remote bearing, if any*” to the case before it, it further held that the earlier decision was, in any event, “*irrelevant and immaterial because this Commission is not bound by the decisions of the Tripartite Claims Commission under the Treaty of Budapest.*”<sup>198</sup>

In light of this general rule, it was necessary to include an express provision in the European Convention on Human Rights excluding the possibility of having the same case (even assuming a triple identity of parties, cause of action and object) submitted to the Commission (today the Court) after it had already been decided by another tribunal.

Article 35(2) (formerly article 27(2)) of the ECHR provides:

*“The Court shall not deal with any [individual] application ... that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”*<sup>199</sup>

That article 35(2) ECHR is evidence of the lack in general international law of *res iudicata* being used in a *ne bis in idem* form, as far as tribunals taking their jurisdiction from different treaties are concerned, is proved by an interpretation of this provision within its context: the first paragraph of the same article makes reference to the previous exhaustion of domestic remedies “*according to the generally recognised rules of*

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<sup>198</sup> *Philadelphia-Girard Nat'l Bank (United States) v. Germany and Direktion der Disconto Gesellschaft* (21 April 1930), 8 R.I.A.A. 69, 74.

<sup>199</sup> A provision like article 35(2) ECHR is evidence of the non-existence of a hierarchical order between different international procedures. See LOUIS-EDMOND PETTITI, EMMANUEL DECAUX & PIERRE-HENRI IMBERT, *LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE*, 627 (1999). Moreover, the only way for the Court to know if there has already been another international procedure on the same matter at hand is through the declaration of the claimant, no other means of investigation by the Court being in place.

*international law*”. The absence of such a qualification when declaring the *ne bis in idem* rule at the following paragraph is revealing enough.

Finally, provisions co-ordinating the operation of two or more parallel international protection mechanisms are evidence of the lack of general principles in the area. Specific provisions have thus to be agreed upon at the international level in order to find a balance between the respect given to decisions already made under other international procedures and the protection of the individual’s right to seek international redress of his rights.<sup>200</sup> Provisions like those of article 35(2) of the ECHR (or article 47 of the Inter-American Convention on Human Rights) would not be necessary if the international legal system had already acquired an advanced level of juridical order able to coordinate the co-existence of different petition procedures. In any case, such provisions cannot be applied in a manner that would deny the individual the protection to which he is entitled according to the treaty in question.<sup>201</sup>

Moreover, article 35(2) of the ECHR does not apply to State-to-State disputes under the Convention but only in cases of individual applications. The *ne bis in idem* form of *res iudicata* embodied in it, thus, has a specific scope.

The ICCPR does not contain any *res iudicata* limitation for State actions, and when the Optional Protocol was drafted to permit individual submissions, no *ne bis in*

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<sup>200</sup> See, e.g., LAURIDS MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS: THE PRACTICE AND PROCEDURE OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ON THE ADMISSIBILITY OF APPLICATIONS FROM INDIVIDUALS AND STATES 146 (1980) (“*The aim of the coordination rule is to protect the authority of the international organs and the respect for legal decisions already taken.*”); M.E. Tardu, *The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A Study of Co-Existing Petition Procedures*, 70 AM. J. INT’L L. 778, 779-80 (1976).

<sup>201</sup> As far as human rights conventions are concerned, Mikaelson points out that it would be a denial of justice. Mikaelson, *supra* note 200, at 146. With reference to other treaties, Lowe recognizes that the fact that a State has sought adjudication under one treaty cannot deprive it of the right to seek a declaration in respect of another treaty. Lowe, *supra* note 146, at 203.

*idem* provision was inserted in that respect either, but only a *lis pendens* provision. (See *supra* Section B.2.a (ii).) Recognizing that there was no principle preventing a case previously decided by the European Commission from being resubmitted to the U.N. Committee, the Committee of Ministers of the Council of Europe recommended a model reservation clause for use by member States when signing the Optional Protocol:

*“In order to prevent the possibility of successive applications to the European Commission and the United Nations Committee, Member States of the Council of Europe which sign or ratify the Optional Protocol might wish to make a declaration, at the moment of signing or ratifying, whose effect would be that the competence of the United Nations Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or have already been examined under the procedure provided for by the European Convention.”*<sup>202</sup>

Many European States followed the Committee of Ministers’ recommendation and formulated the necessary reservation. Some States, however, did not consider it appropriate unilaterally to exclude the possibility of successive applications to the ECHR and the U.N. Committee. Of particular interest here, for example, neither the Netherlands nor the CR included this reservation in their signature or ratification of the Optional Protocol. With regard to such States, no reservation having been formulated, the U.N. Human Rights Committee could not refuse to hear a claim that had already been brought elsewhere unless a general international rule of *res iudicata* (covering *ne bis in idem*) existed to bar the claim. The Committee has in fact consistently refrained from finding such a rule.

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<sup>202</sup> Information Submitted in Accordance with Economic and Social Council Resolution 1159 (XLI) Regarding Co-operation with Regional Intergovernmental Bodies Concerned with Human Rights, UN Doc. E/CN.4/1057/Add.1 (23 Dec. 1970), at 18.

For example, in light of the Netherlands' decision not to include a *ne bis in idem* reservation, the U.N. Committee decided that prior decisions on the same matter were not a bar to its hearing of claims against the Netherlands. In *Hendriks v. Netherlands*, a Dutch national who had brought and lost an action in front of the ECHR proceeded to bring a case before the U.N. Committee—a case involving precisely the same parties, the same substantive rights, and the same facts as presented to the ECHR. The Committee held that “Article 5, paragraph 2(a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The Committee ascertained that the case was not under examination elsewhere. It also noted that prior consideration of the same matter under another procedure did not preclude the Committee’s competence as the State Party had made no reservation to that effect.”<sup>203</sup>

Legal scholars have recognised the jurisprudence of the U.N. Committee. Sudre, for example, has written:

“... l’exception de recours parallèle ne trouve à s’appliquer que si l’affaire portée devant le Comité des droits de l’homme est “en cours d’examen” devant (en pratique) la Commission européenne ou la Commission américaine. Il ne s’agit pas là de la reprise du principe ne bis in idem: le Comité peut traiter d’une affaire déjà

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<sup>203</sup> *Hendriks v. Netherlands*, Communication No. 201/1985, 27 July 1988, 96 ILR 623. In two other cases the Committee reached the conclusion that notwithstanding the same dispute had been previously brought before the European Commission of Human Rights, it maintained its competence over the matter. In fact, in *J.P.K. v. Netherlands*, “The Committee has found that the same matter was considered in 1988-89 by the European Commission of Human Rights; this does not, however, preclude the Committee’s competence, as the State party has made no reservation to that effect”. *J.P.K. v. Netherlands*, Communication No. 401/1990, 18 Nov. 1991. In *R.L.A.W. v. Netherlands*, the Committee held that “The consideration of the same matter in 1986-88 by the European Commission of Human Rights does not, however, preclude the Committee’s competence”. *R.L.A.W. v. Netherlands*, Communication No. 372/1989, 11 July 1990.

*examinée par une autre instance, et dont la procédure est close.*<sup>204</sup>

The practice of the U.N. Committee demonstrates that there is no general principle of *res iudicata* having a *ne bis in idem* effect as between proceedings submitted to bodies established by separate treaties, even where the triple identity of parties, substantive cause of action and object are the same. From a theoretical point of view, it could be possible to argue that this conclusion is in fact the result of the impossibility of identity of formal cause of action when two disputes are submitted under two separate treaties.<sup>205</sup> Nevertheless, in practice, the triple identity test is not applied at all, as the global concept of *res iudicata* is not considered relevant.

The London Tribunal and the Stockholm Tribunal are each international tribunals constituted for the limited purpose of resolving disputes under two separate treaties. The existence of a dispute under one treaty, a proceeding to resolve that dispute, or an award resolving that dispute can have no impact on the other proceeding.

The need for appropriate treaty provisions in order to establish the principles of *res iudicata* and *lis pendens* between tribunals established under different treaties has, moreover, been recognised in paragraph 4 of the Agreed Minutes of the recent consultations between the Netherlands and the CR on the interpretation and the application of the Dutch-CR BIT.

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<sup>204</sup> FREDERIC SUDRE, *DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME*, 484 (5<sup>th</sup> ed., 2001) (emphasis in original) [the exception for parallel proceedings is only found to be applicable if the matter brought before the Human Rights Committee is “being examined” before (in practice) the European Commission or the American Commission. This does not amount to the taking up of the *ne bis in idem* principle: the Committee can handle a case already examined by another body, and for which the procedure is concluded.]

<sup>205</sup> On this point, see Marceau, *supra* note 185, at 1113, who asserts: “legally speaking, the applicable law would not be the same; ... It is therefore difficult to speak of *lis pendens* or *res iudicata* between two international law jurisdictions.”

Based on the above, I conclude that under public international law *res iudicata* has a limited recognition, as equivalent to “finality” of a decision, but that it does not prevent a different adjudicatory body, absent a specific treaty provision to the contrary, from hearing either in parallel or subsequently a dispute being substantially the same than another one, previously examined by or pending before an other body, if this body has competence in accordance with its own jurisdictional basis.

**C. Even if the Concept of *Res Iudicata* Were Relevant to this Case, the Criteria for Its Applicability Are Not Met.**

Although there is no reason to apply the criteria of *res iudicata* in international law as between the London and Stockholm Tribunals, it is plain that the *res* at issue in the two proceedings is not the same.

As already stated, it is generally accepted in international law that the *res* that is *iudicata* is identified by three criteria: (i) the parties to the dispute; (ii) the cause on which the action is brought (*causa petendi*); and (iii) the object of the claim (*petitum*).<sup>206</sup>

**(a) Identity of parties**

**(i) In general**

The Stockholm and London Proceedings do not involve the same parties. The London Award settles a dispute between the CR and an American national, Ronald Lauder. The Stockholm Proceedings, on the other hand, involve a dispute between the CR and a Dutch company, CME Czech Republic B.V. In order to find *res iudicata* via the application of the triple identity test to the case at hand, one would need to consider that CME is the “same party” as Mr. Lauder—the indirect, controlling, but minority shareholder of CME.

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<sup>206</sup> See *supra* notes 144-145 and accompanying text.

As a general rule, an individual shareholder of a company and the company itself cannot be considered one and the same party in international law. In general international law, only the State of nationality of a company is entitled – after the company has exhausted all local remedies – to bring a diplomatic protection action against the State who violated the international standards on the treatment of foreigners.<sup>207</sup> For that purpose, it is a well-established rule of international law that the company is deemed to have the nationality of the State “*under the laws of which it is incorporated and in whose territory it has its registered office*”.<sup>208</sup>

BITs and other investment protection treaties introduce a right for covered investors to pursue directly their treaty rights in arbitration against the host country.<sup>209</sup> The scope of BITs is to guarantee an investor – be it a physical or a legal person – having the nationality of one contracting Party the treatment set out in the treaty. In the case before the Stockholm Tribunal, CME was entitled to seek redress from the CR for the violation of the Dutch–CR BIT resorting to the means provided for by the Treaty itself. CME’s right could not have been denied because Mr. Lauder (the minority – though controlling – shareholder of CME) enjoyed a similar right under a different treaty (US–CR BIT). It would have been a denial of justice.

In the specific context of investment disputes, an ICSID tribunal has refused to find an identity between a shareholder and its company for the purposes of a *lis pendens* analysis. In the *Benvenuti and Bonfant* case, the arbitral tribunal found a lack of identity

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<sup>207</sup> *Case Concerning the Barcelona Traction Light & Power Co. Ltd.* (Second Phase) (Belg. v. Spain) 1970 I.C.J. Rep. 4 (5 Feb. 1970), para. 88.

<sup>208</sup> *Id.* at para. 70.

<sup>209</sup> The ICJ noted the prevalence of this practice in the *Barcelona Traction* decision, and that no such agreement was in place between the parties to the dispute before it. *See id.* para. 90 (“*the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed.*”).

of parties between one case brought by a company against the Republic of the Congo, and a second case brought by the Government of the Congo against the shareholder of the company.<sup>210</sup> Similarly, applying the specific prohibition on parallel proceedings set forth in article VI(a)(3) of the United States-CR BIT, the London Tribunal (in a finding that is not subject to review or recourse) held that the case between CME and the CR was not the same dispute as the case between Mr. Lauder and the Czech Republic, stating, “*All other arbitration or court proceedings referred to by Respondent involve different parties, and deal with different disputes.*”<sup>211</sup>

In the *Council of Civil Service Unions* case, the European Commission on Human Rights similarly found that a union and its members are different parties for the purpose of the *res iudicata* analysis required under the European Convention.<sup>212</sup> Although the United Kingdom did not request the Commission to reach any particular conclusion on the application of Article 27(1)(b) (as it then was), the Commission nonetheless considered whether the triple identity test was satisfied. It concluded that the parties in each of the proceedings were different—complaints brought before the International Labor Organization (ILO) were on behalf of the Trade Union Congress whereas the complaints before the Commission were submitted by individuals and the Council of Civil Service Unions. The individuals were unable to present their claims before the ILO, which only examined complaints from organisations of workers and employees.<sup>213</sup>

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<sup>210</sup> *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo* (Case No. ARB/77/2) (15 Aug. 1980), VIII Y.B. COM. ARB. 145 (1983), at para. 1.14.

<sup>211</sup> London Award, para. 162.

<sup>212</sup> *Council of Civil Service Unions and others v. United Kingdom* (Application No. 11603/85, 20 Jan. 1987), 50 E.C.H.R. REP. 228 (1997).

<sup>213</sup> *Id.* at 237.

Thus the two sets of claimants were not assimilated for the *res iudicata* purposes of Article 27(1)(b).<sup>214</sup>

In any case, with respect to the identity of shareholders and companies under the *lis pendens* and *res iudicata* provision of the European Convention on Human Rights, it is clear, as a former member of the European Commission of Human Rights has stated, that a majority shareholder and the company he controls must be considered to be separate parties—even though the wording of the European Convention (“*substantially the same*”) is broader than the international standard (the “*same parties*”).<sup>215</sup>

(ii) International commercial arbitration and the group of companies theory

With reference to the practice of international commercial arbitration, the issue of the possible impact of relationships existing within groups of companies (parent company or shareholder/subsidiary) on arbitral clauses, on proceedings and on the effect of the award has been extensively discussed.

Professors Schreuer and Reinisch invoke the common law doctrine of “privity” to argue for a more flexible identification of different parties, which, however, that very

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<sup>214</sup> As noted by Professors Schreuer and Reinisch (Schreuer Opinion, para. 238), the solution is different under the European Convention if the union has in fact asserted the individual members’ rights in the earlier proceeding, and not its own rights. In the *Martin* case, the European Commission confirmed the general rule stated in the *Council of Civil Service Unions* case, but found that, since the circumstances were different, the wording of then-article 27(1)(b) (requiring a finding of “substantially the same claim”) was broad enough to consider that the parties were “substantially the same.” *Miguel Cereceda Martin and others v. Spain* (Application No.16358/90, 12 Oct. 1992), 73 E.C.H.R. REP. 120, 134 (1992). The French text of the *Martin* decision uses the wording of then-article 27 from the French version of the European Convention (“*essentiellement la même*”), which has been translated in the Schreuer and Reinisch opinion as “essentially the same”. This English translation gives the impression of a new standard, not based on the language of the treaty, but in fact it is only a liberal translation of language that should be rendered into English as “substantially the same”, which is the official English wording of then-article 27 of the Convention and is used in the official English version of the decision.

<sup>215</sup> See Stefan Trechsel, *Article 27*, in Pettiti et al., *supra* note 199, at 624.

doctrine prevents. In any case, such a notion of English and/or American law (in fact, they cite only domestic common law references), if at all applicable to the relationship at issue under those domestic legal systems, is unknown in international law as shown immediately above. Moreover, arbitral practice points to the opposite direction.

Authors who have dealt with the matter in international commercial arbitration tend to take an opposite approach, namely that the starting point of any analysis:

*“certainly is the privity of the arbitration clause which does not as such allow an extension to a non-signatory. A restrictive view prevails. An extension of the scope, reach and effects of an arbitration clause to a third non-signatory party has only been affirmed if very special circumstances existed, which justified or necessitated such an extension”.*<sup>216</sup>

The author, one of the most reputed Swiss experts on international commercial arbitration, stresses that the issue of considering the parent company bound by an arbitration agreement made by the subsidiary with a third party, or vice-versa the arbitration binding the parent as binding on the subsidiary, is not dealt with by arbitration rules. Also silent are national laws that in a given case might be controlling either as *lex arbitri* or *lex contractus*. Turning to transnational law or *lex mercatoria*, that is the criteria generally applied by international commercial awards, Blessing stresses that the criteria that have been considered relevant for basing such an extension, both in favour of one of the related companies against the third party and vice-versa, notwithstanding the absence of an arbitration clause between them, have been both subjective and objective. Among them he lists the “fair and reasonable expectation of the parties”, the “behaviour” of the party not bound by the clause that makes the independent contracting party believe that “the parent company was involved in the contract and its implementation”, as well

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<sup>216</sup> Marc Blessing, *Extension of the Scope of an Arbitration Agreement Clause to Non-Signatories*, 151, 160 (ASA Series No. 6, 1994) (specially dealing with this subject) (second emphasis added, other emphasis in original).

as the “active participation” of the non-signatory related party. These facts could lead the tribunal to construe such active participation in a manner “*to justify in exceptional circumstances a conclusion that the participating party which had not signed the arbitration clause should become bound thereunder or might avail itself of the benefits of the arbitration clause*”.<sup>217</sup>

Blessing concludes:

*“All individual elements of a case will have to be weighed very carefully, respecting the basic principle of the privity of contract and the clear notion that legal entities are distinct from each other and that, therefore, such fundamental principles cannot be easily removed by an arbitral tribunal unless very specific circumstances demand such a removal”.*<sup>218</sup>

This conclusion is accepted by many authors: thus, in his writing at the same symposium, Professor O. Sandrock of Munster flatly stated that as to arbitration “*the group-of-companies theory has to be rejected*”. First, the very idea of having a companies is based on the existence of certain relationships that presupposes that “*each member of such group maintains its legal personality*”; second, it is the involvement that normally different units of the group have in a given contractual relationship (even if some do not become formally a contractual party to it) that justifies their attraction to the arbitration clause.<sup>219</sup> Also the theory of “piercing the veil” of a corporation and reaching the “real owner” behind it is admitted in some jurisdictions and in international trade only

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<sup>217</sup> *Id.* at 161 (emphasis added).

<sup>218</sup> *Id.* at 161.

<sup>219</sup> Otto Sandrock, *Extending the Scope of Arbitration Agreements to Non-Signatories*, ASA Special Series No. 8, 17 June 1994, p. 167. This is also the position of French case law. See Eric Loquin, *Différences et convergences dans le régime de la transmission et de l' extension de la clause compromissoire devant les juridictions françaises*, CAHIERS DE L' ARBITRAGE 7, 15 (2002/1).

when the latter is hiding itself behind another entity for some illegal purpose, basically in order not to be liable for its acts.<sup>220</sup>

A careful analysis of the case-law shows that the group of company theory in international commercial relations has been the basis for the extension of the subjective application of an arbitral agreement only when some additional factual element concerning the relationship at issue has also been shown, such as fraud on part of the parent company to avoid being bound by the contract that it made the subsidiary sign; intervening in the negotiations or the deal; taking advantage of the contract; participating in its carrying out, agency or representative relations.<sup>221</sup> This result is also true for the leading case, quoted in Professor Schreuer and Reinish's opinion to support the contrary view: in the *Dow Chemical – Saint Gobain* award, a claim by Saint Gobain against the Dow Chemical parent was admitted although only a subsidiary of the latter had signed the contract with the arbitration clause. The ground for this conclusion was that:

*“the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.”*<sup>222</sup>

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<sup>220</sup> Sandrock, *supra* note 219, at 172.

<sup>221</sup> C. Jarosson, *Conventions d'arbitrage et groupes de sociétés*, ASA Special Series No. 8, 17 June 1994, at 214.

<sup>222</sup> *Dow Chemical France et at. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), IX Y.B. COM. ARB. 131, 136 (1984) (emphasis in original).

No case has ever “pierced the veil” and submitted to arbitration a unit of a group that was not a party to the arbitration agreement absent some specific subjective or objective additional element.<sup>223</sup>

The conclusions to be drawn for the present case are the opposite than those stated in the Statement of Claim or Reply and in the Schreuer Opinion. Theory and practice only permit the piercing of the corporate veil and extending the effect of an arbitration agreement to a non-signatory related within a group of companies to a signatory in exceptional circumstances and when those involved have been actively part of the contractual or economic relationship at issue.

This is also true for ICSID cases on which the Schreuer Opinion so extensively relies. Thus, in the *Holiday Inn v. Morocco* award of 1973, where parent companies that were not party of the contract containing the ICSID clause were co-claimants, as Professor Schreuer himself mentions:

*“The Tribunal rejected Morocco’s objections and recognised that Holiday Inns Inc. and O.P.C. were parties even though they had not been named as such in the Basic Agreement. The Tribunal relied specifically on the fact that the parent companies had participated in the carrying out of the contract.”*<sup>224</sup>

However, in that case the parent was joined in the arbitration to which the subsidiary was bound towards a third party. In our case, the parent is bound to the third party by a separate undertaking to arbitrate. The bases of the two arbitrations (CME–CR

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<sup>223</sup> Jarosson, *supra* note 221, at 217; Yves Derains & Sylvie Schaf, *Clauses d’arbitrage et groupes de sociétés*, J. DROIT ARBITRAGE INT. 231, 234-36 (1985). See also *Bay Hotel and Resort Limited and another v. Cavalier Construction Company Limited* [2001] UKPC 34 (15 July 2001), cited in CAHIERS DE L’ARBITRAGE 48 (2002/1-2) (a decision of the British Privy Council holding that a third party (subsidiary) could not be made a party to arbitral proceedings between the parent and a third party notwithstanding any factual involvement in the matter).

<sup>224</sup> ICSID Commentary, *supra* note 20, at 175 (discussing article 25).

and Lauder–CR) are moreover found in international treaties that neither a tribunal nor a State court have the authority to disregard. In such an instance, the issue is rather that of connected proceedings, as was examined above. Indeed, the discussion of the possible binding effect of an arbitration agreement made by a company of a group on another entity of the group has been always raised in the factual situation where such other entity was not bound by (the same or another) arbitral agreement with a third party. In our case, both the shareholder and the company are parties to separate undertakings to arbitrate with the same third party, and both have made use of their right. The doctrine invoked by the CR and Professors Schreuer and Reinisch is therefore inapplicable, as case law and doctrine demonstrate.<sup>225</sup>

Fundamentally, the group of companies theory is invoked when there is an expectation that a parent company is engaged with its subsidiary at the time of signature of the arbitration clause. Here, CME was not involved in the negotiation of the arbitration clause invoked by Mr. Lauder, and CME had no obligations under the U.S.-Czech BIT. The United States negotiated the arbitration clause for the benefit of American investors and there could not therefore have been any legitimate expectation (nor even possibility) that CME would be brought into the Lauder arbitration under a group of companies theory. Furthermore, there is a significant difference between extending the reach of an arbitration clause under the group of companies theory (or otherwise), to allow an additional party to participate in an arbitration, and extending the reach of an arbitral award to an additional party that was unable to participate in the underlying arbitration.

In any case, should the issue be addressed under the heading of group of companies, literature and case-law show that the arbitration agreement concerning the

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<sup>225</sup> Otto Sandrock, *Arbitration Agreements and Groups of Companies*, in *ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE* 625, 625-27 (Christian Dominicé, Robert Patry & Claude Reymond, eds., 1993).

effective economic contractual relation and binding the parties thereto (in our case: CME and the CR) might be extended to another entity of the group to which the one bound belongs. In our case, it is Mr. Lauder who would be bound by the award rendered in respect of the CME-CR relationship and not vice-versa!

As Professors Schreuer and Reinisch concede,<sup>226</sup> this was and would be the result of the *Dow Chemical-Saint Gobain* ICC award: where “*the tribunal considered the fact that the parent company exercised absolute control over its subsidiaries to be a crucial factor in extending the arbitration agreement to the parent which had not participated in it.*” (Emphasis added.)

The separate nature of the legal personality of a company and its shareholders is more than just a legal fiction. If the theory proposed by the CR were accepted, then the exercise of a right to act under a BIT by a shareholder who cannot obtain damages for all shareholders would prevent the company itself from exercising its independent right to protection for itself and all of its shareholders under another treaty, and thereby prevent the other shareholders from recovering any damages. The proposed application of the economic unity theory to separate arbitral proceedings would lead to an absurd result.

Thus, if the economic unity theory were to be applied at all in this case, which does not seem possible, careful consideration shows that it could only lead to the conclusion that the Lauder claim would have to be included in the CME claim. It would be absurd on the other hand to include the CME claim (covering the totality of the alleged “economic unit”) within the Lauder claim (brought by only a subpart of the alleged “economic unit”). It follows that the application of the economic unity theory could be invoked, if at all, only to challenge the award of the London Tribunal, and not the Stockholm Award.

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<sup>226</sup> Schreuer Opinion, at 74, para. 225.

Finally, the very limited applicability of “piercing the veil” and “single economic entity” theories does not permit reference or analogy to European competition regulation. The public purpose objectives of competition regulation, where, to some extent, enterprises are considered from an economic point of view as units irrespective of their legal structure within groups, is totally irrelevant to the case at issue here.

- (iii) In public international law as to claims of foreign investors

In customary international law, the right of shareholders to pursue a claim for an injury suffered by their company has been generally rejected. As stated before, the issue has come up in the past within the context of diplomatic protection and therefore when the national State of the company and that of the shareholder were different. When the national State of the company had declined to pursue the claim for injury against the third State where the assets of the company had been damaged by an action of that third State allegedly contrary to international law, the legitimacy of an action by the national State of the shareholders was denied. This decision was reached even when all the shareholders were nationals of the State that presented the claim. In such a case, the national State of the company did not intervene, in view of the limited or non-existent damage caused to its economy by the action of the third State.<sup>227</sup>

These were the facts and the holding of the famous *Barcelona Traction* case before the International Court of Justice in 1970.<sup>228</sup> The Court denied the *locus standi* of Belgium to protect Belgian shareholders of the Canadian company, Barcelona Traction,

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<sup>227</sup> In fact, US BITs exceptionally admit that in such a case of lack of an effective connection between the company and the economy of the contracting State of incorporation, the other contracting State may deny the benefits of the BIT to such a company, but only if control of it is exercised by nationals “*of a third country with which the denying party does not maintain normal economic relations*”. See, e.g., U.S.-CR BIT, article I(2).

<sup>228</sup> *Barcelona Traction*, *supra* note 207, at para. 40 ff.

whose assets had been expropriated by Spain.<sup>229</sup> According to this precedent, only the Netherlands could protect the investment made by CME, a Dutch company, in CR, not the US as the State of CME's major shareholder.

BITs and similar treaties were entered into specifically to grant distinct protection to shareholders when the investment is made through a company established in another country, by extending their coverage to "indirect investment". It is noteworthy that the Court in a *dictum* in the *Barcelona Traction* decision pointed out that bilateral treaties were the proper instruments to solve this issue.<sup>230</sup>

The *Barcelona Traction* jurisprudence is relevant in our case: in public international law, in the absence of a BIT provision extending protection to the shareholder, only CME would be protected and only the Netherlands would have *locus standi* in respect of the CR. Direct arbitration in the Netherlands–CR BIT is the procedural device that makes such protection effective. Direct arbitration cannot be displaced by the remedy available to a US shareholder of CME directly against the CR thanks to the extended protection granted to US "indirect investments" (made by a US investor through a Dutch company) by the separate treaty (the BIT of 1991) entered into by the US with the CR.

Some treaties have gone further in order to protect foreign investments even more effectively, in view of current modalities of effecting investments through local subsidiaries in the host State. Thus, article 25(2)(b) of the ICSID Convention allows a foreign investor and the host State to agree that the local company, established in the host State by the foreign investor in order to effect the investment, may be considered as a

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<sup>229</sup> *Id.* at para. 88 ("the general rule of international law authorizes the national State of the company alone to make a claim." (emphasis added)).

<sup>230</sup> *Id.* at para. 90.

national of another Contracting State, in order that the local subsidiary may have recourse to available ICSID direct arbitration.

This provision grants procedural rights (not available under general international law) to the local subsidiary, in lieu of or besides the foreign parent investor's rights.<sup>231</sup> Regardless of article 25(2)(b) of the ICSID Convention, under customary international law and as specified by virtually standard BITs clauses,<sup>232</sup> the assets of a local company owned by a foreign investor are protected against violations of international law, including unlawful expropriation by the host State, as an investment of that foreign owner.

In light of the above, ICSID case law cited in the Opinion is immaterial and irrelevant.<sup>233</sup> Thus the *Amco v. Indonesia*, the *Klöckner v. Cameroon* and the *AMT v. Zaire* ICSID awards involved such a local subsidiary incorporated in the host State: the protection granted to the foreign investor<sup>234</sup> for investments made through a local company in the host State was not dependent on an “economic approach” drawn from the group of companies theory.<sup>235</sup> These decisions constitute an application, in conformity

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<sup>231</sup> This is stressed by Professor Schreuer in his ICSID Commentary. *See* ICSID Commentary, *supra* note 20, at 290 *et seq.*

<sup>232</sup> *See ELSI*, *supra* note 76, at 15 *et seq.* The ICJ held that the assets of ELSI, the Italian subsidiary of the two US companies for which the US asserted diplomatic protection, were protected from unlawful expropriation and interference in the control and management by Italy under the US–Italy Friendship, Commerce and Navigation Treaty of 1948. *See also* article 1(a) (ii) of the Dutch-CR BIT (including among protected investments “*shares, bonds and other kind of interests in companies and joint-ventures, as well as rights derived therefrom*”); Dolzer & Stevens, *supra* note 192, at 27 (discussing different definitions in BITs).

<sup>233</sup> *See* Schreuer Opinion, at 74-75.

<sup>234</sup> Amco was a UK company, Klöckner was German and AMT a US company, and all of these home countries were signatories of ICSID.

<sup>235</sup> Schreuer Opinion, at 75.

with the ICSID Convention object and purpose, of an accepted notion of general international law.<sup>236</sup>

In conclusion, the *locus standi* granted to shareholders in ICSID arbitration when the agreement had been signed by their subsidiaries is based on specific provisions and grounds internal to the ICSID regime. This jurisprudence has not prevented the subsidiary from relying on the arbitration agreement, but has also allowed the parent company to act concurrently in the same proceeding, thus overcoming any lack of *locus standi* of the shareholders under general international law. This ICSID case law and the underlying principles are therefore irrelevant in order to challenge the competence of the Stockholm Tribunal to entertain the case because of the parallel arbitration between the shareholder and the host State based on a different BIT.

If anything, under general international law (referred to in article 8(6) of the Dutch-CR BIT) the arbitration between CME, as the direct investor, and CR, as the host country, has precedence over the parallel claiming of rights in respect of the same investment by a shareholder, even if controlling.

In the Agreed Minutes, the Netherlands stressed, consistently with the above conclusion, that: “*Claims of different legal entities, even though they may be controlled by the same economic entity, are not necessarily the same claims and difference in legal personality has been recognised by Tribunals (see e.g. the ICJ Barcelona Traction case).*”<sup>237</sup> The position of the Netherlands therefore conforms with the well-established

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<sup>236</sup> The sentence of the *Klöckner* award quoted at 75 of the Opinion makes it clear: “*The Establishment Agreement reflected the contractual relationship between a foreign investor, acting through a local company, and the host country of this foreign investor*”. The sentence of the *Amco Asia* award quoted in the Opinion goes in the same direction and is quoted with approval by Professor Schreuer in his ICSID Commentary. See ICSID Commentary, *supra* note 20, at 176. Indeed, Professor Schreuer refers to the above cases in his commentary on article 25(2)(b). See ICSID Commentary, *supra* note 20, at 293.

<sup>237</sup> Agreed Minutes, at 3.

position in international law that the corporate entity must be distinguished from its shareholders.

**(b) Identity of cause of action**

Two separate treaties provide two different causes of action, i.e. the legal grounds or the legal provisions that sustain the claim made (*causa petendi*). Even if two treaties include textually identical provisions, claims made under one or the other of them cannot be considered as having the same cause of action, since the legal provisions are included in different legal instruments.

It is clearly accepted in international law that even if the wording of two treaties is identical, they can nevertheless lead to different outcomes. Thus in the *Mox Plant* case, the International Tribunal for the Law of the Sea stated that “*the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux preparatoires.*”<sup>238</sup>

The factual identity or similarity of the provisions of two treaties may imply that a State, which is a party to both, may breach both of them by the same conduct if such conduct is relevant under both. As the Tribunal noted in the jurisdictional phase of *Southern Bluefin Tuna*:

*“it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty.*

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<sup>238</sup> *The Mox Plant Case* (Ireland v. U.K.), Request for Provisional Measures, ITLOS/Case No. 10, 8 Dec. 2001, para. 51. See also Marceau, *supra* note 185, at 1111 (“*All these references seem to point towards the cumulative application of various dispute settlement mechanisms under different treaties, in the absence any clear prescription to the contrary.*”).

*There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising hereunder.”<sup>239</sup>*

In the *Southern Bluefin Tuna* case, the question of whether the dispute under the two relevant treaties was “the same” or not was irrelevant to the Tribunal’s analysis. The Tribunal was not confronted with issues of *lis pendens* or *res iudicata*, as only one proceeding was instituted. The primary question for the Tribunal was whether it had jurisdiction in accordance with its constitutive instrument, the United Nations Convention on the Law of the Sea. This Convention would not permit an *ad hoc* tribunal to exercise jurisdiction if avenues of dispute settlement under a separate agreement were not exhausted and that agreement did not exclude any further procedure.<sup>240</sup> The parties in this instance had another treaty in force between them that applied to the dispute and that treaty did exclude recourse to the compulsory procedures in the Law of the Sea Convention. There was no issue of two international tribunals addressing factually similar disputes under different treaties.

In circumstances where there are parallel proceedings under two separate treaties, so long as each tribunal is satisfied that it has jurisdiction under the applicable dispute resolution clause, two different tribunals interpreting provisions of different treaties that are textually identical can reach different conclusions, because of the different context, different arguments raised, and the different evaluation of facts and law by different arbitrators.

The same reasoning explains the practice of the UN Human Rights Committee (described above) of accepting petitions irrespective of those claims having already been submitted to other human rights bodies applying norms having the identical content.

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<sup>239</sup> *Southern Bluefin Tuna Case* (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, (2000) 39 ILM 1359, para. 52.

The causes of action provided by the United States–CR BIT and the Dutch–CR BIT, respectively, therefore can not be considered to be legally the same, even if the wording in them was identical—which it is not.

In any case, as far as the Stockholm proceedings are concerned, there is a more fundamental reason by which it is legally impossible to oppose the London Award to the Stockholm Proceedings. The two tribunals were constituted under two bilateral treaties to which different States are parties. According to international law, when the same States are not parties to same treaties, then each treaty is, for the State not party to it, “*res inter alios acta*”. This rule is codified in article 34 of the Vienna Convention on the Law of Treaties, and prevents a State from invoking against a third State the provisions of a treaty to which that State is not party.<sup>241</sup> The legal relationship created by a treaty between its contracting States cannot be altered by another treaty to which one of those contracting States is not a party. As far as the third Party is concerned, the treaty cannot work either to its benefit or to its detriment. This rule is also known as “*pacta tertiis nec nocent nec prosunt*”.<sup>242</sup>

Under international law, it is not possible to invoke a treaty to which one State is a non-party in order to deny its rights under another treaty to which it is a party. In this case, the Netherlands has a right under its treaty with the CR to see the CR comply with the Award rendered by the Stockholm Tribunal. The use of a decision arising under the United States-CR treaty to interfere with the effectiveness of an award under the Dutch-CR treaty would be an interference with the sovereign rights of the Netherlands based on

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<sup>240</sup> United Nations Convention on the Law of the Sea, article 281.

<sup>241</sup> Article 34 reads: “A treaty does not create either obligations or rights for a third State without its consent.”

<sup>242</sup> See Brownlie, *supra* note 72, at 628; Combacau & Sur, *supra* note 176, at 151-52; Nguyen Quoc Dinh, *supra* note 176, at 238 and 250.

an engagement to which the Netherlands is not a party. The London Award is, in itself, *res inter alios acta* for the Stockholm Proceedings.

A different interpretation would not only be contrary to established principles of international law, but would also be inconsistent with the purpose of the U.S.-CR BIT, which is to afford protection to U.S. investors—not to deprive companies and investors of third States of their own protection.

**(c) Identity of the object of the claim**

The determination of whether the objects of two claims (*petitum*) are the same is primarily a factual determination to be made by studying the relief requested in the two instances. In this case, the problem posed is that a minority shareholder (in terms of economic interest) in a company sought relief from the London Tribunal in an amount representing his minority interest in the company, while the company itself sought relief from the Stockholm Tribunal in an amount representing the entirety of the damage suffered. Under any standard, it is difficult to find that a minority and a totality are “identical.” If the purpose of the identity of object requirement extended so far as to prevent not just identical, but overlapping claims, then it could be a bar only to the minority claim (in this case, of Mr. Lauder) and not of the totality claim (of CME). In practice, however, the problem of overlapping claims is dealt with by rules respecting double recovery, not *lis pendens* and *res iudicata*.

Generally speaking, it would be for the country where recovery would be sought through enforcement of one of the two awards to determine under domestic law whether any previous recovery under the other award should be taken into account as a deduction.

#### IV. CAUSATION

The Stockholm Award contains a section entitled “Causation of damage by Council’s actions and omissions.” I have been asked to express a legal opinion as to the way the international law of causation was stated and applied by the Tribunal, and, in particular, to analyze the Tribunal’s references to “joint tortfeasors” in that section.

##### A. The Law of Causation

The principle governing the international law of State responsibility in the field of causation is that a State is obliged to make reparations only if, and only to the extent that, the injury sustained by the claiming victim is connected by a causal link to the wrongful act of the State.

In its very first award, rendered on 17 August 1923, the Permanent Court of International Justice found that Germany breached its international obligations by its refusal of passage through the Kiel Canal to the S.S. Wimbledon. The Court then held that Germany “*is responsible for the loss occasioned [“causés” in the authoritative French text] by this refusal.*”<sup>243</sup> Similarly, in the Permanent Court of Arbitration proceedings in the *Lighthouses Case*, the tribunal stated that “*pour qu’un dommage soit générateur de responsabilité, il ne suffit pas qu’il soit consécutif à une faute; il faut encore qu’il existe un lien de causalité entre le fait et le dommage*”.<sup>244</sup> More recently, the Iran-US Claims Tribunal has concluded, “*the question of causation cannot be ignored, as the Respondent can be held liable for damages only if wrongful actions attributable to it were a substantial factor in causing the damages*”.<sup>245</sup> The need for a causal link has also

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<sup>243</sup> *Case of the S.S. Wimbledon*, P.C.I.J., Series A, No. 1, p. 15, 30 (17 Aug. 1923); *see also id.* at 32 (disallowing damages for expenses “*not connected with the refusal of passage*”).

<sup>244</sup> *Affaire relative à la concession des phares de l’Empire Ottoman* (Greece/France) (24/27 July 1956), 12 R.I.A.A. 155, 220 [for an injury to result in responsibility, it is not enough that it follows from a wrongful act; there must also be a causal link between the act and the damage].

<sup>245</sup> *Jack Rankin v. Iran*, Award No. 326-10913-2 (3 Nov. 1987), 17 IRAN-US CL. TRIB. REP. 135, at 149.

been explicitly recognised in the Security Council Resolution establishing the United Nations Compensation Commission, which states that Iraq “*is liable under international law for any direct loss, damage... or injury... as a result of Iraq’s unlawful invasion and occupation of Kuwait*”.<sup>246</sup>

In its work on the codification of the law of State responsibility, the International Law Commission reaffirmed the existence of the requirement of a causal link in article 31(1) of the Articles on State Responsibility, which states, “*The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*” The included requirement of a causal link between the internationally wrongful act and the injury is completely non-controversial and it can in no way be suggested, as Professors Schreuer and Reinisch do, that article 31’s reference to this requirement falls into the category of “progressive development” of international law.

The ILC Articles on State Responsibility have been prepared by eminent international lawyers selected for their expertise from all parts of the world, and their views are entitled to substantial weight for their thorough analysis and exposition on international law. Article 31 was adopted by thirty-six of the world’s most distinguished international lawyers (among them the arbitrator appointed by the Czech Republic for the quantum phase, Ian Brownlie, who sat on the drafting committee preparing that very sentence, and Professor Schreuer’s colleague at the University of Vienna, Gerhard Hafner). The International Law Commission is an organ of the United Nations and its mandate under the UN Charter is to codify and progressively develop international

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<sup>246</sup> UN Security Council Resolution 687 of 3 April 1991, para. 16.

law.<sup>247</sup> The Articles on State Responsibility have been commended to the attention of all governments by the General Assembly.<sup>248</sup>

In my opinion, the Tribunal fully respected the need to determine whether there was a causal link between the wrongful act attributed to the State and the injury suffered by the claiming party. It properly recognised that the relevant question in international law is not the temporal link between a wrongful act and an injury, but the existence of a causal link.<sup>249</sup> The Tribunal then devoted an entire section of its award to the analysis of the causal link as applied to the facts proven to it.<sup>250</sup>

The jurisprudence on causation does not attempt to establish more detailed legal standards than that applied by the Tribunal. This is because tribunals' determinations of whether a required causal link is present in a given case turn not on fine legal standards, but rather on an appreciation of the factual circumstances presented. Writing in 1929, former President of the Permanent Court of International Justice Dionisio Anzilotti, in his leading treatise on international law, wrote:

*Le principe étant posé que le dommage, pour donner lieu à indemnité, doit être une conséquence du fait illicite, c'est ensuite une question d'espèce que de déterminer si le rapport de causalité existe et quelle en est l'importance dans la réunion d'autres causes. La question ne peut être tranchée qu'espèce par espèce, et il est par suite utile que la jurisprudence reste libre de procéder de la façon dont elle a fait jusqu'ici.*<sup>251</sup>

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<sup>247</sup> UN Charter, article 13.

<sup>248</sup> General Assembly Resolution A/RES/56/83 of 28 January 2002.

<sup>249</sup> See Stockholm Award, para. 527.

<sup>250</sup> *Id.* at paras. 575-85.

<sup>251</sup> DIONISIO ANZILOTTI, COURS DE DROIT INTERNATIONAL 533 (1929) [The principle being posed that damage, to give rise to compensation, must be a consequence of an unlawful act, then becomes a

In 1999, dealing with the problem of complex causation, Nguyen Quoc Dinh, Dailler and Pellet concluded: “Anzilotti avait raison, lorsqu’il écrivait que ‘c’est une question d’espèce de déterminer si le rapport de causalité existe.’”<sup>252</sup>

In application of the requirements of international law, it is common practice in international awards, including in investment disputes, for tribunals merely to state that they have found a causal link between a wrongful act and a claimant’s damages.<sup>253</sup>

Despite international tribunals’ tendency to provide only the briefest analysis and conclusions with respect to causation, I am unaware of any decision setting aside an international award for an error in its analysis of the law of causation. As for the application of that law to the facts, no review is possible in international matters.

The Stockholm Award reflects a more accurate and detailed analysis of the international law of causation than most international decisions. In a fashion much more thorough than usual in findings of international tribunals, the Tribunal devoted an extensive section of its Award to the analysis of the causal link and to the statement of the reasons for its findings.<sup>254</sup>

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question of the facts of the case to determine if the causal relationship exists and what is the importance of it among all the causes. The question can only be resolved on a case by case basis, and it is therefore useful for the jurisprudence to remain free to proceed in the fashion in which it has done until now.].

<sup>252</sup> NGUYEN QUOC DINH, P. DAILLER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC*, 768, para. 486 (6<sup>th</sup> ed., 1999) [Anzilotti was right, when he wrote that “it is a question of the particular case to determine if the causal relationship exists”].

<sup>253</sup> *See, e.g., American Manuf. & Trading Inc. v. Republic of Zaire*, Case No. ARB/93/1, 36 ILM 1531, 1552, at para. 7.01 (Nov. 1997) (“Suffice it to prove that Zaire has not fulfilled its obligation of vigilance, and . . . to prevent the occurrence of a given event . . . , giving rise to losses, damages and injuries sustained by AMT.”).

<sup>254</sup> Stockholm Award, paras. 575-585.

In light of the foregoing, it is difficult to see what rule of the international law of causation was disregarded by the Tribunal.

**B. Concurrent Causes and Joint Tortfeasors**

The Tribunal had to deal with the objection, raised by the CR, that “*no harm would have come to CME’s investment without the actions of Dr. Železný; hence, the Media Council and the Czech State are absolved of responsibility for the fate of CME’s investment.*”<sup>255</sup> The CR’s argument led the Tribunal to a thorough analysis of the effects of Dr. Železný’s actions on the causal link connecting the Media Council’s actions and the loss of CME’s investment.

The Tribunal first considered that “*a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury.*”<sup>256</sup> It referred therefore to situations where “*the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State.*”<sup>257</sup> The Tribunal considered that in such cases the State is responsible only for the consequences (in legal terms) of its own wrongful acts. Referring to the general rule of causation in international law (defined above in Part IV.A of this opinion), and quoting the ILC, the Tribunal stated that “*unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.*”<sup>258</sup> Applying this legal standard to the facts presented to it, the Tribunal concluded “*Pursuant to these standards, the allocation of*

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<sup>255</sup> Stockholm Award, para. 580.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at para. 583.

<sup>258</sup> *Id.*

*injury or loss suffered by CME to the Media Council's acts and omissions is appropriate.*"<sup>259</sup>

The object of the Tribunal's reasoning in this section H(II)(2)(5) of the Stockholm Award ("Causation of Damage by Council's Actions and Omissions") is only the existence of a causal link between the Media Council's wrongful acts and the prejudice suffered by CME. To give full weight to the CR's arguments about Dr. Železný's role, the Tribunal considered the possibility that Dr. Železný had separate legal responsibility, *e.g.* as a tortfeasor, for CME's loss and usefully clarified the consequences of parallel proceedings directed against Dr. Železný.<sup>260</sup>

Despite this useful consideration of the possibility of Dr. Železný's separate liability, the Tribunal based its finding of the responsibility of the CR: *first*, solely on wrongful acts of the Media Council attributable to the CR and, *second*, causally connected to the injuries suffered by CME. *Third*, this State responsibility cannot be altered by any separate responsibility of a private individual such as Dr. Železný.

### **1. Attributability of the wrongful act to the State**

States are juridical persons. They act through organs (whether composed of one physical person, such as a head of State, or of numerous people, such as a parliament or a Media Council) or through agents. One question that can sometimes lead to difficulties in practice is whether the actions of one or more physical persons can be attributed to a State, as a separate juridical person. The CR is a party to the BIT. The CR is the respondent in the Stockholm arbitration proceedings. The CR can be held responsible for an act in breach of the treaty under which the Tribunal was constituted only if such wrongful act can be attributed to the CR.

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<sup>259</sup> *Id.* at para. 585.

<sup>260</sup> *Id.* at paras. 580-83.

The Tribunal found that the acts of the Media Council were in breach of the Treaty and considered that the acts of the Media Council were attributable to the CR. It barely needs to be stated that under international law the State as a person must answer for the actions of such State authorities as the Media Council, no matter how powerful or legally independent such authorities may be under the constitution or municipal laws of the State.<sup>261</sup> The attribution of the acts of the Media Council to the CR is not really questionable. Para. 362 of the Stockholm Award shows that the CR accepted such attribution.

The acts of the Media Council were considered to be in breach of the Treaty,<sup>262</sup> and only those acts were attributed by the Tribunal to the CR. Closing the discussion on causation, para. 585 of the Stockholm Award does not leave any doubt as to the fact that the causal link was established between the acts of the Media Council (wrongful acts attributable to the CR) and the prejudice suffered by CME. That conclusion does not purport to establish the attribution of Dr. Železný's acts to the State, but only to establish that the prejudice suffered by CME through Dr. Železný was caused by the Media Council's acts—which were attributed to the CR.<sup>263</sup>

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<sup>261</sup> For example, article 4(1) of the ILC Articles on State Responsibility reads: “*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*” (Emphasis added).

<sup>262</sup> Stockholm Award, paras. 586-614.

<sup>263</sup> In the *Diplomatic and Consular Staff Case*, the International Court of Justice similarly found the Islamic Republic of Iran liable for its failure to protect hostages who were being held in the United States' embassy and consular offices by private Iranian citizens. *United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980 I.C.J. REP. 3, 31-33 (24 May 1980). The Court examined the conduct of Iran and determined its liability for its omissions in protecting the diplomatic and consular staff. The fact that private citizens took the United States' staff hostage did not alleviate Iran's responsibility for its failure to protect those staff. As a separate issue, the Court also examined whether the acts of those private individuals could be attributed to the State. If the individuals' acts could be attributed to Iran, however, that would have resulted in different breaches of international law. Issues of attribution in no way affected a finding of Iran's responsibility for its failure to protect

The Tribunal stated at the beginning of its analysis of the merits of the case that “*The Czech Republic violated the Treaty by actions and inactions of the Media Council which led to the complete collapse of the Claimant’s and the Claimant’s predecessor’s investment in the Czech Republic*”.<sup>264</sup> Reviewing the claims relating to 1996, the Tribunal then stated that “*The Media Council, acting on behalf of the Czech Republic, in 1996 breached the Treaty . . .*”<sup>265</sup> Again, analyzing the claims of CME relating to actions in 1999, the Tribunal found that the Czech Republic was “*acting through its broadcasting regulator, the Media Council,*” when it improperly supported Dr. Železný.<sup>266</sup> Setting aside any possible doubt, section H(II)(2)(6) of the Award, entitled “The Respondent breached the Treaty”, starts with the preliminary comment that “*By the Media Council’s actions and failures to act, the Respondent has violated its obligations towards the Claimant and its predecessors under the Treaty*”. (Emphasis added.) The Tribunal goes on to complete this section with the statement:

*The Czech State acted towards the Claimant and its predecessors as investors under the Treaty solely by acts of the regulator, the Media Council. . . . The only task for this Tribunal is to judge whether the actions and omissions of the Media Council were in compliance with the Treaty. The Tribunal’s considered conclusion is that the actions and failures to act of the Media Council as described above, affecting CME and CNTS, were in breach of the Treaty.*<sup>267</sup>

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the diplomatic and consular staff. Similarly, the Stockholm Tribunal did not need to consider whether the acts of Dr. Železný or CET 21 were attributable to the CR—the CR was liable for its own conduct in violating the Treaty.

<sup>264</sup> Stockholm Award, para. 427 (emphasis added).

<sup>265</sup> *Id.* at para. 538 (emphasis added).

<sup>266</sup> *Id.* at para. 558 (emphasis added).

<sup>267</sup> *Id.* at para. 590.

The Tribunal went on, coherently, to state that every breach of the Treaty it found was, as a result of actions and omissions of the Media Council, attributed to the CR.<sup>268</sup>

The text of the Stockholm Award makes clear that the liability of the CR to pay reparations to CME was based solely on acts of the Media Council attributable to the CR, and not on the acts of any other person or entity.

As stated above, for the responsibility of the CR to be established, international law requires that there be a causal link between these wrongful acts of the Media Council, attributed to the Czech Republic, and the damages suffered by CME.

## **2. Causal link between the wrongful act and the prejudice**

To establish causation in the Stockholm Award, the Tribunal made a thorough study of the factual circumstances and the applicable legal standards before concluding, in paragraph 585 that:

*“Pursuant to these standards, the allocation of injury or loss suffered by CME to the Media Council’s acts and omissions is appropriate. The Media Council, when coercing CNTS in 1996 to amend its MOA and to implement the Service Agreement must have understood the foreseeable consequences of its actions, depriving CME of the legal “safety net” for its investment in the Czech Republic. Also in 1999 the Media Council must have foreseen the consequences of supporting Dr. Železný, in dismantling the exclusiveness of CNTS’ services for CET*

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<sup>268</sup> *Id.* at para. 609 (“This qualifies the Media Council’s actions in 1996 and actions and inactions in 1999 as expropriation under the Treaty”); *id.* at para. 611 (“The Media Council’s intentional undermining of the Claimant’s investment in CNTS equally is a breach of the obligation of fair and equitable treatment”); *id.* at para. 612 (“the Media Council’s actions and inactions in 1996 and 1999 were unreasonable”); *id.* at para. 613 (“The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant’s investment”); *id.* at para. 614 (“The Media Council’s actions as described above are not compatible with the principles of international law”).

*21 by the Council's regulatory letter of May 15, 1999, which supported Dr. Železný actions 'to harm CNTS.'*”

It is beyond the scope of any expert opinion to review the entire body of evidence submitted to an arbitral tribunal and to purport to review the correctness of the tribunal's appreciation of the facts. Nor is this a proper ground for challenging an international award such as the Stockholm Award before a domestic court, in view of the restrictions of that court's competence in this respect (as discussed above), which does not extend to reviewing the merits. Rather, an expert opinion can simply analyze whether a tribunal in fact presented the findings necessary for the application of the law.

In its statement of reasons, the Stockholm Tribunal respected the causation requirement of the international law of State responsibility. It did so by making the factual finding that the “*Media Council . . . must have understood the foreseeable consequences of its actions*” in 1996 and “*must have foreseen the consequences of supporting Dr. Železný*” in 1999.<sup>269</sup> Even though it is difficult to see how such a finding of an international tribunal can be subject to review, it is clear that this reasoning is well within the practice of international law.

**(a) The foreseeability analysis as undertaken by international tribunals**

As noted above, any detailed discussion of causation is relatively rare in international practice. However, when international tribunals detail the basis of their findings on causation, they generally take into consideration whether the consequences of the wrongful act should have been foreseen by the actor. A finding that the consequences in fact should have been foreseen, is regularly considered a sufficient factual finding to fulfill the requirement of causation in international law.

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<sup>269</sup> Stockholm Award, para. 585.

In the well-known *Samoan Claims* award, Oscar II, King of Sweden and Norway, as sole arbitrator, found Great Britain and the United States liable for reparations to German interests in Samoa allegedly resulting from the Anglo-American act of arming and supporting a faction of Samoans. In making this finding, the King stated, “*it ought to have been foreseen that the said actions on the part of the British and American authorities . . . should exasperate [the opposing faction] and greatly endanger the peace of the country . . .*”<sup>270</sup> Making a proposal for the fulfillment of this award in their Joint Report No. II of 12 August 1904, the American and British Commissioners recommended to offer Germany an indemnity covering the damages “*which a reasonable man in the position of the wrong-doer at the time would have foreseen as likely to ensue from his action*”.<sup>271</sup>

Similarly, in perhaps the leading international case on complex causation, the arbitral tribunal in the *Naulilaa Incident Case* found that Germany’s destruction of a fort in Portuguese-controlled Angola was causally linked to Portuguese losses after a rebellion by the local population. The tribunal stated that “*les Allemands . . . devaient compter que leur action militaire, dans une contrée tout récemment pacifiée, entraînerait des conséquences redoutables pour l’autorité portugaise*”.<sup>272</sup> Doctrine accepts the formulation in the *Naulilaa* case as authoritative.<sup>273</sup>

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<sup>270</sup> *Samoan Claims* (Germany/Great Britain/United States of America, 14 Oct. 1902), 9 R.I.A.A. 15, 26.

<sup>271</sup> Quoted in MARJORIE WHITEMAN, 3 DAMAGES IN INTERNATIONAL LAW 1780 (1943). Professors Schreuer and Reinisch reference the *Samoan Claims* award, but they quote from this U.S./British proposal, rather than from the award itself. In fact, as we will see, the test stated in the quoted Joint Report is not materially different from the test applied in the original award.

<sup>272</sup> *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l’Afrique (sentence sur le principe de la responsabilité)* (Portugal/Germany, 31 July 1928) 2 R.I.A.A. 1013, 1032 [hereinafter *Naulilaa Incident*] [the Germans . . . ought to have foreseen that their military action, in a country only recently pacified, would entail significant consequences for the Portuguese authority].

<sup>273</sup> Nguyen Quoc Dinh, *supra* note 176, at 768.

Applying the “proximate cause” standard established in *Administrative Decision II*, E.B. Parker, umpire of the United States-Germany Claims Commission, stated in the *Crabtree* case that “it is fairly inferable from the record that it could reasonably have been foreseen that this treatment would result, and that it did in fact result, in reducing his already impaired vitality and contributed to the permanent impairment of his health”.<sup>274</sup>

To establish the causal link in the CME – CR arbitration, the Tribunal took into consideration the fact that the Media Council (and therefore the CR) “must have foreseen” the consequences of its wrongful acts. In this way, it followed a line of jurisprudence, described above, established by tribunals having paid careful attention to issues of causation.

**(b) The Tribunal correctly stated and applied a foreseeability analysis**

Professors Schreuer and Reinisch criticize the Tribunal’s analysis of causation on two grounds. First, they argue that the Tribunal erred in its appreciation of the facts of the case.<sup>275</sup> A debate over the facts of the case is, however, beyond the scope of this opinion and is also outside of the competence of any domestic court faced with a challenge for an annulment or setting aside of an international award. Second, they argue that the Tribunal misunderstood the “foreseeable” test of causation.<sup>276</sup>

Professors Schreuer and Reinisch consider that the “foreseeable” test requires not only that the consequences of an act be theoretically foreseeable, but that they be reasonably foreseeable.<sup>277</sup> They rely for this proposition primarily on Whiteman’s report

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<sup>274</sup> *Leslie H. Crabtree* (U.S. v. Germany), 8 R.I.A.A. 32, 34 (14 Jan. 1927).

<sup>275</sup> Schreuer Opinion, paras. 181-82.

<sup>276</sup> *Id.* at paras. 183-84.

<sup>277</sup> Schreuer Opinion, para. 183.

of the U.S./British recommendation on the execution of the *Samoan Claims* award.<sup>278</sup> As noted above, King Oscar II, the sole Arbitrator, considered that Great Britain and the United States should have refrained from actions that had harmful consequences that “ought to have been foreseen”.<sup>279</sup> King Oscar II thereby adopted the same reasoning used 24 years later in the well-known *Naulilaa Incident Case*, referred to above, where the Tribunal held that the Germans “*devaient compter que leur action ... entraînerait des conséquences redoutables pour l’autorité portugaise*”.<sup>280</sup>

Even if the Tribunal had not in fact applied the very standard proposed by Professors Schreuer and Reinisch (although, as we will see, it did), it would be difficult to criticize this or any other causation finding in an international decision on the basis of a subtle distinction in the wording used to describe the test. In fact, it is clear from a thorough review of international sources that “[v]arious terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise”.<sup>281</sup>

Moreover, and more fundamentally, the test relied upon by Professors Schreuer and Reinisch from the *Joint Report No. II*, “reasonably foreseeable”, is not different from the general standard actually referred to in the *Naulilaa Case*, and in the *Samoan Claims Award*: “ought to be foreseen”. In fact, what a person ought to foresee (and certainly

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<sup>278</sup> Joint Report No. II of 12 August 1904, *quoted in* Whiteman, *supra* note 271, at 1779-1780.

<sup>279</sup> *Samoan Claims*, *supra* note 270, at 26.

<sup>280</sup> *Naulilaa Incident*, *supra* note 272, at 1032 [ought to have foreseen that their military action, in a country only recently pacified, would entail significant consequences for the Portuguese authority.]

<sup>281</sup> ILC Commentary to the Articles on State Responsibility, Art. 31, para. 10; *see also* Bernhard Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, 185 HAGUE REC. DES COURS 34, 95 (1984-II) (listing the various expressions used to describe a “causal relationship which is normal” and concluding “*The different adjectives used to indicate limitation of the causal chain make it already clear that an unambiguous decision cannot be reached even with a strict orientation to the direct causal nexus.*”).

what a person must foresee) is only what a person can reasonably foresee. Perhaps a person can foresee other consequences of his acts, but what in law he can be required to foresee are only the reasonably foreseeable consequences of those acts: This appears clearly in the reasoning of the *Samoan* arbitration, itself, where the tribunal considered that the United States and Germany should have refrained from acts that had consequences they ought to have foreseen.

These comments hold true for the reference to the *Chorzów Factory Case*. Professors Schreuer and Reinisch rely on the dictum of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory Case*, stating that reparation must re-establish “*the situation which would, in all probability, have existed if [the wrongful] act had not been committed.*”<sup>282</sup> The dictum of the PCIJ does not purport to set a standard for causation, but only to set a formula for the extent of reparation.

Even if the PCIJ dictum is left aside, however, it is obvious that a probability test is relevant to the appreciation of facts when verifying if the legal requirement of a link of causation is met. Thus, in the *Naulilaa Incident Case*, the tribunal found that, even though the Germans could not have foreseen the extent of the revolt that would take place, the revolt itself “*était dans l’ordre naturel des choses*” and that therefore the Germans “*devaient compter que leurs actions ... entraîneraient des conséquences redoutables pour l’autorité portugaise.*”<sup>283</sup> It is easy to understand that this test is fulfilled when a tribunal finds that a legal person “must have foreseen” a consequence, because that person is not required to foresee actions that do not follow in the normal course of events, are improbable, abnormal or not reasonably foreseeable.

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<sup>282</sup> *Case concerning Factory at Chorzów (Claim for Indemnity)*, Merits, 1928, P.C.I.J., Ser. A, No. 17, 4, at 47.

<sup>283</sup> *Naulilaa Incident*, *supra* note 272, at 1032 [was in the natural order of things] [ought to have foreseen that their military action, in a country only recently pacified, would entail significant consequences for the Portuguese authority].

The Tribunal clearly understood this aspect of causation, as it stated in paragraph 527 of the Partial Award that “*Causation arises if the damage or disadvantage deriving from the deprivation of the legal safety of the investment is foreseeable and occurs in a normal sequence of events*”. On this basis, and in light of the facts proven to it, the Tribunal considered that the Media Council had to foresee the consequences that its acts made possible and even “supported”. It is not possible to pretend that a “reasonable man” would not have foreseen the consequences of an action when he supported them—as the Tribunal found to have been factually proved in the Stockholm Award, paragraph 585, a matter that I do not discuss here. What does matter in the appreciation of causation is that the causal chain is not broken—no matter how many links there are.<sup>284</sup> The foreseeability test (or the “normal consequence” or “proximate cause” tests) represents the standard for a factual determination relied on in practice for the fulfillment of the legal requirement of causation—and particularly for the appreciation of whether there has been a break in the causal chain. The Tribunal correctly applied this test in appreciation of the facts.

When the Tribunal found that the Media Council “must have foreseen the consequences” of its acts,<sup>285</sup> it applied the legal standard of causation to the facts of the case before it in a way that is entirely consistent with established international practice. In short, anything that a person “must have foreseen” (*CME v. Czech Republic*) is clearly something he “ought to have foreseen” (*Samoa Claims, Naulilaa Incident*), does not go

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<sup>284</sup> The United States-Germany Mixed Claims Commission stated the point: “*The proximate cause of the loss must have been in legal contemplation the act of Germany. The proximate result or consequence of that act must have been the loss, damage or injury suffered. ... It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany’s act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced link by link to Germany’s act.*” *Administrative Decision II* (U.S.-Germany) (1 Nov. 1923) 7 R.I.A.A. 23, 29-30 (emphasis in original).

<sup>285</sup> Stockholm Award, para. 585.

beyond what “could reasonably have been foreseen” (*Leslie Crabtree, Joint Report No. II*), or “follows in the natural order of things” (*Naulilaa Incident, CME v. Czech Republic*). “In all probability” (*Chorzów Factory*), if the Media Council had not acted as it did, then those things that must have been foreseen as a consequence of its actions would not have come to pass. It is difficult to see what is even unusual, let alone improper, in the Tribunal’s approach, given the facts deemed by it to be proven—and not subject to review in this opinion.

### **3. The responsibility of a private party and the responsibility of a State**

Having determined that the wrongful acts of the Media Council were attributable to the CR, and clearly having applied the international law standards to find that these wrongful acts were the legal cause of CME’s loss, the Tribunal also took into consideration the consequences that there might be for the CR’s responsibility if Dr. Železný were to be considered a tortfeasor, himself responsible for CME’s loss. Professors Schreuer and Reinisch argue that this situation cannot occur in international law because Dr. Železný is a private actor. It is true that international law deals primarily with the responsibility of States and international organizations—even if, especially in the field of criminal responsibility, modern international law calls for more careful consideration, and one might note that dispute resolution provisions in BITs are generally not limited to actions brought by private parties against States, although in practice it is unlikely that a State would initiate a BIT arbitration against a private person. However, this does not imply that the Tribunal’s analysis was unjustified, as Dr. Železný’s responsibility could still be determined in other, domestic, proceedings.<sup>286</sup> In any case,

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<sup>286</sup> In the *Aerial Incident Cases*, the United States devoted a section on one of its submissions to the “Liability of Bulgaria as a Joint Tortfeasor”. United States Memorial of 2 December 1958, in *Aerial Incident of 27 July 1955 (Israel v. Bulgaria, United States v. Bulgaria, U.K. v. Bulgaria)*, ICJ PLEADINGS, at 227-233. Although the *Aerial Incident Cases* was an inter-State proceeding before the ICJ, where private entities have no standing, the United States considered it necessary to argue extensively the consequences of a possible joint tortfeasor relationship between Bulgaria and El Al Israel Airlines, Ltd. The United States’ position, not addressed by the Court (which decided it lacked jurisdiction), was that the responsibility of a State for damages caused by its wrongful acts is not

the potential inapplicability of a joint tortfeasor theory to the Stockholm proceedings would not have any bearing on the correctness of the Tribunal’s findings and reasoning regarding liability and causation.

First, even if Dr. Železný could not be considered to be a tortfeasor under international law, the Tribunal did not purport to make any finding as to Dr. Železný’s liability.<sup>287</sup> Rather, the Tribunal diligently and accurately considered the possibility that Dr. Železný could be held liable towards CME in different fora competent to establish his (municipal law) responsibility. The concept of joint tortfeasors is not a concept of liability, but a concept of apportioning liability between multiple responsible parties. The Tribunal thus, usefully and rightfully considered that even if Dr. Železný’s liability to CME were established in domestic proceedings, this would not affect the CR’s liability—although it also would not entitle CME to double recovery.<sup>288</sup>

Second, the Tribunal, *ad abundantiam*, considered that the result of its analysis would not change even if it treated Dr. Železný as a “joint tortfeasor”. It thus considered its analysis to be “*consistent with the way in which the liability of joint tortfeasors is generally dealt with in international law and State practice*”.<sup>289</sup> This means that,

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reduced by the potential liability of a third party—whether the third party be a State or a private entity. The United States concluded that “*An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage. . . . What rights the next of kin of the passengers may have against El Al Israel Airlines Ltd. is not relevant in the present proceeding, which is an international proceeding, nor is it relevant to discuss whether any rights exist against the Government of Israel.*” *Id.* at 229-230.

<sup>287</sup> A plain reading of the *dispositif* of the Stockholm Award makes clear that the Tribunal did not decide Dr. Železný’s liability. Stockholm Award, para. 624(1) and (2).

<sup>288</sup> Stockholm Award, para. 582. The restrictions on recovery have also been recognised in situations where there are several States responsible for the same internationally wrongful act. In its commentary to Article 47 of the Articles on State Responsibility, which addresses the plurality of responsible States, the International Law Commission has noted, in para. 9, “*that the injured State may not recover, by way of compensation, more than the damage suffered*”.

<sup>289</sup> *Id.* at para. 581.

according to the Tribunal, even if one were to consider Dr. Železný jointly liable, it would nevertheless be proper to hold the CR responsible for the entire injury caused by its own wrongful acts. As long as the causal link is established, each author of a wrongful act is responsible for the entire prejudice caused.

International authorities support the Tribunal's analysis. In the *Corfu Channel Case*, for example, Albania was held responsible for the entire damage suffered by Great Britain as a result of Albania's failure to warn of mines in its territorial waters. The International Court of Justice did not reduce or deny Albania's obligation to pay full damages even if another State could also have been held liable for having laid the mines. According to the International Law Commission, this same solution would apply "a fortiori in cases, where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals".<sup>290</sup> In its pleadings to the International Court of Justice in the *Aerial Incident Cases*, the United States clearly stated its position that the rule stated by the ILC is a rule of international law.<sup>291</sup> Scholars also support this view.<sup>292</sup>

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<sup>290</sup> Report of the International Law Commission, 56th Session, U.N. Doc. A/56/10, p. 230, quoted by the Tribunal in para. 583 of the Stockholm Award.

<sup>291</sup> See *Aerial Incident Cases*, *supra* note 286, at 229.

<sup>292</sup> See Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 REVUE BELGE DE DROIT INT'L 370, 379 (1996) ("In case of a multiple responsibility of States... it may be assumed that the principle of joint and several liability has to be applied. That gives the best protection for the injured State. The injured State can claim full compensation from each of the States involved in the wrongful act. The injured State cannot be held to accept only shares of responsibility according to a greater or lesser part of responsibility of the perpetrators."); see also John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT'L L. 225, 226 (1988) (examining an array of international legal sources and concluding that "significant support exists for the principle of joint and several liability in international law, when more than one breaching state owes a duty of compensation.").

Even if there is room for debate over the status of the “international law of joint tortfeasors,” because of the rarity of precedents, it is difficult to criticize an arbitral award that adopts the best-established analysis.<sup>293</sup>

In any case, the reasoning of the Tribunal with respect to Dr. Železný’s potential liability was neither necessary for, nor mutually exclusive of, the remainder of its finding with respect to the causal link between the wrongful acts attributable to the CR and the damages suffered by CME. It was simply the Tribunal’s attempt to consider possible theoretical ramifications of the CR’s defence that Dr. Železný was responsible. Even if one considers that Dr. Železný cannot be a tortfeasor in the same way that a State can be, the consequences of Dr. Železný’s actions would need to be analyzed by the Tribunal only as they affect the causal link between the wrongful acts of the Media Council attributed to the CR and the loss—and potentially as an intervening act that breaks the causal chain.<sup>294</sup> This is precisely the analysis that the Tribunal undertook, and which is discussed above.

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<sup>293</sup> There is nothing illegitimate in observing, as the Tribunal did, that the solution adopted in international law is also followed in municipal legal regimes. The United States, for example, relied on a comparative law analysis to refer to the principle of joint tortfeasors in its pleadings in the *Aerial Incident Cases*. *Aerial Incident Cases*, *supra* note 286, at 230-233. Professors Schreuer and Reinisch criticize the Tribunal’s reference to municipal laws in their opinion. While it is true that references to municipal law should be made only with caution in international cases, it is not uncommon or improper to refer to municipal law to confirm a solution that is already deemed established in international law. Professors Schreuer and Reinisch themselves do not hesitate to quote *Joint Report No. II in the Samoan Claims Case* (Schreuer Opinion, para. 183), in which the British and American Commissioners proposed an analysis of the international law of causation based on the following reasoning: “*There is . . . a striking absence of international precedent or authority that we can appeal to, but in the continual litigation in the Courts of our respective countries rules have gradually been established . . . nor does there seem to be any reason why as between nations liability for wrongdoing should not be assessed in accordance with the rules observed in municipal Courts...*” *Joint Report No. II of 14 Aug. 1904*, *quoted in Whiteman*, *supra* note 271, at 1779.

<sup>294</sup> The International Law Commission stated this as follows: “*It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not*

It is no basis for criticism in an annulment or setting aside proceeding that an international arbitral award has included additional analysis that goes beyond what is necessary to support the tribunal’s final decision, as long as the final decision is established in law.<sup>295</sup> This is particularly so here, where accepting the CR’s argument that Dr. Železný could not be liable as a joint tortfeasor only underscores the rest of the Tribunal’s finding that the CR alone is liable for the Treaty breaches. The Tribunal having made the necessary and adequate finding that Dr. Železný’s acts did not break the causal chain between the Media Council’s wrongful acts and the loss suffered by CME, and having usefully noted that the establishment of Dr. Železný’s possible liability in a separate proceeding could not lead to a double recovery, there is no reason to discuss further a reference to joint tortfeasors that does not affect the Tribunal’s proper findings—and which is, in any event, supported by international law authorities.

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*being too remote, of its wrongful conduct*”. ILC Articles on State Responsibility, Commentary to article 31, para. 13.

<sup>295</sup> In the annulment proceeding in the *Orinoco Steamship Company Case*, the competent international tribunal simply stated: “*the circumstance that the umpire, not content to have based his Award on his interpretation of the contracts, which of itself should be deemed sufficient, has invoked other subsidiary reasons, of a rather more technical character, cannot vitiate his decision.*” *Orinoco Steamship Case* (United States v. Venezuela, 25 Oct. 1910) 11 R.I.A.A. 226, 232.

V. **ALLEGED LACK OF STANDING OF CME IN RESPECT OF CLAIMS FOR DAMAGES ACCRUED TO A DIFFERENT DUTCH INVESTOR BEFORE ITS INVESTMENT WAS BOUGHT BY CME.**

The CR claims that the Tribunal exceeded its mandate by addressing CME's claims of treaty violations which occurred during the period prior to 1997. Before addressing the merits of that argument, I should first state my opinion that such a ground for challenge of an arbitral award cannot be admitted. Whether, when CME obtained the ownership interest in CNTS in 1997, it did not also obtain the right to bring claims regarding 1996 actions of the CR is a question going to the merits of the Tribunal's decision on the admissibility of CME's claim. Unless Swedish law permits the review of the merits of an admissibility decision in an annulment or setting aside action (and I am not aware of any grounds for such review), the Stockholm Award cannot be annulled or set aside by a domestic court on the basis of this claim, even if this claim were well-founded.<sup>296</sup>

In substance, in his opinion, Professor De Ly criticizes the award in that CME could have been protected only as an assignee of CME Media Enterprise BV, since the latter was the investor when the breach of the Dutch-Czech BIT had occurred.<sup>297</sup> He concludes that even in this respect the assignment should have been notified to the debtor (the CR) under comparative private law principles.<sup>298</sup> Since this has not been the case, he argues, CME could not bring a claim under the BIT; but the previous owner should or could have done so.<sup>299</sup> There are in my opinion at least three reasons for which these

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<sup>296</sup> I understand that CME had interpreted the CR's objection at 64-65 of the Statement of Claim to be a repetition of an argument made during the arbitration that, by virtue of the language of article 4 of the Transfer Agreement, CME had waived the right to make any claims with respect to events in 1999. Such a claim would plainly be a question of the merits, but I also understand from the CR's Reply (at 82), that the CR does not make this claim.

<sup>297</sup> De Ly Opinion, para. 83.

<sup>298</sup> *Id.* at para. 91 ff.

<sup>299</sup> *Id.* at para. 95.

substantive arguments are wrong. First, since the claim as brought by CME arose after the 1997 reorganisation of the CME corporate structure, pursuant to which CME took over the investment from CME Media Enterprise BV, CME did not act as an assignee in respect of the deprivation of its investment (A). Second, BIT claims inhere to the investment as defined by the State parties: as long as the disputed investment falls within the definition in the treaty, there can be no objection to the jurisdiction of the tribunal, nor to its findings on the merits, based on allegations related to a change of the owner of the rights (B). Third, even if the issue had to be analyzed as a transfer (assignment) of rights after (or at the same time as) the claim arose, both under the Dutch-Czech BIT and under general international legal practice, the assignee is vested with the substantive rights and the right to claim (C).

**A. There Is No BIT Injury Until Damages Are Realised**

In the CME-CR case, the damage to be indemnified materialized only after the acquisition of the investment by CME, even if some unlawful acts occurred earlier. The Stockholm Award acknowledges that the 1999 action completed the breach by provoking, through the wrongful acts of the Media Council, the injury that was only “latent” or “potential” as a result of the legal undermining of the status of the investment by the 1996 coerced change of the legal structure of CME’s investment.

In international law, the “primary” or “substantive” obligation of States to respect the property rights of foreigners includes the obligation not to take this property away directly or indirectly. The content of this obligation includes as a constituent part the duty not to cause injury.<sup>300</sup>

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<sup>300</sup> See 2 RESTATEMENT OF THE LAW OF THE FOREIGN RELATIONS OF THE US, para. 711 (1987); 2 Whiteman, *supra* note 271, at 838-39; F.V. GARCÍA-AMADOR, LOUIS B. SOHN & R.R. BAXTER, RECENT CODIFICATIONS OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 9 (1974); F.V. GARCÍA-AMADOR, I THE CHANGING LAW OF INTERNATIONAL CLAIMS - OTHER CONSTITUENT ELEMENTS; THE INJURY TO THE ALIEN AND THE IMPUTABILITY OF THE ACT OR OMISSION 133, para. h

Therefore, as long as there is no economic injury (i.e., no damage is caused), no damages remedy can be claimed. In other words it is possible that the “event” (legal breach) and the “effect” (damages) can be separated in time, and that the latter be caused by an additional separate fact. In the present case, the object of the claim presented under the BIT is the reparation of the economic loss suffered in connection with the loss of the business of CNTS, and not the redress of the “moral” or “juridical” injury resulting from the wrongful acts of the foreign State, as sometimes happens in State-to-State disputes. In the latter kind of cases there might be a theoretical discussion as to the moment in which the international responsibility arises. But if the claim is predicated on a material loss, it is legally impossible to obtain reparation before the loss, because there can be no right to redress something that has not occurred. The right of reparation arises legally with the injury, and it is therefore a right that has always belonged to CME.

If one considers the specific treaty breaches found by the Tribunal, it is clear that the main breach, independent of the others and sufficient to establish the responsibility of the Czech State, is the unlawful “taking of property” – this “property” being all of the economic value in the business of CNTS.<sup>301</sup> It is difficult to pretend that this “taking of property” occurred and that the claim arose before the time the property was “taken”, that is before 1999. According to the Stockholm Award, the CR, acting through the Media Council, started deviating from the legal standards set forth by the treaty and general international law in 1996, but the claim for taking of property arose only when the property was taken, or, as the Stockholm Tribunal stated, when the breach was “consummated” in 1999.<sup>302</sup>

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(1984) (“As a matter of fact, if international responsibility implies the ‘duty to make reparation’, the existence of damages or injuries seems to be a sine qua non requirement.”).

<sup>301</sup> Stockholm Award, paras. 601-604.

<sup>302</sup> Stockholm Award, para. 624.

The reasoning presented is self-evident and sufficient to reject all claims based on the restructuring of the CME group. If confirmation in practice was needed, it is enough to refer to the *Mariposa Development Company* case judged by the United States-Panama General Claims Commission.<sup>303</sup> In this case, the Commission had to deal with a claim by the United States for the expropriation of property belonging to an American company. The Commission was empowered to hear only claims arising before 3 October 1931. The company in issue had been deprived of its property under a law of 1928, but the court judgment that applied the law to its case was rendered only on 20 October 1931. The Commission dismissed the American claim considering that the claim arose after the 3 October cut off. According to the Commission,

*“It was not until the rendition of the Supreme Court’s opinion that the possession of the Mariposa Development Company was interfered with and its titles canceled. The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible”.*<sup>304</sup>

The Commission noted and rejected the United States’ contention *“that the claims ‘arose’, within the terms of the convention, when the allegedly confiscatory legislation was enacted and with the Government’s consent, applied to claimants’ rights by a suit*

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<sup>303</sup> *Mariposa Development Company and others (United States) v. Panama*, Award of 27 June 1933, 6 R.I.A.A. 338.

<sup>304</sup> *Id.* at 340.

*through a government agent to cancel his titles—that the question of the date of the damages was not an essential consideration on the question of jurisdiction”.*<sup>305</sup>

In the case of CME, the 1996 breach made the 1999 deprivation of possession possible, but the deprivation—and therefore the claimed-for damages—took place only in 1999, and the claim therefore arose in 1999.

The 1999 action by Czech authorities and the actual loss of the CNTS business were in the circumstances a necessary requirement for the right of action and the claim of indemnification of CME to be admissible, because before that CME had not suffered an actual damage even if its investment had been the victim of breach of the BIT’s standard of protection. In my opinion, this is what has happened in the case at issue.

**B. BIT Claims Inhere to the Investment**

In analyzing the question posed by the CR, it is necessary to recognize the important differences between BIT (and other international law) rights and private law rights in the municipal order. BITs are entered into for the express purpose of encouraging and protecting investments of foreign investors. The right to invoke a breach is therefore linked in BITs to ownership of an investment. Application of private law concepts is fallacious in public international law and specifically under a BIT. The BIT protects investors, covered in view of their nationality, and their investment as defined in the BIT. This understanding has been implicitly recognised by the Netherlands and the CR: In the “Agreed Minutes” of the 2002 consultations between these two Contracting Parties to the Treaty, it is agreed that:

*“A claim which an investor has under the BIT may pass to a qualifying second investor if that claim has been transferred to the second investor either expressly or*

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<sup>305</sup> *Id.* at n.2 (emphasis in original).

*impliedly by operation of the law applicable to the transfer and the claim so transferred will be available to the second investor on the same basis ... [If the claim is not so transferred] the first investor may still be able to make the claim”.*<sup>306</sup>

What is the claim at issue, what transfer is being discussed here, and what law applies to the implicit or explicit transfer of the claim (which is not necessarily the law applicable to the transfer of the investment)? The claim is to Treaty protection, specifically (if applied to the CME case) not to be unjustly expropriated directly or indirectly. The transfer is the transfer of the claim, and not the transfer of the investment. Such a claim is transferred with the transfer of the investment itself, irrespective of the contractual, corporate reorganization, or whichever other instrument effects the transfer of the underlying investment as defined in the BIT at Article 1(a). In our case, the relevant investment consists of a combination of rights in “a company” and “associated rights of the company.”

These rights to the investment have been undisputedly transferred to CME, and without any doubt in conformity with applicable (Czech) laws, for valuable consideration, for sound business reasons and without any fraudulent intent, with knowledge of the Czech authority as far as this was relevant, and in any case surely not clandestinely. If domestic law applies to the transfer of the investment (Czech law in this case), the claim is an international law (Treaty) right, and its transfer should be analyzed under international law.<sup>307</sup>

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<sup>306</sup> Agreed Minutes, para. 3.

<sup>307</sup> See CARLO SANTULLI, LE STATUT INTERNATIONAL DE L'ORDRE JURIDIQUE ETATIQUE: ETUDE DU TRAITEMENT DU DROIT INTERNE PAR LE DROIT INTERNATIONAL 316, n.619 (2001) (“*Plus généralement, le ‘droit d’action’ international est indépendant du ‘droit d’action’ interne même s’il est attaché à la méconnaissance des règles relatives à une qualité d’origine interne*”). [More generally, the international ‘cause of action’ is independent from the domestic ‘cause of action’ even if it is attached to the violation of rules relating to a quality of domestic origin.] See also Juan Manzo

As a matter of international law and practice, and in conformity with the process quoted above from the “Agreed Minutes”, CME (the “assignee” of the investment) has automatically acquired all rights under the Treaty pertaining to that investment. This applies both to the substantive right of the investor to have its investment benefit from BIT standards of protection and, procedurally, to that of being able to invoke direct arbitration in respect of any breach of such protection (even if it had already occurred).

International law is further applicable to the analysis of whether the treaty rights are transferred because rights under treaties cannot be limited by domestic laws. This analysis is confirmed when one understands that, structurally in BITs, the rights conferred to the private investors are the same than those which either Contracting State could have invoked under public international law by exercising diplomatic protection, if the BIT had not provided for direct arbitration of investment disputes.

International law does not subject these rights to specific requirements such as notification, etc. beyond what is required under the relevant domestic law to effect validly an assignment “*inter partes*.”

I conclude that CME is fully entitled under the BIT to claim protection, redress for any breach, or reparation for any injury suffered by its investment even before its acquisition from another Dutch investor.<sup>308</sup>

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*(Panama) v. United States*, 26 May 1933, 6 R.I.A.A. 314; *W.C. Greenstreet, Receiver of the Burrowes Rapid Transit Co. (U.S.A.) v. United Mexican States*, 10 April 1929, 4 R.I.A.A. 462, at 463.

<sup>308</sup> As discussed below, however, it is important that there has been continuity of Dutch nationality of succeeding investors, such that the CR was continuously under the same legal obligations as prescribed by the Dutch-CR BIT.

**C. Even in the Case of Transfer of an Existing Claim, the Claim Belongs to the Assignee**

The structure of BITs (1) and the general, ordinary practice of international tribunals (2) lead to the conclusion that the “successor in interest”, the assignee, is the legal owner of the international claim.

**1. BITs dual protection mechanisms (State claims and investor claims)**

The context provided by Article 10 of the Dutch-Czech BIT also advocates against the interpretation proffered by the CR and in favor of the Tribunal’s decision. Article 10 provides for State-to-State dispute settlement procedures. Article 8 permits the investor to assert directly a claim that his State could have espoused with respect to the investor’s investment pursuant to article 10. Thus, under the treaty, one and the same dispute can be resolved through either investor-State or State-to-State dispute settlement procedures. Indeed, as described by one of the negotiators of NAFTA’s Investment Chapter and various U.S. BITs, the object and purpose of the provision for investor-State arbitration in BITs alongside State-to-State procedures was precisely to enable the investor to assert directly the same claims which the State could have espoused otherwise:

*“BITs [...] empowered the investor itself to seek redress against the host government. The intent was to depoliticize these disputes – to take them out of the political realm and put them more into the realm of international arbitration. The idea was that the investor, by having the ability to bring the dispute itself, could resolve the dispute in a way that did not engage the political organs of the two governments. [...] [T]he ultimate decision to go forward now rests in the hands of the private investor.”<sup>309</sup>*

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<sup>309</sup> Daniel M. Price, *NAFTA Chapter 11 – Investor-State Dispute Settlement: Frankenstein Or Safety Valve?*, 26 CAN.-U.S. L.J. 1, 6-7 (emphasis added).

It is uncontroversial that the Netherlands would have standing to bring a claim relating to the 1996 events pursuant to article 10.<sup>310</sup> Both the text of article 10 and its international law context confirm this view. Article 10 permits arbitration of “*disputes [...] concerning the interpretation or application of this Agreement*”. Under international law, similarly, the right of a State to espouse an investor’s claim by exercising its right of diplomatic protection is in no way conditioned upon a continuity of ownership of the investment by the same investor, provided there is continuity of nationality. It is immaterial in this respect whether there has been a change of ownership during the period between the time the injury was inflicted and the time the claim was brought. The International Court of Justice has stated unequivocally:

*“In order to bring a claim in respect of the breach of [...] an obligation, a State must establish its right to do so, for the rules on the subject rest on two suppositions: ‘The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.’”*<sup>311</sup>

No other conditions are attached to the exercise of the right of diplomatic protection – the historical and legal antecedent of investor-State claims under BITs. Consequently, the right of diplomatic protection is traditionally attached to the

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<sup>310</sup> The Netherlands could bring a diplomatic protection claim independently of the availability to the investor of direct arbitration. *See, e.g.*, First Report on Diplomatic Protection to the ILC by Mr. John R. Dugard, Special Rapporteur, UN Doc. A/CN.4/506 (March 7, 2000), para. 73 (“*The State of nationality is not limited in its right of diplomatic intervention to instances of large-scale and systematic human rights violations. Nor is it obliged to abstain from exercising that right when the individual enjoys a remedy under a human rights or foreign investment treaty. In practice, a State will no doubt refrain from asserting its right of diplomatic protection while the injured national pursues his international remedy. Or it may, where possible, join the individual in the assertion of his right under the treaty in question. But in principle a State is not obliged to exercise such restraint as its own right is violated when its national is unlawfully injured.*”). (Emphasis of single underline added; emphasis of double underline in original).

<sup>311</sup> *Barcelona Traction*, *supra* note 207, at para. 35 (citation omitted).

investment, and not the investor, the only requirement *ratione personae* being that the investment must have been continuously owned by a national, or subsequently by several nationals, from the time of the occurrence of the injury to the time of the filing of the claim.<sup>312</sup>

The text of the BIT operates in precisely the same fashion and does not support the introduction of a new *ratione temporis* restriction.

To find that CME, the “current” investor, has no standing to bring a dispute to arbitration pursuant to article 8 notwithstanding the fact that the Netherlands would have standing to raise that same dispute pursuant to article 10 would thus frustrate one of the basic purposes of BITs.

## **2. The practice of international tribunals**

Even if one accepts the analysis used to challenge the validity of the Stockholm Award based on some doctrine of assignment (which I do not), the solution adopted in international legal practice relating to assignments nonetheless leads to a result opposed to the one claimed by the CR.

The reasoning of international tribunals varies, but they constantly consider that under international law the assignee is vested with the substantial and procedural rights.

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<sup>312</sup> The facts of the *Barcelona Traction* case themselves provide a helpful illustration of this principle. In order to establish the continuity of nationality rule, Belgium tried to establish that the shares of Barcelona Traction were owned by Belgian nationals at both the time the injury occurred (1948) and the time the application to the Court was made (1962). The relevant shares had been transferred in 1939 to an American trustee, and no evidence was provided that they had been returned by 1948, the time at which the injury was allegedly inflicted. It is clear from the Court’s judgment and accompanying separate opinions that this issue was considered relevant only to the extent that Belgian nationals would not have had “full control” over the shares at the time of injury, i.e. in 1948. *A contrario*, the fact that a different entity of the same nationality would not have had “full control” over the shares during (part of) the crucial period was of no significance. See *Barcelona Traction*, *supra* note 207, at para. 98 (Sep. Op. Judge Jessup).

In his important book on the continuity of nationality, published in 1990, E. Wyler reviews the practice of international tribunals and comes to the following conclusion:

*“Que le droit applicable à la question du transfert du droit ait été le droit étatique ou le droit international, la solution n’a pas varié : c’est le cessionnaire qui figure comme nouveau titulaire du droit en cause”.*<sup>313</sup>

The author then refers to the *Norton* case, decided by the Mexico-United States Mixed Claims Commission, as authoritative. The opinion of the Commissioners was expressed by Commissioner Pallacio in the following terms:

*“In such cases natural reason, the laws of all countries and the records of all courts suggest a single solution of the question, which is, to declare the assignee to be the person in whom is vested the formal and perfect right to make the petition and institute the suit for the thing assigned.”*<sup>314</sup>

As I understand the contentions in this case, the validity of the 1997 restructuration and of the creation of CME is not questioned, and the transfer of the investment is not denied. In these circumstances all the pertinent rules and institutions of international law converge to the same result: there is no ground for questioning the validity of the Stockholm Award on the basis of the fact that the claim has been brought before the Tribunal by CME after the 1997 reorganisation.

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<sup>313</sup> ERIC WYLER, *LA RÈGLE DITE DE LA CONTINUITÉ DE LA NATIONALITÉ DANS LE CONTENTIEUX INTERNATIONAL* 146 (1990) (emphasis added) [Whether the law applicable to the question of a transfer of rights was national law or international law, the solution has not varied: it is the assignee who features as the new holder of the right of action.].

<sup>314</sup> *H.G. Norton v. Mexico*, No. 401 A.D., Mexico-United States Commission constituted under the treaty of 4 July 1868, reported by J.B. Moore, in J.B. MOORE, III *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED-STATES HAS BEEN A PARTY*, 2163 (1898) (emphasis added).

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October 15, 2002